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LIVING DANGEROUSLY ON THE DECONSTRUCTIVE EDGE*

A Review of *Dwelling on the Threshold* by Allan Hutchinson. Toronto: Carswell and London: Sweet & Maxwell, 1988.

*Review by Alan Hunt***

I. THE DILEMMA OF PROGRESSIVE INTELLECTUALS

The closing years of the twentieth century are proving to be fraught with difficulties for progressive intellectuals. Contemporary Western societies seem further than ever away from the major structural transformations necessary for the dismantling of hierarchies of class, gender, and race. It no longer seems relevant to repeat the old battle cries of the variant forms of the socialist movement. Despite the exciting chinks becoming visible in the monolith of the communist East, orthodox Marxism, despite the intellectual if not political renaissance ushered in by the Western Marxism of the 1960s, is simply too tarnished to provide contemporary inspiration. But neither has the social democratic tradition been able to transcend its bureaucratic and paternalistic legacy. The oppositional Leftisms, whether Maoist, Trotskyist, or anarchist that have occasionally surfaced over recent decades, seem ever less relevant to confront the complexities of sustainable social change in the contemporary world. Despite the commitment of progressive intellectuals to strive for links between theory and practice, meaningful engagement with where the people are at in relatively affluent consumerist societies is more difficult than ever to realize.

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If progressive intellectuals in general confront these intractable quandaries, a more specific set of dilemmas confront the progressive working in and around the law. The intellectual demography of the 60s and 70s resulted in a significant entry of radical intellectuals into both legal practice and law schools. There had, of course, been progressives working in the legal arena in previous periods. The difference today is that the loose alliance of progressives has achieved a certain critical mass which makes it possible to entertain the aspiration that they might displace the elite pageboys who have for so long and with such self-satisfaction served the aggrandizement of law's empire.

> We are the subjects of law's empire, liegemen to its methods and ideals.[1]

The most distinctive contemporary embodiment of this aspiration to transcend liberal legalism and to found a critical paradigm for legal practice and scholarship has been the critical legal studies movement.[2] It has sustained some degree of cohesion around a shared project of slaying the dominant paradigm of liberal legalism. But of late, it has found itself divided as to whether it is either possible or desirable to generate an alternative critical paradigm.[3] Perhaps more significant than the fact of divergence is that critical scholars have been uneasy about how to debate such issues.

Thus, no sooner has an energetic and potentially transformatory critical tradition been born than it has been confronted by perplexing questions about what is involved in aspiring to move beyond criticism of the dominant liberal tradition. It is into this general and controversial terrain that Allan Hutchinson

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[1] Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press 1985).

[2] For my assessment of the context and content of critical legal studies see Alan Hunt, "The Theory of Critical Legal Studies" (1986) Oxford J. Leg. Stud. 1.

[3] The first major expression of doubt about the project of generating an alternative theory were voiced by Duncan Kennedy & Peter Gabel, "Roll Over Beethoven" (1984) Stan. L. Rev. 1. For my own defence of the project of theory in critical legal studies [hereinafter CLS], see Alan Hunt, "The Critique of Law: What Is 'Critical' About Critical Legal Studies" in P. Fitzpatrick & A. Hunt, eds, *Critical Legal Studies* (Oxford: Basil Blackwell, 1987).

intervenes. The essays (some new, some old, and some reworked), collected together under the title *Dwelling on the Threshold*,[4] although wideranging in their immediate subject matter, can be read, I suggest, as advancing an answer to the question: What is progressive in legal scholarship? As will become apparent, I have some substantive differences with Hutchinson's answer to that question; but this should not be read as in any way detracting from my warm enthusiasm for the fact that he has posed and grappled with the central issues confronting the progressive project in law and legal scholarship. It is around his engagement with these key issues that this essay will concentrate its attention.

II. THE PROBLEM POSED: LIBERALISM'S FEAR OF POLITICS

Hutchinson derives his formulation of the problems confronting legal scholarship and practice directly from his critique of liberal legalism. The centrepiece of his argument is to be found in the essay "About Formalism" in which liberalism is encountered in its formalist costume.

> My ambition is to prise legal thought from the vice-like grip of this unfortunate tendency [legal formalism] and to suggest other ways of thinking about and performing the legal project.... The central thrust of my critique is to reveal its theoretical untenability and political partiality. Throughout, I will insist that the crime is not ideology, but the silence that hides it.[5]

The untenability of legal formalism resides in its never-to-be-realized quest for some rational and objective grounding for the decisions and choices that courts make. Legal reasoning strives to rise above personal preferences to achieve some neutral resolution to the Millean dilemma of the search for a means of choosing

[4] Allan Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Toronto: Carswell and London: Sweet & Maxwell, 1988). If I may express a minor irritation: it is unfortunate that the author did not provide information about date and place of publication of originals or the sometimes complex re-editing and re-writing to which these essays have been subjected. This absence made it more difficult to follow shifts and developments in his thinking over the last few years.

[5] *Ibid.* at 26.

between individual liberty and social interests; but in so doing, legal formalism is blind to the fact that it can do no more than to give effect to and to legitimate the established distribution of power relations. Moreover, rather than achieving transcendental neutrality, legal thinking is inescapably contingent. It will remain so because the Enlightenment quest for some epistemological grounding of Truth and Knowledge is unrealizable.

This general argument is illustrated in Hutchinson's discussion of, amongst other things, administrative law when he insists that the search for neutral principles which would allow judges to mediate, as if they were referees in a game governed by consensual rules,[6] between the private citizen and the state, involves ideological illusion and self-deception. His discussion of the recent history of judicial review, in particular the British cases arising from the victims of the Thatcher axe, the Greater London Council and its "Fares Fair" policy,[7] demonstrate that at its best:

> The evolution of legal doctrine comprises an unending series of fragile and makeshift compromises between contradictory ideals.... Legal discourse is nothing more than a stylised version of political discourse.[8]

Hutchinson also uses these statutory interpretation cases to reject an instrumentalist account of law as the agency of dominant economic or political forces; rather, they are read as demonstrating the "relative" autonomy of law.[9] In similar terms, his analysis of the

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[6] The aspiration to achieve the neutrality of the referee is made explicit by Lawton L.J.: "I regard myself as a referee, I can blow the whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play." *Laker Airways Ltd* v. *Department of Trade* [1977] 2 W.L.R. 235 at 267.

[7] See *Bromley L.B.C.* v. *Greater London Council* [1982] 2 W.L.R. 62 and *R.* v. *London Transport Executive; Ex parte Greater London Council* [1983] 2 All E.R. 262.

[8] *Supra*, note 4 at 91.

[9] Whilst I agree with Hutchinson's general indictment of instrumentalism there is a significant deficiency in his formulation. He seeks to encapsulate the relative autonomy thesis with the metaphor "The law is like a dog on a long leash". (Interestingly Norman Geras, in his criticisms of Laclau and Mouffe's demonstration of the metaphorical inadequacy of 'relative autonomy', uses the analogy of being fastened by the ankle to a long chain; see "Post-Marxism?" (1987) 163 New Left Rev. 40. The problem with these analogies is that they imply that the leash/chain is fixed or held by identifiable social actors and that it is of fixed length

contest between variants of the fault and no-fault liability principles in tort law points to both the contingency of legal doctrine and its inescapably political nature.[10]

If law and legal doctrine are congenitally political, then it follows that there can be no other course of action than to embrace the politics of law. Legal scholarship cannot avoid grappling with the contending socio-economic and political commitments which underpin the texts with which it deals. It is to that end that Hutchinson advances his democratic alternative to formalism and which I will consider in some detail in Section VI below. Liberal legalism, according to Hutchinson, not only represses the political dimension of law, but he also finds it guilty of suppressing "power" and "history." The absence of consideration of the power relations underlying legal relations is a corollary of liberal legalism's fear of politics.

Hutchinson gives voice to a theme common in critical legal scholarship in calling for the reinstatement of "history" in contrast to the characteristic ahistoricism of liberal legalism. This position manifests the close alliance that has developed between the critical legal studies movement and the "new legal history."[11] But much of the historical writing relied on by critical scholars — I have particularly in mind the enormous influence of E.P. Thompson[12] —

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such that the controlling hand is able to say "so far and no further." Presented in this form 'relative autonomy' remains nothing other than a sophisticated instrumentalism (implying a far-sighted ruling class aware of the tactical advantage of a system of courts which does not always hand down the decision dictated by its own immediate political interests) rather than providing an alternative to it. The implication of my criticism of Hutchinson's version of relative autonomy is that the question it purports to address, namely, the relationship between political power and judicial power still lies unanswered on the table.

[10] *Supra*, note 4, c. 5 and 10.

[11] This "alliance" is epitomised by the important role played of Morton Horwitz and Robert Gordon for critical legal scholars. It is also worth recalling that much of the formative CLS writing had a strong historical dimension; the early work of Duncan Kennedy, Mark Tushnet, and Karl Klare was strongly historical. The positive evaluation of historical scholarship is a continuing feature of CLS writing.

[12] Thompson's *Whigs and Hunters* (London: Allen Lane, 1975) is perhaps the most frequently cited historical text and rightly has had an enormous influence on critical legal scholarship. Yet Thompson's historiography is generally incompatible with the "deconstructive turn" favoured by Hutchinson. There is one possible link provided by Thompson's deployment

emerges from an intellectual tradition which is by no means necessarily compatible with the emphasis on contingency; writers like Thompson and Horwitz are deeply imbued with the rationalism of the Enlightenment tradition. Hutchinson avoids this difficulty by primarily invoking the Foucauldian style of history, emphasizing micro-politics and contingency, which sits much more comfortably with his commitment to deconstruction.[13] Foucault is doubly significant for Hutchinson because he paradigmatically embodies both a postmodernist conception of history and a central preoccupation with power.

III. THE DECONSTRUCTIVE ALTERNATIVE

The major thematic unity in this collection is provided by Hutchinson's espousal of deconstruction. Before commenting on the substantive version of deconstruction which he espouses, I want to consider the reasons which he gives for going down this particular path. His commitment to deconstruction stems from two main sources: first, his acceptance of the postmodernist critique of the Enlightenment. (Since so much of the case for deconstruction rests upon its postmodernist presuppositions, I consider these intellectual underpinnings in a separate section below (see Section V).) The second source is the enthusiastic primacy which deconstruction accords to language and textuality.

The linguistic turn has had far-reaching impact on legal scholarship over the last decade. The "interpretation debate"

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of the category "experience" to defeat the structuralism which has been his main theoretical target; it is one of his least adequately developed concepts in that it seems to inject into historiography a free-floating play of an unexplorable subjective consciousness. Thompson himself is most unlikely to feel any more sympathy for deconstruction than he did for structuralism.

[13]It is by no means clear that Foucault's development of the genealogical method entirely succeeds in banishing the Enlightenment figures of "evolutionism" and "developmentalism." There remains in place the troubling figure of "strategies." Even though he insists that they are strategies without strategists, it is difficult to take this attempted escape too seriously since the very notion of strategy implies the 'intentionality' of historical actors.

continues with unabated enthusiasm. Hutchinson is concerned to demonstrate that deconstruction offers a solution to the deficiencies of liberalism which are reproduced within the interpretation debate. In "Doing Interpretive Numbers," he demonstrates that both James Boyd White and Stanley Fish replicate liberalism's sins of being ahistorical and apolitical. Their works are respectively a "paean to liberal legalism"[14] and "a profoundly conservative theory of interpretation."[15]

It is in Hutchinson's preoccupation to remain within the "linguistic turn" whilst impelling it in a radical direction that I detect problems. As I will argue, it is no simple matter to draft power, politics, and ideology onto textual or discourse analysis; it is not that I think it impossible, just that it is more difficult than Hutchinson admits because as I hope to show, it involves grafting on to the deconstructive project concepts from an incompatible theoretical tradition.

I find myself most at odds with him in his strategy of striving to outdo White and Fish by taking over from them a linguistic determinism which further compounds the problem of how to integrate power, politics, and ideology. Critical legal studies has been much preoccupied with expunging all determinisms.[16] It seems unfortunate that a new determinism should make its appearance in the guise of deconstruction.

The key passage which raises the problem of linguistic determinism is worth quoting at length:

> Language, thinking and being are inextricably linked. Our language is the raw material from which our world and reality are forged; they are a cultural artifact of the first order. Language is not a transparency through which we observe the world nor a catalogue of labels to be attached to the appropriate contents of the world. There is no form of pure communication that merely represents instead of creating. The world is within the language and the language within the world....

[14] *Supra*, note 4 at 141.

[15] *Supra*, note 4 at 143.

[16] The most rigorous critique of determinism from within the critical legal studies movement is probably by Robert Gordon "Critical Legal Histories" (1984) 36 Stan. L. Rev. 57.

> Language is not a system of static symbols, but is a form of social action. To acquire and exercise language is to engage in the most profound of political acts: to name the world is to control it.[17]

In trying to unpack these formulations, the most important feature is that alongside "language" there is another, but rather shadowy presence, namely, "our world and reality." Now "reality" is generally expunged by Hutchinson: he adopts a severe anti-realism. For example, a few pages earlier he has insisted:

> We must pull the curtain down on the melodramatic comedy of scientific manners that presents the pursuit of truth as an attempt to achieve an ever closer approximation to reality.[18]

If "the world" is not "reality," what is it that is not language but which language "forges"? The passage quoted above offers the possibility that it might be "social action" (elsewhere he refers to "practices"). In other formulations, "history" is lined up amongst the candidates.

> We are worked upon and made by history and language, yet, by our interaction with them, we create language and shape history.[19]

Again we have the invocation of a powerful, but still silent figure, whose distinction from language is unspecified.

Hutchinson does not preach the absurdity that there is nothing else but language. But in seeking, and here I am in full agreement, to emphasize the importance of language, to reinstate the cultural nature of sociality and intersubjectivity, he ends with an overemphasis because that which is "other" than language melts into the air. Thus, paradoxically he fails to make the radical break from White and Fish which he is striving for.

Hutchinson is not alone in this dilemma; it arises very distinctively in Foucault's work. Appearing alongside "discourses," Foucault refers on and off throughout his work to a shifting set of concepts which are not reducible to discourse; variously "practices,"

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[17] *Supra*, note 4 at 287-88.

[18] *Supra*, note 4 at 278.

[19] *Supra*, note 4 at 147.

"power," and "strategies" play this role. But there is always something unsatisfactory about these concepts. He refuses to reduce "practices" to behaviour, but cannot identify its supplement. We are unconvincingly invited to accept that there can be strategies without strategists (because to admit the presence of the strategist would allow back the banished figure of "the subject"). And finally we are asked to accept that the compelling insistence that "power is everywhere" compensates for an account of how it is other than language/discourse. Hutchinson's problems are thus similar to Foucault's: in elevating language he is unable to provide an adequate conceptual framework within which the play and power of language operates.

The problem with Hutchinson's thesis that "to name the world is to control it" is that it implies an unlimited capacity in the hands of those with the power to "name" to create the world in their own image; it involves the same omnipotence of God in creating man in his own image.[20] Some means is needed to specify the limits of "naming." Such an approach is indicated in Bourdieu's formulation:

> Nonetheless, the will to transform the world by transforming the words for naming it ... can only succeed if the resulting prophecies, or creative evocation, are also, at least in part, well-founded *pre*-visions, anticipatory descriptions. These visions only call forth what they proclaim ... because they announce what is in the process of developing. They are not so much the midwives as the recording secretaries of history.[21]

I am not concerned to claim that Bourdieu solves the problem of the specification of the limits of the power to name; I am concerned

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[20] The problem posed by the apparently unlimited power to "name " is but a larger version of the same issue that arose with respect to the labelling theory of deviance in the 60s; I have in mind work such as David Matza, *Becoming Deviant* (Englewood Cliffs NJ: Prentice-Hall 1969). What limits are there to the "labelling" or "naming" capacity of the powerful to create the world as they will? One possible solution is that provided by Foucault's notion of "resistances"; see Michel Foucault, *Power/Knowledge* (Brighton: Harvester Press, 1980). But this only tells us that power engenders resistance rather than aiding the specification of the limits of the capacity to name.

[21] Pierre Bourdieu, "The Force of Law: Towards a Sociology of the Juridical Field" (1987) 38 Hastings L.J. 805 at 839-40.

merely to name the problem which leads Hutchinson into the perils of linguistic determinism. His is not a "crude" determinism (there is nothing but language), but a complex determinism which results from the fragility of the supporting conceptual cast.

There is, I suggest, a very simple reason why both Foucault and Hutchinson get into the difficulties they do. It is a consequence of their philosophical anti-realism. However attractive it may be to seek to escape from the dangerous water of epistemology and ontology, on which the philosophy of the Enlightenment has been continuously battering itself, the idea that there can be an escape by abandoning the ship will remain forever illusory. To indicate some "other" to which language/discourse relates is itself to presuppose an ontology, and consequentially an epistemology, which have been vetoed in the self-denying ordinances of postmodernism's non-philosophical philosophy.

The consequences are more important than simply a return to enduring philosophical problems which Hutchinson had hoped to put behind him. There are real political implications. The most serious of which is a reduction of all forms of social struggle to linguistic struggles. Class struggle (and for that matter all other forms of struggle) is reduced to the struggle to control meaning, to a "hermeneutical struggle."

> The struggle to control meaning and, therefore, the conditions of collective life is fought anew every day.[22]
> [L]anguage must be recognized as both the prize of political conflict and the arena in which that conflict takes place ... It is at this stage that the elemental struggle to control meaning and, therefore, life is won and lost.[23]

My concern is not that I wish to deny the struggle over meaning; indeed I regard this as a core feature of the total process which is helpfully grasped by Gramsci's concept of the struggle for hegemony. My disagreement with Hutchinson is that "the elemental struggle to control meaning" leaves no place for what most interests me, namely, how the struggle over meaning is articulated with other forms of struggle, particularly those revolving around material

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[22] *Supra*, note 4 at 155.

[23] *Supra*, note 4 at 148.

interests. In summary, the linguistic turn as practiced by Hutchinson has simply turned too far. In retreat from the old shibboleths of economic determinisms, he has acted as if the only response was to abandon the concepts of economic and material interests and has imagined that language and the hermeneutic struggle embraced the whole project of constructing a better world.

Deconstruction is the hegemonic form of postmodernism and nowhere more so than in legal scholarship. As Hutchinson makes clear he is particularly indebted to Richard Rorty.[24]

> The Enlightenment Project is beyond repair and must be junked.[25]

In particular this requires either that philosophy be abandoned or philosophy itself must eschew any pretension to provide an epistemologically secure foundation for knowledge, that Truth and Knowledge conceived as the quest for objectivity and a correspondence with Reality must be renounced. Since legal formalism is deeply imbued with this rationalist credo of the Enlightenment, it is irredeemable.

The alternative which Hutchinson adopts is to embrace the radical implications of deconstruction conceived not as an alternative philosophy but as a strategy for displacing traditional philosophy. It is precisely because deconstruction refuses the status of philosophy that it is difficult to give a direct answer to the question: What is deconstruction? Rather it revels in its slipperiness; it delights in the enigmatic and suggestively insightful phrase, but immediately denies that its pronouncements can be dissected and roundly accuses anyone who should want to do such a thing of being trapped in the mythology of the Enlightenment.

Yet, accepting the risk of such charges being laid against me, I will press the question: "What is deconstruction?" I do so for two reasons: first because it is important to know what way of thinking or method of study one is being asked to adopt and, second, we need to know how to recognize good deconstructive practice when

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[24] See, in particular, R. Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979); and *The Consequences of Pragmatism* (Sussex: Harvester Press, 1982).

[25] *Supra*, note 4 at 49.

we encounter it; it is not sufficient to be referred in footnotes to the master texts of Derrida or Foucault or any other exponent.

What follows is my attempt to answer the impermissible question. Deconstruction is first and foremost a particular form of Critique; that is, it starts out from the content of that which is to be criticized. It is only concerned to a limited degree with the major component of the methodology of critique, namely, with the examination of the internal consistency and coherence of the ideas it addresses. Rather, deconstruction starts by insisting that we treat our object of inquiry as a text; this in turn leads to the substantive project of exploring how the text is constructed. We are directed to focus upon the components of that construction: these include the linguistic style (for example the metaphors or other tropes employed in the text), and the context in which the text is constructed. It is in examining the context that deconstruction insists upon the historicity of the text as a product of the play of relations of *power*. This in turn leads to the contention that the truth or knowledge claims of any text are *political* expressions of the power play between the text under consideration and other texts. These steps are, I think, the bare-bones of deconstruction.

Before considering the implications of deconstruction for legal scholarship, I want to pause to consider two other features that are included in Hutchinson's account of deconstruction which I want to suggest are problematic. First, his account includes the claim that the "task of criticism [is] to note the meaning actually ascribed to texts."[26] Here we encounter the problem of hermeneutics; whilst there is often a close association between deconstruction and hermeneutics, it does not follow that they can be automatically conjoined since it is far from clear that the meanings ascribed to texts by participants are necessarily a consequence of textuality itself.[27]

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[26] *Supra*, note 4 at 39.

[27] The relationship between hermeneutics and deconstruction is fully explored in H. Dreyfus & P. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press, 1983). I agree with their thesis that Foucault recognised the problematic connection between his project and hermeneutics but remain undecided as to whether he solved the difficulty.

The second problem concerns the relations between texts and practices. Hutchinson includes in his account of deconstruction its object as being to "draw out the social practices that the text reflects and reworks."[28] This task is only feasible with a very expanded conception of textuality such that it embraces "practices"; intuitively it seems important to hang on to a distinction between what people think/mean and what they do. But the real difficulty for deconstruction is embedded in the idea of "reflection" since this inevitably takes us back to the philosophically forbidden thesis that there is an independent "reality" which is mirrored in "thought."[29] These two problems touch on some "big" issues which I do not propose to pursue further, but merely want to draw the moral that it is more difficult for deconstruction to escape philosophical and methodological issues than its "slippery" and enigmatic self-presentation seeks to suggest.

From this consideration of the nature of the deconstructive project, I return to consider the implications which Hutchinson derives for legal thinking and practice. Most of the theses he advances stem unproblematically from his account of deconstruction, for example, that law and lawyering are political, "legal discourse is only a stylised version of political discourse."[30] Other of his theses are not so self-evidently derived from the deconstructive method he espouses. Two are of particular importance and I hasten to add that it is not that I disagree with them, but rather that I am not convinced that he can claim them as consistent with or as stemming from deconstruction.

> [T]here is a deep logic and *structure* to law that broadly *reflects* the *contradictory* relations of modern hierarchical society.[31] [emphasis added]

My concern is to question whether Hutchinson's commitment to

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[28] *Supra*, note 4 at 39.

[29] It is precisely this reality-thought connection which it is the main target of Rorty's powerful critique of the imagery of thought as a mirror of nature (*supra*, note 15) and upon which Hutchinson relies so heavily.

[30] *Supra*, note 4 at 40.

[31] *Ibid.*

deconstruction allows him to invoke the three crucial concepts emphasized in the above quote. Most versions of deconstruction, and in particular that of Foucault, upon which Hutchinson relies most heavily, regard all talk of structure as suspect since it refers back to some reality outside discourse.[32] I have already commented above that to invoke "reflection" violates the deconstructive veto against all talk of relations between reality and thought.[33] Finally, the introduction of "contradiction" is problematic since it seems to imply precisely the kind of dichotomized conceptions for which liberalism and Enlightenment thought are criticized. Perhaps more importantly, if contradiction means more than mere internal incoherence, then it involves some idea that the features in contradiction stand in some relationship to real processes or structures external to the text. But this idea is incompatible with the anti-realist epistemology on which deconstruction rests; it can only be provided by some return (for example, to Hegel or Marx) to the metatheories which deconstruction has set out to slay.

Similar problems surround his other major thesis:

> All critique must recognise the operation of law as ideology. The Rule of Law lends to existing social structures the appearance of legitimacy and inevitability.[34]

Again I have no hesitation in endorsing his thesis, but I challenge whether it is consistent with a deconstructive strategy. There is a widespread tendency to conflate "discourse" and "ideology" and I suggest that Hutchinson is guilty of precisely this error. It is particularly significant because of his avowed indebtedness to Foucault. While the interpretation of Foucault's writing leaves room for many versions, my reading of him is that he saw the project of discourse analysis as markedly different from ideological analysis, and that this was one of his significant breaks with Marxism in general

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[32] It may be that at this juncture in his argument Hutchinson is relying upon Alan Ryan, *Marxism and Deconstruction: A Critical Articulation* (Baltimore: John Hopkins University Press, 1982) (which he elsewhere acknowledges); Ryan's project is precisely directed at finding some rapprochement between structuralism and deconstruction.

[33] *Supra*, note 17.

[34] *Supra*, note 4 at 40.

and the structuralism of his own earlier works.[35] So again the doubt must be raised that Hutchinson may have debarred himself from deploying the powerful analytic tool of ideology precisely because that concept implies the existence of some connection between the representations, discourses, and images which are constitutive of social actors and some "real" or objective characteristics of the social relations in which they participate. It is precisely this connection which deconstruction disallows.

Let me take stock. The theses which Hutchinson appends concerning structure, reflection, contradiction, and ideology are ones that I am in agreement with. My point is that by jumping on the deconstructive bandwagon, he has debarred himself from making use of these important and powerful concepts. It may be that he is guilty of trying to have his cake and eat it. If these concepts have to be vetoed, then it gives point to the source of my anxiety about the implications of deconstruction. Put briefly, my concern is that the benefits that accrue from the espousal of deconstruction (and these are not to be minimised) have to be bought at far too high a price if these concepts have to be renounced.

It may be objected that this discussion of deconstruction is flawed precisely because it is imposing the assumption, which deconstruction denies, that it involves a methodology. My brief rejoinder is that, like epistemology, there is no escape from methodology. However, in deference to this objection, I will now turn my attention to Hutchinson's deconstructive practice.

IV. DOING DECONSTRUCTIVE NUMBERS

Hutchinson's application of deconstructive practice involves two stages: deconstructive criticism and reconstruction. The first of these involves the strategies now made familiar through critical legal

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[35] The relationship between the concepts discourse and ideology is most fully discussed by Mark Cousins & Athar Hussain, *Michel Foucault* (London: Macmillan, 1984). They conclude that Foucault's later work must be understood as a "concerted attempt on his part to steer the analysis of power away from the theme of ideology" (at 229). See also Diane Macdonell, *Theories of Discourse* (Oxford: Basil Blackwell, 1986) c. 2.

studies work in which bodies of legal doctrine are subjected to interrogation through the examination of their deployment of metaphors and other tropes. For example, he draws attention to the heavy reliance in public law discourse upon the concept of sovereignty; the transference of relations of sovereign/subject from monarchical to democratic regimes is, as Foucault noted, significant because the implied continuity masks the expansion and consolidation of disciplinary power. The second element of critique, even more familiar to readers of the critical legal theorists, is the revelation of unstable dichotomous conceptualizations. In Hutchinson's analysis of the contest between the variants of fault and no-fault liability in tort law, he demonstrates not only the contingency of legal doctrine and its inherently political nature, but the coexistence of mutually inconsistent principles.[36] Deconstructive criticism thereby undermines the metaphysics of legal rationality with its claims to objectivity. His version of deconstructive practice does not embrace all dimensions of critique. For example, neither Hutchinson nor the critical legal theorists have focused on the institutional constraints which differentially effect the operationalization of the coexisting legal principles.[37]

The second stage of his deconstructive practice concerns the objective of turning "the deconstructive urge into a reconstructive impulse."[38] He is at pains to head-off any suggestion that deconstruction is negative or destructive.

> Deconstruction need not lead to moral despair or political quietism: it can be incorporated within a mode of political life that is organised in accordance with a radical form of democracy.[39]

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[36] The subject matter of the essays "Derek and Charles v. Anne and Martin" and "Beyond No-Fault," *supra*, note 4 at c. 5 and 10.

[37] One of the unremarked ways in which Foucault manifests some continuity with Marx is the extent to which he was greatly preoccupied by the institutional context of discursive formations. The neglect of this dimension of critique by Anglo-American deconstructionists is to be explained by their almost complete preoccupation with language to the exclusion of all else.

[38] *Supra*, note 4 at 264.

[39] *Ibid.*

I will postpone consideration of his conception of radical or "dialogic democracy"[40] until Section VI below. The issue of democracy receives less detailed attention than does the positive reading of Foucault on which he seeks to ground his discussion.[41] The main implication of Hutchinson's use of Foucault is that it provides him with the link between the linguistic preoccupations of deconstruction and his concern to encompass the dimensions of power and politics absent from liberal legalism. In his account of the Foucauldian theory of power, he pays special attention to Foucault's emphasis upon the positive or constitutive role of power and upon the localization of power.[42] What is, perhaps surprisingly, missing from his account of Foucault is any exploration of his suggestion that law constitutes a form of power/knowledge which is distinctive of modernity[43]; despite the widespread interest in Foucault by critical legal scholars, there has been little or no consideration of this extremely interesting and potentially fruitful vein within Foucault's work. Since so many of the issues and problems which I have identified about the theory and practice of deconstruction revolve around its roots in postmodernism, I now turn to consider the underlying antiphilosophy upon which the deconstructive project rests.

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[40] *Ibid.* at 265.

[41] See "Working the Seam: Truth, Justice and the Foucault Way," *supra*, note 4 at 261-93.

[42] For Foucault, the insistence that the only viable form of politics is 'local politics' was one of his most significant and, I would contend, pessimistic reflections on the May 1968 events in France. I characterize this conclusion as pessimistic because it consisted of a simple juxtaposition of local versus national politics. The primacy of "the local" was announced as a revelation without noticing that in Italy, the C.P.I. had during the same period made significant advances with a strategy which had sought to integrate very detailed 'local politics' along with a national perspective. Hutchinson adopts Foucault's exclusive focus on local or small-scale politics with little or no argumentation; see section VI below.

[43] See, in particular, "Two Lectures" in Michel Foucault, *Power/Knowledge* (Brighton: Harvester Press, 1980) at 102-108.

V. POSTMODERNISM AND THE ENLIGHTENMENT: REVISITED

Hutchinson's text. rests, as I have indicated, upon an unargued acceptance of a Rortian version of the postmodernist rejection of the Enlightenment project. It is therefore important to explore the postmodernist view of the Enlightenment and the consequences that stem from it. In doing so, I will touch upon large and significant questions far beyond the aspirations of even the most discursive review article. So, rather than attempt any full treatment I will set up a contrast to Hutchinson's approach by presenting an alternative view.

Rorty and the other theorists of post-modernism,[44] with their critique of the false dichotomies of Enlightenment thought, present us with an unhelpful and, I suggest, avoidable dichotomy between the wholesale endorsement of the classical version of the Enlightenment project and its complete abandonment. We are presented with a stark and dramatic choice between the Enlightenment (with the strong implication that to make this choice would reveal our unreconstructed mind in its most old-fashioned garb) or postmodernism (with the strong inference that this is the up-to-date and radical choice); significantly no intermediate answers are admissible. Any approach which leaves anything of the Enlightenment intact is but an attempt to keep that played-out project alive. It is important to note, in passing, that the "Enlightenment Project" is always in the singular and thus assumed to be a unitary and integrated project. The import or relevance of the Enlightenment is confined to the past. Thus Rorty, less cavalier than some of the European postmodernists, readily admits the importance of the Enlightenment in displacing theological discourses, but this recognition does nothing to hide the fact that the Enlightenment has run its course.

Postmodernism embraces a complex set of ideas and I am anxious to avoid committing the same error which I have just accused its adherents of perpetrating, namely, that of suggesting a

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[44] I have in mind particularly J-F. Lyotard, *The Postmodern Condition* (Manchester: Manchester University Press, 1984).

simple alternative between acceptance and rejection. Marshall Berman succeeds in capturing the persistence of an intellectual ambiguity towards the Enlightenment.

> [F]rom Marx's and Dostoevsky's time to our own, it has been impossible to grasp and embrace the modern world's potentialities without loathing and fighting against some of its most palpable realities.[45]

Berman goes on to make the very important point that whereas the intellectual giants of the nineteenth century were simultaneously enthusiasts for and enemies of modernity and wrestled with its ambiguities and contradictions, their twentieth-century successors have

> lurched far more toward rigid polarities and flat totalizations. Modernity is either embraced with a blind and uncritical enthusiasm, or else condemned with neo-Olympian remoteness and contempt; in either case it is conceived as a closed monolith.[46]

I want to suggest that we can adopt a more dispassionate view of the substance of postmodernism (and indeed retain many of its insights and techniques) if we first separate its content from its general intellectual outlook. At root, postmodernism is grounded in a profound disenchantment with modernity. There is a very specific reason why many progressive intellectuals have come to adopt this disenchantment as their own; as I argued in the opening section, none of the available political strategies of the present period seem to offer much hope of foreseeable and radical social transformation. So whether in disillusionment with the results of the May events in 1968 or with the swing to the Right since the late 70s, it is not surprising that postmodernism has its attractions for progressives. The implications go beyond mood, they effect style, I will argue that the wider intellectual ramifications of postmodernism are at the root of Hutchinson's political message that macro-politics are out and that local politics is all that is available (see Section VI below), and it also explains his concern to say things in new ways (see Section VII below).

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[45] Marshall Berman, *All That Is Solid Melts Into Air: The Experience of Modernity* (New York: Simon & Schuster, 1982) at 14.

[46] *Ibid.* at 24.

I am anxious to hang on to Berman's sense of the ambiguity of modernity. My own approach has its roots in an admixture of reflections on Gramsci, Habermas, and Poulantzas. Whilst I empathize with postmodernism's critique of instrumental reason, scientism, and the cult of progress. I want to affirm that significant projects, in particular, that of human emancipation through freedom, equality, and knowledge remain uncompleted. From Edward Thompson, I derive the view that liberalism has lost the will and inclination to pursue these goals, and that their realization has fallen to contemporary socialism; this in turn underlines my view that socialism must engage with and draw significantly from liberalism in order to fulfil this objective.

I state these personal orientations in broad outline only in order to indicate possible areas of disagreements since Hutchinson himself does not advance any account or defence of the general tenets of postmodernism. Its themes suffuse his writings. He does, however, seek to defend postmodernism from some objections. In particular, he takes on board the charge that postmodernism leads by some inevitable and very slippery slope into the abyss of relativism and, even worse, to nihilism. His line of defence is two-fold. The first I entirely endorse when he rejects the politically reactionary scare techniques which have recently been used against the proponents of critical legal studies by people who should know better than to resort to intellectual McCarthyism.[47]

His other major line of defence is to follow Rorty in claiming that the charge of relativism/nihilism must be false because there simply are no relativists or nihilists to be found on the block.

> Nihilism is only threatening or comprehensible for those who maintain that objective truth and rational knowledge are required for moral action and authority. It is only troublesome to those who continue to believe in the worth of the enlightenment project. The nihilistic deep is a construct of that project. If the Enlightenment Project is abandoned, the association of nihilism with moral despair will also be rejected.[48]

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[47] See in particular P. Carrington, "Of Law and the River" (1984) 34 J. Leg. Ed. 227; Owen Fiss, "The Death of Law?" (1986) 72 Cornell L. Rev. 1; Alvin Rubin, "Does the Law Matter? A Judge's Response to the Critical Legal Studies Movement" (1987) 37 J. Leg. Ed. 307.

[48] *Supra*, note 4 at 46.

Let me turn the argumentative techniques of postmodernism against this defence. When he speaks of nihilism and relativism, he does so in the same way that he does of Truth and Knowledge, where the capitalization signifies "Absolute." In this sense, there are no Relativists or Nihilists. But this does not make the issue of uncapitalized "relativism" and "nihilism" go away. From the range of philosophical and political issues involved, I will single out for comment the problem of the grounds for evaluation. By what means, if any, are we able to judge if one argument, policy, or strategy is any better than another? I am happy to dispense with any claims about whether one argument is "correct" or "right," but I am passionately interested in which is "better." The postmodernist credo rejects according any priority to particular strategies. In its general hostility to deductive logic, it elevates narrative in a way that makes other than aesthetic evaluation problematic. For example, Rorty insists that philosophy can be nothing more than conversation or more recently that

> one can also think of philosophy in other ways – in particular, as a matter of telling stories: stories about why we talk as we do and how we might avoid continuing to talk that way.[49]

Whilst this has the merit in questioning the unique claims of any particular philosophical genre, it leaves entirely to the play of rhetoric the choice between contending arguments. Thus, for example, my personal reaction was that I did not get as much from those essays where Hutchinson adopted a narrative style as I did from his more conventional essays.

My worry about postmodernist epistemology (or if it is insisted that postmodernism denies the pertinence of epistemology, then its anti-epistemology) is that it denies our capacity to ground evaluative claims. More generally in rehearsing and reiterating the Nietzchean assault on truth, logic, and objectivity, postmodernist writers end up promising much but being held back in the alternative they feel able to offer. Their texts are all too often like dieting, they leave one with a lasting hunger – but perhaps this is

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[49] R. Rorty, "Philosophy Without Principles" in W.J.T. Mitchell, ed., *Against Theory* (Chicago: Chicago University Press, 1985) at 135.

just my hankering after the rich fare from the Enlightenment kitchen.

VI. THE POLITICS OF LAW

After these reflections on postmodernism, it is time to return to consider the programme for legal theory and legal practice which Hutchinson derives from "doing deconstructive numbers." In the essay under this title, he provides an extended critique of James Boyd White's fascinating and wide ranging excursions into law and literature. Hutchinson's conclusion is that White's work is ahistorical and apolitical. One of the major reasons being that White, like many contemporary theorists

> has all but ignored the ideological dimensions of language even though all interpretation assumes an entire structure of values. The hard shell of language has a soft ideological underbelly.[50]

In other words, his diagnosis is that it is the absence of ideology from White's interpretive analysis which leads to its questionable politics. My rejoinder is that White is entirely consistent with the interpretive approach and deconstruction in general; and this in turn explains the politics that are the result. Whilst my politics are much closer to Hutchinson's than to White's, the latter has the advantage of consistency, whereas Hutchinson's radicalism is grafted onto deconstruction. It is not that I hold that deconstruction is politically negative; it is just that it can be employed any which way.

Hutchinson's progressive reconstruction of the politics of law proceeds by starting with deconstruction and then supplementing it with a few key additional concepts (ideology, power, *et cetera*). I will argue that the general limitation of his political agenda, namely, the failure to offer any linkage between "local" or micro-politics and the wider structural location of politics within the state, stems precisely from his adhesion to the self-imposed limitations of the deconstructivist strategy. Let me hasten to add that I think the task of providing the linkages between micro- and macro-politics is the most difficult and pressing task of political strategy and further that

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[50] *Supra*, note 4 at 134.

the reader will look in vain for any answers to that problem in this essay. I will be content to underline the claim that this is *the* question and that deconstruction is an evasion of, rather than a contribution to its solution.

Hutchinson derives his political stance directly from post-modernist theoretical premises.

> By abandoning the search for foundational truths, we enhance the possibilities for the powerless to engage in the essential dialogue of world re-making.[51]

Unfortunately he does not indicate just how the adoption of such an abstract philosophical (or non-philosophical) position helps the powerless. Indeed once it becomes clear that he conceives of politics as "conversation" (here again the influence of Rorty) and espouses "dialogic democracy"[52] it becomes even less clear how this helps the powerless even though he writes of conversational politics with militant rhetoric.

> [A]s conversationalists, we are front-line combatants in the daily struggle to resist, reproduce or change the world.[53]

He explicitly renounces the question of institutional change.[54]

> The focus of endeavour must be realigned. Each person must individually and collectively encourage themselves and others to promote and experience new forms of inter-subjectivity.[55]

It is difficult to conceive of how such a view of politics can provide any challenge to the institutionalized structures of power and inequality which characterize modern society. Whilst he recognizes that in politics as conversation, the powerful have the cards stacked in their favour, he is optimistic that localized politics can provide the empowerment to activate the powerless. Local politics is more than

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[51] *Ibid.* at 289.

[52] *Ibid.* at 290.

[53] *Ibid.* at 289.

[54] *Ibid.* at 291.

[55] *Ibid.*

just a starting point; it requires the renunciation of politics at the level of the state.

> [W]e must refrain from the familiar attempt to think in total and global terms. The response must be much more local and domestic. By working at ground level, transformative activity becomes a real possibility for disaffected citizens.[56]

It follows directly from the Foucaldian thesis that power is everywhere then politics is also everywhere. There is an obvious sense in which this is true, but a more important sense in which it is misleading since it fails to take account of the fact that local politics are not autonomous realms, but that states, legal institutions, political parties, *et cetera*, function to intervene in and to hegemonize local struggles and resistances.

Hutchinson quite correctly accords significance to the wider lessons that can be learnt from feminism for progressive politics. I want to suggest that there are more important lessons than the localization of politics which is the moral which he derives from feminism. Not only has feminism opened up the whole arena of the politics of gender and sexuality, but it has wider political significance. Contemporary feminism was born out of the struggle against the reduction of gender to class politics.[57] The resulting stress on the specificity of sexual politics and, by extension, of other forms of politics, and the consequent necessity for autonomy has made feminism the most refreshing and innovative force in contemporary politics.

But perhaps of greater importance is that feminism, or more particularly socialist feminism, has begun to move beyond the

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[56] *Ibid.*

[57] Feminism has not surprisingly entirely escaped the clutches of reductionism. Indeed it has produced its own internal reductionism in the form of radical feminism which has sought to promote a form of essentialist reduction of gender politics to the essences of the feminine and masculine. This essentialism takes a variety of forms. Mary O'Brien, for example, reduces sexual politics to the politics of "biological reproduction" which is in conflict with social reproduction; *The Politics of Reproduction* (London: Routledge, 1981). Carol Gilligan's insight that boys and girls exhibit different forms of ethical thinking has been erected into a counterposition of male/female thought without exploring the most obvious inference that boys and girls learn, as we ourselves have done, to play their gendered roles; *In a Different Voice: Psychological Theory and Womens' Development* (Cambridge, Mass.: Harvard University Press, 1982).

celebration of specificity and autonomy to ask a whole series of important questions: To what extent can specific politics (including local politics) succeed without at the same time engaging with the multifaceted forms of social oppression? If struggles are not reducible, under what conditions is it possible to go "beyond the fragments" to achieve concerted action, and even alliances, effective at the level of the state? These are questions which Hutchinson needs to explore because without posing these issues he dooms the powerless to forever engage in an endless series of single-issue struggles. It is not that such struggles are unimportant; they are the starting point of action and empowerment, but unless they find appropriate forms of articulation at the national or international level, they may remain locked into a vicious circle of a reformism that can never achieve its most significant goals.

It follows from his commitment to local politics that he is suspicious of, if not downright hostile to, institutional politics, and this goes for legal politics as well. His strategic position is:

> Resort to the courts can only be a pragmatic and occasional strategy for change.[58]

This thesis is fleshed-out in the series of forceful and sharp newspaper articles collected together as "Charter Cuttings" which record his responses to the *Canadian Charter of Rights and Freedoms*. He is trenchant in his critique of the judicialization of politics and of creeping judicial review of legislation which has come with the first few years of *Charter* litigation. Whilst his criticisms of individual decisions is damning, he keeps open a small glimmer of hope that the *Charter* may have some progressive potential, and it is this glimmer that I want to explore. He poses the questions: What should those committed to social justice and democracy do about the *Charter*? His answer is "expose the peripheral nature of the *Charter*" and do not waste too much energy or money in mounting *Charter* litigation. But the third element of his reply is more positive, if guarded.

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[58] *Supra*, note 4 at 292.

> Charter litigation might be used as a platform from which to develop a more caring and egalitarian society.[59]

It is a pity that he does not explore these possibilities further. I will content myself with outlining one way of approaching this important issue by suggesting that it may be worth posing the question in the following form: What sorts of issues and what types of social movements might stand to benefit from a strategy which gives some (not exclusive) priority to *Charter* litigation? In pursuit of this question it would be useful to explore whether social movements without institutional resources and mass membership might benefit more as a paradoxical result of their inability to pursue politics by other means. It might follow that whilst trade unions would be well advised to abandon *Charter* idolatry, single issue campaigns might fare better before the courts. Alternatively, it may be the content of the political objectives of social movements that is decisive. Those able to articulate their objectives within the individualized rights paradigm of the *Charter* would be likely to be more successful than those movements concerned with social or collective rights, not so readily expressible in terms of individual rights.

I raise these issues because without some exploration of the potential of legal strategies the type of position which Hutchinson expresses comes dangerously close to a one dimensional negative politics of law or, perhaps more accurately, the absence of a politics of law.

VII. THE POLITICS OF STYLE

Hutchinson argues that new thinking requires a new style.

> I have taken seriously the idea that in order to say different things about law, it is necessary to say them differently as well. By jolting readers' traditional expectations about the style and presentation of academic argument, the hope is that they will

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[59] *Ibid.* at 227.

> become more sensitive and responsive to critical challenges to received jurisprudential wisdom.[60]

In pursuit of this objective, he experiments with a range of stylistic genres. The reader encounters a one act play, snatches of sheet music, poetry, cartoons, and a number of other devices. The strength of this approach is that it makes the reader more conscious of the author in contrast to the conventional academic disembodied style which, with a rarefied conception of the pursuit of truth, does its best to abolish the author. This it does by taken-for-granted conventions which impose a third person style or forces the author to employ the archaic royal plural "we."

In general, his concern with style is a product of his sensitization at the hands of deconstruction to textuality and language. However, it does lead him to make rather optimistic assumptions about readers. To assume that to jolt the reader's expectations is to engage their attention is probably unwarranted. My more pessimistic judgment is that the "new style" of postmodernist legal scholars is an immediate "give-away" and provides an apparent excuse for unreconstructed legal academics to turn the page in search of "some real law"!

Paradoxically, the effect of Hutchinson's concern with style is to draw attention to the presence of authorial intent which sits inconsistently with his commitment to a deconstructive method. But perhaps a bigger problem is that it requires the author to be in firm control of his styles. Hutchinson's command of conventional academic style (which in fact predominates in this text) is polished; he maintains clarity and lucidity. Most impressive is the chapter of "Charter Cuttings" which reproduce, even down to the retention of snaking columns, a set of articles written for popular newspapers on the politics of the *Canadian Charter of Rights and Freedoms*. Here he achieves what many professional intellectuals find so difficult; he communicates complex issues in an accessible fashion with a laudable clarity and directness.

I was rather less impressed by other of his stylistic innovations. "Indiana Dworkin and Law's Empire" subjects

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[60] *Supra*, note 4 at viii.

Dworkin's text[61] to a series of film review styles. I enjoyed the read and he captured the film review genre well, but I do have to report that I have a rather hazy picture of the substance of Hutchinson's critique of Dworkin than I would probably have had from a more orthodox piece. "In Training" offers the reader a melange of a playlet constructed of dialogue, sheet music, and academic style. In "And Law," we are offered an allegorical anthropology. My personal reaction was that I found these chapters contrived and less effective vehicles than his more orthodox academic offerings. This may reflect nothing more than that this reviewer is so inflexible in his habituation to the academic style, that he cannot grasp the libratory potential of such experimentation. On the other hand, it may be that Hutchinson won't make as much impact as a playwright or as a film reviewer as he will as a scholar and a journalist.

VIII. STEPPING BACK FROM THE EDGE

When Hutchinson conceives of his situation as "Dwelling on the Threshold" of modern legal thought, his purpose is to carve out a narrow, but hopefully secure, "ledge" from which it is possible to avoid the twin evils of

> succumbing to the secure comforts of traditional jurisprudence or straying too far into the wilderness of political irrelevance.[62]

This laudable objective makes it more difficult to understand why the intellectual rope with which he has sought to secure his position should be that of deconstruction. Not only do I have doubts about the safety of deconstruction as a life-line, but more puzzling is its tendency to impede the general thrust of his work.

He identifies the connecting thread of these essays as the basic belief that law and its study is inescapably political in scope and substance.[63] My general contention has been that deconstruc-

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[61] *Supra*, note 1.

[62] *Supra*, note 4 at viii.

[63] *Ibid.*

tion proves to be an unsatisfactory vehicle for the pursuit of an objective which I share with him. Theoretically, deconstruction leads him to have to graft on the concepts of politics, power and ideology; and politically it leads to the insubstantial politics of localism. It is as if rather than being a safety device, deconstruction becomes entwined about his ankles such that he is in constant danger of loosing his footing – hence this reviewer's title suggestion that Hutchinson is living dangerously on the deconstructive edge. My suggestion is to step back from the deconstructive edge and to seek firmer theoretical and political ground from which to conduct the engagement with the post-liberal project of reuniting law and politics.