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# Intellectual Voyeurism in Legal Scholarship

Brian Leiter\*

## I. INTRODUCTION

Arguably, the most important general development in legal scholarship over the past two decades has been the remarkable flourishing of interdisciplinary work bringing together law and the humanities and social sciences. The most visible manifestation of this development has been the usurpation of certain traditional doctrinal areas by the law and economics movement; but outside the courts, and in the classrooms and journals, numerous other interdisciplinary movements have made prominent appearances: law and social science; law and literature (or literary theory); constitutional law and philosophy; even law and theology. The fruit of battles waged by Legal Realists more than sixty years ago is now being harvested to an extent quite unparalleled in the history of professional legal education (and in directions the Realists never contemplated). Yet these new developments in legal scholarship have placed unprecedented demands on the legal scholar, for each of the disciplines on which the legal scholar might draw has its own history, tradition, training, and standards. The legal scholar is now called upon to participate in other academic discourses with practitioners who have completed five or more years of graduate study and whose professional lives are devoted to that piece of the intellectual universe.

Many law professors, of course, now have advanced training in fields outside law, while many others, though lacking "professional" credentials, still engage usefully and intelligently with other disciplines and intellectual developments. Not surprisingly, though, the dramatic rise in interdisciplinary work has witnessed a considerable amount of sub-standard scholarship. This work likely would not find a home in the professional journals of the associated discipline, but appears all too often in leading law journals. Some of this work surely reflects good efforts gone astray; some reflects unrealistic ambitions for an encounter between law

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\* I wish to take this opportunity to express my gratitude to Milton Handler for his valuable instruction and support over the past few years.

and another discipline; and some even seeks unlikely (and unfortunate) marriages of law with disciplines that are perhaps best excluded from the current trend of interdisciplinary scholarship.

More objectionable, however, is another class of sub-standard interdisciplinary work whose most striking feature is what I call its "intellectual voyeurism": superficial and ill-informed treatment of serious ideas, apparently done for intellectual "titillation" or to advertise, in a pretentious way, the "sophistication" of the writer. In these cases, the promising scholarly endeavor of interdisciplinary research becomes a forum for posturing and the misuse of knowledge.

In this essay, I want to begin by examining one particularly apt illustration of this latter type of interdisciplinary work: Jerry Frug's employment of Nietzsche in his recent essay, "Argument as Character."<sup>1</sup> Professor Frug's essay embodies the paradigmatic traits of the intellectual voyeur: misunderstanding of the philosophical ideas at issue;<sup>2</sup> a lack of *critical* knowledge of the relevant secondary literature; and a pretense of intellectual sophistication, proudly displayed with every Nietzschean quote or reference. Indeed, this last aspect of Frug's essay is most striking; for, when one gets through with his article, one realizes that Frug's Nietzsche—misunderstood, misappropriated, and vulgarized—plays no important role in his intellectual project. Rather, more like a cocktail party affectation, Frug's Nietzsche commands attention again and again as evidence of the author's alleged intellectual worldliness. Such displays, annoying in isolation, cry out for comment when they become the hallmark of a whole genre of legal scholarship.

Note again that I discuss Professor Frug's article only as a (particularly sharp) example of a more general phenomenon. Similar critiques could no doubt address the recent treatments of Wittgenstein, Hegel, Rawls, Foucault, Rorty, Sartre, Habermas, Aristotle, and others in law reviews.<sup>3</sup> Interdisciplinary work indeed demands greater intellectual vigilance. Critical exposures of the suspect quality of some of the work which passes for interdisciplinary scholarship in law journals may persuade legal scholars to engage in deeper study of other disciplines before rushing into print. In the hope of contributing to more rigorous interdisciplinary legal study, I shall conclude in Section IV of this essay with general observations about the prospects for an engagement between law and philosophy that transcends the traditional boundaries of analytical jurisprudence.

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1. Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988).

2. Even where there is room for intelligent interpretive and intellectual dispute, it is characteristic of the intellectual voyeur to present the matter as neatly and noncontroversially simple.

3. I suspect that there is shoddy interdisciplinary work other than that in law and philosophy, but I lack the relevant competence to assess these cases fully and thus will confine my attention to philosophy.

## II. FRUG'S THESIS

To appreciate Frug's misappropriation of Nietzsche, it is necessary to have an understanding of Frug's thesis. Frug starts with what he takes to be the well-established claim that "there is no place of relative stability on which one can ground the legal system."<sup>4</sup> Nonetheless, legal argument can still be "meaningful."<sup>5</sup> As Frug writes:

[W]e should abandon the traditional search for the basis of legal argument because no such basis can be found, and we should replace such a search with a focus on legal argument's effects, in particular, on its attempt to persuade. I suggest, in other words, that we look at legal argument as an example of rhetoric. A rhetorical analysis of legal argument involves examining its elements, such as facts, precedents and principles, not in terms of how they support the argument's conclusion but in terms of how they form attitudes or induce actions in others.<sup>6</sup>

Frug then quotes in a footnote Kenneth Burke's definition of rhetoric: "The basic function of rhetoric [is] the use of words by human agents to form attitudes or to induce actions in other human agents."<sup>7</sup>

Thus Frug's initial formulation of his thesis is that we should conceive of legal argument as an attempt to *persuade*—but persuade as to what? Frug's answer seems to be: to persuade us to accept a certain view of character and society, that is, to accept larger concerns that transcend the particular legal dispute at hand. He makes this point several different ways in the course of the article:

[The question is] how the elements [of a legal argument] are combined to constitute an appeal to an audience—how they present a view of the world which others are asked to share.<sup>8</sup>

I shall discuss legal argument in terms of how in making arguments the speaker or writer "show[s] himself to be of a certain character" [citation to Aristotle omitted] and seeks to have his listeners (or readers) identify with that kind of character. When we advance arguments, we say "be like me" (or, at least, be like the character I am presenting myself to be in this argument).<sup>9</sup>

[Y]ou should evaluate my article (like any other argument) in terms of the kind of character to which it is appealing. What kind of

4. Frug, *supra* note 1, at 870.

5. *Id.* at 871.

6. *Id.* One wonders here to what extent the argument's ability to "form attitudes or induce actions in others" depends on how the "facts, precedents and principles . . . support the argument's conclusions." Frug, however, does not address this matter. I will not pursue this point because it, as well as the other internal weaknesses of this article, are tangential to my main themes.

7. KENNETH BURKE, A RHETORIC OF MOTIVES 41 (1950); quoted in Frug, *supra* note 1, at 872 n.9.

8. Frug, *supra* note 1, at 872.

9. *Id.* at 872-73.

world does the argument attempt to describe and nurture?<sup>10</sup>

In short, Frug's thesis is that we should read a given legal argument as an attempt to persuade us to accept the larger vision of social order and, in particular, of character that underlies and informs the argument and the argumentative moves it makes.<sup>11</sup> Frug goes on to consider a variety of issues: what "character" consists of and how it is constituted; what sort of "character" is exemplified by legal scholars who think legal arguments do need foundations; whether the denial that legal arguments have foundations commits one to an unpalatable form of relativism or nihilism. Frug also analyzes two extended arguments in terms of the characters that underlie them. How, then, does Nietzsche figure in the development of Frug's essay?

### III. FRUG'S TREATMENT OF NIETZSCHE

Frug's opening quote is a fragment from Nietzsche. Frug then makes a series of largely footnote references to Nietzsche throughout the article, sometimes quoting a phrase or a short passage, purportedly to fill out his point. I shall review just four of Frug's references in what follows—all of them typical in their misunderstanding and misappropriation of Nietzsche's thought.

#### A. *Morals and Metaphysics*

The essay opens with the following fragment from *Beyond Good and Evil*:<sup>12</sup>

Indeed if one would explain how the abstrusest metaphysical claims of a philosopher really came about, it is always well (and wise) to ask first: at what morality does all this (does *he*) aim? BGE, 6.

Significantly, Frug omits the paragraph immediately preceding this one, which reads:

Gradually it has become clear to me what every great philosophy so far has been: namely, the personal confession of its author and a kind of *involuntary and unconscious* memoir; also that the moral (or immoral) intentions in every philosophy *constituted the real germ of life* from which the whole plant had grown. BGE, 6 (emphases added).

10. *Id.* at 879.

11. Given the title of Frug's article and its primary emphasis, I shall refer in what follows only to the notion that we should read legal argument as an attempt to persuade us to accept a certain view of *character*.

12. I shall cite to Nietzsche's books by section number and with the following standard English-language acronyms: DAYBREAK (D); THE GAY SCIENCE (GS); THUS SPOKE ZARATHUSTRA (Z); BEYOND GOOD AND EVIL (BGE); ON THE GENEALOGY OF MORALS (GM); TWILIGHT OF THE IDOLS (TI); THE ANTICHRIST (A); ECCE HOMO (EH); the collection of posthumously published notes, THE WILL TO POWER (WP).

If we then turn to the section immediately preceding this one, we get yet a further indication of the real import of Nietzsche's claim:

[The philosophers] all pose as if they had discovered and reached their real opinions through the self-development of a cold, pure, divinely unconcerned dialectic . . . while at bottom it is an assumption, a hunch, indeed a kind of "inspiration"—most often a desire of the heart that has been filtered and made abstract—that they defend with reasons they have sought after the fact. They are all *advocates who resent that name*, and for the most part wily spokesmen for their prejudices which they baptize "truths" . . . BGE, 5 (emphasis added).

In the next paragraph, Nietzsche cites Kant as a case in point, with his "dialectical bypaths"—an amusing "spectacle" for those who know "the subtle tricks of old moralists and preachers of morals." The section closes with the same observation concerning Spinoza's pretense of "mathematical form." The next section then begins, as quoted above, with the observation that "moral (or immoral) intentions" are the "real germ of life" of every metaphysics.

Rather than provide further quotation—since the points made above are familiar ones throughout Nietzsche's writing<sup>13</sup>—I will restate Nietzsche's position in two propositions:

1. Philosophers present their metaphysical systems as the products of rational/philosophical inquiry and argumentation.
2. In fact, considerations of an entirely different class—namely, moral considerations—give rise to particular metaphysical systems; moreover, these considerations are *unconscious causes* of the acceptance of the metaphysical views.

Thus Nietzsche's point is fundamentally (and characteristically) an *epistemic* one. It challenges the purported justification for belief in metaphysical views and the corresponding claim about their epistemic standing, and it does this through appeal to the *real* (psychological) explanation of the genesis of such beliefs.<sup>14</sup> These two propositions, which constitute the core of Nietzsche's argument, have three important corollaries:

- a. Belief in a given metaphysical system is motivated only by a desire to *vindicate* the underlying morality.<sup>15</sup> For example, Kant

13. See, e.g., D, 358, 553; GS, Preface, 2; WP, 458, 530, 578.

14. Notwithstanding some well-known problems, the best analysis of what it is for "P to know that Q" holds that four conditions must be met: (i) P believes that Q; (ii) Q is true; (iii) There are "good reasons" for believing that Q; and (iv) These "good reasons" are the "cause" of P's believing that Q. Writers like Nietzsche—as well as Marx and Freud—challenge condition (iv).

15. Alexander Nehamas, the only Nietzsche commentator of whom Frug evinces any real awareness, notes this point (in related terms): "Nietzsche believed that the goal of every philosophical view is to present a picture of the world and a conception of values which makes a certain type of person possible and which allows it to prosper and flourish." ALEXANDER

makes the (untenable) phenomenal-noumenal distinction only because he wants to vindicate free will as the precondition for the valid application (and hence intelligibility) of moral categories (the possibility of such a will is located, for Kant, in the noumenal realm).

b. A metaphysical system is undermined by exposing its purely moral motivations; that is, metaphysical systems, by their own criteria, must rest on metaphysical (philosophical), not moral, grounds.

c. Vindication is not persuasion: the metaphysics makes the moral views conceptually intelligible, but, in order for the metaphysics to be credible, the connection to the moral purpose cannot be transparent.<sup>16</sup>

For Nietzsche's position, then, to be relevant to Frug's line of argument, Frug's claims about legal argument would also have to be essentially epistemological: that is, claims about the epistemic status of legal arguments. More specifically, Frug's claims would have to be the following:<sup>17</sup>

- i. The *unconscious cause* of the acceptance or employment of a certain legal argument is belief in a particular view of character.
- ii. The plausibility of the legal argument vindicates the view of character, that is, makes it conceptually intelligible.
- iii. Making explicit the connection between the legal argument and the view of character undermines the credibility of the legal argument.

In contrast, the claims Frug actually makes appear to be the following:

Fi. Implicit in legal argument is a view of character (not Nietzsche's strong psychological thesis about unconscious causes and the corresponding challenge to the epistemic status of metaphysical views).

Fii. Legal argument simply tries to persuade us to accept a view of character which transcends the particular legal dispute (not Nietzsche's view that belief in the metaphysics (legal argument) is necessary for the "morality" (the view of character) to be *conceptually* intelligible).

Fiii. We can see clearly how the legal argument presupposes a certain view of character without affecting in any way the character or credibility of the legal argument (not Nietzsche's view noting the (only apparent) autonomy of metaphysical (legal) argument required to preserve its credibility).<sup>18</sup>

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NEHAMAS, NIETZSCHE: LIFE AS LITERATURE 128 (1985). Frug, who otherwise follows Nehamas faithfully, seems to have missed this point.

16. That is why philosophers are "advocates who resent that name." If they are identified as advocates, such identification undermines the rationalistic and objective pretense of their philosophical systems.

17. Recall the relevant analogy: morality is to metaphysics as a view of character is to legal argument.

18. In fact, Frug's claim is stronger than this. Remember that his argument that we should read

In short, the similarity between Frug's position and Nietzsche's actual position is entirely illusory. Nietzsche's concerns are radically different from Frug's. Nietzsche's are partially an outgrowth of his unusual epiphenomenalism, his view that conscious mental states are causally inert and merely symptomatic of unconscious psychological and physiological states.<sup>19</sup> This view simply has no bearing on Frug's comparatively mundane thesis that legal arguments try to persuade us to accept a view of character that transcends the legal argument.

### B. *The Active Modernist*

Frug contrasts a "tragic modernist"—someone who sees the integrity of thought and action threatened in the absence of foundations—with his preferred character, the "active modernist," who knows that there are no foundations and who sees the "openness of argumentation as an opportunity rather than as a concern."<sup>20</sup> He then imagines the active modernist saying the following:

"Every action I have taken, every position I have adopted, has made me what I am," the activist modernist replies [to the tragic modernist]. "An attempt to articulate a rationale for my actions and positions would not constitute the basis for the decisions I've made; on the contrary, it would simply be an effort to interpret what I have done—an effort to 'give style to my character.'"<sup>21</sup>

In the footnote to this passage, we find a long quotation from Section 290 of *The Gay Science*, the famous passage which begins "To 'give style' to one's character—a great and rare art!" The passage is presented without comment, as though its meaning is apparent. Unlike the previous case, Frug here quotes enough of the passage to show, in fact, why the meaning is not apparent, or rather why the meaning Frug thinks is apparent is not in fact Nietzsche's meaning. Frug's point is that interpreting what one has done is a way of "giving style to one's character." But is that a

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legal argument as rhetoric supporting a view of character is intended as an *alternative* to foundationalist interpretations of legal argument. Thus the connection between the view of character and the legal argument must, on Frug's account, be made explicit in order to understand properly the legal argument.

19. See note 13 *supra*; see also D, 42, 83, 86, 119; GS, 11, 39, 115, 360; Z, I, "On the Despisers of the Body"; BGE, 3, 5-6, 17; WP, 229, 314, 492, 659, 665-66. Nietzsche's epiphenomenalism differs from contemporary forms which worry about the possibility of *mental causation per se* (conscious or unconscious) and which see the problem as arising from the conjunction of two widely accepted theses: (i) every mental event is (token-)identical to, but not reducible to, some physical event; and (ii) all physical events have complete *physical* explanations. The issue, then, is what causal difference the mental event could possibly make (assuming, as philosophers like to say, "the completeness of physics"). Some aspects of this issue are described and explored with characteristic lucidity in Jaegwon Kim, *Mechanism, Purpose, and Explanatory Exclusion*, 3 PHIL. PERSP. 77 (1989). One recent attempt to salvage mental causation is Jerry Fodor, *Making Mind Matter More*, 17 PHIL. TOPICS 59 (1989).

20. Frug, *supra* note 1, at 877.

21. *Id.* at 878 (citation omitted).



viable interpretation of what Nietzsche says in Section 290? Does one give style through interpretation—through the intellectual activity of organizing, assigning, and justifying meanings?

If one looks at the passage as Frug quotes it, one finds that Nietzsche describes the process of giving style to one's character centrally as follows: "Here a large mass of second nature has been added; there a piece of original nature has been removed—both times *through long practice and daily work at it* [emphasis added]."<sup>22</sup> Nietzsche does not argue here (or elsewhere) that the intellectual activity of interpretation is *constitutive* of giving style. Rather, giving style entails hard work on one's life, that is, "long practice and daily work at it." That is why Nietzsche begins this passage by noting that this is "a great and rare art."<sup>23</sup> If a little "armchair" reflection on one's life were sufficient to "give style" to one's character, Nietzsche's opening remark would hardly be warranted.<sup>24</sup>

### C. *Relativism and Perspectivism*

Nietzsche surfaces again towards the end of the essay when Frug considers the charge of relativism leveled against his anti-foundationalist

22. This passage continues: "Here the ugly that could not be removed is concealed; there it has been reinterpreted and made sublime." One would rightly conclude from this and other brief subsidiary remarks that interpretation plays *some* role in the giving of style; but given Nietzsche's naturalistic stance towards philosophical and other problems, interpretation could not play a constitutive role in the giving of style—and Nietzsche never says that it does. Compare GS, 290 with, for example, D, 462: "[H]e who wishes to cure his soul must also consider making changes to the very pettiest of his habits"; and D, 534: "If a change is to be as profound as it can be, the means to it must be given in the smallest doses unremittingly over long periods of time! Can what is great be created in a single stroke?"

23. And, in Nietzsche's view, it is practiced by few people; see, e.g., his discussion of Goethe in TI, IX, 49-50.

24. There is a second reference to Nietzsche also on page 878 of the article which I must skip over because I find Frug's point here obscure; as a result, I cannot even assess what view Frug enlists Nietzsche to support. I do note that Frug cites—once again without comment—one of the most difficult passages in Nietzsche, Section 481 of WP. The passage is often cited as evidence of Nietzsche's "perspectivism"—his purported view that the world has no determinate nature and that consequently all views about the world are mere perspectives, enjoying no epistemic privilege over other views. This reading was influentially developed by Arthur Danto in his *NIETZSCHE AS PHILOSOPHER* (1965), and owes much of its present currency to Derrida and his entourage who have made the attack on truth central to their Nietzsche reading, conveniently making Nietzsche an ally of the deconstructionist program. JACQUES DERRIDA, *SPURS: NIETZSCHE'S STYLES* (1978). See also Nicholas Davey, *Nietzsche's Doctrine of Perspectivism*, 14 J. OF THE BRIT. SOC'Y FOR PHENOM. 240 (1983); Bernd Magnus, *Nietzsche Today: A View From America*, 15 INT'L STUD. IN PHIL. 99 (No. 2 1983); Ruediger Grimm, *NIETZSCHE'S THEORY OF KNOWLEDGE* (1977); Alan Schrift, *NIETZSCHE AND THE QUESTION OF INTERPRETATION* (1990). I criticize this reading of Nietzsche in my *Perspectivism in Nietzsche's Genealogy of Morals*, in *ESSAYS ON NIETZSCHE'S GENEALOGY OF MORALS* (Richard Schacht ed., forthcoming). See also Richard Schacht, *NIETZSCHE* (1983); Maudemarie Clark, *Nietzsche's Perspectivist Rhetoric*, 18 INT'L STUD. IN PHIL. 35 (No. 2 1986); Maudemarie Clark, *NIETZSCHE ON TRUTH AND PHILOSOPHY* (1990); Robert Nola, *Nietzsche's Theory of Truth and Belief*, 62 PHIL. & PHENOM. RES. 525 (1987); Kenneth Westphal, *Was Nietzsche a Cognitivist?*, 22 J. OF THE HIST. OF PHIL. 343 (1984); Kenneth Westphal, *Nietzsche's Sting and the Possibility of Good Philology*, 16 INT'L STUD. IN PHIL. 71 (No. 2 1984). Although I am unable to comment on Frug's argument, I do note that this Nietzsche reference fits the general pattern: citation without comment, as though an extremely controversial passage had a plain (and "Frug-friendly") meaning.

account of legal argument (if there are no foundations for legal arguments, then is not any argument as good as any other?). In a footnote, Frug notes:

[One] way of dealing with the charge that relativism suggests that every belief is as good as every other is to stop using the word, substituting for it another term. For example, Alexander Nehamas discusses Nietzsche's views not in terms of relativism but of perspectivism:

The fact that other points of view are possible does not by itself make them equally legitimate: whether an alternative is worth taking, as we shall see, must be shown independently in each particular case. Perspectivism, as we are in the process of construing it, is not equivalent to relativism. But perspectivism does imply that no particular point of view is privileged in the sense that it affords those who occupy it a better picture of the world as it really is than all others. Some perspectives are, and can be shown to be, better than others. But a perspective that is best of all is not a perspective at all. . . . Perspectives cannot be adopted at will; new interpretations, which necessarily involve new forms of life, are reached only through great effort and only for what at least seems like good reason at the time. . . .<sup>25</sup>

There are two problems with this analysis: one is with Frug's argument and the other is with his misplaced reliance on Nehamas.<sup>26</sup>

First, one wonders whether Frug really means to suggest that a way of "dealing with the charge of relativism" is to "stop using the word" by "substituting . . . another term." Is a semantic shuffle supposed to be a solution to a philosophical problem? Does Frug also mean to impute such a "resolution" to Nehamas's treatment of the charge of relativism in Nietzsche? In actuality, Nehamas offers a different view, but one that ultimately does not rescue Frug from the relativism he tries to resist.

Nehamas accepts the problematic view that Nietzsche's perspectivism commits him to the position that "no particular point of view is privileged in the sense that it affords those who occupy it a better picture of the world as it really is."<sup>27</sup> That being the case, how could Nietzsche not be a relativist? Frug only quotes Nehamas asserting that "[s]ome perspectives are, and can be shown to be, better than others" without

25. Frug, *supra* note 1, at 922 n.193 (quoting NEHAMAS, *supra* note 15, at 49, 52).

26. This misplaced reliance on Nehamas pervades the article. One even finds that long passages quoted by Frug (for example, on page 880) are also cited by Nehamas (see NEHAMAS, *supra* note 15, at 95) (but Frug does not acknowledge this). This general coincidence between the matters Frug treats and quotes and the ones Nehamas does is striking and leads one to suspect that Frug knows his Nietzsche only through Nehamas. I discuss some of the serious problems with Nehamas's reading of Nietzsche in my *Nietzsche and Aestheticism*, J. OF THE HIST. OF PHIL. (forthcoming 1992).

27. See note 24, *supra*, for citations to the literature attacking this interpretation.

explaining how this could be so, given that no perspective “hooks up” with the facts about the world.

In fact, Nehamas’s “resolution” does little to deflect the worries of the anti-relativist that Frug wants to refute. Nehamas’s strategy is to note—rightly—that perspectivism is essentially predicated on the notion that “all efforts to know are also efforts of particular people to live particular kinds of lives for particular reasons.”<sup>28</sup> Thus, for Nehamas, “[p]erspectivism does not result in the relativism that holds that any view is as good as any other; it holds that one’s own views are the best for oneself without implying that they need be good for anyone else.”<sup>29</sup>

Putting aside the questions whether this reading is fair to relativism and whether there is any text in Nietzsche to support it, one might still wonder whether this response will assuage a concerned anti-relativist. Nehamas’s Nietzsche is not a “relativist” (in Nehamas’s idiosyncratic sense) because he rejects the notion that *every* view is as good as any other;<sup>30</sup> instead, he holds that some views may be good, even better, *at least for me* (given the sort of life I lead, for example). But is not this view exactly what the anti-relativist is worried about? Does not the anti-relativist want to know what to say to the person who declares that the views that are “better for him” are fascist or racist? Nehamas’s Nietzsche—the one invoked by Frug—cannot answer that query, because “better for the agent” is the only admissible criterion on Nehamas’s reading. Making beliefs agent-relative, however, is just as bad to the anti-relativist as saying that any belief is as good as any other. Thus Frug’s cursory footnote invocation fails on two counts: he does not explain how Nehamas’s Nietzsche rescues Frug from the anti-relativist; and Nehamas’s actual resolution is not an adequate response to the charge that Frug tries to deflect.

#### D. Nietzsche and Nihilism

Frug’s final citation to Nietzsche comes in the context of considering the charge of nihilism leveled against his anti-foundationalist account of legal argument. Frug responds:

The faith that I have asked people to adopt is believing that we should take responsibility for our own ideas and actions because they constitute us as individuals. Moreover, we need to take responsibility collectively for the combination of our ideas and actions

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28. NEHAMAS, *supra* note 15, at 73. This quasi-empirical claim (about the psychology and sociology of belief acquisition and retention) does not rule out the possibility—which I take to be Nietzsche’s actual view—that particular types of people, in living their lives, do “hook up” with how the world is, precisely because they are stronger, healthier, and more courageous and honest people. For a suggestion along these lines, see my *Perspectivism in Nietzsche’s Genealogy of Morals*, *supra* note 24.

29. NEHAMAS, *supra* note 15, at 22.

30. It is doubtful, of course, whether any relativist since Protagoras has held *this* view.

because together they create the kind of society we have. This kind of evangelical message, and the character of the left moralist I associate with it, has roots, in its conception of the self, in Nietzsche: “‘This is *my* way; what is yours?’—thus I answered those who asked me ‘the way.’ For *the* way—that does not exist.”<sup>31</sup>

In the footnote to this passage, the reader finds the following:

Nietzsche, *Thus Spoke Zarathustra*, in *THE PORTABLE NIETZSCHE* 307 (W. Kaufmann ed. & trans. 1954). Of course, relying on Nietzsche to attack the charge of nihilism is itself controversial given the complex relationship between Nietzsche’s views and nihilism. See generally 4 M. HEIDEGGER, *NIETZSCHE: NIHILISM* (F. Capuzzi trans. 1982).<sup>32</sup>

Having reviewed in some detail Frug’s superficial understanding of Nietzsche and appreciation of the secondary literature, one marvels at the irony (and pretense) of his acknowledgement (almost as an afterthought) of the “complexity” of a question of Nietzsche interpretation. Of course, one now suspects that Frug is in no position to know whether the issue is, in fact, “complex.”

First, and most simply, Nietzsche’s relation to nihilism is not particularly complex,<sup>33</sup> and, in any event, it is hardly the most complex of the issues that Frug has glossed in the course of the essay. Second, and more importantly, Frug betrays the fact that he overlooks what complexity there is by his choice of citation: the fourth volume (in English) of Heidegger’s Nietzsche study, which even partisans of Heidegger (like Richard Rorty) acknowledge is more important as a statement of Heidegger’s view of the history of philosophy than it is as a piece of Nietzsche scholarship.<sup>34</sup> Again, a scholar who had studied the Nietzsche secondary literature would know that perhaps the most important dis-

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31. Frug, *supra* note 1, at 923.

32. *Id.* at 923 n.195.

33. Nietzsche is clearly a critic of one sort of nihilism—the inability to believe or value that comes in the wake of the collapse of metaphysical and transcendent foundations. Yet Nietzsche is a “nihilist” only if one regards (and Nietzsche does not) the rejection of transcendent foundations as nihilistic.

34. Among other curiosities, the book is predicated on the fantastic view that only Nietzsche’s unpublished notes contain his actual philosophical views. By contrast, some American scholars have argued that Nietzsche’s unpublished notes (the *Nachlass*) are never a legitimate source of his philosophical views. See, e.g., Bernd Magnus, *The Use and Abuse of The Will to Power*, in *READING NIETZSCHE* (Robert Solomon & Kathleen Higgins eds., 1988). My own opinion is that what Magnus’s detective work shows is that one should probably not attribute a view to Nietzsche for which the only support is in the *Nachlass*. I believe, however, that it is quite legitimate to use the *Nachlass* material in order to illuminate views developed in the published works. I should acknowledge that my own view of Heidegger’s Nietzsche study is at odds with a view widespread in certain circles about its importance. See, e.g., *THE NEW NIETZSCHE* (David Allison ed., 1977); *NIETZSCHE’S NEW SEAS* (Michael Gillespie & Tracy Strong eds., 1988). Nonetheless, it seems to me that anyone genuinely interested in the interpretation of Nietzsche’s texts cannot possibly count Heidegger’s study as an adequate piece of scholarship. In general, work on the Continent on Nietzsche has been of low quality, with the notable exception of the perceptive (if uneven) work by Gilles Deleuze; see, e.g., *GILLES DELEUZE, NIETZSCHE AND PHILOSOPHY* (1983) (orig. pub. 1962).

cussion of Nietzsche's relationship to at least one sense of "nihilism" is the exchange between Arthur Danto and Richard Schacht on that subject.<sup>35</sup> A scholar genuinely concerned with the "complexities" of Nietzsche interpretation would, at a minimum, refer the reader to this debate.

Yet even Frug's substantive invocation of Nietzsche in the text here is problematic. This becomes particularly apparent when Frug, after quoting Zarathustra's invocation of "my way," writes: "The related view of collective life [that is, related to Zarathustra's invocation] can be found in some forms of feminism, democratic socialism, humanist marxism . . ."<sup>36</sup> Let alone the irony of invoking Nietzsche here—the Nietzsche who presents himself as the merciless critic of feminism and socialism<sup>37</sup>—Frug simply distorts Zarathustra's meaning by translating his highly individualistic ethic—an affirmation of "my way" against "the way"—into support for group ideologies. Each of these groups (feminists, socialists, Marxists), to the extent that an individual identifies with them, quickly supplants "my way" in favor of "the way," the way of the group. A common reading of Nietzsche for the last hundred years has identified him as the advocate of radical individualism against the conformist demands of the masses and the "herd."<sup>38</sup> That reading (albeit incomplete) is surely not wrong. Thus, yet again, Frug enlists Nietzsche to support a claim that is anathema to Nietzsche's philosophical position.<sup>39</sup>

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A useful discussion of many of the misreadings of Nietzsche due to Continental writers (Derrida, Sarah Kofman, Heidegger) can be found in CLARK, *supra* note 24.

35. See the contributions by each in NIETZSCHE: A COLLECTION OF CRITICAL ESSAYS (Robert Solomon ed., 1973).

36. Frug, *supra* note 1, at 923 (citations omitted).

37. See, e.g., BGE, 202-03; EH, "Why I Write Such Good Books," 3; WP, 753.

38. A nice example of this is Hermann Hesse, *Zarathustra's Return*, in CRITICAL ESSAYS, *supra* note 35. See also LESLIE PAUL THIELE, FRIEDRICH NIETZSCHE AND THE POLITICS OF THE SOUL (1990).

39. Let me indicate here briefly one of Frug's other misuses of Nietzsche that I have not discussed in the text, but which is also of some interest. In his discussion of how one constitutes "character," Frug contends that "[b]eing persuaded by an argument is a way of becoming who one is." Frug, *supra* note 1, at 874. In an accompanying footnote, Frug attributes this view to Nietzsche's Zarathustra and goes on to quote Nehamas's account of Nietzsche's view that the self is "the product of creation rather than an object of discovery." *Id.* at 874 n.18 (quoting NEHAMAS, *supra* note 15, at 174). One difficulty here is that in Nietzsche's view one does not "become who [sic] one is" as a result of persuasion: "To become what one is, one must not have the faintest notion what [was] one is." EH, "Why I Am So Clever," 9. If that is the case, what role can persuasion play? How can one be persuaded to something unknown? A second difficulty is that there are strong reasons to be skeptical about the Nehamas interpretation which Frug invokes as authority. A diligent scholar might have discovered as much if he or she had bothered to check the very passage which Nehamas cites to support his reading. On page 174 of NIETZSCHE: LIFE AS LITERATURE, *supra* note 15, where Nehamas asserts that Nietzsche views truth, as well as the self, as "the product of creation rather than as the object of discovery" (emphasis added), Nehamas cites GS, Section 335; in particular, he quotes the following fragment: that those "who want to become those they are" are precisely those "who give themselves laws, who create themselves" (Nehamas italicizes "create themselves" to emphasize his point). Yet Nehamas chops this quote at a misleading place, for the passage continues as follows: "To that end [of creating ourselves] we must become the best learners and discoverers [emphasis added] of everything that is lawful and necessary [emphasis added] in the world: we must become *physicists* in order to be able to be *creators* in this sense. . . ." GS, 335. This passage suggests that to be a creator "in this sense" is different from being a creator in Nehamas's sense. "Creation" for Nietzsche is explicitly dependent on *discovering first* what is "lawful and

#### IV. BEYOND INTELLECTUAL VOYEURISM

Near the end of the essay, Frug turns his "method" back upon his own article. He writes, "A particular kind of law professor is evoked in Part I. That section—starting with the opening quotation from Nietzsche—is filled with references to fancy philosophical and literary theory."<sup>40</sup> Let us ask, then, following Frug's lead, what sort of law professor *is* evoked in these passages. What sort of law professor tosses around "fancy" theory when it makes little or no discernible contribution to his or her central legal theses? One might say that this law professor is self-important and pretentious or that he or she has a spurious relation to ideas.

But such a conclusion would surely be too harsh. Indeed, when one overlooks Frug's penchant for intellectual voyeurism, one finds that elsewhere he has written interestingly and intelligently on diverse areas of the law.<sup>41</sup> What really matters is that the same "Frugian character" plays a role in too much interdisciplinary work in law journals these days. There is too much "fancy" philosophy and literary theory and too little serious engagement with the primary and secondary texts of other disciplines. Sometimes this "fancy" theory is, as in Frug's case, no more than irrelevant window-dressing; but other times this "fancy" philosophy has more pernicious effects.

I turn, then, to consider some of the problematic tendencies and aspects of this "Frugian character." I will concentrate on just two philosophical "movements"—post-empiricist philosophy of science in Thomas Kuhn and Paul Feyerabend and pragmatism as espoused by Richard Rorty—as good examples of philosophical work that, like Frug's mishandling of Nietzsche, is routinely misappropriated by legal scholars. Unlike Frug's case, however, this philosophical work is often more integral to the legal scholarship in which it appears. As I noted above, there are

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necessary," that is, discovering (as the preceding parts of GS, 335 suggest) the lawful mechanisms underlying and determining our actions, including, presumably, our "self-creating" actions. This, of course, poses a puzzle about how these actions could constitute "self-creation"—a puzzle obscured by the way Nehamas chops the quote. Part of what may be going on here is that Nietzsche is attacking Kant, in particular the Kantian moral ideal of self-legislation which posits an autonomous self, located in the noumenal realm, that issues itself laws. Nietzsche's "self-creation" rhetoric might be read as ridding this Kantian paradigm of its psychological and metaphysical mythology. Nietzsche drops the idea of autonomous agency (the process of creation goes on in the agent, but no self *chooses* to carry it out) and treats the laws of the self not as rationally chosen commands but instead as "real" laws ("the law of their mechanism," GS, 335) "governing" this natural "self-creating" phenomenon we must aim to "discover": that is, an organism with particular natural properties which enjoy a certain sort of necessary development. Although these issues are too complex to be fully addressed here, I do want to note that they are obscured by both Frug and Nehamas.

40. Frug, *supra* note 1, at 925.

41. See, e.g., Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1984). Both of these articles (when one overlooks superficial references to various Continental philosophers) are intelligent pieces of critical legal analysis.

many other examples of careless or superficial treatments of philosophy in law journals. Thus the following discussion is by no means exhaustive.

Before turning to this discussion, however, I wish to highlight a particularly troubling feature of philosophical writing in law journals: the startling absence of *argumentation* in most discussions of philosophical issues.<sup>42</sup> In its place, we typically find a parade of authoritative pronouncements by Derrida, Habermas, Rorty, or the like. Citation in place of argument, needless to say, ought to have no place in scholarly inquiry. It is especially out of place in philosophy—all the more so given the absence of any consensus in contemporary philosophy about what is or is not the case on the “big” issues (the nature of reality, knowledge, or truth). Anyone who writes as though there is such a consensus—and it is not only law professors who do so—simply advertises his or her ignorance.<sup>43</sup> Thus one cannot simply make sweeping philosophical proclamations—with citations to the usual suspects—and move on from there. One needs to give *reasons* for one’s philosophical views—something which both Habermas and Rorty do.

What, then, has been the appeal to legal scholars of figures like Kuhn, Feyerabend, and Rorty?<sup>44</sup> The following propositions seem to capture the reasons for the appeal:

- (i) These figures have leveled devastating critiques against traditional philosophical ideals of objectivity, rationality, certainty, knowledge, and truth.
- (ii) These attacks are thought to lend support—or intellectual legitimacy—to attacks on comparable ideals in law.

The problem with such use of these thinkers is twofold. First, it is not clear that (i) is true (here is where greater attention to recent philosophical work would help, as I shall try to illustrate below). Second, it is equally unclear that the philosophical attacks mounted by writers such as Rorty and Kuhn have any bearing on issues of objectivity or certainty in law. Nevertheless many legal writers believe that some connection plainly exists. For example, John Stick has remarked that legal “nihilists”—those who hold “that law is indeterminate, contradictory,

42. I am not referring here (or above or below) to traditional work in analytical jurisprudence.

43. This is especially true of so-called “post-modernist” writers (Derrida, Lyotard, as well as many recent literary theorists) whose naiveté in philosophical matters is often surprising. When one presses to the heart of their “critiques” of knowledge or truth or science or meaning, it typically turns out that they start from the false assumption that if (broadly speaking) positivist/foundationalist accounts do not work, then none will. For example, if the positivist reconstruction of scientific practice turns out to be false to science—which is something that philosophers like Hanson, Kuhn, and Feyerabend helped us to see—then the conclusion must be that there is nothing epistemologically special about science. But this simply ignores what is far more likely to be the case: namely, that there is a more sophisticated account of the epistemology of science than positivism provided. I take up some of these issues below.

44. As should become apparent below, Derrida and Wittgenstein have appealed to legal scholars largely for the same reasons.

nonobjective, historically and socially contingent”—are “attracted to Rorty because his work criticizes the dominant tradition in Western philosophy in much the same way that legal nihilists criticize current law.”<sup>45</sup> Similarly, Joan Williams has observed that Critical Legal Studies seeks to “reinterpret law and legal education in the context of the most prestigious and authoritative intellectual currents available” (she specifically mentions in this regard Rorty, Kuhn, and Feyerabend, among others).<sup>46</sup> Others, too, have emphasized the importance of these figures, especially (but not only) to Critical Legal Studies.<sup>47</sup>

#### A. *Kuhn and Feyerabend*

The central difficulty here is the taking of such figures as authoritative in light of the now extensive (and in some cases devastating) criticism of their views—criticisms with which legal scholars ought to familiarize themselves. I will begin with Kuhn and Feyerabend. Kuhn and Feyerabend are certainly important historical figures in the development of twentieth century philosophy of science; but *they also seem to have gotten many things largely wrong*. Although that may overstate the case, it is surely closer to the truth than what is the norm in law journals (and, again, elsewhere): that to show that Kuhn or Feyerabend endorsed a view is to show that it is true. A scholar familiar with developments in philosophy of science after 1970, for example, would not write about “the common obsession” of various theorists with the notion “that the very concept of rationality has become problematic” and then cite Feyerabend as the *sole* evidence that “philosophers of science” endorse this view.<sup>48</sup>

Consider this summary of the reception of Feyerabend’s work among philosophers of science:

Feyerabend generally has ignored and refused to take seriously . . . criticisms [of his views], preferring instead to develop increasingly extreme versions of his general views. This attitude, coupled with the widely held perception that a number of the objections raised are serious and even devastating, has seriously eroded the credibility of Feyerabend’s work.<sup>49</sup>

In light of the actual philosophical reception of Feyerabend’s work, there can be no excuse for the parroting of Feyerabend’s conclusions as though they had survived philosophical scrutiny. Nor can one cite Feyerabend

45. John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 338 (1986).

46. Joan Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 430, 455 (1987).

47. See, e.g., James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 707 (1985); Steven Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1115 (1989).

48. Boyle, *supra* note 47, at 707.

49. FREDERICK SUPPE, *THE STRUCTURE OF SCIENTIFIC THEORIES* 636-37 (2d ed. 1977).



as though his views were representative of philosophical thinking about the questions which he addresses. To do so assures that a legal scholar will lack credibility with the community of professional philosophers. Equally important, that same scholar does a disservice to his colleagues in law.

Similar problems arise in the case of Kuhn. Take, for example, Kuhn's perhaps best-known thesis: that science oscillates between periods of "normal" and "abnormal" science. In the "normal" periods, there are agreed-upon paradigms<sup>50</sup> of inquiry, defining problems and standards of success; in the "abnormal" periods, no such agreement exists. This view was thought to undermine a certain picture of scientific objectivity (scientific "results" are always relative to a "paradigm") and scientific progress (we do not get closer to the truth, we simply change paradigms).<sup>51</sup> Kuhn's case for this view, however, depends importantly<sup>52</sup> on showing that this picture actually does justice to how science has really evolved. This claim has been widely disputed. Professor David Hull's criticism is typical: "The cyclic pattern which [Kuhn] describes for science is much too simplistic. In fact, rarely any of the stages can be found exemplified in the course of science."<sup>53</sup> Or, as Larry Laudan has recently commented, "I find the historical analysis pretty unimpressive."<sup>54</sup>

The issues presented by the work of Kuhn and Feyerabend are complex; those interested should consult the material in the footnotes for a thorough exploration of these topics. What requires emphasis here is that to cite Kuhn and Feyerabend as authoritative simply turns a blind eye to an enormous body of philosophical and historical literature that has called into doubt their views on the epistemology of science, scientific progress, and the nature of rationality. Thus Kuhn and Feyerabend are not suitable "authority" for either (a) attacks upon science or (b) compa-

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50. As is well-known, Kuhn used "paradigm" in *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) in multiple ways. See Margaret Masterman, *The Nature of a Paradigm, in CRITICISM AND THE GROWTH OF KNOWLEDGE* (Imré Lakatos & Alan Musgrave eds., 1970). Subsequent to *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS*, Kuhn gave a more precise definition, according to which a paradigm consists both of *exemplars*—detailed examples which could serve as models for other applications—and a *disciplinary matrix*—that is, shared substantive and methodological commitments to, for example, instruments, substantive theories, metaphysical assumptions, and goals of inquiry. See, e.g., Thomas Kuhn, *Reflections on My Critics, in CRITICISM AND THE GROWTH OF KNOWLEDGE, supra*, at 171-73.

51. Whether these are necessarily the conclusions Kuhn wanted to draw or should have drawn is a tricky issue, especially since Kuhn changed some of his views quite significantly over time. See, e.g., THOMAS KUHN, *THE ESSENTIAL TENSION* (1977). In any event, it seems fair to say that the points in the text are the main ones that impressed his readers.

52. Though not entirely. Kuhn also raised in a powerful way certain problems about the theory-ladenness of observation, an issue also explored influentially in NORWOOD HANSON, *PATTERNS OF DISCOVERY* (1958).

53. David Hull, Book Review, 24 *SYSTEMATIC ZOOLOGY* 397 (1975).

54. LARRY LAUDAN, *SCIENCE AND RELATIVISM* 90 (1990).

rable attacks on “objectivity” or “rationality” or “truth” in other fields (like law).

There are, fortunately, some good resources for legal scholars who wish to familiarize themselves with recent work in the philosophy of science. Frederick Suppe’s “Critical Introduction” and “Afterword” to his well-known volume *The Structure of Scientific Theories*<sup>55</sup> provide a standard, basically reliable, and fairly accessible survey of developments in twentieth century philosophy of science up to the late 1970s.<sup>56</sup> More recently, Laudan has published a useful, if sometimes argumentatively dense, response to the arguments of Kuhn, Feyerabend, Rorty, and others.<sup>57</sup> Laudan’s book should be essential reading for all those who want an informed view—on any side of the debate—of the status of science and scientific knowledge.

### B. Rorty—and the Law?

What, then, of Richard Rorty? Although Rorty is undoubtedly an interesting and important figure in late twentieth century American philosophy, he gets overused in law journals. He is *not* the only thinker on the philosophical landscape, nor does he give the best treatment of most of the issues that he addresses. It is startling, for example, to find a writer who announces that he will situate his project “within contemporary philosophical debate concerning the character of knowledge” and then discusses *only* the views of Rorty,<sup>58</sup> ignoring Alvin Goldman, Lau-

55. See note 49 *supra*.

56. In the same vein, and also recommended, is ISRAEL SCHEFFLER, *THE ANATOMY OF INQUIRY* (1963). A more difficult text that tries to accommodate important Kuhnian insights within a broadly “realist” framework is RICHARD MILLER, *FACT AND METHOD* (1987). A useful account of Miller’s views, as well as their problems, can be found in Paul Teller, Book Review, 99 *PHIL. REV.* 469 (1990). So as not to mislead readers, I should emphasize that I have said nothing here about those contemporary philosophers of science—John Earman, Arthur Fine, Clark Glymour, Michael Friedman, Larry Sklar, Bas van Fraassen, Peter Railton, Nancy Cartwright, Wesley Salmon, Richard Boyd, David Malament, and others—who have had a greater impact on the shape of contemporary debates in the philosophy of science and physics than Miller and Suppe. But Miller and Suppe strike me as being (along with Laudan) largely more accessible to non-philosophers. I have also not said much directly about the quite lively debate in the philosophy of science between realists and anti-realists (that is, the debate over whether it would be irrational or rational to withhold belief in the unobservable entities posited by scientific theories). For two powerful statements of the opposing views, see BAS VAN FRAASSEN, *THE SCIENTIFIC IMAGE* (1980) (anti-realism) and Peter Railton, *Explanation and Metaphysical Controversy*, in *SCIENTIFIC EXPLANATION* (Wesley Salmon & Philip Kitcher eds., 1989) (realism). For a famous attempt to show that the distinction between realism and anti-realism is not an issue, see Arthur Fine, *The Natural Ontological Attitude*, in *SCIENTIFIC REALISM* (Jarrett Leplin ed., 1984).

57. LAUDAN, *supra* note 54. Laudan also provides interesting criticisms of recent realist views and of now largely discredited logical empiricist views. For some interesting considerations favoring empiricism in the philosophy of science, however, see Lawrence Sklar, *Modestly Radical Empiricism*, in *PHILOSOPHY AND SPACETIME PHYSICS* (1985) and Lawrence Sklar, *Foundational Physics and Empiricist Critique*, in *SCIENTIFIC THEORIES* (C. W. Savage ed., 1990).

58. Winter, *supra* note 47, at 1115. The problems with Winter’s work cut much more deeply than this. His work is actually full of philosophical confusions—confusions which provide a good illustration of more damaging intellectual voyeurism than in the case of Frug. Consider the following five points:

(1) Winter presents his “experientialist epistemology” (hereinafter EP) as a non-relativist

rence BonJour, Fred Dretske, Gilbert Harman, Keith Lehrer, Nicholas Rescher, W. V. Quine, C. I. Lewis, Wilfrid Sellars, Roderick Chisholm, and many others who have shaped and constituted this contemporary philosophical debate.

More serious than the habit of treating Rorty as *the* authoritative voice of contemporary philosophy is the frequent invocation of Rorty as authority for the downfall of objectivity, knowledge, and truth—a putative phenomenon which some writers hope to show is replicated in the

alternative to “objectivism” (a metaphysical view committed to realism, essentialism, and a correspondence theory of truth, *id.* at 1108). He announces quite confidently—Plato, David Lewis, and common sense notwithstanding—that objectivism “is, however, mistaken” on the grounds that “surprisingly little of human rationality actually fits this [objectivist] paradigm.” *Id.* It is left completely mysterious throughout the article how this latter claim about the nature of human cognitive abilities could have any bearing on the truth of a metaphysical doctrine. Our cognitive capacities could be irredeemably dependent on “metaphor” (as Winter claims) and it could still be true that, as the realist holds, “the world [is] filled with determinate, mind-independent objects with inherent characteristics unrelated to human interactions.” *Id.* All that would follow is that we could never have knowledge of this reality.

(2) Winter ignores obvious self-referential problems for his view. For example, if objectivism is “mistaken,” then what epistemological status can be granted the “empirical evidence from the cognitive sciences,” *id.* at 1109, on which Winter bases so much of his work? What exactly is this empirical evidence *about* if it is not about “determinate mind-independent objects”?

(3) Winter’s use of “objectivity” is unclear. He says that the process of adjudication is “not truly and completely ‘objective’” because it is “situated in the experiences of actual human beings and is shaped by the ways they understand their experience.” *Id.* at 1113. What is “truly and completely” objective as opposed to just “objective”? Why is the former the relevant sense of objective in the legal context? And who could possibly deny (or needs to deny) that adjudication is “situated” in Winter’s sense? These questions do not receive adequate answers.

(4) Winter claims that EP stakes out a middle ground between objectivism and relativism, the view that “reasoning and categorization . . . are relative to particular languages, cultures, histories, or conceptual schemes.” *Id.* at 1108. Yet Winter later concedes that on the EP view “there is no *objective* description of reality separate from our conceptual schemes,” *id.* at 1131, which would make EP relativist in precisely Winter’s sense. Winter claims further that our “embodied experiences” do constrain knowledge and meaning, but then concedes that “embodied experiences may be elaborated to construct meanings in many different fashions” that will vary between “different cultures or subcultures.” *Id.* at 1134. EP, then, is a completely relativist view; it is simply nonsense for Winter to write that EP is “simultaneously constrained, realist, *and* relativist.” *Id.* at 1136.

(5) Winter criticizes Felix Cohen’s famous attack (*Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935)) on relying on the metaphor of “where a corporation is” in deciding jurisdictional questions. Contrary to Cohen, Winter claims that “metaphor is inevitable in legal analysis because it is central to human rationality; it is a primary mode of comprehension and reasoning.” Winter, *supra* note 47, at 1166. Winter goes on to show that Cohen uses metaphors as well. This extraordinarily peculiar discussion demonstrates a basic confusion in Winter’s project. First, metaphors could not possibly be primary since they are *necessarily* derivative on non-metaphorical (literal) meanings. It could be that our knowledge “is elaborated . . . largely by means of metaphor,” *id.* at 1115, only if there are independent literal meanings that really are *primary*; otherwise, to speak here of “metaphor” would not make any sense. Second, that Cohen himself employs metaphors in his rather stylized defense of his “scientific” view of law does not impugn the literal meaning of his criticism of the traditional procedural doctrine at issue: namely, that instead of arguing about “where a corporation is”—a piece of “transcendental nonsense”—courts should weigh economic, sociological, political, and ethical factors in deciding these questions. The latter is the *literal* meaning of Cohen’s article; he defends and elaborates it in part with metaphors. None of this is strange or problematic or shows that metaphor is primary. Why Winter thinks anything of interest turns on this fact is mysterious.

I should add that something of value may perhaps be found in a “Lakoffian” approach to law; but Winter will have to get clear about about these and other issues to help us see what that is.

law. In this regard, I want to emphasize two general points about Rorty's work.

First, Rorty himself *argues* for his views. *Philosophy and the Mirror of Nature*<sup>59</sup> is a book of analytic philosophy in which analytic philosophical arguments are made (largely) against the positions of other analytic philosophers. It is fashionable these days to dismiss analytic philosophy; and, not surprisingly, such dismissals are often made without any real knowledge of analytic philosophy.<sup>60</sup> But those who dismiss analytic philosophy, and invoke Rorty in the process of doing so, should at least acknowledge that Rorty's whole case *against* philosophy was made primarily in terms of analytic philosophical arguments. These arguments, not merely Rorty's conclusions (which can be repeated in convenient slogans), ought to be the central concern of the legal scholars who bring Rorty's ideas into an encounter with the law.

Second, and more importantly, if legal scholars can extract themselves from Rorty voyeurism, then perhaps we can address the truly central issues of whether or not Rorty is right, and, if so, about what precisely. These issues, of course, bear directly on whether and to what extent a legal scholar can or should rely on Rorty in his or her interdisciplinary work.

Perhaps the most influential aspect of Rorty's work—a theme which he explicitly appropriates from earlier philosophers, particularly Sellars<sup>61</sup>—is his “anti-foundationalism.” Anti-foundationalism is a view about epistemic justification<sup>62</sup> that denies that knowledge can have foundations in the following sense: chains of justification can never end in a proposition that, unlike every other step in the chain, enjoys a non-inferential epistemic warrant.<sup>63</sup> Rorty's reasons for denying foundationalism

59. RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

60. The widespread ignorance of developments within analytic philosophy is simply inexcusable, especially among those who purport to be interested in questions about the nature of truth, knowledge, and reality. Those who seek to engage recent analytic philosophy will discover, for example, that there are certain important affinities between the views of, for example, Donald Davidson and Heidegger, or Sellars and Hegel. In fact, perhaps the main difference between certain analytic and Continental writers *when it comes to issues of metaphysics and epistemology* is that the former address these topics with greater care and argumentative sophistication than the latter.

61. See Wilfrid Sellars, *Empiricism and the Philosophy of Mind*, in *SCIENCE, PERCEPTION, AND REALITY* (1963).

62. For the clearest statement of Rorty's related view that the notion of “truth” can do no explanatory work and is thus an empty compliment we pay to sentences that we want to assert, see Richard Rorty, *Pragmatism, Davidson and Truth*, in *TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON* (Ernest LePore ed., 1986). Rorty's reading of Davidson on truth should be contrasted with Davidson's own view that Rorty *wrongly* thinks that there is nothing to say about “truth.” Davidson writes:

[A]s I read him, Dewey thought that once truth was brought down to earth there were philosophically important and instructive things to say about its connections with human attitudes, connections partly constitutive of the concept of truth. This is also my view.

Donald Davidson, *The Structure and Content of Truth*, 87 *J. OF PHIL.* 279, 281 (1990).

63. That is, a proposition that we are justified in believing, but not because it can be inferred from other propositions that we are already justified in believing.

are complex. Some have to do with familiar Sellarsian reasons (all epistemic warrant is inferential; “brute” facts must enter the “logical space of [inferential] reasons” in order to justify belief); others are connected to his larger project of rejecting the picture of the mind as trying to accurately represent (or “mirror”) a mind-independent reality.

Since many Anglo-American philosophers accept anti-foundationalism,<sup>64</sup> but few endorse Rorty’s ultimate conclusions (for example, his denial that there is anything of philosophical interest to say about “truth” or “knowledge”), the key question becomes: what follows from Rorty’s project? In particular, what bearing, if any, does the failure of epistemological foundationalism have on other areas of philosophy, such as metaphysics, philosophy of mind, and ethics? Whether a failure of a particular epistemological project makes any difference to most of the rest of contemporary philosophy must be established. Furthermore, does anti-foundationalism mean that there can be no epistemic standards? This is perhaps the key issue, for a common feature of much broadly post-modernist writing (Lyotard, Derrida, Rorty in his less careful moments, and much recent literary theory and work in Critical Legal Studies) is to assume that if foundationalism fails, then so must epistemology and philosophy. But such a conclusion follows only if foundationalism is the only epistemological theory in the offing, one on which the possibility of philosophy depends. And that is simply not the case.

Think of it, to start with, this way: even if we cannot ground our belief systems in some one-to-one correspondence with the “facts” about the world (because, for example, those “facts” are already infused with our linguistic and conceptual categories), surely we will still want answers to mundane questions like “Am I justified in believing ‘x’?”, where “x” can be a proposition of science or of parapsychology, or a claim about the causes of poverty or what is actually happening in Central America. Yet answering such questions—and does anyone want to assert that they will not require answers because “foundationalism” is “dead”?—requires answering questions about standards of epistemic justification, even if they are the standards *within our practices*.<sup>65</sup> But that may be epistemol-

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64. Many others, however, do not. Perhaps the most important contemporary writer on epistemology, Alvin Goldman, defends a version of foundationalism, though nothing is said about Goldman’s views in either of Rorty’s two major books. See RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE*, *supra* note 59, and RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982). For the most recent statement of Goldman’s views, see ALVIN GOLDMAN, *EPISTEMOLOGY AND COGNITION* (1986). For trenchant criticism of Goldman’s views, see LAURENCE BONJOUR, *THE STRUCTURE OF EMPIRICAL KNOWLEDGE* 34-52 (1985). Note that while BonJour, like Rorty, takes his inspiration from the classic critique of empiricist foundationalism in Sellars, he does not give up on epistemology as Rorty does.

65. Philosopher Kendall Walton has made a related point:

[R]eality is reality and facts are facts, however they are to be understood, and . . . what is the case obviously *does* differ from what is not the case, even if the difference is somehow conventional, culturally specific, dependent on this or relative to that, or whatever. The insight

ogy enough, for philosophy and for life.<sup>66</sup>

Let me put this point differently, since it is an important one about Rorty. Many philosophers are inclined to think that Rorty's work involves, in one sense, a giant *non sequitur*: from the claim that there are no "absolute" foundations or "absolute" truth to the claim that there is nothing for philosophy to do except continue the "conversation."<sup>67</sup> But that only follows if ahistorical foundationalism is central to the philosophical enterprise. It is doubtful that it need be. Even if there is no robust sense in which there is a mind-independent reality to which we have to make our beliefs correspond,<sup>68</sup> that fact, I submit, will not help answer questions like the following: Are the theoretical postulates of science real entities or useful fictions? What do we mean when we speak of "knowledge"? Can moral beliefs be justified, or are they in worse epistemic shape—within our practices—than our factual beliefs?<sup>69</sup> Can we reconcile our ordinary explanations of our behavior with a scientific view of the world? Do we need to? All of these are good questions for philosophers to ask; and none of them requires presupposing foundationalism or a robust realism. None of them requires an assumption that the

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that facts are not "brute," if indeed they are not, is a far cry from collapsing the distinction [between truth and falsity, reality and fiction].

KENDALL WALTON, *MIMESIS AS MAKE-BELIEVE: ON THE FOUNDATIONS OF THE REPRESENTATIONAL ARTS* 100 (1990).

66. The Rortian alternative—that we should explain "rationality and epistemic authority by reference to what society lets us say" (RORTY, *supra* note 59, at 174)—seems to do considerable violence to even our social practices concerning knowledge; for surely it is part of *our* idea of knowledge—within *our* practices of epistemic justification—that what counts as knowledge does not depend on what society thinks or on what the social consensus is.

67. Or to the claim that, as Rorty once wrote, "the sciences" can no longer aim "to embody or formulate truth," but rather only to "bring us greater happiness than we have now." Richard Rorty, *The World Well Lost*, in *CONSEQUENCES OF PRAGMATISM*, *supra* note 64, at 16.

68. Note again that whether we should give up such a view is hardly obvious. Surely it is central to common sense that the way things are does not depend on the way we take them to be. As Hilary Putnam has recently written, "[I]t is part of [our] image [of the world] that the world is not the product of our will—or our dispositions to talk in certain ways either." HILARY PUTNAM, *REALISM WITH A HUMAN FACE* 29 (1990). Putnam tries to show, however, that this view is, in fact, compatible with Rortian views about epistemic justification, and thus compatible with something that still deserves to be called "realism." A similar proposal—under the more accurate label of "transcendental anti-realism"—can be found in John McDowell's important paper, *Anti-Realism and the Epistemology of Understanding*, in *MEANING AND UNDERSTANDING* (Herman Parret & Jacques Bouveresse eds., 1981), especially at p. 248. See also John McDowell, *In Defence of Modesty*, in *MICHAEL DUMMETT: CONTRIBUTIONS TO PHILOSOPHY* (Barry Taylor ed., 1987).

Many, of course, may think that I grant far too much to Rorty as it is on this score. It is worth recalling, then, that within analytic philosophy (and common sense) *realism*—broadly, the view that there are mind-independent entities which it is the aim of knowledge to "represent" accurately or to depict in some manner—is the *dominant* view in many areas (and is even enjoying a resurgence in ethics, as I discuss below).

69. Much of the recent "British" moral realist literature—by writers like John McDowell, Sabina Lovibond, and David Wiggins—seems to assume that through a Wittgensteinian appeal to the "practices" of moral discourse within our "form of life" we can vindicate realism about morality. Yet one hardly needs a practice-transcendent point of view to find the traditional grounds for moral anti-realism (diversity of moral opinion, intractability of moral disagreement). Indeed, if anyone shares a "form of life," it is surely philosophy professors at elite universities; yet they themselves are locked in seemingly intractable moral disagreement (in a way, and to an extent, that their colleagues in the natural sciences are not).

answer sought is one that stands in some inexplicable correspondence relation to a reality so independent of human conceptions that we could get everything about it wrong.

Finally, Jaegwon Kim, a prominent analytic philosopher, has made a similar point in response to Rorty's charge that philosophy must abdicate its role as "the Queen of the Sciences," as the ultimate arbiter of epistemic standards for all other areas of inquiry:

There is another conception of philosophy, equally venerable [as the one Rorty attacks] and in fact commonplace, which views philosophy as the Handmaiden of Science. It views philosophy as an essentially *intraparadigmatic* inquiry concerning the conceptual, foundational, and regulative aspects of a given paradigm. The assumptions and methodologies of a paradigm are often only implicit in the practice of its adherents, and we cannot always expect them to be internally coherent and consistent. When any paradigm turns self-reflective, as any sufficiently mature and comprehensive paradigm should, it becomes important for the self-knowledge of its practitioners to undertake the kind of intraparadigmatic inquiry I have indicated. . . . It seems to me that this is one perfectly good traditional sense of philosophy, a sense that does not assume the existence of a "neutral matrix" outside any and all paradigms. . . . Systematic philosophy need not study eternal problems; that is, it need not be "epistemology" in Rorty's sense.<sup>70</sup>

The point of this discussion is not to deny the importance of Rorty's work—especially of *Philosophy and the Mirror of Nature*. (It should be noted, though, that even the themes that Rorty has made well-known have been, on the whole, more thoroughly and carefully addressed by others.<sup>71</sup>) Rather, the point is twofold. First, Rorty, like Kuhn and Feyerabend, is not good authority for any and all attacks on "objectivity" or "knowledge" or "truth," because it seems that meaningful notions of each of these concepts can survive the Rortian critique. Second, this may mean that Rorty's view may simply have little bearing on law.<sup>72</sup> Unless there is some reason to see the various sorts of strong Pla-

70. Jaegwon Kim, *Rorty on the Possibility of Knowledge*, 77 J. OF PHIL. 588, 595-96 (1980). Kim's piece offers a very fair-minded account of Rorty's central themes.

71. See, e.g., Robert Brandom, *Truth and Assertibility*, 73 J. OF PHIL. 137 (1976); Robert Brandom, *Reference Explained Away*, 81 J. OF PHIL. 469 (1984); Robert Brandom, *Pragmatism, Phenomenalism and Truth-Talk*, 12 MIDWEST STUD. IN PHIL. 75 (1988); McDowell, *supra* note 68; MICHAEL WILLIAMS, *GROUNDLESS BELIEF* (1977); BONJOUR, *supra* note 64; STEPHEN SCHIFFER, *REMNANTS OF MEANING* (1987); STEPHEN STICH, *THE FRAGMENTATION OF REASON* (1990). In different ways, these philosophers are, like Rorty, drawing on and exploring the consequences of various Quinean, Sellarsian, and (sometimes) Wittgensteinian themes. They typically do so with greater argumentative care than Rorty, and they are, on the whole, far more influential among contemporary Anglo-American philosophers than Rorty has been. It would be nice to see some acknowledgement of their existence—and of the difficulty of the issues they address—from those outside philosophy who profess an interest in these issues.

72. This, I take it, is part of the motivation behind the critiques of Critical Legal Studies in Stick, *supra* note 45, and Williams, *supra* note 46 (though I do not consider their treatments of the relevant

tonic, Cartesian, and Kantian assumptions about truth and knowledge and philosophy that Rorty attacks as pertaining at all to law, then the Rortian critique is simply irrelevant. I am inclined to think that this actually is the case and that the interest in Rorty to date has depended on a belief that all attacks on “objectivity”—whether it be the Platonic variety or the type that figures in adjudication—are of a piece. Rorty has articulated a powerful challenge to certain aspects of the philosophical tradition, but he (and more often his “followers”) have drawn overstated conclusions from this challenge about epistemic justification, the status of science, the purpose of philosophy, and the like. Thus it is doubtful to me whether Rorty’s work presents a truly fruitful resource for the legal scholar.<sup>73</sup>

### C. *Prospects for Law and Philosophy*

The moral of this discussion is not that there ought not to be interdisciplinary work in law and philosophy. While I think that most such work currently in law journals makes no real contribution to either law or philosophy, such work should not necessarily be abandoned. On the contrary, I suggest only that law professors who want to undertake such an interdisciplinary engagement have some serious homework to do in philosophy. There is every reason to think that this is a realistic expectation. After all, there are law professors (for example, Frederick Schauer<sup>74</sup>) pursuing this more serious interdisciplinary work who do not have formal advanced training in philosophy.<sup>75</sup>

There are, unfortunately, no comparable models for those who seek what would indeed be a valuable engagement between law and Continental philosophy;<sup>76</sup> but there is, again, no reason to think that such an engagement is impossible. It requires only that those legal scholars who want to think seriously about Hegel, for example, avail themselves of some of the recent excellent work on Hegel.<sup>77</sup> Further, such legal schol-

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philosophical issues entirely satisfactory). *But see* Thomas Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787 (1989), for an interesting treatment of the relevance of pragmatism to jurisprudence. This treatment does not focus solely or primarily on Rorty and displays scholarly care and rigor of an entirely different order than is typical in such discussions.

73. This is not to say that there are not genuine issues about objectivity in law; but these issues have to stand or fall on their merits in the *legal case*. No help on this point, as far as I can see, will be found in the work of Richard Rorty.

74. *See, e.g.*, FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991), which is a good example of the benefits gained from thinking about (in this case) the legal rules of certain methods derived from ordinary language philosophy.

75. The best-known literature in analytical jurisprudence is, of course, of very high philosophical quality; but it is written primarily by scholars with training in philosophy.

76. *But see* the thoughtful—if rather uncritical—account of Derrida’s views in J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743 (1987).

77. *See, e.g.*, MICHAEL FORSTER, *HEGEL AND SKEPTICISM* (1989) and ROBERT PIPPIN, *HEGEL’S IDEALISM* (1989), both of which constitute significant advances, in philosophical sophistication and textual care, over almost all the prior Hegel literature. Forster’s work, in particular, is a model of argumentative clarity on these issues. On Hegel’s moral and political



ars should seek to model their own work on the clarity and argumentative rigor of this recent work and to avoid the vague paraphrase or post-modernist obscurities that too often characterize the mediocre secondary literature.

This still leaves open the question whether such an engagement would be worthwhile. I am inclined to think, for example, that the best work in Critical Legal Studies<sup>78</sup> has shown that a radical critique of law does not need the pretentious footnotes and obscure asides that often clutter that literature (both the best and the worst of it). Radical criticism may require only a commitment to progressive politics and a knowledge of law and its institutions; to date, at least, the Continental philosophy in such criticism has been superfluous.

What, then, can be gained from the interdisciplinary encounter? I shall conclude with three suggestions, of varying degrees of specificity.

### 1

One possibility would be for law professors to pursue studies of the "law and x" variety, where "x" is an important philosophical figure or movement. Most philosophical scholars are less likely to pursue this sort of study.<sup>79</sup> Thus law professors—who take the time to learn the relevant philosophy—could fruitfully stake their claim to this intellectual territory. Such studies would be preferable to the many studies by law professors of the philosophy of "x" that pay little, if any, attention to the connection of "x" to law. With rare exception, law professors have been ill-prepared to engage in these discussions. While it is not inconceivable that such studies could improve through better and more careful work on

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philosophy, there are a couple of useful works: for example, CHARLES TAYLOR, *HEGEL AND MODERN SOCIETY* (1979), and, more recently, ALLEN WOOD, *HEGEL'S ETHICAL THOUGHT* (1990). MICHAEL HARDIMON, *THE PROJECT OF RECONCILIATION* (forthcoming) will, no doubt, be an important contribution. In general, it turns out that philosophers trained in the Anglo-American tradition, who typically bring to texts a more refined sense of philosophical argumentation, have offered the best commentary on the Continental philosophical tradition. See, e.g., FREDERICK NEUHOUSER, *FICHTE'S THEORY OF SUBJECTIVITY* (1990); G. A. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENCE* (1978); SCHACHT, *NIETZSCHE*, *supra* note 24; HUBERT DREYFUS, *BEING-IN-THE-WORLD* (1991); RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* (1981). Not all such "analytic" work on the Continental tradition has been successful; see, e.g., the pertinent criticisms of some aspects of analytical Marxism raised in Robert Paul Wolff, *Methodological Individualism and Marx: Some Remarks on Jon Elster, Game Theory, and Other Things*, 20 *CANADIAN J. OF PHIL.* 469 (1990); and the criticisms of Cohen's version of historical materialism in Peter Railton, *Explanatory Asymmetry in Historical Materialism*, 97 *ETHICS* 233 (1986).

78. See, e.g., Michael Fischl, *Some Realism About Critical Legal Studies*, 41 *U. MIAMI L. REV.* 505 (1987); Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *MINN. L. REV.* 1049 (1978); Frug, *The City as a Legal Concept*, *supra* note 41; Robert Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984); Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 *WIS. L. REV.* 379 (1983); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976); Karl Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW* (David Kairys ed., 1982).

79. *But see* GERALD POSTEMA, *BENTHAM AND THE COMMON LAW* (1986).

the philosophical issues, it seems to make far more sense for law professors to bring their own specialized knowledge of the law to their scholarly pursuits.

## 2

The work of Michel Foucault, as some legal scholars have noted,<sup>80</sup> suggests a number of areas of research, though I know of no law professor who has pursued these areas in a meaningful way. Following a useful typology articulated by Arnold Davidson,<sup>81</sup> at least one natural path for legal scholars to explore in a Foucaultian vein would be to undertake an “archaeological” investigation of law. Given Foucault’s view of truth “as a system of ordered procedures for the production, regulation, distribution, circulation and operation of statements,”<sup>82</sup> an archaeological investigation of a realm of discourse is one that would show what rules govern the saying of “true” things, that is, “what rules permit certain statements to be made; what rules order these statements; what rules permit us to identify some statements as true and some as false.”<sup>83</sup> This “structuralist” analysis—even minus Foucault’s view of truth—could be extraordinarily illuminating in an application to legal texts, especially if a systematic analysis of the rules of discourse that make a text “legal” (as opposed to “journalistic,” “political,” or “philosophical”) could be given.

## 3

Finally, some of the most important debates in contemporary Anglo-American philosophy—for example, about the nature of rule-following<sup>84</sup> or between moral realism and non-cognitivism<sup>85</sup>—present many fruitful

80. See, e.g., Boyle, *supra* note 47; Robert Gordon, *New Developments in Legal Theory, in THE POLITICS OF LAW*, *supra* note 78, at 290; Gordon, *supra* note 78, at 125; Thomas Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 196 (1984).

81. Arnold Davidson, *Archaeology, Genealogy, Ethics*, in FOUCAULT: A CRITICAL READER (David Hoy ed., 1986).

82. MICHEL FOUCAULT, *POWER/KNOWLEDGE* 133 (1980).

83. Mark Philp, *Michel Foucault*, in *The Return of Grand Theory in the Human Sciences* 69 (Quentin Skinner ed., 1985).

84. See, e.g., CRISPIN WRIGHT, *WITTGENSTEIN ON THE FOUNDATIONS OF MATHEMATICS* (1980); SAUL KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982); Crispin Wright, *Kripke’s Account of the Argument Against Private Language*, 81 J. OF PHIL. 759 (1984); John McDowell, *Wittgenstein on Following a Rule*, 58 SYNTHÈSE 325 (1984); Crispin Wright, *Wittgenstein’s Rule-Following Considerations and the Central Project of Theoretical Linguistics*, in REFLECTIONS ON CHOMSKY (Alexander George ed., 1989); Paul Boghossian, *The Rule-Following Considerations*, 98 MIND 507 (1989); José Zalabardo, *Rules, Communities and Judgments*, 21 CRITICA 33 (1989).

85. See, e.g., Peter Railton, *Moral Realism*, 95 PHIL. REV. 163 (1986); Peter Railton, *Facts and Values*, 14 PHIL. TOPICS 5 (1986); Peter Railton, *What the Noncognitivist Helps Us to See, the Naturalist Must Help Us to Explain*, in REALITY: REPRESENTATION AND PROJECTION (Crispin Wright & John Haldane eds., forthcoming); Richard Boyd, *How To Be A Moral Realist*, in ESSAYS ON MORAL REALISM (Geoffrey Sayre-McCord ed., 1988); and ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* (1990). The recent literature on these topics is considerably larger, but these accounts are the most sophisticated and promising. A clear

issues for legal scholars, issues that are just beginning to be explored.<sup>86</sup> On the one hand, Wittgensteinian questions about how we fix the content of rules, what we “know” when we know how to follow a rule, and how objective the requirements of rules can be, intersect naturally with issues about the nature of legal rules, theories of adjudication, and problems of indeterminacy. On the other hand, questions about the objectivity of value may prove especially relevant to those areas of law (for example, constitutional law) where Dworkin’s lesson about the interdependence of law and morality is most obviously applicable. In both cases, law professors could make a real contribution by exploring the ramifications of the contemporary philosophical debate in the legal context.

#### V. CONCLUSION

These are but three suggestions for potentially fruitful interdisciplinary work. Now that law schools have opened their doors to such interdisciplinary studies, one may hope that the opportunity to bring law and philosophy together—in ways that transcend the traditional debates of analytical jurisprudence—will be utilized intelligently rather than squandered. At present, law schools and law journals are too often the refuge for people who could not teach in comparable departments of philosophy, let alone publish in comparable philosophical journals. To realize the promise of interdisciplinary work, law professors must do the hard work necessary for a real intellectual encounter between law and philosophy.

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*introduction* to some of the basic issues can be found in DAVID BRINK, *MORAL REALISM AND THE FOUNDATIONS OF ETHICS* 1-25 (1989).

86. See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 76-85 (1986); Charles Yablon, *Law and Metaphysics*, 96 *YALE L.J.* 613 (1987) (book review); David Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 *PHIL. & PUB. AFF.* 105 (1988).