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AFTERWORD: TOWARD STABLE PRINCIPLES AND USEFUL HEGEMONIES

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These papers reflect a larger, ongoing conversation about the relationship between law and culture, a relationship that, for its complex open-endedness, eludes any fixed definition. In attempting to sketch the shape of that relationship, Robert Post examines with characteristic insight some of the jurisprudential lineage of the law-culture conversation, reminding us that the notion of legal neutrality is illusory, and that culture itself is neither stable nor coherent.[1] The papers that ensue are emblematic of *many* conversations—academic, political, and other—taking place along the broad spectrum of critical methodologies and historical topics that constitute the "law and culture" discourse.[2] Yet if these symposium papers' diverse perspectives invoke any point of unity, it is, to paraphrase Sartre, *the search for a method*—for a coherent framework in which to evaluate the conflicts and judgments of human society. This normative enterprise is a fundamental part of legal history and theory, of course, but the critical protocols and disciplinary contours of the enterprise have evolved along with the ambient culture. In light of both the constant "search for a method" and the evolving relationship between law and culture, the modest point I want to make in reflecting on the discussions of this symposium is that they further demonstrate the unique framework that the law provides for understanding cultural conflict.

What is unique about the legal take on cultural conflict? Essentially, that the law must concern itself to an unparalleled degree with both its internal coherence and its external implications. That is, the law focuses on standards of judgment and conduct not only to achieve

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1. Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 492 (2003). Several symposium authors assert the impossibility of legal neutrality. *See, e.g.*, Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785 (2003).

2. For an excellent brief discussion of the growing field of law and culture studies, see Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, *in* LAW IN THE DOMAINS OF CULTURE 1 (Austin Sarat & Thomas R. Kearns eds., 1998).

satisfactory philosophical and moral consistency, but to establish also workable, pragmatic social frameworks. This necessary balance yields a particularly grounded kind of thinking about cultural conflict, one which must (a) at least take seriously the useful fiction that cultural conflict can be mediated from a place of deliberate, principled neutrality, and (b) remain attentive to the invariably social, experiential ramifications of its judgments. These symposium proceedings address both points.

I

As to the problem of neutrality, the law's concern is not whether anyone believes neutrality is fully possible (if anyone ever did),[3] but rather that the law must choose from among many defensible arguments that enlist the *ideal* of neutrality in the service of other interpretive and ideological ends—say, Justice Scalia's rage for distinguishing judicial *involvement* from judicial *judgment*,[4] or Justice Stevens' need for "a way to express an ambitious moral agenda in terms that convey the impersonal authority of fundamental law."[5] As

3. To view skeptically the dogma of pure legal neutrality is crucially different from recognizing, relying on, even embracing the *ideal* of neutrality (along with other jurisprudential ideals such as objectivity, truth finding, etc.) as a necessary fiction for purposes of achieving a social order that is as just, fair, and democratic as possible. Vital to consequential legal analysis, it seems to me, is the *quality* of one's self-consciousness about this difference—a point exemplified variously in this symposium. And because the ideal of legal neutrality is, after all, part of our basic sense of the common law, it should be neither surprising (nor necessarily distressing) that such idealism persists in animating both adjudication and legal scholarship. What matters is to maintain critical vigilance about the powerful mediating influence of that idealism. Peter Goodrich remarks, for example, that this conceptual idealism tends to divert us from a sensitivity to legal language as an index of culture:

> Despite the linguistically dubious nature of the assumptions regularly made by formalistic (deductive) theories of adjudication, lawyers and legal theorists have successfully maintained a superb oblivion to the historical and social features of legal language, and rather than studying the actual development of legal linguistic practice, . . . have asserted deductive models of law peculiar to the internal development of legal regulation and legal discipline. What has been consistently excluded from the ambit of legal studies has been the possibility of analysing law as a specific stratification or "register" of an actually existent language system, together with the correlative denial of the heuristic value of analysing legal texts themselves as historical products organised according to rhetorical criteria.

PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS 1 (1987). Similarly, in his general symposium introduction, Robert Post draws upon "the analogy of language" to illustrate the relativity of cultural stability: "Just as language is constantly changing despite the fact that a functioning language requires relatively stable and shared meanings, so cultural understandings are always shifting despite the fact that a functioning culture requires relatively stable and shared perspectives." Post, *supra* note 1, at 491.

4. Post, *supra* note 1, at 498.

5. Robert F. Nagel, *Six Opinions by Mr. Justice Stevens: A New Methodology for Constitutional Cases?*, 78 CHI.-KENT L. REV. 509, 511 (2003).

several commentators observed during the symposium discussion, this rhetorical struggle for the neutral high ground may be framed as one of competing *hegemonies*, or better still as a continuous dialectic of hegemonies and counter-hegemonies. But whatever one's angle, it seems clear that to achieve meaningful traction in the legal conversation about cultural conflict requires the relatively stable footing provided by interpretive schemes that assert *some kind* of principled neutrality.[6]

This insight does not necessarily (if at all) lead to legal solutions for cultural problems, insofar as resolving cultural conflict is an aim of the law. Still, the process of clarifying both the ideological stakes and the interpretive strategies involved in legal analysis of, for example, polygamy or homosexuality reframes our collective preoccupation with the regime of neutrality and enables us to explore more thoughtfully what all agree is a convoluted, symbiotic relationship between law and culture. The philosopher Honi Fern Haber has characterized this perspective shift as a kind of enlightened compromise, with important implications for understanding culture:

> There is no view from nowhere. We can never leave all our prejudices behind and operate from a wholly disinterested standpoint, but our prejudices become dangerous only when they are dogmatic, kept hidden from view and not open to discussion.... We cannot think or speak, much less act, in any purposeful manner without having structured our world and our interests in some heuristically useful way. Without some notion of structure (unity) and some allowance for a legitimate recognition of similarities between ourselves and others, there can be no subject, community, language, *culture*.[7]

I agree with Haber that recognizing the impossibility of neutral standards, rather than undermining our attempts at useful dialogue, actually frees us to consider more realistic avenues for evaluating cultural conflict. This position of "stable relativity," resonant of innumerable postmodern voices, is thus more than a resigned posture toward the proverbial question whether neutral legal standards are possible for the proper interpretation of culture and hence desirable for the just regulation of cultural conflict. While these symposium

6. *See, e.g.*, Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 707 (2003) (arguing that "the Rawlsian-based approach to [Establishment Clause] sizing developed here is *more neutral* than the approach found in the contemporary Establishment Clause doctrine").

7. HONI FERN HABER, BEYOND POSTMODERN POLITICS: LYOTARD, RORTY, FOUCAULT 1, 5 (1994) (emphasis added).

discussions answer that question with a qualified "no" on both counts, these papers more importantly emphasize that it is the practical *substance* of that qualification that matters.

II

Indeed, most of the authors included here gesture toward a more nuanced paradigm for understanding the relationship between law and culture by centering their discussions on the concrete texture of social and cultural conflict. For example, Sarah Barringer Gordon's rhetorical analysis of nineteenth-century American public debates over Mormon polygamy draws attention to the cultural complexity of that controversial practice, suggesting the difficulty of any wholly satisfactory legal response.[8] Mark Rosen develops some of the constitutional questions of cultural integration and homogeneity implicit in Gordon's analysis of Mormon polygamy and explores the scope of those concerns in Establishment Clause debates about diverse American religious practices.[9] And Nancy Bentley, examining American interracial marriage law, argues that the "cultural force of intimacy . . . lies in the shared sense that it originates somewhere outside of either culture or law, in the immediacy of individual feeling."[10]

Although these papers demonstrate distinct kinds of cultural analysis, each conveys its own sense of another indispensable dimension of law's relationship to culture—what Martha Nussbaum calls "empathetic imagining," "an essential ingredient [along with a focus on stable principles] of an ethical stance that asks us to concern ourselves with the good of other people whose lives are distant from our own."[11] Nancy Dowd devotes part of her analysis to this narrative aspect of the law; reflecting on the legal impact of 9/11 on prevailing structures of family law, she reasons that "[s]ympathy perhaps opened the door to understanding the lived realities of families as consciously plural. With that understanding may come another incremental shift towards accepting, even valuing, actual relational ties."[12] In this and

8. Sarah Barringer Gordon, *A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy*, 78 CHI.-KENT L. REV. 739 (2003).

9. Rosen, *supra* note 6.

10. Nancy Bentley, *Legal Feeling: The Place of Intimacy in Interracial Marriage Law*, 78 CHI.-KENT L. REV. 773, 774 (2003).

11. MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE xvi (1995).

12. Dowd, *supra* note 1, at 805.

other ways, these papers emphasize that the law must stand rooted in concrete social experience even as it reaches for coherent principles by which to regulate that experience; this is essentially what generates the law's unique relationship to cultural conflict. In this sense, cultural conflict is the law's *raison d'être*, for the law presupposes human community and the intrinsic conflicts of human interaction.[13]

Although this symposium set as its subject the law's relationship to cultural *conflict*, then, the discussions here implicate also the flip side of that coin—what is, as Haber suggests, the possibility of unity, of a shared sense of cultural understanding.[14] But whether the specific focus is cultural conflict or cultural unity, the point is that the law is inexorably linked to culture; accordingly, we who theorize the relationship between law and culture must consider the role that the law plays in constituting culture *itself*.[15] In so doing, we, as members—elements—of that culture, function as though we were fish theorizing water; in Sarat's formulation, "we come, in uncertain and contingent ways, to see ourselves as law sees us; we participate in the construction of law's 'meanings' and its representations of us even as we internalize them, so much so that our own purposes and understandings can no longer be extricated from those meanings."[16]

III

The relationship between the localities of cultural practice and the fashioning of coherent legal principles, and the role of the self-conscious, liberal subject in theorizing that relationship, are familiar concerns in contemporary critiques of law and philosophy. To consider one, Stanley Fish, a critical voice in attendance at the symposium, has recently declared that there exists no necessary connection between metaphysical thinking and practical conduct.[17] After arguing that both Jürgen Habermas and Richard Rorty fall prey, in their respective forms of pragmatism, to the naïve belief that

13. Steven Shiffrin echoes this syllogism at the close of his discussion of the Establishment Clause. Invoking Justice Holmes, Shiffrin concludes that "there are times when experience is worth more than logic." Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717, 728 (2003).

14. HABER, *supra* note 7.

15. *See* Post, *supra* note 1, at 489.

16. Sarat & Kearns, *supra* note 2, at 7–8.

17. Stanley Fish, *Truth but No Consequences: Why Philosophy Doesn't Matter*, 29 CRITICAL INQUIRY 389 (2003).

social good invariably issues from well-conceived philosophical visions, Fish seeks to demystify with signature flourish:

> Decency, like all other virtues invoked in discussions like these—tolerance, straightforwardness, sincerity, accuracy, reliability, honesty, generosity, objectivity, truth telling—is a quality independent of the metaphysical views you happen to hold, if you hold any. Indeed, *everything*, except for your profile in the narrow world of high theory, is independent of the metaphysical views you happen to hold.[18]

This agnostic view of practical-to-metaphysical correspondence seems a corollary to Steven Shiffrin's observation here that "there is no principle in the sky which can be invoked in the style of political geometry to resolve difficult questions about church and state."[19] Fish claims that even those pragmatic theories that avoid the hegemony of neutral principles or moral correctness nonetheless subscribe to the false belief "that normative philosophy is not [itself] a local, pragmatic practice like any other, but is a special practice in which the local and pragmatic have been left behind."[20] In Fish's view, this broad fallacy, which obviously affects even the most sophisticated thinkers, leads one right back to the original sin of the myth of neutrality: one becomes, "in short, a theologian, maintaining himself the disciplinary task of relating a historical, mundane occurrence to its contingent and multiple causes."[21]

Taken as a whole, these symposium papers raise related questions, in the context of cultural conflict, about the possibility of connecting theory to practice. Whether these discussions manage to avoid the epistemological blindness that Fish decries remains to be argued. But by emphasizing historical concreteness and practical argument, as well as offering careful, reasoned perspective on the present climate of secular and religious fundamentalism, these presentations make a realistic contribution to the public conversation about what is at stake when the law regulates cultural conflict.

18. *Id.* at 417.

19. Shiffrin, *supra* note 13, at 728.

20. Fish, *supra* note 17, at 403. Steven Heyman nicely characterizes this seductive will-to-hermeneutic-transcendence in his discussion of the First Amendment: "Amid all this controversy, there is a strong temptation to appeal to an idealized version of the First Amendment—one with a clear meaning that stands above cultural conflict." Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 533 (2003).

21. Fish, *supra* note 17, at 394.

IV

Notwithstanding that (in Habermas' famous phrase) "[o]ur first sentence expresses unequivocally the intention of universal and unconstrained consensus,"[22] the discussions presented here move toward engaging Fish's most compelling interrogatory: "How, then, do you get to a place where the partisan and parochial visions that have so immediate an appeal for embedded subjects can be countered by a vision that belongs to no one but includes everyone?"[23] That "place" of satisfactory equipoise between practice and theory is itself an unreachable ideal, but the image of diverse minds aspiring to reach such an elusive destination may be as apt a metaphor as any for the setting that the law provides for analyzing cultural conflict. To work toward that ideal is to practice what Nussbaum describes as "a humanistic and multivalued conception of public rationality that is powerfully exemplified in the common law tradition."[24] This affirmative vision of the law may crowd Fish's "parsimonious and minimalist"[25] argument, or it may hold out something of an antidote—a rendering of the same glass as half-full.

Post's concluding remarks would appear to identify scant common ground: "The only abstract truth seems to be that we cannot escape the risks and responsibilities of practical judgment."[26] Yet rather than be "disappointed by the relentlessly contextual nature of these conclusions,"[27] we might see substance and possibility in this modest appraisal. Insofar as we are mindful of the core limitations of thinking legally, we may benefit considerably from the idiosyncratic perspectives of the law: philosophically inconsistent and ideologically interested, to be sure, but anchored in and accountable to actual experience. There is no view from nowhere, but here, in the law, are an empathic "public rationality," a fundamental commitment to "the risks and responsibilities of practical judgment," and a rich discourse through which to explore our always contested place within the matrix of culture.

22. JURGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 314 (Jeremy J. Shapiro trans., 1971).

23. Fish, *supra* note 17, at 398.

24. Nussbaum, *supra* note 11, at xv.

25. Fish, *supra* note 17, at 417.

26. Post, *supra* note 1, at 508.

27. *Id.*