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Postmodern Philosophy and Legal Thought

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LOYOLA UNIVERSITY CHICAGO

POSTMODERN PHILOSOPHY AND LEGAL THOUGHT

VOLUME I (CHAPTERS 1 TO 5)

A DISSERTATION SUBMITTED TO
THE FACULTY OF THE GRADUATE SCHOOL
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

DEPARTMENT OF PHILOSOPHY

BY

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TABLE OF CONTENTS

VOLUME I (Chapters One through Five)

Chapter

1.	INTRODUCTION: UNDERSTANDING POSTMODERNISM GENERALLY	1
	1.1 Overview of the Project	1
	1.2 Structure of the Manuscript	7
	1.3 Understanding Modernism and Postmodernism	11
	(i) Historical Emergence of Postmodernism	11
	(ii) Theoretical Emergence of Postmodernism	15
	1.4 Death of Grand Narratives	18
2.	METHODOLOGICAL ISSUES IN POSTMODERN LEGAL PHILOSOPHY	34
	2.1 Internal and External Legal Theory	35
	(i) Anglo-American Legal Theory tends to be Internal	49
	(ii) Postmodern Legal Theory tends to be External	60
	2.2 Foundationalism and Anti-Foundationalism	69
	2.3 Positive and Negative Jurisprudence	77
3.	NIETZSCHE'S THEORY OR LAW: CRITIQUE OF NATURAL LAW THEORY	81
	3.1 The Basics of Natural Law Theory	87
	3.2 First Critique: the Illusion of Natural Laws	92
	3.3 Second Critique: Natural Law as Linguistic Error	99

3.4	Third Critique: the Genealogy of Law	104
3.5	Does Nietzsche Offer a Positive Jurisprudence?	111
3.6	Problems for a Nietzschean Jurisprudence	121
4.	FOUCAULT ON LAW: MODERNITY AS NEGATIVE UTOPIA	127
4.1	The Classical Juridical View and Nietzsche's Critique of it	131
4.2	Foucault on Law and Discipline	139
4.3	Does Foucault Offer a Positive Jurisprudence?	157
4.4	Foucault as Negative Utopian and Enlightenment Critic	166
5.	DERRIDA: POSTMODERNISM BORROWING FROM PLATO AND KANT	169
5.1	Derrida on Law and Justice	172
5.2	Platonic and Kantian Influences	187
5.3	Some Problems for a Derridean Positive Jurisprudence	195
5.4	Towards an Assesment	204

VOLUME II (Chapters Six through Eight)

Chapter

6.	LYOTARD: POSTMODERN GAMING AND A PLURALITY OF JUSTICES	208
6.1	Lyotard on Postmodern Law and Justice	209

6.2	Problems with Lyotard's Account of Law and Justice	235
6.3	Conclusion: The Lessons of Lyotard's Work	253
7.	RORTY'S POSTMODERN ANTI-FOUNDATIONALISM	256
7.1	From Postmodernism to Anti-Foundationalism	256
7.2	Rorty's Anti-Foundational Pragmatism (Rorty on Ethics, Politics, Law)	259
7.3	What Would a Rortian Jurisprudence Look Like?	282
7.4	What is Objectionable About Rorty's Pragmatism?	287
7.5	Why Rorty Stops Short of a Positive Jurisprudence	293
8.	CONCLUSION: DOES POSTMODERNISM HAVE ANYTHING TO OFFER TO LEGAL PHILOSOPHY	297
8.1	The Insights of Postmodern Legal Theory	297
(i)	Genealogy and the Awareness of Contingency	298
(ii)	Awareness of Incommensurability and Marginalization	302
(iii)	Deconstruction of Supposedly Neutral Doctrines	308
(iv)	The Shaping of Legal Discourse and the "Unsayable"	312
8.2	Two Problems: Externality and Lingering Foundationalism	316
8.3	The Use of Postmodern Theory in Thinking the Other of the Law	332
	SELECT BIBLIOGRAPHY	340
	VITA	353

"Since Copernicus man has been rolling from the center toward X."

--Friedrich Nietzsche

"To realize the relative validity of one's convictions, and yet to stand for them unflinchingly, is what distinguishes a civilized man from a barbarian."

--Joseph Schumpeter

CHAPTER 1

INTRODUCTION: UNDERSTANDING POSTMODERNISM GENERALLY

1.1 Overview of the Project

The philosophy of law is not immune from the trends and fashions which sweep through academia from time to time. The most influential trend of the last quarter century in academic circles is without doubt the rise of "postmodernism" or "post-structuralism."¹ The core group of philosophers placed under the "postmodern" rubric generally includes Jacques Derrida, Michel Foucault, Friedrich Nietzsche, Jean-Francois Lyotard, Jacques Lacan, Fredric Jameson, and Richard Rorty.² Over the last decade or so, the basic themes of postmodernism have worked their way into the scholarship in the philosophy of law, with the result that law professors have recently begun to chart the

¹ In order to avoid confusing the reader, I will not accentuate the distinction between postmodernism and post-structuralism, but will encompass both movements within the term "postmodernism." This means that certain thinkers who are more appropriately thought of as post-structuralists (such as Barthes and Foucault) will be deemed postmodernists for the purposes of this manuscript. This use of terminology should not lead to confusion, because nothing in my analysis hinges on the distinction between postmodernism and post-structuralism. For a discussion of the categories of "postmodernism" and "post-structuralism," see Madan Sarup, An Introductory Guide to Post-Structuralism and Postmodernism (Athens, GA: Univ. of Georgia Press, 1989) and Douglas Kellner and Steven Best, Postmodern Theory (New York: Guilford Press, 1991).

² A useful list of postmodern thinkers and writers is collected by Ihab Hassen, The Postmodern Turn (Columbus, OH: The Ohio State University Press, 1987), 84-96.

progress of "postmodern legal movements,"³ "postmodern jurisprudence"⁴ and "postmodern legal feminism."⁵ In addition, symposia are now held to discuss the contribution to legal theory of such seeming non-lawyerly types as Jacques Derrida⁶, Michel Foucault⁷, Richard Rorty⁸, and Jacques Lacan⁹. There can be no question that legal scholars are joining with the rest of academia in expressing a growing interest in postmodern theory. Twenty years ago there was no such thing as "postmodern legal philosophy," whereas we can now identify a coherent and growing body of literature which falls under this heading.¹⁰ This manuscript is an attempt to understand postmodern legal philosophy by assessing whether the central postmodern philosophers have anything to contribute to the philosophy of law.

³ Gary Minda, Postmodern Legal Movements (New York: New York University Press, 1995).

⁴ Costas Douzinas and Ronnie Warrington, Postmodern Jurisprudence (New York: Routledge, 1991).

⁵ Mary Joe Frug, Postmodern Legal Feminism (New York: Routledge, 1992).

⁶ Symposium on "Deconstruction and the Possibility of Justice," 11 Cardozo L. Rev. 919-1726 (1989).

⁷ Alan Hunt, "Foucault's Expulsion of Law: Towards a Retrieval," 17 Law and Social Inquiry 1 (1992), and subsequent articles.

⁸ See Lynn Baker, "Just Do It: Pragmatism and Social Change," 78 Va. L. Rev. 697 (1992), and subsequent articles.

⁹ See Jacques Derrida, "For the Love of Lacan," 16 Cardozo L. Rev. 699 (1995), and subsequent articles.

¹⁰ Indeed, textbooks on jurisprudence now include a section on postmodernism. For example, see Jurisprudence: Contemporary Readings, Problems, and Narratives, ed. Robert Hayman, Jr. and Nancy Levit (St. Paul: West Publishing Co., 1995), 507-575.

The growing interest in postmodernism among legal scholars is something of a mixed blessing, I think. On the one hand, there is always something to be gained when the parameters of existing scholarship are widened to include new approaches, especially when a new approach purports to be radical and challenging. Yet one gets the nagging feeling that there is something missing at the core of the work presently being done under the rubric of postmodern legal theory. It seems that there is a lot of unsubstantiated verbiage being tossed around with a decidedly postmodern flavor. Radical lawyers are now speaking the language of postmodernism, writing about the law in terms of "floating signifiers," "logocentrism," "difference," and "marginality."¹¹ Unfortunately, this verbiage (or "verbal drift," if you will) is often unsupported by hard scholarship which looks at the arguments underlying the colorful terminology. Strangely, there has been a paucity of detailed scholarship devoted to finding out exactly what the most influential postmodern thinkers had to say about the law. Even as postmodern thinkers such as Derrida, Lyotard, and Foucault are becoming increasingly influential in legal studies (indeed, they are cited at an almost alarming rate in recent law review articles¹²), there are very few sustained efforts being made to wade through the complicated texts of these authors to find out what they thought about basic concepts such as "justice," "law," and

¹¹ For example, the postmodern influence is notable in such important recent books as Patricia Williams' The Alchemy of Race and Rights (Cambridge: Harvard University Press, 1991), where Professor Williams says that her books is about "floating signifiers" and the social construction of race and gender.

¹² A recent LEXIS-NEXIS search revealed that Lyotard, Nietzsche, Derrida, Foucault, and Rorty have each been mentioned in well over two hundred articles published in American law journals.

"right." This has become my task---to provide a close textual reading of these thinkers to discern the implications of their work for legal philosophy.

To be sure, this might seem like an obvious task that should have been attempted long ago. Surely somebody should have taken the time to work her way through the writings on law by Nietzsche, Foucault, Derrida, and Lyotard. Yet very few scholars have undertaken this project in a systematic way, choosing instead to focus on one or another thinker, or to borrow isolated insights from a range of thinkers. Despite the occasional clearly-written book on postmodern politics¹³, there has been very little written in a clear, analytic style on postmodernism and law. What little that has been written in support of postmodern legal philosophy is shrouded in a language and style of argument which is accessible only to those who are already sympathetic to the postmodern approach.¹⁴ To analytic philosophers, texts written in this style can be daunting, even incomprehensible. What seems to be happening in legal scholarship is that certain writers are picking up on the language (some would say the "jargon") of postmodernism, but they are not digging deeply into the primary texts from which this jargon originates: they are not asking hard questions about the coherence of the views held by postmodern thinkers. Furthermore, there has not been a book devoted to

¹³ Honi Fern Haber, Beyond Postmodern Politics (New York: Routledge, 1994); Linda Hutcheson, The Politics of Postmodernism (London: Routledge, 1989).

¹⁴ I have here in mind Drucilla Cornell's Philosophy of the Limit (New York: Routledge, 1992), and Gillian Rose's Dialectic of Nihilism (Oxford: Basil Blackwell, 1984), which are largely inaccessible for analytic philosophers. Another book which is has received some attention but is difficult to follow is Post-Modern Law, ed. Anthony Carty (Edinburgh: Edinburgh University Press, 1990).

explaining the arguments of these thinkers as a collective movement in legal philosophy. And not surprisingly, there has been little or no genuine dialogue between Anglo-American legal thinkers and the adherents of postmodernism.

One explanation for the lack of dialogue is that the followers of the various postmodern thinkers tend to be fiercely loyal. For example, my own experience has been that writers sympathetic to Derrida and Lyotard tend to disparage any work which is critical of these thinkers, no matter how well argued the critique happens to be. In particular, as John Searle has observed, Derrida's supporters often seem to employ the dubious tactic of asserting that anyone who is critical of Derrida has misread him!¹⁵ Those who are working within the postmodern approach (e.g. those who focus on Derrida, Lyotard, and Foucault) tend to be derisive of those who are working on more mainstream thinkers such as H.L.A Hart and Ronald Dworkin, holding something akin to the view that these mainstream thinkers are hopelessly tied to an outdated approach in legal philosophy. On the other side of the dividing line, the leading Anglo-American theorists (such as Rawls, Dworkin, and Bruce Ackerman) do not even purport to respond to the postmodernists, even to point out errors in their work. In any event, the battle lines have been tightly drawn by mutual disregard instead of rational argument and dialogue. As a result, there has been no rapprochement between the postmodernists and those who are within the more mainstream schools in Anglo-American jurisprudence. Hopefully this manuscript will help to bridge the gap between Anglo-American theory

¹⁵ See John Searle's "The World Turned Upside Down," The New York Review of Books (October 27, 1983) and "Reply to Mackey," The New York Review of Books (February 2, 1984).

and postmodern theory by examining postmodernism from the perspective of analytic jurisprudence, and by explaining the exact points in dispute between the two approaches. Now because my topic is postmodernism, and postmodern theory is largely derived from French and German thinkers, much of this manuscript will require an excursion into a philosophical landscape which is staked out largely by continental figures. Yet my methodology (specifically, my focus on argument and critique) will remain decidedly within the tradition of analytic philosophy.

This manuscript operates as a two-level analysis of postmodern philosophy and legal thought: on the one hand, it is centrally concerned with postmodern legal theory as a collective approach in legal studies; on the other hand, it is also about the views of the individual thinkers who are central to the postmodern movement. This chapter and the chapter that follows it are an attempt to explain the orientation and assumptions of postmodern legal philosophy as a collective approach, and the subsequent chapters are each devoted to the work of a individual postmodern thinker. After five key postmodern thinkers have been discussed (Nietzsche, Foucault, Derrida, Lyotard, and Rorty), I offer some criticisms of the postmodern project as a whole, assessing both its strengths and weaknesses. My aim is to provide a simultaneous introduction and critique of major figures from continental philosophy (and Rorty as well) who are becoming increasingly important in the philosophy of law. If nothing else, this project should have the effect of loosening the parameters of legal scholarship to make room for new thinkers who have not been central figures in the philosophy of law, but whose work is of growing interest to legal scholars.

1.2 Structure of the Manuscript: Critiquing Postmodern Legal Philosophy and Individual Postmodern Thinkers

Postmodern legal theory does not revolve around a particular work which functions as a manifesto, nor can we isolate a single thinker as **the** key postmodern thinker. Further, there are some quite significant differences among the postmodern thinkers discussed in this manuscript. A threshold question, then, is whether postmodernism can, or should, be seen as a coherent brand of legal philosophy in its own right. In other words, we must ask whether there is such a thing as "postmodern legal philosophy," or alternatively, if we are dealing merely with individual viewpoints that do not share a set of core, essential attributes. Obviously, I will be arguing that there is something akin to a postmodern orientation (or approach) in legal philosophy which unites the various thinkers discussed in this manuscript.

Certainly, if the postmodern thinkers shared nothing in common in their writings on the law, then the best approach to their work would be to simply discuss their positions in serial fashion (passing from one thinker to another), because there would be nothing to say about them collectively. Yet I think that these thinkers **do** have quite a bit in common, in two key senses. First of all, they share a set of basic **philosophical** assumptions about central issues in philosophy, issues such as selfhood, truth, justice, language, interpretation, and history. Secondly, they share some basic assumptions about the proper methodology and goals of **legal theory**. The first set of beliefs (the more general philosophical notions) have a profound effect upon the second set of notions (about legal theory as a particular branch of philosophical inquiry). Because the

postmodern thinkers share some basic assumptions about philosophy and legal theory, I will be taking the position that they can be seen collectively as putting forth a somewhat unified approach to law, and I will be referring to this approach as **postmodern legal philosophy** or **postmodern legal theory** even though there is no distinct intellectual movement which has adopted either of these designations.

This manuscript examines postmodern legal philosophy according to the following format: in the remainder of this chapter, I establish that the postmodernists share certain basic assumptions about selfhood, justice, truth, and interpretation. I then turn in Chapter Two to an examination of two fundamental beliefs which postmodernists seem to hold about the way in which legal theory should operate. The first assumption is that legal theory should be conducted from an external perspective in that it need not privilege the first-person accounts of the officials of the legal system (the judges and lawyers). This external perspective is common to Marxist and other sociological accounts of the law, yet it stands in sharp contrast to the perspective of Anglo-American legal theory, which tends to adopt an internal perspective on the legal system, viewing the law from the perspective of judges and lawyers. Throughout the manuscript I will be referring to the perspective on the legal system taken by the postmodernists (and Marxists) as "the external perspective."

A second approach which is shared by the postmodernists is a deep distrust and skepticism of the metaphysical and epistemic foundational notions which have historically been offered by lawyers and philosophers in support of particular arrangements of the legal system. Some of these foundational concepts include natural law, dialectical

materialism, maximization of utility, inherent human dignity, autonomy, God, and self-evident rights. The postmodern distrust of foundations extends beyond these metaphysical foundations and applies with equal force to such non-metaphysical foundations as John Rawls' "overlapping consensus," and Jurgen Habermas' "ideal speech situation." The radical skepticism toward foundations shall be referred to in this manuscript as "extreme anti-foundationalism."

Postmodern legal theory, then, is centrally concerned with taking an external perspective on the legal system and with doing away with the foundations which once served to ground the legal system. The big question which runs through this manuscript is whether these orientations can lead to what I call a '**positive jurisprudence**,' that is, a general theory of right and justice which can be used as a methodology for deciding cases and enacting laws. Without a positive jurisprudence, postmodern legal theory will be relegated to a purely critical approach, which means that it will have limited use for those who desire a plan of action for creating an improved legal system. All of these preliminary questions of methodology are raised, but not resolved, in Chapter Two.

Chapters Three through Six look closely at the legal philosophies offered by various postmodernists. For each thinker I attempt to formulate a 'theory of law and justice,' and I then subject this theory to a searching critique. Finally, in Chapter Eight I conclude that the postmodern treatment of law is useful as a critique or 'check' against the existing terms and concepts within both the practice of law and the enterprise of mainstream legal scholarship, but it nevertheless fails to offer a coherent vision for the future of the legal system. In keeping with this assessment, my opinion is that

postmodern legal theory is partially successful; postmodernism correctly points out that we can no longer naively rely on the foundations once offered in support of our legal system, and it is correct that we must perform a genealogy and deconstruction of our existing legal concepts. But this interesting **critical** effort is accompanied by a less successful effort to **build** a new vision for the law. And when the postmodern anti-foundationalism is wedded to an external perspective on the legal system, the result is a line of thought which is of limited value to the players within the legal system who must decide cases and enact statutes from an internal perspective. Yet while this manuscript is predominantly critical of postmodern legal theory, I nevertheless attempt in the final chapter to explain some ways in which postmodernism **can** contribute to legal theory.

Having foreshadowed my ultimate conclusion, let me now offer a gentle reminder about methodology before my analysis begins in earnest. Earlier I spoke of the attitude of distrust and derision which surfaces from time to time between philosophers working in the different traditions of Anglo-American and continental theory. My goal in this manuscript is to present an assessment and critique of postmodern legal theory, and in order to do this responsibly, I must make every effort to outline that theory in its best light. This much is required of the so-called "principle of charity," which requires that an interpreter make the object of her interpretation the best that it can be before portraying it in a worse light.¹⁶ The overall goal of the manuscript is to get a good

¹⁶ In the area of legal theory, Ronald Dworkin has stated the principle of charity thusly:

Roughly, constructive interpretation is a matter of imposing purpose on

grasp of the postmodern analysis of law and to place this line of thinking in its best light, to see postmodernism as a coherent and useful movement in legal thought. And we can only put the postmodern movement in its best light if we try understand it sympathetically, on its own terms, before subjecting it to a critique. As a first step, I offer the remainder of this chapter as a guide to postmodernism generally. It is intended especially for those who seek a broader context in which to place the individual thinkers discussed later in this manuscript.

1.3 Understanding Modernism and Postmodernism

The best way to understand **postmodernism** is by contrasting it with **modernism**. This comparison can take place on two levels: an historical level and a theoretical level. The historical level looks at the sequence of events surrounding the emergence of postmodernism as an intellectual movement in the late Twentieth Century. The theoretical level looks at the doctrinal and philosophical views which distinguish the postmodern thinkers from the thinkers of the so-called "modern" period. I will begin with the historical analysis and then turn to the theoretical plane.

(i) The Historical Emergence of Postmodernism

In historical terms, the **modern** epoch encompasses the period stemming roughly from the mid-Enlightenment of the 18th Century all the way to the 1960s and early

an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.

Ronald Dworkin, Law's Empire (Cambridge: Harvard University Press, 1986), 52.

1970s. The modern period was characterized by a faith in the power of reason and a belief in the inherent dignity and uniqueness of individuals as ends-in-themselves. A basic tenet of modernism was that the faculty of reason could operate as a neutral court of appeal to weed out beliefs and practices that were based on superstition and blind tradition (for example, belief in the divine right of kings). Among the purveyors of modernism we would count Locke, Kant, Jefferson, Rousseau, Lincoln, and Mill. In political and legal theory, the modern approach strove to justify a participatory democracy with full civil liberties and due process of law, which was justified on the basis of God's plan, natural law, reason, inherent dignity, or the social contract. We can safely say that most American lawyers remain within the modern mindset in their attitude toward politics and law. As Roscoe Pound said earlier in this century, "The American lawyer, as a rule, still believes that the principles of law are absolute, eternal, and of universal validity."¹⁷ In legal theory, the modern approach generally took the form of an attempt to justify a legal arrangement by reference to a-historical and a-contextual truisms about human nature, God, reason, and natural law. Indeed, each of these concepts are mentioned in the Declaration of Independence, and found their way into Supreme Court decisions handed down from the founding of the republic until the early part of this century. As a matter of American history, we can safely say that the modern epoch extended from the Colonial period until shortly after World War Two.

Historically speaking, the **postmodern** period began as a movement within the

¹⁷ Quoted in Jerome Frank, Law and the Modern Mind (Gloucester, Mass.: Peter Smith, 1970), 59-60.

arts, originating just after World War Two, but gaining momentum as the 1960s approached. In a sense, the postmodern movement was a spin off from certain trends within modern art and literature, especially the experimentation with new perspectives that was emerging in the work of writers such as James Joyce and William Faulkner, as well as movements in art such as Cubism and Expressionism, which challenged the notion that paintings should be oriented from the perspective of a single, ideal vantage point. Taking its clues from the radical strains in the modern art of the early part of this century, the postmodern movement was led by artists such as Andy Warhol and Robert Rauschenberg, composers such as John Cage and Philip Glass, and filmmakers such as Jean-Luc Godard. All of these artists stressed the breakdown of linear narratives, the rise of pastiche and 'blank parody,' as well as discontinuity, diffusion, and schizophrenia.¹⁸

As the 1960s moved into the 1970s and 1980s, postmodernism was becoming less tied to artistic movements and more wedded to philosophical speculation and abstract theorizing, especially in the work of Jacques Derrida, Jean-Francois Lyotard, Jean Baudrillard, and Frederic Jameson. By the mid-1980s, with the English language publication of Lyotard's seminal The Postmodern Condition, postmodernism had become an identifiable theoretical approach in philosophy.¹⁹ And by the 1990s, postmodernism

¹⁸ On the rise of pastiche and schizophrenia, see Frederic Jameson, "Postmodernism and Consumer Society," in The Anti-Aesthetic: Essays in Postmodern Culture, ed. Hal Foster (Seattle: Bay Press, 1983).

¹⁹ Jean-Francois Lyotard, The Postmodern Condition: A Report on Knowledge (Minneapolis: University of Minnesota Press, 1984).

was a force to be reckoned with among political theorists and legal scholars.²⁰ Historically speaking, then, postmodernism began as a movement in the arts and has become increasingly theoretical over the years, to the point where it can now be identified as an intellectual movement apart from a movement within the arts. Nevertheless, the artistic origins of postmodernism remain highly visible, which explains why each of the postmodern thinkers discussed in this manuscript has written extensively on the arts. For example, Derrida has written on "The Truth in Painting"²¹, Foucault has lectured on Magritte²², Lyotard has written about painting and about Kafka²³, and Rorty has written about Nabokov and Orwell.²⁴ At present, one need not be concerned with art to qualify as a postmodernist, because postmodernism has become theorized to the point where it can be embraced as a philosophical position distinct from a movement in the arts.

²⁰ See, e.g., Honi Fern Haber, Beyond Postmodern Politics (London: Routledge, 1994); Linda Hutchenson, The Politics of Postmodernism (New York: Routledge, 1989); Alan Hunt, "The Big Fear: Law Confronts Postmodernism," 35 McGill L. J. 508 (1990).

²¹ Jacques Derrida, The Truth in Painting (Chicago: University of Chicago Press, 1987).

²² Michel Foucault, This is Not a Pipe (Berkeley, CA: University of Calif. Press, 1983).

²³ Jean-Francois Lyotard, Toward the Postmodern (Atlantic Highlands, N.J.: Humanities Press International, 1993).

²⁴ Richard Rorty, Contingency, Irony, and Solidarity (Cambridge: Cambridge University Press, 1989).

(ii) The Theoretical Emergence of Postmodernism

We can now turn from the historical perspective to the theoretical perspective.²⁵

As a matter of philosophical theory, modernists such as Locke, Kant, and Jefferson were wedded to foundational metaphysical notions of a stable human subject or self, a belief in objectivity and undistorted rational dialogue, a commitment to emancipation from superstition and tyranny, and a general optimism that science was moving steadily toward the Truth. Some thinkers have taken to referring to this set of beliefs as the "Enlightenment Project,"²⁶ understood broadly as the project of bringing reason and science to bear on our metaphysical and political beliefs. This approach can be seen in Kant's seminal essay, "What is Enlightenment?," where Kant says that Enlightenment represents man's emergence from self-imposed immaturity through the use of reason and

²⁵ The following discussion characterizes modernism in broad strokes as a movement which employs metaphysical or epistemic foundations. While this criterion captures most of the philosophers of the modern era (it certainly applies to Hobbes, Locke, and Kant), there are a few modern philosophers who do not fit neatly into this taxonomy. For example, Mill can be considered a type of foundationalist in that he purported to justify ethical and legal positions in terms of general utility; on the other hand, he did not operate with a rigid view of human nature, and he recognized that political judgments can vary from one culture to another. Similarly, Marx's early work relied heavily on a metaphysically-laden conception of the free laborer who recognized himself in his products, while his later works purported to be 'scientific' and devoid of metaphysical speculation. Because of these difficulties of classification, I will be using the term "modernism" to denote a family resemblance among a group of diverse theorists who each relied in some way upon ontological or epistemic foundations, and who justified their conceptions of justice with reference to unempirical, deep-structure notions of the self, or Reason, or nature.

²⁶ See, especially, Max Horkheimer and Theodor Adorno, The Dialectic of Enlightenment (New York: Continuum, 1991).

public debate.²⁷ A distinguishing feature of modernism, then, is the reliance on sweeping metaphysical and/or epistemic claims to underlie positions in political and legal philosophy. A nice summary of this attitude was provided recently by Robert Hollinger:

Modern philosophy, whose archetypal figures are Descartes and Kant, seeks to provide necessary and universal criteria for discovering truth and universal moral principles. This gives rise to the Enlightenment ideal of the moral and epistemological unity of humankind which was to provide us with the tools for "relieving man's estate" (Bacon) without theoretical limit. This led to the notion of a scientific culture, in which everything was grounded in scientific doctrine or method, or committed to the flames as sophistry and illusion, as Hume put it.²⁸

Two examples of this project come to mind: Kant's claim that the faculty of reason generates laws which can be used to justify legal rights to liberty and property, and Marx's claim that history is unfolding according to a series of necessary laws.²⁹

In The Postmodern Condition, Lyotard refers to the foundations espoused by modern thinkers (such as Descartes, Kant, and Marx) as "grand narratives" or "metanarratives":

I will use the term **modern** to designate any science that legitimates itself

²⁷ Immanuel Kant, "What is Enlightenment," in Perpetual Peace and Other Essays (Indianapolis: Hackett Publishing Company, 1983), 41-2.

²⁸ Robert Hollinger, Introduction in Hermeneutics and Praxis (Notre Dame: University of Notre Dame Press, 1985), x.

²⁹ The method of grounding political and legal positions in metaphysical assumptions about human nature, reason, or history, has seemed increasingly less plausible in recent years to Anglo-American political theorists such as John Rawls, Michael Walzer, and Ronald Dworkin, who argue that political and legal philosophy must be based on values which are held imminently within a particular culture, not on sweeping claims about human nature as such. The movement away from foundations is nicely documented in Georgia Warnke, Justice and Interpretation (Cambridge: MIT Press, 1992), which focuses on the "hermeneutic turn" of such thinkers as Michael Walzer, John Rawls, Ronald Dworkin, and Jurgen Habermas.

with reference to a metadiscourse [] making an explicit appeal to some grand narrative, such as the dialectic of Spirit, the hermeneutics of meaning, the emancipation of the rational or working subject, or the creation of wealth. [] I define **postmodernism** as incredulity toward metanarratives.³⁰

The postmodern theorists discussed in this manuscript hold unanimously that the grand narratives of the Enlightenment are no longer tenable: hence Lyotard's claim that postmodernism is incredulous toward metanarratives. This incredulity can be seen in Nietzsche's rejection of the Lockean (and Jeffersonian) reliance on God and natural law; Foucault and Lyotard's rejection of the claim that history has a **telos** or end point which could support liberal democracy; Rorty's rejection of the Kantian notion of human beings as ends-in-themselves; and Derrida's rejection of the notion that the just state can be founded on first principles. All of these thinkers (together with the postmodern-influenced movement of Critical Legal Studies) deny the existence of a neutral and objective faculty of reason which can be used to generate first principles of morality and law.

All of this talk about rejecting foundations may sound vaguely nihilistic, and as we shall see, there is a certain sense in which postmodern theory is resigned to a failure of finding a foundation for a political vision of the just state. Part of the postmodern malaise derives from the impression that two hundred years of an Enlightened quest for "reason," "truth," and "rationality" has led to the present regime of gross inequality, class warfare, the death of any hope for socialism, two world wars in this Century alone,

³⁰ Lyotard, The Postmodern Condition: A Report on Knowledge (Minneapolis: Univ. of Minnesota Press, 1984), xxiii-xxiv.

the threat of nuclear annihilation, sexism, racism, neurosis, and other ills of the modern era. While most people would argue that inequality, racism and violence are due to the **failure** to use reason in public affairs, postmodernists like Foucault argue that it is precisely what we call "reason" which has brought us to the state we are in: "The relationship between rationalization and excess political power is evident. And we should not need wait for the concentration camps to recognize the existence of such relations."³¹ Given this, one way to understand postmodernism is to say that it is a movement which is dubious about the modernist claims for the use of reason as a way of solving problems, and it is skeptical about modernist conceptions of truth, justice, and selfhood. There is a sense among postmodernists (and perhaps this is borrowed from certain critical theorists in the Frankfurt School) that the Enlightenment has been something of a failure.³²

1.4 Death of Grand Narratives (God, Nature, Truth, Self, Spirit, Reason)

In order to get a complete idea of the extent to which postmodernism rejects the basic approach of modern philosophy, we turn now to a side-by-side comparison of

³¹ Michel Foucault, "The Subject and Power," in Michel Foucault: Beyond Structuralism and Hermeneutics, by Hubert Dreyfus and Paul Rabinow (Chicago: University of Chicago Press, 1982), 210. Foucault points out that racism and fascism were couched as "rational" solutions to political dilemmas, so we must be suspicious of claims that are based on reason: "This [racism and fascism] was, of course, an irrationality, but an irrationality that was at the same time, after all, a certain type of rationality." See "Space, Knowledge, and Power," in The Foucault Reader, ed. Paul Rabinow (New York: Pantheon Books, 1984), 248.

³² On this point see Max Horkheimer and Theodor Adorno, Dialectic of Enlightenment (New York: Continuum, 1991).

modern and postmodern positions on key metaphysical and epistemic issues, including reason, justice, selfhood, truth, natural law, history, texts, and God. In each case, the modern and postmodern view are contrasted.

Reason

The Enlightenment modernism of Descartes and Kant saw reason as a universal faculty held by all humans which could be used to articulate a set of rational, true beliefs. The goal, then, was to separate reason from contingent and distorting features, such as tradition and emotion.

Kant: Reason proceeds by "eternal" and "unalterable" laws.³³

Descartes: "I observe that there is in me a certain faculty of judgment that I undoubtedly received from God, as is the case with all the other things that are in me. Since he has not wished to deceive me, he certainly has not given me a faculty such that, when I use it properly, I could ever make a mistake."³⁴

Locke: "reason teaches all mankind that will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions; for men being all the workmanship of one omnipotent and infinitely wise Maker."³⁵

The postmodern reaction to this line of thought is to argue that reason is not a uniform faculty in all humankind, but is socially constructed; it is always situated within existing practices and discourses, and it will therefore be biased or slanted in favor of existing

³³ Immanuel Kant, Critique of Pure Reason (New York: St. Martin's Press, 1965), sec. Axi-xii, p. 9.

³⁴ Rene Descartes, Meditations on First Philosophy (Indianapolis: Hackett Publishing Company, 1979), 35.

³⁵ John Locke, The Second Treatise of Government, sec. 6: "On the State of Nature", reprinted in What is Justice?, ed. Robert Solomon and Mark Murphy (Oxford: Oxford University Press, 1990), 94.

power relations.

Foucault: "The central issue in philosophy and critical thought since the eighteenth century has always been, still is, and will, I hope, remain the question: What is this Reason that we use? What are its limits and what are its dangers?"³⁶

Horkheimer/Adorno: "the Enlightenment has always aimed at liberating men from fear and establishing their sovereignty. Yet the fully enlightened earth radiates disasters triumphant ...[M]ankind, instead of entering into a truly human condition, is sinking into a new kind of barbarism."³⁷

Lyotard: "There is no politics of reason, neither in the sense of a totalizing reason nor in that of the concept. And so we must do with a politics of opinion."³⁸

Rorty: "Kant splits us into two parts, one called "reason," which is identical in us all, and another (empirical sensation and desire), which is a matter of blind, contingent, idiosyncratic impressions. [But we should] take seriously the possibility that there is no central faculty, no central self, called 'reason'..."³⁹

Given this incredulity toward reason, we can expect that postmodernism will reject any approach in politics and law that claims to be based upon the demands of reason, as if reason were a neutral court of appeal.

Self

The modern view of the self reached an apex in Kant's notion that each individual

³⁶ Michel Foucault, "Space, Knowledge, and Power," in The Foucault Reader, 249.

³⁷ Max Horkheimer and Theodor Adorno, The Dialectic of Enlightenment, 3, xi. It is worth mentioning that Horkheimer and Adorno, despite being cited as inspiration by the postmodernists, nevertheless still believe in the value of a type of "reason," if not in "Reason" in the full blown Humean/Kantian sense.

³⁸ Jean-Francois Lyotard, Just Gaming (with Jean-Loup Thebaud) (Minneapolis: University of Minnesota Press, 1985), 82.

³⁹ Richard Rorty, Contingency, Irony, and Solidarity, 32-3.

must be treated as a unique end-in-himself, inviolable and sacrosanct, never to be used as a mere means. Like other modern thinkers, Kant thought that we might be able to separate the metaphysical, transcendent self from the contingent self, such that the core self can be thought to exist separately from its immersion in a particular culture, language, or history. This attitude has its roots in Cartesian dualism, where the mind was conceived as a separate substance from the body.

Descartes: "because I have a clear and distinct idea of myself--insofar as I am a thing that thinks and not an extended thing--and because I have a distinct idea of a body--insofar as it is merely an extended thing, and not a thing that thinks--it is therefore certain that I am truly distinct from my body, and that I can exist without it."⁴⁰

Kant: "Rational nature exists as an end-in-itself."⁴¹

Rawls: "the self is prior to the ends which are affirmed by it."⁴²

The postmodern reaction to this line of thinking rests on the notion that the "self" is a product of language and discourse, that the self is "decentered" (to use a term from Althusser); that there is no core self. The postmodernists seem to concur with Claude Levi-Strauss' assertion that the Cartesian ego is the "spoiled brat of philosophy."⁴³

⁴⁰ Rene Descartes, Meditations on First Philosophy, 49.

⁴¹ Immanuel Kant, Groundwork of the Metaphysics of Morals (New York: Harper & Row, 1964), 96.

⁴² John Rawls, A Theory of Justice (Cambridge: Belknap Press of Harvard University Press, 1971), 560. Rawls' more recent work backs off the position that the self is somehow lurking below contingent personality features. Rawls now insists that the choosers in the Original Position were never de-contextualized and unencumbered.

⁴³ See Madan Sarup, An Introductory Guide to Post-Structuralism and Postmodernism, 1.

Rorty: "The crucial move [] is to think of the moral self, the embodiment of rationality, not as one of Rawls' original choosers [] but as a network of beliefs, desires, and emotions with nothing behind it--no substrate behind the attributes."⁴⁴

Althusser: "Since Marx, we have known that the human subject, the economic, political or philosophical ego is not the center of history--and even, in opposition to the Philosophers of the Enlightenment and Hegel, that history has no center []. In turn, Freud has discovered that the real subject, the individual in his unique essence, has not the form of an ego--- **that the human subject is de-centered, constituted by a structure which has no center either...**"⁴⁵

Foucault: "As the archaeology of our thought easily shows, man is an invention of recent date. And perhaps one nearing its end."⁴⁶

Given this view of the self (which is sometimes associated with the so-called 'death of the subject' and the 'death of the author'), we can expect postmodernism to reject any approach which is based on the assertion that human beings have an immutable nature which pre-exists civil society. The postmodern approach would rule out a social contract theory based upon a 'state of nature,' or for that matter any theory which holds that man is naturally egotistical (Adam Smith) or aggressive (Thomas Hobbes).

Truth

The so-called "rationalists" of the modern epoch (Descartes, Leibniz, Spinoza) thought that philosophy could find a method for establishing first principles of metaphysics and epistemology. In contrast to the rationalists, the so-called "empiricists"

⁴⁴ Richard Rorty, "Postmodern Bourgeois Liberalism," in Hermeneutics and Praxis, 217.

⁴⁵ Louis Althusser, "Freud and Lacan," in Lenin and Philosophy (New York: Monthly Review Press, 1971), 218-9 (emphasis added).

⁴⁶ Michel Foucault, The Order of Things: an Archaeology of the Human Sciences (New York: Random House, 1970), 387 (this is from the final page of the book).

(Hume, Locke) thought that experience could provide a solid basis for truth claims. The goal in either case was to find the ultimate nature of reality, to make the real into something rational. The idea of truth as correspondence between language and reality exerted a strong influence far beyond the modern period, holding sway even among 20th Century philosophers such as Bertrand Russell. These thinkers would have soundly rejected the postmodern contention that truth is constructed, changing, and affected by the distorting influences of class, race, and gender.

Descartes: "There is a need for a method for finding out the truth. [] By method I mean certain and simple rules, such that if a man observes them accurately, he shall never assume what is false to be true, but will always gradually increase his knowledge and arrive at a true understanding of all that does not exceed his powers."⁴⁷

Russell: "Thus a belief is true when it corresponds to a certain associated complex, and false when it does not. [] What makes a belief true is a fact, and this fact does not (except in exceptional cases) in any way involve the mind of the person who has the belief."⁴⁸

In contrast, the postmodernists are skeptical about the notion of a fixed Truth (with a capital T). For example, Nietzsche ridicules the notion of Truth and holds instead that the we are faced with alternative interpretations and perspectives; Rorty thinks that the modern focus on Truth has turned up nothing; and Derrida thinks that what is typically called 'truth' can never find a stable resting place.

Nietzsche: "There is something about "truth," about the search for truth; and when a human being is too human about it--"he seeks the true only

⁴⁷ Rene Descartes, Rules for the Direction of Mind, in The Philosophical Works of Descartes (Cambridge: Cambridge University Press, 1931), vol I.

⁴⁸ Bertrand Russell, The Problems of Philosophy (New York: Oxford University Press, 1980), 128-130.

to do the good"--I bet he finds nothing."⁴⁹

Rorty: "truth is not the sort of thing that one should expect to have a philosophically interesting theory about...[I] would simply like to change the subject."⁵⁰

Derrida: "what is put into question is precisely the quest for a rightful beginning, an absolute point of departure, a principle responsibility...[T]he signified concept is never present in and of itself. [] Essentially and lawfully, every concept is inscribed in a chain or in a system within which it refers to the other, to other concepts, by means of a systematic play of differences."⁵¹

Foucault: "'Truth' is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it. A 'regime' of truth."⁵²

Given this skepticism, it is easy to see why 'Truth' (as commonly understood) does not play a central role in postmodern legal philosophy. This is not to say that postmodernists disregard questions of truth and falsity, but they purport to be sensitive to the ways in which truth is relative to, or shaped by, power relations.

God/Nature/Self-Evidence

The modernists (and their progeny) tended to argue that God had endowed men with inherent rights which could be deduced by the exercise of reason. These rights were innate and self-evident, and they stood as an ideal or standard to which the law

⁴⁹ Friedrich Nietzsche, Beyond Good and Evil, sec 35 (New York: Vintage Books, 1989), 47.

⁵⁰ Richard Rorty, "Introduction: Pragmatism and Philosophy," in Consequences of Pragmatism (Minneapolis: University of Minnesota Press, 1982), xiii-xiv.

⁵¹ Jacques Derrida, "Differance," in Margins of Philosophy (Chicago: University of Chicago Press, 1982), 6, 11.

⁵² Michel Foucault, "Truth and Power," in Power/Knowledge (New York: Pantheon Books, 1980), 133.

should aspire.

Jefferson: "We hold these truths be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."⁵³

Martin Luther King, Jr: "A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law."⁵⁴

In contrast, postmodernists profess a disbelief in God, and they reject the notion of self-evident principles of justice and natural law.

Nietzsche: "There are still harmless self-observers who believe that there are 'immediate certainties'; But that 'immediate certainty,' as well as 'absolute knowledge' and the 'thing in itself,' involve a contradiction in terms, I shall repeat a hundred times; we really out to free ourselves from the seduction of words."⁵⁵

Foucault: "it seems to me that the idea of justice in itself is an idea which has been invented and put to work in different types of societies as an instrument of a certain political and economic power..."⁵⁶

Given this suspicion toward self-evident truths (and toward such cherished notions as justice and consensus), postmodern thinkers do not put much stock in common sense or "self-evident" rules, and they are suspicious about the outcomes reached by consensus and popular sovereignty. There is also a commonly held belief, which can be traced to

⁵³ Thomas Jefferson, Declaration of Independence, in What is Justice?, 149.

⁵⁴ Martin Luther King, Jr., "Letter from Birmingham Jail," in Philosophical Problems in the Law, ed. David Adams (Belmont, CA: Wadsworth Publishing Company, 1992), 60.

⁵⁵ Friedrich Nietzsche, Beyond Good and Evil, sec 16, p. 23.

⁵⁶ Michel Foucault, from the debate with Noam Chomsky, in "Human Nature: Justice versus Power," in Reflexive Water: the Basic Concerns of Mankind, ed. Fons Elders (London: Souvenir Press, 1974), 187.

the Marxist Antonio Gramsci, that "common sense" and "reasonableness" are determined by existing power relations and thus inevitably reflect biases of class and gender.⁵⁷

Writers/Texts/Meaning

The thinkers of the modern period tended to assume that the meaning of a text could be reduced to the intention of the author. Texts were interpreted literally and meaning was limited to the four corners of the text. For example, courts sitting in the modern era stressed the literal meaning of a contract as controlling, to the exclusion of contextual factors surrounding the execution of the contract. This view continues to exert a particularly strong hold over conservative thinkers and literary critics of the present age.

Judge Iredall (1798): 'Judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implied in the written Constitution.'⁵⁸

Edwin Meese: "History and tradition point to an understanding of the Constitution as a document of **fixed meaning**, supplied by those who framed and ratified it."⁵⁹

E.D. Hirsch: "Meaning is that which is represented by a text; it is what the author meant by his use of a particular sign sequence; it is what the

⁵⁷ Antonio Gramsci, Selections from the Prison Notebooks (New York: International Publishers, 1971), 325-6.

⁵⁸ Judge Iredall's famous opinion in Calder v. Bull, 3 U.S. 386 (1798) is summarized in John Ely, Democracy and Distrust (Cambridge: Harvard University Press, 1980), 1.

⁵⁹ Edwin Meese III, "Our Constitution's Design: The Implications for its Interpretation," 70 Marquette L. Rev. 381, 383 (1987)(emphasis added).

signs represent."⁶⁰

For the postmodernists, the text is a locus of polysemy, dissemination, and multiple meanings. There is no single meaning of the text, and there is an element of undecidability in the inevitable choice which must be made between different readings of a text. Most importantly, the whole notion of the "author" as a locus of meaning is an ideological distortion designed to limit the free play of meaning by anchoring interpretations to a seemingly rigid center of reference.

Barthes: "We know that a text is not a line of words releasing a single 'theological' meaning (the 'message' of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash. [] Once the Author is removed, the claim to decipher a text becomes quite futile."⁶¹

Foucault: "the author is not an indefinite source of significations which fill a work; the author does not precede the works...The author is therefore the ideological figure by which one marks the manner in which we fear the proliferation of meaning."⁶²

Derrida: "the central signified, the original or transcendental signified, is never absolutely present outside a system of differences. The absence of the transcendental signified extends the domain and the play of signification infinitely."⁶³

Given this, postmodernism will be skeptical of the idea that a single text (say, the

⁶⁰ E.D. Hirsch, Jr., "In Defense of the Author," from Validity and Interpretation, reprinted in Art and Its Significance, ed. Stephen David Ross (Albany: State University of New York Press, 1994), 336.

⁶¹ Roland Barthes, "The Death of the Author," in Image-Music-Text (New York: Hill and Wang, 1977), 146-7.

⁶² Michel Foucault, "What is an Author?," in The Foucault Reader, 118-9.

⁶³ Jacques Derrida, "Structure, Sign and Play in the Discourse of the Human Sciences," in Writing and Difference (Chicago: University of Chicago Press, 1978), 280.

Constitution) is 'foundational,' and they will be skeptical of 'authoritative' readings of foundational texts. Further, they will argue that interpretations of these key texts are always offered from a particular perspective, toward a particular end, such that there is no clear 'plain meaning' of a text.

History/Progress

Modern theorists tended to believe in the ideal of moral progress, the Enlightenment-based belief that, as history unfolds, reason is lifting us out of superstition and moving us toward an increasingly rational political order. Thinkers like Kant and Locke felt that the rise of reason and science in the Enlightenment provided our best hope for the creation of a just society. Later thinkers of the modern era, such as Hegel and Marx, thought that history itself had a internal logic and was moving toward a teleological end-point of a better society.

Hegel: "The history of the world is none other than the progress of the consciousness of freedom."⁶⁴

Marx: "Asiatic, ancient, feudal, and modern bourgeois modes of production can be designated as progressive epochs in the economic formation of society. The bourgeois relations of production are the last antagonistic form of the social process of production [and] create the material condition for the solution of that antagonism. This social formation brings, therefore, the prehistory of human society to a close."⁶⁵

Fukuyama: Liberal democracy is "the endpoint of mankind's ideological evolution" and "cannot be improved upon as an idea"; thus, "no further

⁶⁴ G.W.F. Hegel, from Lectures on the Philosophy of History, quoted in Peter Singer, Hegel (New York: Oxford University Press, 1983), 11.

⁶⁵ Marx, "Preface to a Contribution to a Critique of Political Economy," in The Marx-Engels Reader, ed. Robert Tucker (New York: Norton, 1978), 5.

historical change is possible."⁶⁶

The postmodern thinkers argue in response that history has no necessary internal logic or laws, and that claims to moral progress are unfounded.

Nietzsche: "Mankind does not represent a development toward a better, stronger, or higher type, in the sense which this is supposed to occur today. 'Progress' is merely a modern idea--that is to say, a false idea."⁶⁷

Lyotard: "Auschwitz refutes speculative [Hegelian] doctrine. This crime at least, which is real, is not rational."⁶⁸

Foucault: "Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity instills each of its violences in a system of rules and thus proceeds from domination to domination."⁶⁹

From the foregoing we can see how postmodernism tries to shake free of the metaphysical and epistemic foundations which lie at the roots of the modern approach to ethics, politics, and law. But at the same time, the postmodernists understand that these foundational terms (selfhood, justice, truth) are in some sense inescapable, because in order to talk intelligently about matters of law and justice, we must have recourse to notions of the self, truth, reason, and so on. After all, political and legal theory is centrally concerned with people, so it must treat people as legal subjects with some degree of freedom and autonomy, and it must make claims which purport to be true, so

⁶⁶ Francis Fukuyama, The End of History and the Last Man (New York: Free Press, 1992), ix, 199-200.

⁶⁷ Friedrich Nietzsche, The Antichrist, #4, in The Complete Works of Friedrich Nietzsche, vol 16, ed. Oscar Levy (New York: Russell and Russell, 1964), 129.

⁶⁸ Jean-Francois Lyotard, The Differend: Phrases in Dispute (Minneapolis: University of Minnesota Press, 1988), 179.

⁶⁹ Michel Foucault, "Nietzsche, Genealogy, History," in The Foucault Reader, 85.

it will end up using the same type of language (terms such as truth, self, rights, freedom, justice) which it found so problematic in the modern thinkers. Yet it uses these terms in a wry, almost sarcastic way. Rorty sometimes labels this approach as an "ironic" posture because it requires the adoption of a language game (broadly construed) which the ironist acknowledges to be contingent and fallible. That is, the ironist uses a certain set of terms to explain her ethical position (that is, she speaks about "rights" and "inherent human dignity") while refusing to give these terms the status of a "final vocabulary" that is closer to reality than the vocabularies used by others, and she is willing to change her vocabulary if a more useful one arises.⁷⁰ This explains the tendency of postmodernists to pepper their work with quotation marks, which are supposed to designate that certain terms are used tentatively or with reservation.

A similar move is made by Derrida through his use of certain words "under erasure." For Derrida, certain words and concepts cannot be avoided if we are to speak in a way that can be understood by an audience steeped in the tradition of Western philosophy. These words include basic metaphysical postulates like "soul," "truth," "justice," and "history." Yet while we must use these words as points of reference in order to make discussion possible, we should recognize that these terms carry an effective history with them, a sort of baggage of associations which must be questioned. Derrida, following Heidegger, expresses this double gesture by saying that we cannot avoid slipping into the use of metaphysically loaded terms, so our use of these terms must be playful and ironic, with the result that the traditional meaning of these terms is

⁷⁰ Richard Rorty, Contingency, Irony, and Solidarity, 73.

hedged or erased:

There is no sense of doing without the concepts of metaphysics in order to shake metaphysics. We have no language--no syntax and no lexicon--which is foreign to this history; we can pronounce not a single destructive proposition which has not already to slip into the form, the logic, and the implicit postulations of precisely what it contests.⁷¹

One implication of this view is that while we **must** use terms such as "justice" and "rights," we should be careful to recognize that these words do not have stable meanings and transcendental referents; instead, they come loaded with an effective history that includes distorting factors. For example, the term "rights" has been understood for so long in terms of **negative** rights (rights to be let alone, as it were) that it sounds strange to talk about rights which are clearly **positive** rights, such as a right to child care, housing, and meaningful employment. Indeed, these might be considered "rights" under a socialist system of government, but for now we label them as "privileges," a label which places them outside the system of rights. Under our present scheme it seems natural and normal to speak of a right to free speech, but it stretches credulity to speak of a "right to employment." As law professor Mark Tushnet explains,

[A]ppeals to rights are inherently limited. Such appeals operate within the legal system, or at least within a rhetorical structure shaped in large measure by what the legal system has already done. Some things, such as a right to shelter, simply "go too far" in light of what the legal system has already done. What exactly "too far" means is [] strongly affected by the sound common sense of the community of professional lawyers.⁷²

The basic point here is that the key terms used in the philosophy of law do not provide

⁷¹ Jacques Derrida, "Structure, Sign, and Play," in Writing and Difference, 280-1.

⁷² Mark Tushnet, "The Politics of Constitutional Law," in The Politics of Law, ed. David Kairys (New York: Pantheon Books, 1990), 232.

a neutral medium for discussing legal issues, but instead are already weighed down with power relations. When we use terms like "justice" or "truth," these terms have a history that must be genealogically investigated to detect bias, a method that we will later discover in Nietzsche's genealogical investigation of the terms "good" and "evil," as well as Foucault's genealogical analysis of criminality and punishment.⁷³ The concern of the postmodernists is that our existing language games tend to become reified to the point where our practices and concepts seems natural or inevitable, such that every demand for change seems an affront to nature itself, and hence inappropriate, radical.

The use of terms "ironically" and "under erasure" reflects the postmodern supposition that the self is constituted in language games and discourses, and that these discourses are slanted, biased, and non-neutral. The self is **not** a Cartesian ego or Chomskian deep-structure which pre-exists the language and the community into which it is thrown. Rather, the self is the "effect" or "result" of power networks, disciplines and discourses (Foucault), or a 'narrative construction' which results from the heterogony of language games in our society (Lyotard).⁷⁴ We are dealing, then, with a radically de-centered concept of the self and a radical rejection of foundations, combined with a skepticism toward the terms and concepts which are found in mainstream legal philosophy.

In this chapter we have explored (albeit somewhat superficially) the basic

⁷³ Friedrich Nietzsche, On The Genealogy of Morals (New York: Random House, 1967) Bk II; Michel Foucault, Discipline and Punish (New York: Vintage Books, 1979).

⁷⁴ For more on the notion of the self in postmodern political theory, see Honi Fern Haber, Beyond Postmodern Politics, 4-5.

suppositions and ideas of postmodernism generally, and we are now prepared to pass to an examination of the postmodern stance on law. In the next chapter I will explore the methodological stance of postmodern legal theory in detail by focusing on its external perspective and its severe anti-foundationalism, the two factors which distinguish postmodern legal philosophy from mainstream philosophy of law. The question to be asked is whether an externally-oriented, anti-foundational approach can give rise to a normative vision for the law, which (I would think) is something that we seek as legal philosophers.

CHAPTER 2

METHODOLOGICAL ISSUES IN POSTMODERN LEGAL PHILOSOPHY

Throughout this manuscript I will be exploring two sorts of problems with postmodern legal philosophy. The first class of problems deals with logical or tactical errors which can be found in the arguments made by particular postmodern thinkers. For example, in Chapter Three I will be arguing that Nietzsche's critique of natural law theory fails to come to terms with sophisticated versions of that theory, and in Chapter Five I will be arguing that Derrida's earlier writings contradict the conception of justice found in his later work. My concern with problematic arguments requires no special explanation; philosophers are trained to look for gaps in logic. I will be highlighting many of these gaps and problems in the chapters to come, so there is no need to discuss them individually at this juncture.

A second class of problems arises from the approach and orientation of postmodern legal philosophy as a collective movement in legal studies. At this level, I will be drawing attention to two problems: they are both problems of methodology and orientation, not problems which involve the substantive views of particular postmodern thinkers. These problems affect postmodernism in a global sense, and they need to be addressed straightaway because they are problems which are potentially crippling to

postmodern legal theory. Since these problems infect postmodern legal philosophy at a meta-level, they also negatively impact the legal theories of individual postmodern thinkers.

My two concerns are as follows: (i) postmodern theory takes an excessively external perspective on the legal system, thereby cutting off insights which are generated from an internal perspective of the participants in the social practice of the legal system; and (ii) postmodern theory is excessively dubious of any and all foundations in legal theory, thereby cutting off all hope for what I will be calling a "positive jurisprudence," that is, a theory of how the legal system should operate in a just state. The critical question raised by all of this is as follows: if postmodern legal theory takes a critical, external perspective on the law, and also adopts a perspective which is critical of all foundations for a legal system, is there any way to salvage a vision of the just state and the proper legal system, or are we consigned to a purely negative, critical theory?

2.1 Internal and External Legal Theory

I will refer to my first concern with the methodology of postmodern theory as "**the problem of external perspective**," adopting the term "external perspective" from H.L.A. Hart's groundbreaking work The Concept of Law¹, as well as from Ronald

¹ H.L.A. Hart, The Concept of Law (Oxford: Oxford University Press, 1961), 55, 86-7, 96.

Dworkin's seminal works, A Matter of Principle and Law's Empire.² Hart and Dworkin both stress the possibility of doing legal theory from two perspectives, which they designate as "internal" and "external." Internal theory tends to see the legal system from the perspective of what Hart called the "officials" of the system (judges and lawyers), while external theory tends to take a third-person (observer's) view of the legal system. As we will see, there are limitations with both approaches, and it is especially difficult for a legal theory to take both perspectives into account at the same time.

I might pause to add that the internal/external dilemma is not specific to legal theory, but is a debate that runs through all areas of social inquiry. The internalist perspective in the social sciences has been advanced convincingly by Peter Winch in his influential book, The Idea of a Social Science and its Relation to Philosophy.³ The basic idea of the internalist perspective is that any social practice must be understood with reference to the meanings and interpretations offered by the actors themselves. According to Winch, "reflective understanding [of social phenomena] must necessarily presuppose [] the participant's unreflective understanding."⁴

A radically different perspective is taken by those who adopt an externalist perspective which downplays the internal perspective of the participants on the grounds that the internal participants are not in a privileged position to understand their own

² Ronald Dworkin, "On Interpretation and Objectivity," in A Matter of Principle (Cambridge: Harvard University Press, 1985) and "Internal and External Skepticism," in Law's Empire (Cambridge: Harvard University Press, 1986).

³ (London: Routledge, 1958).

⁴ *Ibid.*, 89.

behavior.⁵ The external perspective, which was advanced by sociologists in the tradition of Durkheim and Marx, holds that the participants in a social practice (such as law) may be deluded about the real impetus for their actions. This means that a theorist who is trying to understand a social practice will invite confusion and distortion if she privileges the participants' interpretations of their own behavior. A quick example may help to illustrate the different approaches: consider how a sociologist might attempt to formulate a theory about the role of marriage in America. An internal perspective would take into account the interpretations offered by those who endorse the practice: it might focus on the participants' interpretation of marriage as a sacred ritual of exclusive devotion to another person. An external perspective might focus, among other things, on the relationship between marriage and social stability (as measured by crime and suicide rates) and it might claim that marriage is motivated by a need for social stability, even though the participants don't realize that this motivates their behavior.

This manuscript cannot, of course, address the larger theoretical question of whether the internal or external perspective has proven more valuable in social inquiry. At this point I merely want to point out that the postmodern thinkers tend to criticize the legal system from an external perspective, that is, from a perspective different from the "players" (such as judges, lawyers, and legislators) who are engaged in the day-to-day operations of the legal system. This external perspective contrasts with the internal approach which is typically (but not always) taken by Anglo-American thinkers, who tend

⁵ See, for example, the discussion in Understanding and Social Inquiry, eds. Fred Dallmayr and Thomas McCarthy (Notre Dame: University of Notre Dame Press, 1977), 77-80.

to work from within the language games and concepts of those who are officials within the legal system. As we shall see later in this chapter, H.L.A. Hart and Ronald Dworkin (the leading Anglo-American thinkers in the philosophy of law) both insist that the philosophy of law should be conducted in a manner which privileges the understandings of those officials who are players in the legal system. Postmodern theory takes an external perspective on the legal system, and thus might seem strange to Anglo-American thinkers who are accustomed to seeing the legal system from an internal view.

The external strategy of the postmodernists follows two basic methodologies. First, some postmodernists tend to problematize the legal system as a whole, on the ground that the foundations or fundamental assumptions of the entire system are erroneous, biased, or faulty. This global approach can be seen in Nietzsche's claim that democracy and equal rights constitutes a type of "slave morality," and in Foucault's claim that the legal system's guarantees of liberty and autonomy are deceptive. A second external strategy does not question the legal system on this global level, but proceeds instead by taking an established concept within legal philosophy (such as "liberty" or "contract" or "property" or the public/private distinction) and then deconstructs the concept by showing that its accepted usage harbors a hidden ideological distortion. This means that we will almost never find the postmodernists discussing the options which a judge must choose from in deciding a case; indeed, they almost never discuss case law at all, nor do they discuss the specific legal issues that perplex analytic thinkers, issues such as abortion, affirmative action, flag-burning, and privacy. This does not render their work useless, because there is always room for an external critique of any important

social practice, especially a practice as central to our way of life as the legal process. Nor does the lack of an internal perspective take away from the richness of the postmodernists' external critiques. However it does make their work somewhat one-dimensional, unless it can somehow be translated into the internal language of the law, where it can be used to affect outcomes in particular cases.

In contrast to the external strategy of the postmodernists, Anglo-American philosophers of law tend to argue about the propriety of particular court decisions and the justice of specific laws. Their focus is almost entirely on the act of judging, which they see from the perspective of the judge and the lawyers who are appearing before the court. Thinkers like Hart and Dworkin discuss the meaning and scope of the terms used by those within the legal system (that is, they discuss the judge's perspective on terms like "due process," "contract" and "liberty"), and they tend to see their project as a way of clarifying but not rejecting the meanings which these terms hold for the officials. Anglo-American thinkers have not been interested in the external project of showing how legal concepts are ideologically laden, nor are they interested in demonstrating that legal doctrine is hopelessly contradictory or indeterminate. Indeed, the adoption of these types of positions will be unhelpful to the players on the inside of the legal system who seek solutions to legal problems under the current arrangement. Analytic legal theorists tend to speak in a language which mirrors the terms used by lawyers and judges, and they often adopt this basic framework without subjecting it to external attack, as if the basic terms inside the practice of law are not in need of defense.

Now there is nothing *per se* wrong or problematic about taking an internal or

external perspective on the legal system. Indeed, there are advantages and disadvantages to both the internal and external perspective, and these will be discussed in more detail later in this manuscript. At this point I merely want to show that the tendency of the postmodernists to remain stuck in an external perspective has the effect of limiting the focus and power of their analysis of law, because they fail to make an engagement with the language games and mental states of the actors within the legal system. To understand this point, let me offer the following hypothetical situation to illustrate the advantages and disadvantages of an internal and external perspective.

Suppose that the California legislature has created a Beauty Panel which is charged with awarding the annual title of "Most Beautiful Person" to a male and a female resident of the State, who will receive a large cash award. Suppose further that the Panel is charged by statute with making a decision in light of four factors: bodily shape, facial features, personality, and fashion sense. Finally, suppose that the Panel is told to look at the past recipients in order to get an idea of the types of people who should be given the award during the present year. Past recipients in the male category include Robert Redford and Paul Newman.

Now suppose, if you will, that the Beauty Panel chooses Jay Leno, host of the Tonight Show, as the most beautiful man in California.

I want to explore two types of critiques which could be offered of this hypothetical decision by the Beauty Panel: an **internal** critique and an **external** critique. An internal critique could claim that Jay Leno does not deserve the title of Most Beautiful Person because there are other people who better satisfy the four criteria used

by the Panel. For example, a critic might claim that Arnold Schwarzenegger or Bruce Willis should have received the award instead of Jay Leno. Alternatively, a skeptical critic might claim that the Panel's criteria are so malleable and indeterminate that once a small field of plausible candidates has been chosen, there is no way to conclusively prove that one person is the best qualified, so any award will require a subjective choice by the judges among qualified candidates. Both of these criticisms are internal to the judging process---they accept the process of judging the Most Beautiful Person as a social practice, and they critique it **from the inside**.⁶

We might imagine an external type of critique in contrast to the internal critique. Imagine that a group of California residents from Muscle Beach in Los Angeles believes that true beauty is a function of sheer muscle mass, such that the most beautiful person in California will be the largest bodybuilder. This group believes that the criteria used by the Beauty Panel will rule out the truly beautiful candidates by giving weight to such irrelevant factors as facial features and personality. This critique is external to the

⁶ We might also imagine that there is a "philosopher of beauty" in the philosophy department at Stanford or Berkeley who has put forth a theory that beauty must be judged according to facial features, bodily shape, and personality (but not fashion sense). His theory, then, stresses three of the four criteria used by the Beauty Panel. Imagine that this theorist has written several articles about how to judge beauty using these three criteria. In that case, his work would be helpful from an internal vantage point, though it would suffer from neglecting the criterion of fashion sense, which must be taken into account by the panel. Still, his work is internal when compared to the work of, say, a philosopher who holds the skeptical position that there are no consistent criteria for beauty. My point is that a philosophical theory can be understood as internal to a practice if it matches or overlaps with the terms and concepts (the language games) used by those on the inside of the practice. This point is important, because we shall see that Anglo-American legal theory uses concepts which match the practice of law much closer than the terms and concepts used in postmodern legal theory.

judging process because it stands outside of the Panel's judging criteria (it rejects these criteria) and sees the judging process in its entirety as skewed and biased. The external critics think that the Panel members are using terms like "beauty" in a loaded, non-neutral way, even though the Panelists do not recognize the ideological component of their own decisions. The external critics from Muscle Beach would probably admit that the decisions of the Beauty Panel follow an internal logic (they might, for example, understand how Robert Redford could have received the award in a past year), but they remain convinced that the Panel's judgments fail to correspond to true or genuine beauty.

It should be clear that internal and external types of criticism are aimed at different targets. The internal critique is aimed at the inside of a social practice; the external critique tends to stand outside of that same practice to criticize the enterprise on a more global level. The internal critique often takes the rules as given and proceeds to work within them. In contrast, the external critique usually tries to re-write the ground rules of the practice itself, with the hope that the practice as rewritten will lead to different results (in extreme cases, there may be critics who think that an entire social practice cannot be reformed and should be abandoned altogether). These external views, of course, are positions that cannot be taken by the internal players in their official capacity, because to hold such views would destroy the practice in which they are engaged. For example, a judge on the Beauty Panel cannot simultaneously act as a judge and also hold that the whole idea of a beauty panel is absurd.

Notice that if a person is concerned with the inside of a practice and does not venture 'outside' as it were, she will find the external critique to be irrelevant, and vis

versa. In the hypothetical case set forth above, a member of the Beauty Panel will be nonplussed to hear the bodybuilders' claim that true beauty is a function of muscle mass; she will respond by saying, "What good does it do me to hear that beauty is equivalent to muscle mass?--I have to base my decision on the four factors which have been assigned to me by the State of California." Yet from the perspective of those external to the practice, the internalist debate will seem frivolous; the external critics in this hypothetical case might say to the judges on the Panel, "Who cares whether Jay Leno or Bruce Willis better satisfies the four criteria of Most Beautiful Person---the problem is that the criteria themselves are wrong; the Panel should be rebelling against the very use of such criteria instead of applying them without question."

To see the force of the internal/external distinction, let us shift our attention from the hypothetical social practice of the Beauty Panel to the very real social practice of judging a case under state law. I would like to consider first a standard criminal case, and then a dispute over the Constitutionality of flag-burning. Consider first the following criminal scenario, which I have pieced together from reported cases in the criminal law: A would-be burglar drills a hole through the lock on the door of a small business with the intention of gaining access to the safe inside.⁷ The police arrive immediately after the hole has been drilled, and they arrest the perpetrator and charge him with burglary, a felony count. At the court hearing, the defendant points out that burglary requires a **breaking and entering**, and "entry" requires complete bodily entry, which he failed to accomplish. Therefore, he says that he should be charged instead with incidental damage

⁷ See cases discussed under "Burglary," 13 *Am. Jur.* 2d, sec. 10, pp. 326-7 (1964).

to property, a misdemeanor. The prosecutor responds with an argument that the requirement of "entry" is satisfied when a perpetrator uses his body **or any instrument** to break the plane of the residence. Therefore, the intrusion of the drill into and through the front door constitutes a breaking and entering. Continuing with the hypothetical case, assume further that the court accepts the perpetrator's argument that complete bodily entry is required for a burglary to take place, and the court finds him guilty only of the misdemeanor count of property damage, dismissing the felony count.

Now a critic might attack this decision from an internal perspective by saying that the court reached the wrong decision under the law. A sophisticated internal critic might cite cases which hold that bodily entry is not required for a finding of burglary. He might also point out that the requirement of physical entry would have the absurd result that a thief who robs a house by using a long pole (thereby avoiding bodily entry) would not qualify as a burglar under the court's construction of the law. We can imagine a heated dispute taking place solely on the merits of whether the court followed the correct internal decision-making procedure in this case.

Now suppose that a person wanted to criticize the court's decision from an **external** perspective: how would she go about doing it? One avenue might be as follows: a radical Anarchist or Marxist might claim that private property is immoral, with the result that people arrested for burglary should be understood as freedom fighters in the war on capitalism. In effect, these "criminals" are fighting against an unjust system of exploitation. Therefore the perpetrator in our hypothetical case should not go to jail, nor should he be tried under a system of illegitimate bourgeois law: he should

be set free. A more sophisticated Marxist might admit that the defendant is technically guilty under the law as it presently exists, but she would quickly add that the law which presently exists is a sham, a mere reflection of class rule for the protection of property interests.⁸ The Marxist would find the internal debate ("Was it burglary or was it property damage?") too narrow because it wrongfully works from within the framework of the existing legal system without seeing that the entire system is unjust.

In our thinking about this criminal case we must keep in mind my earlier point that the external critique is rather useless to the debate which takes place inside the practice of judging, and vis versa. The Marxist argument sketched above may have philosophical merit, but its frame of reference is completely outside of the frame of reference of the internal players. The judges and lawyers who are working on this case must make use of the terms of the existing legal system, because that is what they do as judges and lawyers; to use this conceptual framework is simply what it is to be a judge or a lawyer. For these players to take a Marxist perspective would require them to abandon what they are doing, which would be something akin to a government shutting itself down as illegitimate. But just as the external critique is useless to the internal players, the debate which takes place on the inside (that is, the attempt to answer the question, "Is the man guilty of burglary or destruction of property?") is irrelevant to the

⁸ This attitude toward the law is expressed in The Communist Manifesto:
But don't wrangle with us so long as you apply, to our intended abolition of bourgeois property, the standard of your bourgeois notions of freedom, culture, law, etc. Your very ideas are but the outgrowth of the conditions of your bourgeois production [], just as your jurisprudence is but the will of your class made into a law for all...

In The Marx-Engels Reader, ed. Robert Tucker (New York: Norton, 1978), 487.

external critic who thinks that the entire classificatory scheme of the criminal law is unjust. Here, then, we have a fundamental disagreement about the legitimacy of the law, and the best that the Marxist can do is to try to convince the internal players that the terms which they are using (freedom, criminality, property) are ideologically loaded, for example by showing that criminality is caused by monopoly capitalism, or that true freedom of contract is impossible under the current arrangement. For the external viewpoint to have any bite, it must somehow be translated into the language which is being used on the inside of the practice, if only to reject the practice or show that the practice can be reconstructed. We will see that this process of translation can be done in some cases, but it is a delicate affair.

Examples of internal and external perspectives can be easily observed once the distinction has been made clear, although the distinction tends to get lost in the heated debates which surround legal controversies.⁹ To see this, consider what happens when a diverse assortment of thinkers argue about the Supreme Court's decision in Texas v. Johnson,¹⁰ which struck as unconstitutional a Texas law that criminalized flag burning.

⁹ I acknowledge that there may be instances in which there is some difficulty in determining whether a particular line of criticism is in fact internal or external. Yet while it does happen that the external/internal boundary is sometimes permeable or fuzzy, the distinction is meaningful enough to serve the purposes of this manuscript. In other words, the distinction is sufficiently robust to serve as a way of bringing out the difference between Anglo-American and postmodern legal theory. Later in the manuscript we will have to make sense of postmodernism's lack of engagement at the internal level in which legal decisions are made by judges and lawyers. Should this be seen as a failure of nerve (a failure to get into the arena and discuss legal issues on the terms used by lawyers and judges), or is there rather a strategic move at work here?

¹⁰ Texas v. Johnson, 109 S.Ct. 2533 (1989).

This controversial decision has come to prominence once again because various members of Congress have vowed to propose a Constitutional Amendment which makes flag-burning a federal crime. In a typical debate scenario (as played out recently, for instance, in the editorial pages of the Chicago Tribune) conservative lawyers make the claim that the proposed Amendment is not an abridgement of the First Amendment guarantee of freedom of speech because flag-burning is akin to incitement to riot (or "an outrageous act of arson") which is not protected speech under the First Amendment.¹¹ The liberal lawyers argue in response that if free speech means anything, it means that we must tolerate speech which we find offensive, even speech as noxious as flag-burning. Notice that both sides to the conversation assume the basic legitimacy of the legal system and the Bill of Rights, yet they differ on the results which should obtain when these agreed-upon laws are applied in the courtroom.

Now suppose that a sociologist enters the debate by pointing out that the only countries which have retained a prohibition on flag-burning are totalitarian states such as Iran and North Korea. Suppose she adds the following historical information: when a country is in decline economically, there tends to be a great deal of concern among politicians to protect the symbols that represent the country (such as flags or statues) instead of worrying about the reasons why people might be led to desecrate these symbols in the first place. The implication of the sociological comment is that the conservative obsession with criminalizing flag-burning is a smokescreen to avoid deeper

¹¹ See the editorial by Stephen Presser, "A Vote for Passing the Flag Amendment," Chicago Tribune (June 19, 1995) sec 1, p. 15, and the subsequent responses to the editors.

social issues such as racism and class conflict.¹² This would be an external comment on the question of flag-burning, because it takes no stand on, for example, the Constitutionality of a flag-burning statute, nor does it use the terms of the First Amendment debate (such as "ordered liberty," "compelling state interest," "fighting words," "marketplace of ideas," etc). But can the sociological point change the minds of the internal participants who are debating the Constitutionality of flag-burning? In one sense it cannot because it stands outside the legal language game, but in another sense it can because it might frighten some internal participants by comparing their proposed legislation to the laws of countries which they find to be un-American.

Postmodern legal theory is similar in its orientation to the sociological stance discussed above in that it tends to take place at an external level, to the neglect of the language game which is going on at the internal level. It is therefore subject to the general complaint that it is not couched in the terms which are used by the officials of the legal system, which means that it cannot affect the day-to-day practice of law directly, but must affect a change in a more subtle and indirect way.

In effect, then, the postmodernists think that the internal perspective takes too much for granted--it works **within** but fails to rigorously examine the foundations and ground rules of the existing legal system, with the result that there is a formalist and conservative bias built into it. The internalist tends to privilege the first-person account of those within the system (judges and lawyers), people who are disposed to seeing the

¹² For example, see Mark Tushnet, "The Politics of Constitutional Law," in The Politics of Law, ed. David Kairys (New York: Pantheon Books, 1990), 219-236.

system as a coherent, ordered set of neutral rules. This point of view can overlook the "outsider's" perspective which is at odds with the official picture from the inside of the practice, but may be just as illuminating.¹³ For example, there may be something important to learn from a **criminal's** perspective on the legal system. There may be cases in which a good judge (or legal theorist) must question the internal perspective by standing outside of it and taking a critical, external perspective which sees the legal system as rotten to the core in some respects.

(i) Anglo-American Legal Theory tends to be Internal

I now want to substantiate my earlier claim that Anglo-American legal theory is largely conducted from an internal perspective while postmodern theory (like Marxism) takes an external vantage point. We can begin our analysis of the Anglo-American tradition with H.L.A. Hart's The Concept of Law, which is widely regarded as this century's most important treatise on the philosophy of law.¹⁴ Hart's project was to define the concept "law" and to determine the minimal requirements by which a set of

¹³ We must remember that even Nazi law can be seen as a coherent system of rules if viewed internally, yet it was morally repugnant when viewed externally. In this connection, recall H.L.A. Hart's insistence that the Nazi legal system was classifiable as a bona-fide legal system. See "Positivism and the Separation of Law and Morals," 71 Harvard L. Rev. 593 (1958). Hart's position was subjected to a heated critique by Lon Fuller, who argued that Nazi law lacked sufficient "inner morality" to earn the status of bona-fide law. See his "Positivism and Fidelity to Law--A Reply to Professor Hart," 71 Harvard L. Rev. 630 (1958).

¹⁴ Jeffrie Murphy and Jules Coleman, Philosophy of Law (revised edition) (Boulder, Co.: Westview Press, 1990), 26: "The Concept of Law is universally regarded as the most significant contribution to legal philosophy of the century."

social rules could be deemed a "legal system." Hart's project was framed as a response and supplement to the work of John Austin, a 19th Century British philosopher, and in order to understand Hart's legal theory we must first briefly examine Austin's view.

Austin argued that "law" should be understood, roughly speaking, as 'the coercive command of a sovereign backed by threat or force.'¹⁵ Austin defined a 'sovereign' as a person or set of persons who were habitually obeyed by a majority of the population but who were not themselves in the habit of obeying a higher authority. For Austin, the existence of a "law" is determined by an examination of the behavior and habits of a society: a "law" can be said to exist where there is a command, backed by force, issued publicly by a sovereign who is habitually obeyed. Austin took this position with the express purpose of distancing himself from the natural law tradition, which was the dominant tradition in jurisprudence at the time. Natural law thinkers such as Augustine and Aquinas held that a command or rule could be a genuine law only if it satisfied the demands of morality; immoral laws were deemed to be illegitimate violence dressed up as law, but were not laws in the genuine or proper sense of the term "law." Austin, writing in the Benthamite tradition of legal positivism, rejected the natural law position by claiming that the existence of law could be determined as a matter of fact by looking at human behavior (by looking at whether a person or group of persons are habitually obeyed by a majority, whether they issue commands backed by threats, and so on), without reference to whether the purported 'law' was morally sound. In reaction to

¹⁵ John Austin, The Province of Jurisprudence Determined (1832), reprinted in Philosophy of Law (5th ed.), eds. Joel Feinberg and Hyman Gross (Belmont, CA: Wadsworth, 1995), 31-42.

Aquinas' claim that 'An unjust law is no law at all,'¹⁶ Austin held that "the existence of law is one thing, its merit or demerit is another."¹⁷ Austin, then, was the first major legal philosopher to make the obvious but essential point that an immoral law is still a law.

Hart agreed with Austin's positivism (that the determination of law should be kept separate from questions of morality) but Hart disagreed with Austin's behavioristic, third-person account of law as a function of habits and obedience. Specifically, Hart felt that Austin's third-person account forced him to wrongfully characterize a legal system as a set of sanctions. This characterization (which fits criminal law better than civil law) assumes the perspective of an external observer looking at the legal system **from without**, such as the perspective of an anthropologist who sees a tribal legal system as a list of punishments enforced by tribal leaders. This approach misses the **internal** perspective by which people see a legal system not merely as a set of commands or sanctions that are issued from above, but as a system of rules which enables them to behave in an orderly way. Hart's classical example to illustrate this point is the example of the third-person observer (say, a foreign anthropologist) who examines the behavior of motorists at a stoplight. After a short period of observation, the anthropologist will soon be able to make a statement from the third-person perspective about behavioral

¹⁶ St. Thomas Aquinas, "The Essence of Law," in Introduction to St. Thomas Aquinas, ed. Anton Pegis (New York: Random House, 1948), 649: "As Augustine says, a law that is not just seems to be no law at all."

¹⁷ Quoted in H.L.A. Hart's "Positivism and the Separation of Law and Morals," 71 Harvard L. Rev. 593 (1958).

regularity at the stoplight, such as "There is a high probability that people will stop at the red light, and when they don't they will be chased by a car with flashing lights." Yet this approach misses the internal perspective by which the participants see the red light as a **signal** that they **ought** to stop the car, not merely as a **threat** that they will be punished if they do not stop. For Hart, Austin was wrong to see the legal system as a "gunman writ large," issuing warnings to the citizens that they will be sanctioned for particular actions.¹⁸ From the internal perspective, laws are obligatory social **rules** that have legitimacy because they have been passed by the legislature and are accepted as common standards of behavior.

Hart was insistent that a legal system should not be viewed only on the model of compliance with sanctions (from the outside, or externally, as it were), but also as a system of rules (from the inside, or internally):

A social rule [such as a law] has an 'internal' aspect in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behavior which an observer could record.¹⁹

In the typical scenario, people see the law as obligatory (because they see the law as a series of social rules aimed at collective ends), not as a set of externally imposed rules which they are obliged to obey because they will receive a penalty for non-compliance.

In his discussion of the proper methodology for legal theory, Hart argues that jurisprudence must take into account both the internal and external viewpoints:

¹⁸ The Concept of Law, 80; the term "gunman writ large" is also used by Hart in "Positivism and the Separation of Law and Morals."

¹⁹ The Concept of Law, 51.

One of the difficulties of any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define them out of existence.²⁰

Yet there is reason to doubt whether Hart followed his own advice, given his great emphasis on the internal aspect of rules to the exclusion of the external perspective. In making his famous assertion that law is a union of primary rules of obligation coupled with secondary rules of recognition, adjudication, and change, Hart tries to give treatment to both perspectives:

There are therefore two necessary conditions for the existence of a legal system. On the one hand those rules of **behavior** which are valid according to the system's ultimate criteria must be **generally obeyed**, and on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication **must be effectively accepted** as common public standards of official behavior **by its officials**.²¹

This recognizes that the existence of a legal system is both an external and internal matter: there must be a group of insiders or officials (however small in number) who regard the rules from the internal perspective, **and** there must be a group of individuals who obey these rules as an external matter regardless of whether they see the rules from the internal perspective.

But despite Hart's insistence on giving due consideration to the external component of social rules, his discussion of the legal process is almost entirely internal. For example, when Hart discusses the role of judges in the Anglo-American system, his discussion assumes the judge's perspective, untempered by third-person accounts of

²⁰ Ibid., 88.

²¹ Ibid., 112 (emphasis added).

decision-making which have been offered by sociologists, Marxists, feminists, and others who are less inclined to see the legal system from the perspective of its officials. In the final analysis, Hart echoes the commonly held judicial belief that the law is coherent, clear, and discoverable in most cases. Specifically, Hart argues that legal rules are necessarily worded in generalities so that they will apply flexibly to a broad variety of cases, and this "open-texture" quality of rules leaves room for an element of judicial discretion (indeed, judicial legislation) in cases where the law is unclear. By way of example, Hart cites a law prohibiting "vehicles" in public parks: there is a core meaning to the term "vehicle" which includes cars and motorcycles, yet there are cases which fall into the penumbra, such as mechanized wheelchairs and toy motor-cars.²² In addition to filling in the gaps in penumbral cases, judges are called upon to exercise discretion in determining the meaning of vague terms such as "fair rate" or "reasonable," although Hart insists that the majority of cases fall under the clear application of a pre-existing rule.

This is all fairly unobjectionable, except that Hart fails to see how judges will tend to fill gaps according to their own class and gender biases, how they have a stake in perpetuating the status quo, how they might be deluded about their own actions. He fails to see the way that the law perpetuates class conflicts, sexism, and racism, because he is concerned with the mechanics of judging from the perspective of judges and lawyers, who are not charged with the project of seeing the legal system from a critical, external perspective. In addition he never mentions the ideological function of law as

²² Ibid., 126.

a way of legitimating the status quo. The sole 'external' approach to the law which he discusses is Austin's theory, and he completely ignores the more powerful external theories offered by, say, Marx, Durkheim, and Weber.

Of course, it was never Hart's goal to provide a sustained critique of the Anglo-American legal system from the external perspective. His goal was broader---to find the key elements which enable us to meaningfully use such terms as "law" and "legal system." He accomplished this goal nicely, but his book was so influential that its first-person account became the accepted starting point for much subsequent legal theory. This can be seen in the perspective taken by Hart's successor at Oxford, Ronald Dworkin, who is currently the heir apparent to Hart's position as the leader in Anglo-American legal theory.

Dworkin's theory of law is rather complicated, but the central mission of his work (especially his early work) has been to critique Hart's conception of law as a system of primary rules linked by secondary rules. In the seminal essay, "The Model of Rules,"²³ Dworkin argued that Hart errs by supposing that judges merely look up the law and apply it to the fact scenarios brought before the court. Dworkin says that judges who are called upon to make legal decisions in hard cases (that is, cases in which there are precedents supporting both sides of the argument) tend to look beyond the formal rules of law toward overarching principles which stand above and control the application of legal rules. Now these principles (such as "No person may profit from his own misdeed") do not apply in an all-or-nothing manner like legal rules. A principle may

²³ Ronald Dworkin, "The Model of Rules," 35 U. of Chicago L. Rev. 14 (1967).

compete for control with various other principles in a single case, yet return to fight again in a different case. Therefore the law on a given subject is not a "plain fact" that can be looked up in a "rulebook" but instead requires a complicated interpretation of settled rules in light of shared moral principles. The task of the judge is to bring the settled law in line with the overarching shared principles, so that the legal principles fit and justify the settled law. The judge's restatement of the law as a set of rules guided by principles is labelled the "soundest theory of the law" on any given subject.²⁴

Dworkin's recent work states that the central task of legal theory involves interpretation; the judge must interpret the settled law in light of moral principles and commitments which run through the particular area of law as well as the legal system as a whole. The law is essentially a text that must be reconstituted, and the judge's task is to make this text coherent and consistent, like an author who is charged with the task of writing a new chapter for a chain novel. In his magnum opus, Law's Empire, Dworkin argues that 'the Law' on any given subject is a function of an interpretive act by a judge who is reconstructing the settled law as a coherent doctrine, making it the best it can be in light of our collective commitment to the principles of due process, equality, fairness, and integrity. Dworkin invokes a mythical judge, Hercules, who is able to perform this difficult task. As a judge, Hercules must assume (as a matter of methodology) that the law should be interpreted in its best light, that the law is or can be understood to be coherent, and that there is a theory or rationale running through the

²⁴ The "soundest theory of law" is discussed in Taking Rights Seriously (Cambridge: Harvard University Press, 1977), 66-7.

reported decisions in a particular area of law. Therefore, even if the case law is split on a given question, Hercules will choose the decision which provides the "right answer" by meshing with our commitments to integrity, equality, and due process. Notice, of course, that Hercules (who is, after all, a judge and not a sociologist or revolutionary) has an institutional duty to see the settled law as a coherent doctrine. **Non-judges and non-lawyers do not** have this institutional duty to see the law as settled and coherent; from their third-person, non-participant perspective, they are free to see the law as chaotic, contradictory, and irrational. One question which we might ask is why Dworkin insists on taking the internal view, given that (as a philosopher) he has no institutional duty to do so.

Like Hart, Dworkin pays lip service to the need for both an external and internal perspective on the legal system:

Both perspectives on the law, the external and the internal, are essential, and each must take account of the other.²⁵

Yet Dworkin is somewhat shrill in his rejection of external, third-person accounts of law:

Theories that ignore the structure of legal argument for supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so their explanations are impoverished and defective.²⁶

Dworkin goes on to say that his work "**takes up the internal, participants' point of view**"---"**We will study formal legal argument from the judge's viewpoint.**"²⁷

²⁵ Law's Empire, 13-14.

²⁶ *Ibid.*, 14.

²⁷ *Ibid.*, 14 (emphasis added).

According to Dworkin, this means that third-person considerations of history and class-consciousness are generally irrelevant. Dworkin's internal perspective rules out, as a matter of methodology, theories which do not privilege the judge's perspective, theories such as Marxism, radical feminism, Critical Legal Studies (CLS), and postmodernism, all of which cannot be applied by judges in their capacity as judges. Dworkin's rejection of external theory nicely illustrates the point which I made earlier to the effect that internal thinkers tend to see external theory as useless. Predictably, external theorists have responded to Dworkin by saying that his internalist perspective is problematic.

According to sociologist and legal scholar Alan Hunt:

The dominant tradition of contemporary legal theory is epitomised by H.L.A. Hart and Ronald Dworkin, who despite their other differences insist upon the adoption of an internalist perspective. [] Internal theories exhibit a predisposition to adopt the self-descriptions of judges or lawyers as primary empirical material []. There is thus a naive acceptance of legal ideology as legal reality. Internal theory is simply **too close to its subject matter**.²⁸

Hunt's point is that the internal approach (exemplified in Dworkin's statement that he is doing legal theory from the perspective of judges) requires a base-line acceptance of the concepts held by the internal players. For example, an internal approach will not have much use for the important sociological finding that the opinions of Supreme Court justices correlate with their political orientations and gender, because these insights are

²⁸ Alan Hunt, "The Critique of Law: What is 'Critical' about Critical Legal Theory?," in Critical Legal Studies, eds. Alan Hunt and Peter Fitzpatrick (Oxford: Basil Blackwell, 1987), 10.

external to the judging process: judges do not use this information when deciding cases.²⁹ The rejection of sociological data leads to some curious results. For example, given the statistical correlation of Supreme Court opinions with the Justices' political orientations and gender, one would think that Dworkin would be weary of writing from the perspective of the ideal, neutral Judge (Hercules) who is not affected by his gender or class. Now it seems obvious to many thinkers that judges' political convictions necessarily affect their decisions on controversial issues such as minimum wage laws, flag burning, or social welfare legislation. Of course, from an internal perspective, judges are not supposed to be influenced by these factors, because the judging process is supposed to be a neutral search for the best statement of the law. It is therefore no surprise that Dworkin's internal perspective fails to engage with, for example, the feminist claim that the law is gendered, nor does he engage at length with postmodernism or Marxism.³⁰

If we have established that Anglo-American legal theory is internally oriented (at least since Hart's work of the late 1950s), we should now examine the sense in which postmodern theory is external. The stage will then be set for a debate on whether legal theory should be internal or external, or whether it can, or should, take into account both perspectives, and how such a balance might be achieved.

²⁹ See, for example, Jeffrey Segal and Harold Spaeth, The Supreme Court and the Attitudinal Model (Cambridge: Cambridge University Press, 1993), 62-5.

³⁰ Dworkin does provide a critique of some themes in Critical Legal Studies, in Law's Empire, 271-5.

(ii) Postmodern Legal Theory tends to be External

I have engaged in a prolonged discussion of internal and external vantage points in order to provide a backdrop to my claim later in this manuscript that postmodern legal theory is hampered because it engages largely in an external critique to the neglect of the internal debates which take place among lawyers and judges. In this section I want to support my claim that postmodern theory takes place at the level of an external critique of the legal system. This point can be made simply and effectively by looking at the types of claims that have been raised by certain postmodern thinkers. For example, consider Nietzsche's claim that the movement toward equal rights is a symptom of "slave morality" and a leveling down of great individuals into the herd, the "botched and bungled."³¹ Whatever sense we want to make of this claim, it is certainly going to be of no immediate use to the players on the inside of the legal system who must decide cases and enact laws. Nietzsche's argument may be of some use to legislators in deciding whether to enact, say, welfare laws or affirmative action schemes (that is, they may have a Nietzschean conception of the Will to Power in the back of their minds when they are deciding whether to vote on a particular law), but Nietzsche's claim about "slave morality" is not couched in the language games used by judges and legislators, who speak in terms of Constitutional rights, compelling state interests, and balancing tests. Nietzsche, in other words, does not make claims about the rights and remedies available under the Constitution or state laws, so his work cannot be imported directly into those

³¹ See, e.g., Beyond Good and Evil (New York: Random House, 1989), sec. 219, pp. 147-8; On the Genealogy of Morals (New York: Random House, 1989), third essay, sec. 25, pp. 154.

legal controversies (for example, Nietzsche did not write about the proper role of the judiciary in interpreting documents such as the United States Constitution). If his work is to affect the legal system, it must do so in a very roundabout way, perhaps by functioning as a sort of reminder that our push toward equality might have an ugly underside, or by causing legislators to stand back and take a global, critical perspective on the legal system. In other words, Nietzsche's external critique must somehow be **translated** or **mediated** so that it can affect the internal practice of the law, perhaps by forcing a re-thinking of the foundational notions in the legal system (justice, property, mercy, punishment, the adversarial system, and so on).

For another example of an external claim, consider Lyotard's point that two legal systems can be incommensurate to the point where one system is silenced by the hegemony of the other system. Thus a claim by Native Americans that a mining company should not dig under an ancient burial site (because nobody can own or disrupt a burial site) will fall on deaf ears in an American court of law. In effect, the Anglo-American system excludes these type of "claims" as non-actionable because they are part of a different language game than the dominant game, which solves property disputes by looking at deeds, easements, and licenses. Lyotard thinks that we should be on the lookout for ways in which a dominant legal discourse silences the claims of certain groups (especially indigenous populations, wage laborers, and minorities) by refusing them a hearing, thereby giving rise to what Lyotard calls a "differend," a term which denotes a claim which is valid under a particular political or legal scheme but cannot be heard from the perspective of an alternative scheme. Thus the claim of wage laboreres

for non-alienating labor is a claim that cannot be heard on the current legal system (one cannot sue to ensure meaningful labor), so the claim falls silent in a court of law. This insight strikes me as powerful, but on another level it is just as useless to judges and lawyers as Nietzsche's claim about the pervasiveness of slave morality in the legal system. Lyotard's claim can have no direct effect on the legal arguments offered in courtrooms in the United States and England, especially since a "differend" is by definition a claim that cannot be given a voice under the existing legal system. Lyotard's work, then, cannot change the law **directly**, though it might lead indirectly to a change in the way judges and lawyers think about what they are doing. Again, the external message will have to be translated so that it can have some bite on the internal practice.

Do the postmodern thinkers realize that their work is almost exclusively external, and hence somewhat inapplicable to the internal debates of lawyers and judges? It would seem that the postmodern thinkers certainly understand the crucial difference between internal and external perspectives, and actually choose to stay on the external side. The best way to illustrate this point is by citing examples of real-life situations encountered by two particular postmodern thinkers (Foucault and Derrida), and by Marxist lawyers.

My first example is drawn from Foucault's life. As we shall see in Chapter Three, Foucault makes a complicated argument to the effect that the formal rights which citizens hold against the state in a democratic republic (such as rights to liberty, privacy, and property) are something of a smokescreen which distract attention from the unjust power relations which undercut these formal rights. That is, we live in a society in which people are proclaimed to be "free," yet they are subjected to endless coercive

practices in schools, factories, hospitals, prisons, and other venues in which they are normalized, classified, disciplined and punished. Furthermore, people are coerced into accepting "freely agreed upon" work situations (such as telemarketing) in which they are subjected to workplace monitoring which would seem to undermine the subject's rights to privacy and liberty. During a particularly radical phase in his life, Foucault suggested that we should turn away from formal rights toward "popular justice,"³² and in a televised debate with Noam Chomsky he suggested that "the idea of justice in itself" was an instrument of abuse in the wrong hands.³³ Here is a thinker, then, who wants to question (and perhaps reject) basic juridical concepts such as the right to autonomy, privacy, and property.

Yet a curious thing happened in 1977, when Foucault came to the defense of German lawyer Klaus Croissant, who was hiding in France after being sought by German authorities for illegally passing materials to a left-wing terrorist group. Apparently there was quite an uproar in France over the question of whether Croissant acted immorally in passing information to the terrorists. Now given Foucault's political activism, it was no great shock when Foucault came to Croissant's defense, but what was indeed surprising was the language of rights-talk in which Foucault couched his defense of Croissant:

There exists a right to have a lawyer who speaks for you, with you, who

³² Michel Foucault, "On Popular Justice: A Discussion with Maoists," Power/Knowledge (New York: Pantheon Books, 1980), 1-36.

³³ See the account in The Foucault Reader, ed. Paul Rabinow (New York: Pantheon Books, 1984), 3-7.

allows you to be heard and to preserve your life...This right is not a juridical abstraction, not is it some dreamy ideal; this right forms part of our historical reality and must not be erased from it.³⁴

Given his reluctance toward formal juridical concepts, there was an understandable incredulity engendered by Foucault's insistence on basic legal rights. How could it be that Foucault's work on law was so critical of the legal system as a whole, yet when faced with a concrete case he invoked the protections offered by this dreaded system?

My second example comes from an incident in Derrida's life which has come to be known as "The Derrida Affair."³⁵ In 1987 Derrida was interviewed by the French weekly Le Nouvel Observateur on the topic of Martin Heidegger's involvement with the Nazi party. The rights to the interview were later assigned by the French magazine to Columbia University Press, without Derrida's knowledge, so that the interview could be included in an anthology on the topic called The Heidegger Controversy, which was being compiled by Professor Richard Wolin.³⁶ The Heidegger Controversy was published in late 1991, and shortly thereafter Derrida came across a copy of it in a New York bookstore. For one reason or another he was very displeased to find that his interview had been included in the collection. Derrida then instructed his lawyer to send

³⁴ Michel Foucault, "Va-t-on extrader Klaus Coissant," La Nouvel Observateur (November 14, 1977), quoted in James Miller, The Passions of Michel Foucault (New York: Anchor, 1993), 297-8.

³⁵ See "L'Affaire Derrida Pits Theorist Who Founded Deconstruction Against Editor of Book on Heidegger's Role in Nazi Era," The Chronicle of Higher Education (February 17, 1993), A8.

³⁶ The book was originally published by Columbia University Press, but publication was halted after the initial run. The subsequent edition was published by MIT Press. For an account of the entire affair, see Thomas Sheehan, "A Normal Nazi," The New York Review of Books (January 14, 1993).

a letter threatening Columbia University Press with a lawsuit to enjoin a re-print of the anthology, which was selling well and was due to be released in paperback. In subsequent communications on the issue of whether Derrida was within his rights in claiming exclusive control over the interview, Derrida claimed that, "any competent lawyer will tell you that I am the only owner of the interview."³⁷

What is striking here is not merely the dubious nature of Derrida's claim to ownership of the interview with the French magazine---after all, why should Derrida be deemed the exclusive owner of the interview?---what is truly striking is Derrida's invocation of legal concepts such as "authorial intention" and "copyright" which he had spent years ridiculing as "logocentric" fictions. The supreme irony of "L'Affaire Derrida" is that Richard Wolin had personally attended seminars held by Derrida in the early 1980s in which Derrida proclaimed the absurdity of the ownership of texts under copyright laws.³⁸ Yet when Derrida found himself embroiled in a real-life controversy over a text, he reverted to the formalist legal language which he had previously ridiculed.

A final example comes from a Marxist-oriented handbook for Critical lawyers.³⁹ This book contains a series of articles on the question of how Marxist lawyers should structure their legal practice, given the orthodox Marxist position that rights are bourgeois fictions. In general, Marxism advocates the destruction of the legal system,

³⁷ Quoted in "L'Affaire Derrida...", A8.

³⁸ Wolin's description of the entire affair is set forth in the Preface to The Heidegger Controversy (Cambridge: MIT Press, 1993), ix-x.

³⁹ The Critical Lawyers' Handbook, ed. Ian Grigg-Spall and Paddy Ireland (London: Pluto Press, 1992).

which is seen as a mere vehicle for managing the affairs of the bourgeoisie. Two radical lawyers who contributed a short piece to the handbook pointed out that Marxist lawyers face a strange double-bind: On the one hand they are committed to what Engels called 'the withering away of the law,'⁴⁰ yet as lawyers they must operate from within a framework of rights:

[For Marxists,] Rights are seen as bourgeois myths, empty promises which are part of the existing hegemony and which place individualistic claims above the needs of the community. Yet the assertion and defense of rights is often the main activity of progressive practitioners.⁴¹

Marxist lawyers, then, must walk both sides of the street---they must hold that rights are "bourgeois myths," yet they are sworn to protect their clients' rights. But doesn't this seem hopelessly contradictory---how can one devote her life to the protection of rights which she holds to be "bourgeois myths?"

How are we to understand the double gesture employed in the three examples discussed above (drawn from Foucault, Derrida, and the Marxist lawyers)? How is it that Foucault wanted to question the value of rights, yet he defended Croissant's rights? How could Derrida ridicule the idea of copyright law, yet assert his own legal rights to possession of a text? How can Marxist lawyers think that rights are myths, yet stand up in court and defend their clients' rights? These examples might give rise to the cynical response that these people are hypocrites who advocate one course of conduct in theory

⁴⁰ Engels, Socialism: Utopian and Scientific, quoted in Christine Sypnowich, The Concept of Socialist Law (Oxford: Oxford University Press, 1990), 1.

⁴¹ Kim Economides and Ole Hansen, "Critical Legal Practice: Beyond Abstract Radicalism," in The Critical Lawyers' Handbook, 143.

but don't follow their own advice in practice.

This cynical response explains the actions of Foucault, Derrida and the Marxists by placing their actions in the worst possible light--by seeing them as selfish and contradictory people. But there is a different interpretation of their actions which places them in a better light while also offering a coherent explanation for their behavior. Specifically, we can say that the general theoretical views held by Foucault, Derrida, and the Marxists were external viewpoints on the legal system, whereas their particular actions were internal responses within the rules of the system. Taking Derrida as an example, we might say that Derrida holds the external view that the entire notion of intellectual property is philosophically untenable (there might be several reasons that he holds this view; perhaps he feels that texts are the result of a shared language which cannot be the private property of any single person or entity; perhaps he feels that all texts make reference to other texts, so no single text can be owned in a complete sense). Yet this external view does not logically necessitate the internal response that he should release all rights which he might have to his interviews. To be sure, there is something ironic about his simultaneous rejection of copyrights and his assertion of a right to a text, but we must keep in mind that these claims were made in different forums: the first claim was made in a philosophical forum (before the philosophical community, as it were) and the second was made in a legal forum (as a prelude to a court case). A similar double gesture would hold for an Anarchist who worked for the postal service: he would insist on his right to a steady paycheck while also believing that his employer (the government) has no right to exist. The examples from Foucault, Derrida, and the

Marxists show that a person can hold an external perspective on the legal system and yet switch approaches and utilize the terms and concepts used by the players inside the system.

The foregoing incidents illustrate the sense in which postmodern theory is by and large an external critique, yet the theorists seem aware on some level that there is also an internal side to the law (indeed, one question that we will want to explore is how these two perspectives can be mediated). I say that the postmodernism is "by and large an external critique" because there are instances in which the postmodern critique is difficult to classify. For example, there are cases in which a postmodern critique is external to the judging process but has broader implications which can affect the practice of judging. For example, consider Derrida's claim that texts are related to other texts (so-called "intertextuality") such that no text is fully closed and self-concealed within its own four corners ("there is no outside to the text"⁴²). If this claim were correct, and if it were adopted by a judge in a contract case, it might allow the judge to disregard or downplay the Parole Evidence Rule (that a written contract cannot be modified by prior or contemporaneous oral communications⁴³), so that the judge would be inclined to look beyond the face of the contract and allow evidence of oral communications which predated the contract. In this way, a general theory about language might have an effect on the internal reasoning process of the court. Yet in another sense this type of claim

⁴² Jacques Derrida, Of Grammatology (Baltimore: Johns Hopkins University Press, 1976), 158.

⁴³ See E. Allan Farnsworth, Contracts (Boston: Little Brown & Co, 1982), sec. 7.2.

cannot be considered "internal" because it does not dictate particular outcomes within the legal system, but rather acts as a guide or reminder that might shape the court's decisions now and again. We seem to be dealing in this case, then, with an external claim that can be translated into the internal practice of the law. Throughout this manuscript I will be performing a similar type of analysis, looking at various external viewpoints offered by the postmodernists and attempting to tease out the internal ramifications of their work.

2.2 Foundationalism and Anti-Foundationalism

Now that I have spent some time discussing my first concern with postmodern theory (its external perspective), I would like to turn to my second methodological concern, which is the postmodernists' radical distrust of foundations in ethics, politics, and law.

It is my contention that postmodern legal theory has arisen in response to a perceived crisis of foundations in classical jurisprudence. The crisis begins with the realization that the foundations (or what might be called the "grounds" or "first principles") that have been offered in support of the legal system are becoming increasingly untenable. The foundational concepts which are put into question include neutrality, justice, reason, history, nature, the social contract, God, the rational self, and the inherent autonomy of the individual. Postmodernism wants to problematize (and in extreme cases, reject) these foundations as if they no longer deserved the sanctity that has been lavished on them over the last few centuries. Therefore, postmodernism is typically **critical**--it seeks to expose the foundations of modern jurisprudence as

constructs or ideologies which parade as eternal verities. This project involves a sort of decentering and relativizing of such enduring legal conceptions as the legal subject, contract, mens rea (mental state), innate rights, property, consensus, and sovereignty.

The postmodernists are certainly correct that our legacy in legal and political theory is highly foundational, in that it tends to rely on a-historical, unempirical conceptions of human nature, reason, and truth. For example, in the Declaration of Independence, Thomas Jefferson justified the American Revolution by alluding to God, self-evident truths, natural laws, and the right to resist and abolish the government.⁴⁴ Indeed, the "founding fathers" of our country built the United States Constitution on the foundation of natural rights set forth by John Locke, including the rights to life, liberty, and property. About the same time, across the Atlantic Ocean in Germany, Immanuel Kant was arguing that a uniform faculty of reason was held in common by all men, and that this faculty of reason could be used as a grounding for republican government and the rule of law, including rights to liberty and property.⁴⁵ Kant's successor, G.W.F. Hegel, as well as Hegel's own successor, Karl Marx, would go on to argue that the iron laws of history could be used to ground a just political and legal system.⁴⁶ Shortly

⁴⁴ Declaration of Independence of the United States of America (1776), United States Code Service, Art. I-III, "Documents Antedating the Constitution," (San Francisco: Bancroft-Whitney, 1986), 1-2.

⁴⁵ Immanuel Kant, "On the Proverb: That May be True in Theory But is of No Practical Use," in Perpetual Peace and Other Essays (Indianapolis: Hackett Publishing Company, 1983), 77-8.

⁴⁶ Hegel claimed that "The history of the world is none other than the progress of the consciousness of freedom." In other words, history has an inner logic, as it moves through determinate stages. Lectures on the Philosophy of History (New York: Dover, 1956), 19. Marx's notion of the inexorable progress to communism runs through much

thereafter, in England, John Stuart Mill argued that liberal democracy could be firmly grounded in considerations of general utility.⁴⁷

To this day, the foundational legacy of Locke, Jefferson, Kant, and Marx is overwhelming. These great thinkers represent our modernist heritage in political and legal theory, and this heritage has an intellectual hegemony so powerful that we assume (almost without a second thought) that legal theory **must** begin with a deep grounding for the state and its laws. The modern, foundational approach demands that philosophers and legal thinkers rest their political and legal visions on absolute, non-empirical, non-revisable claims about human reason, truth, natural rights, utility, and/or history.

The beauty of the modern approach is that it provides a secure foundation for legal theory, an end to the nagging problem of infinite regress which haunts all efforts to establish a political or legal platform. To see the power of a foundational approach,

of his work, but is most succinctly stated in his letter to Joseph Weydemeyer, reprinted as "Class Struggle and the Mode of Production," in The Marx-Engels Reader, 220.

I should note that Hegel and Marx's status as modernists is somewhat cloudly. Hegel claimed, in pre-postmodern fashion, that the philosophy of law cannot rely on a-historical notions, but will instead reflect the society from which it emerges:

"As to the individual, everyone is the product of his time, and therefore philosophy is its time comprehended in thought. It is as silly to imagine that any philosophy could transcend its own time as that an individual could jump out of his time..."

The Philosophy of Right, in The Philosophy of Hegel (New York: Random House, 1954), 226. Marx's early work was characterized by quasi-metaphysical notions like "species being," yet his later work was intentionally derisive of metaphysics in favor of a scientific model.

⁴⁷ John Stuart Mill, Considerations on Representative Government, in The Philosophy of John Stuart Mill, ed. Marshall Cohen (New York: Modern Library, 1961), 408-9: "The ideally best form of government [] is attended with the greatest amount of beneficial consequences."

consider the controversy that has arisen over recent case decisions in which judges have ordered the administration of Norplant (birth control) as a condition for granting parole to mothers with a history of violence or drug abuse.⁴⁸ These decisions (the 'Norplant cases') were the subject of public outcry. The basic bone of contention was that the decisions by these judges violated the female defendants' fundamental right to procreate. This sounds fair enough, but the problem of regress raises its head when we ask where the fundamental right to procreate is grounded, given that it is not mentioned in the Constitution. We can answer this question by saying that the right to procreate is an implied fundamental right which piggy-backs on the rights enumerated in the Constitution.⁴⁹ But we can press the regress further by asking "What grounds the rights in the Constitution?" It is precisely at this point that we seemingly require some sort of backstop which prevents the endless regress of justifications. And here is where the modern approach steps in to provide the necessary backstop by positing a grounding in human nature or reason which ends the regress. Thus, in the Norplant cases, the critics ultimately argued that the judges not only failed to follow the letter of the law, but went so far as to violate the foundations underneath the law: natural rights, inherent human

⁴⁸ See Elyse Ravel Rosenblum, "The Irony of Norplant," 1992 Texas J. of Women and the Law 275 (1992)(citing People v. Johnson, Case No. 29390, Tulane County, CA, Superior Court, June 2, 1991, and State v. Knighton, Case No. 601619, Harris County, TX, 262nd District Court, October 5, 1991).

⁴⁹ The fundamental right to procreate is an implied right that was announced in Skinner v. Oklahoma, 316 U.S. 535 (1942), and affirmed in Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

autonomy, and human decency.⁵⁰ In other words, the grounding is found in a-historical notions which are held to anchor the principles of the legal system.

It is no exaggeration to say that this type of foundationalism has ruled ethics, political theory, and legal theory for hundreds of years, though there have been notable exceptions throughout the history of philosophy. We can find the ubiquitous modern approach in contemporary liberalism, in John Rawls' early work which describes a seemingly unencumbered ego in the Original Position, and in Alan Gewirth's attempt to ground liberal principles in basic premises about human agency.⁵¹ At the other end of the political spectrum, we can find the modern approach equally at home in conservatism, as in Francis Fukuyama's notion that liberal democracy represents the culmination and the *telos* of history, and in the natural law claim that homosexuality can rightfully be outlawed.⁵² We can even find the modern approach in radical positions, as in the Marxist complaint that capitalism destroys man's *inherent* species being.⁵³

We might usefully envision the **modern** approach to law and politics as a house

⁵⁰ See Catherine Albiston, "The Social Meaning of The Norplant Condition: Constitutional Considerations of Race, Class, and Gender," 9 Berkeley Women's Law Journal 9 (1994), arguing that the imposition of Norplant as a condition of parole infringes on "personhood and autonomy rights" and is an affront to "human dignity."

⁵¹ John Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971). Rawls' view has become much less foundational in his recent works, such as "Justice as Fairness: Political not Metaphysical," Philosophy and Public Affairs 14 (1985): 223-51; Alan Gewirth, "The Basis and Content of Human Rights," in Human Rights: Essays on Justification and Applications (Chicago: University of Chicago Press, 1982).

⁵² Francis Fukuyama, The End of History and the Last Man (New York: Free Press, 1992).

⁵³ Karl Marx, Economic and Philosophical Manuscripts of 1844 (New York: International Publishers, 1964).

built upon a foundation of first principles. At the bottom of the house we find the foundational notions about reason, nature, God, utility, history, autonomy, and the soul. At the higher level we find the political and legal structure of the just state, which most modern theorists (with the exception of Marx) see as a free-market participatory democracy with basic liberties and rights to due process, equality, and property. Keeping this analogy of the house and foundation, we could turn to any of the modern theorists to see how the foundation allegedly supports the higher structures. For example, Kant held that **reason** could provide a set of a priori necessary laws which could serve as the basis of the just state: "No one will doubt that the pure doctrine of Right needs metaphysical first principles;"⁵⁴ Jefferson held that democracy and liberty could be justified by reference to nature's laws; and Marx thought that historical materialism provided grounds for believing in the ultimate overthrow of capitalism and the rise of world-wide communism.

But if we no longer believe in the foundations in which we used to believe, doesn't the entire structure built upon the foundation fail? For example, can we support Jeffersonian democracy if we no longer believe in Jefferson's notion of natural law or God? Can we still hold that the Constitution serves as a foundational text for jurisprudence when we no longer believe that texts have stable meanings? What happens when we go so far as to question justice itself as a cause of the oppression which exists in our society, as some postmodern thinkers (such as Nietzsche and Foucault) want to

⁵⁴ Immanuel Kant, The Metaphysics of Morals (Part I: The Doctrine of Right, and Part II: The Doctrine of Virtue (Cambridge: Cambridge University Press, 1991), 124-5, 181.

do? What if we assert, following Lyotard, that consensus is "terroristic"? Once we lose the old foundations and become suspicious about justice and consensus, is there anything left upon which we can build a theory of justice? Postmodern theory is an attempt to call into question the classic foundations and to ask whether we can do without them. We shall have to see if these thinkers can erect a legal theory without these foundations, and we will have to ask whether some sort of foundations are necessary for legal theory to operate at all.

This, then, is the **postmodern** predicament: the grounds which have previously been offered in support of liberal democracy and its system of justice are no longer believable. In the postmodern era, the old foundations seem like after-the-fact rationalizations, ideological postulates, and more akin to mythology than philosophy. As Jean-Francois Lyotard (perhaps the seminal postmodern thinker) puts it, the condition of postmodernity is a condition of '**incredulity toward meta-narratives.**' We no longer buy into the grand stories which we have been told about human nature, God, the soul, history, and human emancipation.⁵⁵

As you will see, the postmodernists discussed in this manuscript adopt different strategies for coping with the loss of foundations. For Nietzsche, Foucault, and Lyotard, the loss of foundations leads to a turn (in varying degrees) toward aesthetics as a way of supporting political and legal positions. This "aesthetic turn" meets with limited success, I will argue. For Derrida, the loss of foundations leads to the adoption of a modified

⁵⁵ Jean-Francois Lyotard, The Postmodern Condition: A Report on Knowledge (Minneapolis: University of Minnesota Press, 1984).

Kantian approach based on Levinas' phenomenological notion of justice, an approach which I find equally problematic. Lyotard, too, turns to Kantian theory to explain how we can find universal rules to govern the disparate language games which we encounter in a pluralistic society. In each case, there is a retreat from the lack of foundations, as if this loss was simply too much to handle. The most fascinating part of postmodern legal theory is the struggle to overcome the loss of foundations without lapsing into nihilism, relativism, or conservatism. The problem of finding a new, non-metaphysical basis for the law is a perennial problem for all of the thinkers discussed in this manuscript. As Lyotard asks: "Where, after the metanarratives, can legitimacy reside?"

Now it should be pointed out that postmodern attack on foundations is aimed at a group of thinkers (Jefferson, Locke, Kant, Marx) whose approach is becoming less influential in political and legal theory. For example, the cutting edge of Anglo-American theory has distanced itself from the metaphysical foundations once offered in support of liberalism. For example, Rawls' recent work stresses that his liberal vision is "political, not metaphysical," in the sense that he purports to articulate principles of justice that apply to a society in which there is already an overlapping consensus in favor of democracy and equality, such as the United States, Canada, or England. His theory is not about the principles of justice which should be adopted by all humans qua participation in humanity, but only for those who are already situated in such a way that these principles are encoded within their basic belief structure. A similar approach is taken by Ronald Dworkin, who argues that the law must be determined with reference to political and moral conceptions held by our society at large, but these political and

moral conceptions cannot themselves be tested against some standard of objective morality. Dworkin even asserts that it makes no sense to speak, as the modern thinkers once did, about the sense in which, say, slavery is really wrong for all humans, as if "the injustice of slavery is part of the furniture of the universe."⁵⁶

In a sense, then, the postmodern critique of foundations has already been adopted by a few (but not all!) Anglo-American thinkers, who argue that we do not need "foundations" in the traditional sense of fundamental principles about human nature. The Anglo-Americans feel that the loss of traditional foundations is not fatal to legal theory because the contingent beliefs of the members of our community provide all the grounding that could be necessary for a vision of justice. But for the postmodern thinkers, political and legal theory cannot rest on the foundation of an overlapping consensus or shared moral principles, because these very concepts are themselves problematic. Thus we find in the postmodernists a radical and deep distrust of any foundations whatsoever (metaphysical or political). We need to ask whether this radical skepticism, when combined with the external perspective on the law, can give rise to a normative program for legal reform.

2.3 Positive and Negative Jurisprudence

In my assessment of what postmodern legal theory has to offer, I will be making use of the terms "**positive jurisprudence**" and "**negative jurisprudence.**" By the former

⁵⁶ See the discussion on slavery in Law's Empire, 80-1, and in A Matter of Principle, 172-3.

term I wish to designate any political or legal theory which provides a basis for judicial action and which outlines the basic structures of a just state. Typically, a positive jurisprudence will go further than this, specifying the demands of justice in particular legal conflicts such as abortion, affirmative action, privacy, and taxation. A list of thinkers who offer a positive jurisprudence would include Ronald Dworkin, John Finnis, H.L.A. Hart, John Rawls, and Richard Posner. All of these thinkers discuss the nature of law as a social phenomenon, and they specify how the law should be decided in particular cases. Their work is "positive" in the sense that they offer a normative guide to future action by legislators and judges. Although they are certainly critical of particular laws and legal decisions (for example, Dworkin rejects the Bakke decision while Posner endorses it), their work has a normative, constructive component.

By the term "negative jurisprudence" I designate a theory of law which is critical but does not offer a positive plan for action. The most blatantly negative jurisprudence can be found in the orthodox Marxist position that the state and the courts are merely a conduit for handling the affairs of the bourgeoisie, such that no justice can be rendered while the current legal system remains intact. Orthodox Marxists favor a situation in which the law ultimately withers away, which means that they cannot offer any pointers for building a better legal system in the present.

Now a radical skeptic might try to reject my claim that legal theory should be concerned with creating a positive jurisprudence. The skeptic might claim that a position in the philosophy of law should be measured solely by the insights which it generates, and not on the basis of whether it provides the framework for a just state or whether it

offers solutions to legal disputes. My response to the skeptic is that a positive jurisprudential program is essential for two reasons. First, if one wants to critique the existing legal system as a whole (or even to argue that a particular case was wrongly decided) then one can do this only by presupposing some sort of normative conception about what the law **should** be, or at least by presupposing some fundamental values which the law should foster. Now it is doubtless possible to offer what is sometimes called an 'imminent critique of the law' which points out that the law fails to live up to its own expectations, for example by showing that the law purports to value 'fairness' but nevertheless enforces unfair contracts. But even to take this stance one must suppose that this failure is correctable, and that a different legal arrangement could avoid this defect, and to make these claims requires a positive jurisprudence with a normative component. Secondly, legal decisions are usually made on the inside of the law by judges and lawyers, not from outside of the law by sociologists and revolutionaries. When it comes to particular issues (like abortion and affirmative action), we need arguments that can affect the law from the inside, arguments that can be understood by judges, lawyers, and legislators who need reasons for favoring one legal arrangement over another. And this requires a positive jurisprudence of some kind, if only to explain why, for example, abortion should be legal or why affirmative action should be allowed under the terms of the current legal system.

One of the central concerns of this manuscript is to investigate whether postmodern theory can give rise to a positive jurisprudence, or alternatively, whether it must remain an essentially negative jurisprudence. The latter would seem to be the case,

given that postmodern theory is externally oriented and radically anti-foundational. Perhaps, though, we can rescue the postmodern project from this charge by showing that it is concerned with questioning the boundary between internal and external perspectives, to show that Anglo-American style discourse is too narrow, that it should incorporate a broader questioning of basic notions of personhood, property, and liberty. And perhaps there is some method of translation by which the external insights of postmodernism can be translated or mediated into constructive proposals which will engage those who are operating on the internal side of the law.

In any event, we can only put the postmodern project in its best light if we understand it correctly. We turn, finally, to the lengthy discussion of particular postmodern thinkers, beginning with Nietzsche, the hugely influential thinker who Habermas recently described as providing "the entry into postmodernity."⁵⁷

⁵⁷ Jürgen Habermas, The Philosophical Discourse of Modernity (Cambridge: MIT Press, 1987), 83.

CHAPTER 3

NIETZSCHE'S LEGAL THEORY AS A CRITIQUE OF NATURAL LAW THEORY

There has been a recent surge of interest in Nietzsche, not only among philosophers and literary theorists, but among legal scholars.¹ Nietzsche's growing popularity in legal circles is somewhat surprising, considering that Nietzsche did not present anything resembling a systematic philosophy of law,² and is generally thought

¹ Prominent recent work on Nietzsche includes Richard Weisberg's "Text into Theory: A Literary Approach to the Constitution," 20 Ga. L. Rev. 936 (1989) and The Failure of the Word (New Haven: Yale University Press, 1984); Phillippe Nonet, "What is Positive Law?" 100 Yale L. J. 667 (1990); Peter Berkowitz, "On the Laws Governing Free Spirits and Philosophers of the Future: A Response to Nonet." 100 Yale L. J. 710 (1990); Gerald Frug, "Argument as Character," 40 Stan. L. Rev. 869 (1988); and Gillian Rose, Dialectic of Nihilism: Post-Structuralism and Law (Oxford: Basil Blackwell, 1984). A recent LEXIS-NEXIS search on Nietzsche indicated that nearly three hundred law review articles have discussed or cited Nietzsche in the last ten years.

² The 400-page index to The Complete Works of Friedrich Nietzsche indicates that the topic of law is addressed only eleven times throughout the collected works. See Index to the Complete Works of Friedrich Nietzsche, compiled by Robert Guppy (New York: Russell & Russell, 1964), 160. Even more telling is the fact that these few references to law are spread throughout various works, indicating that Nietzsche did not provide a sustained analysis of law in a single text. Given Nietzsche's meager output, his thoughts on law cannot be fruitfully compared to the classic works of analytic jurisprudence, such as John Austin's The Province of Jurisprudence Determined in Lectures On Jurisprudence (London: John Murray, 1873); H.L.A. Hart's The Concept of Law (Oxford: Oxford Univ. Press, 1961); Lon Fuller's The Morality of Law (New Haven: Yale University Press, 1964); and Ronald Dworkin's Law's Empire (Cambridge, MA: Harvard Univ. Press, 1986). In this article, however, I take the position that a Nietzschean theory of law can be formulated despite the fact that Nietzsche did not present a totalizing, systemic analysis of law.

to have been a legal nihilist who denied the existence of basic human rights.³ So how can we explain the interest in Nietzsche?

I would suggest that the recent focus on Nietzsche can be explained as the result of two burgeoning trends in legal scholarship: (i) the increased attention being given to postmodernism and post-structuralism, especially in the form of deconstruction; and (ii) the focus on non-foundational, critical, piecemeal approaches to law. With regard to the recent interest in deconstruction, it is useful to remember that the European purveyors of deconstruction are known as "Neo-Nietzscheans"⁴ because the method of deconstruction has been traced back to Nietzsche.⁵ With regard to non-foundational

³ I use the term "legal nihilism" to designate the position that there is no basis for asserting the moral superiority of one law over another law; that disagreements about law are merely disguised political disagreements; and that there can be no right (or even 'better') answers to legal questions. For a further discussion of legal nihilism, see Brian Leiter, "Intellectual Voyeurism in Legal Scholarship," 4 Yale J. of Law and Humanities 79 (1992); and Joseph Singer, "The Player and the Cards," 94 Yale L. J. 1 (1984). The notion that Nietzsche rejects basic human rights can be found in Andre Mineau, "Human Rights and Nietzsche," History of European Ideas 11 (1989):877-882.

⁴ See The New Nietzsche, ed. David Allison (Cambridge, MA: MIT Press, 1985); The Fate of the New Nietzsche, eds. Keith Ansell-Pearson and Howard Caygill (Aldershot: Avery Publications, 1993), 1-10.

⁵ Jacques Derrida's debt to Nietzsche is acknowledge in Spurs: Nietzsche's Styles (Chicago: Univ. of Chicago Press, 1979). For a discussion of Nietzsche's influence on deconstruction and post-structuralism generally, see Madan Sarup, An Introductory Guide to Post-Structuralism and Post-Modernism (Athens, GA: Univ. of Georgia Press, 1993), 45-47; and Nietzsche as Postmodernist, ed. Clayton Koelb (Albany, NY: SUNY Press, 1990). One of Derrida's Anglo-American expositors gave the following description of Nietzsche's influence:

More than any other philosopher in the Western tradition, Nietzsche pressed up against the limits of language and thought which Derrida attempts to define. He anticipates the style and strategy of Derrida's writings to a point where the two often seem engaged in a kind of uncanny reciprocal exchange.

Christopher Norris, Deconstruction: Theory and Practice (London: Methuen & Co.,

approaches, Nietzsche is often touted as the first post-metaphysical thinker and the father of postmodernism.⁶ His work seems to support the growing interest in non-foundational approaches to law, including legal pragmatism⁷ and critical legal studies.⁸

But while the interest in Nietzsche's overall philosophic program is entirely understandable, legal scholars who are interested in Nietzsche must at some point come to grips with the fact that Nietzsche simply did not write very much on the subject of law. His few references to law and justice are scattered throughout his many works, but they are not really systematized into any organized thesis. He generally approached the law in a piecemeal fashion, using scattered aphorisms to address disparate legal issues, such as criminal law, equal rights, and debtor/creditor relations. To be sure, he had a few sustained discussions on law-related issues, such as his discussion of the origin of justice in On The Genealogy of Morals, and his comments on Hindu law, and the

1982), 57.

⁶ Stephan A. Erickson, "Nietzsche and Post-Modernity," Philosophy Today 34(2)(4)(1990): 175-179.

⁷ For the notion that Nietzsche might be read as a pragmatist, see Richard Rorty, Essays on Heidegger and Others (Cambridge: Cambridge Univ. Press, 1991), 2-5, and "What Can You Expect From Anti-Foundationalist Philosophers?: A Reply to Lynn Baker," 78 Va. L. Rev. 719 (1992). See also Maudamarie Clark, Nietzsche on Truth and Philosophy (Cambridge: Cambridge Univ. Press, 1990), 2-3 (citing various authors who have interpreted Nietzsche as a pragmatist). For a discussion of legal pragmatism, see, e.g., Symposium on the Renaissance of Pragmatism in American Legal Thought, 63 So. Cal. L. Rev. 1569 (1990), especially Richard Posner's "What Has Pragmatism to Offer Law?" Ibid. at 1653.

⁸ For the relation between critical legal studies and legal nihilism, see P. Goodrich, "Law and Modernity," 49 Modern L. Rev. 545 (1986), and Ted Finman, "CLS, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington's River," 35 J. of Legal Education 180 (1985).

criminal element, in The Anti-Christ. But I would estimate that the topic of law (broadly construed) occupies certainly no greater than one-half of one percent of Nietzsche's writings.⁹

The lack of specific textual support on the issue of law requires us to admit that Nietzsche did not present a systematic legal philosophy. This means that if we want to formulate a Nietzschean theory of law, we must pass beyond his limited discussions of law itself, and draw from his general approach to other, related philosophic issues, such as his attack on metaphysics, foundational epistemology, and Christian ideals. This is a tricky move because it looks beyond Nietzsche's specific remarks on law and thus takes us somewhat far afield from specifically legal matters. However, I think that this move is necessary if we are to get something akin to a 'Nietzschean theory of law.'

My reading of Nietzsche's comments on law and law-related issues is that Nietzsche's approach to law is best understood as a critique of legal foundationalism in

⁹ Nietzsche's few comments that bear more or less directly on law or legal issues (broadly construed) can be arranged in the following chronological order: Human, All Too Human trans. R.J. Hollingdale (Cambridge: Cambridge University Press, 1986)("HAH") vol. I #92, 459, vol II, pt 1 #9, pt 2 #26; Daybreak trans. R.J. Hollingdale (Cambridge: Cambridge University Press, 1982)("Dawn") #14, 20-1, 68, and 112; The Gay Science trans. Walter Kaufman (New York: Random House, Vintage Edition, 1974)("GS") Bk I #43, Bk II #59, Bk III #109, 117, Bk IV #291; Thus Spoke Zarathustra trans. Walter Kaufman (New York: Penguin Books, 1954)("TSZ") pt. III, #12; Beyond Good & Evil trans. Walter Kaufman (New York: Random House, 1966, Vintage Edition, 1989)("BGE") #164 and 188; On the Genealogy of Morals trans. Walter Kaufman (New York: Random House, 1967, Vintage Edition, 1989)("GM") at book II, #5-12; Twilight of the Idols trans. R.J. Hollingdale (New York: Penguin Books, 1968)("TI") #45, 48; The Anti-Christ trans. R.J. Hollingdale (New York: Penguin Books, 1968)("AC") #57; and Will to Power trans. R.J. Hollingdale and Walter Kaufman (New York: Vintage Books, 1968)("WTP") #204, 279, 629-632, 889, 957. When these few sections are placed against the sum total of Nietzsche's prodigious output, it is apparent that he did not devote a great deal of time to the question of law.

general, and natural law theory in particular. In this chapter, then, I attempt to formulate a Nietzschean critique of natural law theory, despite the fact that Nietzsche had comparatively little to say on this topic. I argue that it is possible to use Nietzsche's few extended comments on law and law-related issues to create a three-pronged attack on natural law theory. First, Nietzsche presents an epistemic skepticism which rules out the possibility of natural law. Second, Nietzsche presents a linguistic theory that exposes natural law to be a human fiction, a life-preserving and perhaps useful convention. Third, and most importantly, Nietzsche presents a genealogical analysis of law which casts doubt on the notion of inherent rights. So Nietzsche's approach to law is primarily, but perhaps not exclusively, critical: he wants to de-bunk the idea that law can be founded on metaphysical or epistemic claims about nature, pure reason, self-evidence, or Christian morality.

After explaining Nietzsche's critical attitude toward natural law theory, I want to explore whether and to what extent it is possible to use Nietzsche's work to generate a positive jurisprudence, that is, a theory of how the law **should** operate in a just state. This claim is difficult in light of the many passages in which Nietzsche ridicules democracy, the rule of law, the state, socialism, and feminism. Still, I think that it is important to make an effort to see if a positive program is possible for Nietzsche, although I readily admit that such an interpretation is possible only at the expense of discounting and downplaying some of Nietzsche's more outrageous comments on political matters. Using this method of interpretation (which has its detractors), I make the argument that Nietzsche's writings **can** be interpreted to provide a positive jurisprudence

which supports a provisional, rights-based, non-foundational, and experimental approach to the law. I argue that Nietzsche is not a legal nihilist, because he recognizes that there can be (provisional) grounds for choosing one legal scheme over another, namely the degree to which it is life-affirming and power-generating (in furtherance of the Will to Power).

There are, however, some problems with this formulation of a Nietzschean positive jurisprudence. First, such a reading of Nietzsche is made possible only by taking Nietzsche's actual work in directions that were probably not anticipated by Nietzsche himself--therefore, this reading of him is somewhat strained. Secondly, the positive jurisprudence which we ultimately derive from Nietzsche is not very powerful in terms of specifying the parameters of the just state, nor does he provide clear solutions to particular legal problems (abortion, affirmative action, privacy). Therefore I conclude that any theory of law which can be derived from Nietzsche will not be a large-scale, full blown theory of law, but is rather a sort of attitude or posture toward law and legal theory. If we see Nietzsche as offering not a grand theory but a set of reminders for a particular purpose, then we can place his work in a plausible light and see him as making an important but limited contribution to legal theory. And this view of Nietzsche is certainly more charitable than the traditional notion that Nietzsche was a nihilist or, worse, a fascist.

I propose to begin my discussion with an explanation of natural law theory, and I will then pass to each prong of Nietzsche's three-part critique of natural law. In the final sections I flesh out some of the details of a Nietzschean positive jurisprudence, and

I explore some potentially fatal objections to it.

3.1 The Basics of Natural Law Theory

Natural law theory typically encompasses three basic positions: (i) there are certain immutable rights and claims which belong to individuals prior to the advent of civil society; (ii) these basic rights and claims must be respected whenever people join together to form a civil society, because governments are legitimate to the extent that they are a mechanism for the preservation of these inherent rights; and (iii) the laws of civil society are commands of nature (or God) that can be determined by reason.¹⁰ For natural law theory, there is a necessary connection between law and morality, such that the test for a "law" is whether it conforms to the dictates of a pre-established, eternally binding morality. An immoral law is simply not a bona fide "law" in the true sense of the term, and it is not morally binding.¹¹

The concept of natural law goes back at least as far as Aristotle's distinction

¹⁰ Raymond Belliotti, Justifying Law (Philadelphia: Temple Univ. Press, 1992), especially chapter 1, "The Immanent Moral Order and Law's Objectivity: Natural Law." For a summary of some of the basic tenets of natural law theory, see Jeffrie Murphy and Jules Coleman, Philosophy of Law (revised edition)(San Francisco: Westview Press, 1990), 11-15.

¹¹ This proposition was most clearly expressed in St. Augustine's dictum that "a law that is not just is not a law." St. Augustine, On Free Choice of the Will, BkI, ch5, #33-4 (Indianapolis: Bobbs-Merrill Co., 1964), 11. Augustine's pronouncement was picked up by St. Thomas Aquinas, who paraphrased it thusly: "A law that is unjust would seem to be no law at all." See Summa Theologica, partially reprinted in Philosophy of Law (4th edition), eds. Joel Feinberg and Hyman Gross (Belmont, CA: Wadsworth Publishing Co., 1991), 24.

between natural and legal justice,¹² but it received its first elaborate treatment from Cicero:

There is in fact a true law--namely, right reason--which is in accordance with nature, applies to all men, and is unchangeable and eternal....To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible....It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples, and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor.¹³

This early formulation of natural law can be seen at work in the natural law theories espoused by St. Augustine and St. Thomas Aquinas, who of course added Christian elements to the theory.¹⁴ For many commentators, the definitive version of natural law theory was set forth in St. Thomas' Summa Theologica.¹⁵ St. Thomas saw the natural law as containing an eternal and unchanging set of first principles that were discoverable by reason and applicable to all men regardless of their circumstances. The source of the

¹² Aristotle, Nicomachean Ethics, #5.7.1134b, and Rhetoric, 1.13.1373b, in The Complete Works of Aristotle, ed. Jonathan Barnes (Princeton: Princeton Univ. Press, 1984). For a more detailed discussion, see Yves Simon, The Tradition of Natural Law (New York: Fordham Univ. Press, 1965), 131-2.

¹³ Cicero, De Re Publica, partially reprinted in Robert M. Wilkin, "Cicero and the Law of Nature," in Origins of the Natural Law Tradition, ed. Arthur Harding (Dallas: Southern Methodist University Press, 1954), 23-4.

¹⁴ The Christian version of natural law theory, which reached fruition in St. Thomas, was a melange of Platonic, Aristotelian, and Biblical sources. See Josef Fuchs, Natural Law (New York: Sheed and Ward, 1965). For a compendium of Biblical law, see The Law in the Scriptures, ed. Edward White (Wm. W. Gaunt & Sons, 1990).

¹⁵ St. Thomas Aquinas, Summa Theologica, in The Basic Writings of Saint Thomas Aquinas, ed. Anton Pegis (New York: Random House, 1945). For a more detailed treatment, see the introduction to St. Thomas Aquinas, The Treatise on Law, ed. and intro. R.J. Henle (Notre Dame, IN: Univ. of Notre Dame Press, 1993).

natural law was divine will, discoverable through God-given reason:

All law proceeds from the reason and will of the lawgiver; the divine and natural law from the reasonable will of God; the human law from the will of men, regulated by reason.¹⁶

Man-made "human law" (what we now call "positive law") was deemed morally acceptable only when it mirrored the natural law, and any attempt to surpass the realm of natural law was deemed immoral. When a man-made law runs afoul of the natural law (say, by imposing unequal burdens or excessive punishments), there are grounds for disobeying the law, because a law that is unjust is not really a law.¹⁷ This last point is clearly the chief advantage of natural law theory, namely that it provides a transcendental grounding for basic civil rights and liberties, and thereby creates a standard by which one can reject oppressive laws. In addition, natural law can be used to generate the basic framework for the just state, because that state will be such that it respects the fundamental rights to security, freedom, and property.¹⁸

¹⁶ St. Thomas Aquinas, in The Treatise on Law, 63.

¹⁷ St. Thomas Aquinas, Summa Theologica, Ia(2ae)(95)(2), in Philosophy of Law, eds. Feinberg and Gross, ibid. at 24. For more on this point, see Passerin d'Entreves, Natural Law (London: Mayflower Press, 1951), 42-44.

¹⁸ Of course, the perennial problem of natural law theory is that there are difficulties in determining the exact tenets of the natural law, and there seems to be no way to resolve a disagreement about whether a given law is in accord with the natural law. In fact, it seems that natural law could supply grounds to justify slavery or oppression, on the theory that such oppression is in accordance with natural law. As Alf Ross explains:

Is it nature's bidding that men shall be as brothers, or is it nature's law that the strong shall rule over the weak, and that therefore slavery and class oppression are part of God's meaning for the world? Both propositions have been asserted with the same support and the same "right";....Like a harlot, natural law is at the disposal of everyone. The ideology does not exist that cannot be defended by an appeal to the law of nature.

The natural law position was well-entrenched in Nietzsche's time, although it was by that time becoming increasingly couched in terms of social contract theory. The French and American revolutions were greatly influenced by the social contract version of natural law theory, and Nietzsche spoke occasionally about these revolutions.¹⁹ Although Nietzsche did not comment at length on social contract theory, it is clear that he repeatedly rejected the idea that society could be founded on a social contract.²⁰

Under the social contract model of natural law theory, people are endowed with certain basic rights as individuals solely by virtue of their status as humans endowed with reason. These rights include, at a minimum, rights to liberty, property, and security. When people come together to form a civil society, each forfeits his natural right to punish others, and vests the state with the exclusive right to punish wrongdoers. In exchange, the individual receives state protection from the violence of others. Since the state is basically a voluntary association, there is a tacit consent to the imposition of law by the authorities, but if the law fails to respect basic rights, it is no longer binding. Under this formulation, the just state is the state which most faithfully respects basic,

Alf Ross, On Law and Justice (Berkeley: University of California Press, 1974), 259-261.

¹⁹ BGE, book II, #38, p. 49; HAH, #463, p. 169.

²⁰ In On the Genealogy of Morals, Nietzsche writes:

I think that the sentimentalism which would have [the state] begin with a "contract" has been disposed of. He who can command, he who is by nature "master," he who is violent in act and bearing--what has he to do with contracts! (GM,II,#17,p86).

For more on Nietzsche's rejection of the social contract model, and on his relationship to Rousseau generally, see Keith Ansell-Pearson, Nietzsche Contra Rousseau: A Study of Nietzsche's Moral and Political Thought (Cambridge: Cambridge Univ. Press, 1991), 146-8.

natural (God-given) rights.²¹

This position is clearly at work in the Declaration of Independence, which refers to "the Laws of Nature" and "Nature's God," and enumerates certain natural rights:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.²²

As evidenced by the Declaration, natural law theory tends to be foundational because it presupposes that the natural order has a definite, discoverable teleology. Typically, this implies that God has created the world such that all beings (including man) have an inherent purpose which is discoverable by the exercise of reason. The legal order, then, is founded upon an assumption about (human) nature itself, namely that it has laws and that these laws can be discovered with certainty once and for all:

Initially, natural law theories involved more than the simple claim that the legal order was to be understood as essentially connected with the moral order; also involved was a certain claim about the nature of the moral order itself. On this view, the moral order (or at least that part of it not

²¹ For an explanation of how the concept of 'natural law' gave birth to the concept of 'natural rights,' see d'Entreves, Natural Law, *ibid.* at 60: "On the eve of the American and French revolutions, they theory of natural law had been turned into a theory of natural rights." See, also, Henle's introduction to The Treatise on Law, *ibid.*, at 93:

Today natural law theorists accept the modern rights language and have no difficulty in deriving human rights from their foundations in St. Thomas and in other earlier natural law theorists.

For more on the transformation of natural law into natural rights, see John Finnis, Natural Law and Natural Rights (Oxford: Clarendon Press, 1980), 198-210.

²² Declaration of Independence of the United States of America, July 4, 1776. My discussion of natural rights in the American context borrows from Louis Henkin, The Age of Rights (New York: Columbia University Press, 1990).

dependent on divine revelation) was viewed as a part of the order of nature---moral duties being in some sense 'read off' from the essences or purposes fixed (perhaps by God) in nature.²³

This means that the specific substantive provisions of the natural law are largely unchangeable, because certain rights (freedom, property, security) are derived from an unchanging conception of what it is to be human. As a result, there is a certain static quality to the natural law. The natural law claim, then, comes down to this: over and above the physical laws of nature which describe how objects in nature actually behave, there is a moral law which governs how humans ought to behave, and this law can be deduced by reason.

3.2 First Critique: The Illusion of Natural Law

Nietzsche's thoughts on natural law are derived in part from his critique of natural laws (emphasis on the plural): Nietzsche's rejection of natural laws entails his rejection of natural law. To understand this argument, we must recall that Nietzsche denies the existence of unchanging laws of nature. For Nietzsche, "nature" and "law" are theory-laden interpretations, not ready-made patterns discovered in the world:

We find a formula to express an ever-recurring kind of succession of phenomena: but that does not mean that we **discover a law**.²⁴

Let us beware of saying that there are laws in nature.²⁵

Forgive me as an old philologist who cannot desist from the malice of

²³ Murphy and Coleman, Philosophy of Law, 13-15.

²⁴ WTP, #632, p. 336.

²⁵ GS, book III, #109, p. 168.

putting his finger on bad modes of interpretation: but "nature's conformity to law," of which you physicists talk so proudly, as though--why, it exists only owing to your interpretation and bad philology. It is no matter of fact, no "text," but rather only a naively humanitarian emendation and perversion of meaning, with which you make abundant concessions to the democratic instincts of the modern soul!²⁶

Nietzsche wants to deny that there is a pre-existing natural law written into the universe that needs only to be discovered, because for Nietzsche there are no rules to be discovered in nature. As he flatly states: "there is no rule of 'law'."²⁷ In his early work, Human, All Too Human, Nietzsche branded laws of nature as "superstition" and "myth":

'Law of nature' a superstition.--When you speak so rapturously of a conformity to law in nature you must either assume that all natural things freely obey laws they themselves have imposed upon themselves--in which case you are admiring the morality of nature--or you are entranced by the idea of a creative mechanic who has made the most ingenious clock, with living creatures upon it as decorations.--Necessity in nature becomes more human and a last refuge of mythological dreaming through the expression 'conformity to law'.²⁸

Nietzsche's central insight is that the seemingly immutable laws of nature do not really exist 'out there' as it were, in the ready-made order of things. Such laws are merely an interest-driven interpretation of events, one among a plurality of competing interpretations.²⁹ Of course, some interpretations are better than others, because they account for the data of experience better, are more internally consistent, and make better

²⁶ BGE, book I, #22, p. 30.

²⁷ BGE, book I, #21, p. 29.

²⁸ HAH, book II, #9, p. 216.

²⁹ GS, book V, #374, p. 356.

predictions. But even the best interpretation is still a human creation, a life-preserving convention, and should not be taken for a perfect mirror of the real:

"Truth" is therefore not something there, that might be found or discovered---but something that must be created and that gives a name to a process.³⁰

We err when we forget that our interpretations are useful conventions, and wrongly project them into the external world. In so doing, we mistake the "map" (the theory) for the "territory" (the real).

Nietzsche also wants to reject the natural law claim that "nature" can provide a basis for ethics. Nature, depending on how it is interpreted, can be used to justify tyranny as well as morality:

"Neither God nor master"--that is what you, too want; and therefore "cheers for the law of nature!"--is it not so? But as said above, this is interpretation, not text; and somebody might come along who, with opposite intentions and modes of interpretation, could read out of the same "nature," and with regard to the same phenomena, rather the tyrannically inconsiderate and relentless enforcement of claims of power.³¹

That is, while it is possible for someone like Thomas Jefferson to read natural law out of the fabric of human relations and find a right to life, liberty, and the pursuit of happiness, that is only an interpretation, not a discovery.

The notion here is that the natural law theorists have interpreted nature in a biased way in order to support their particular ethical and political program. The mistake of reading "nature" according to one's ethical beliefs is an error that goes back as least as

³⁰ WTP, #552, p. 298.

³¹ BGE, book I, #22, p. 30.

far as the Stoic admonishment to "live according to nature":

"According to nature" you want to live? O you noble Stoics, what deceptive words these are! Imagine a being like nature, wasteful beyond measure, indifferent beyond measure, without purposes and consideration...how could you live according to this indifference?³²

Nietzsche's point here is to deny that nature provides clues to an immutable moral code, but he also repeatedly warns against reifying one's theoretical models as if they were part of the ready-made order. His concern is that an interpretation will be mistaken for the text itself, so that the interpretation merges with the text, and all other interpretations are ruled out. This concern was voiced most forcefully in his comments on the French Revolution:

Noble and enthusiastic spectators from all over Europe contemplated it from a distance and interpreted it according to their own indignation and enthusiasms for so long, and so passionately, that the text finally disappeared under the interpretation--³³

So if Jefferson and other natural law theorists were to be intellectually honest, they would have to admit that the appeals to "self-evident rights" and "laws of nature" are interpretations, not 'text.' These are regulative ideas posited by natural law theorists in order to arrive at a justification for their already existing conception of the just state--- "nature" is interpreted in a way that gives support to their political vision. Here, the Nietzschean goal is to expose a dishonesty on the part of natural law theory: it purports to base the legal order on an investigation of (human) nature, yet the reverse is actually true, because it is the theory of law that determines the view of nature. The pre-decided

³² BGE, book I, #9, p. 15.

³³ BGE, book II, #38, p. 49.

political vision shapes the epistemic inquiry:

Indeed, if one could 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?³⁴

[Philosophers] are not honest enough about their work, although they make a lot of virtuous noise when the problem of truthfulness is touched even remotely. They all pose as if they had discovered and reached their real opinions through the self-development of 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.³⁵

The intellectual dishonesty arises when one thinks one has found a fixed and final interpretation that is the product of cold, disinterested reason. To be honest is to say, "We posit natural rights, despite the lack of evidence, in order to justify the democratic state, and we are willing to revise this postulate if the evidence warrants a revision or if we want to support a different conception of the just state." Instead, the natural law theorist wrongly presumes that the natural order has been decoded once and for all, leaving us with a final authoritative interpretation of human affairs.

‘ If Nietzsche is correct that there are no laws in nature and that man is constantly re-visioning and re-interpreting himself, then basic human rights cannot be grounded in a static conception of nature, reason, or God. Rather, rights can only be affirmed as a human creation, as a necessary life-affirming postulate. At bottom, we do not discover law and morality, but **create** it:

³⁴ BGE, book I, #6, p. 13.

³⁵ BGE, book I, #5, p. 12.

We, however, want to become those who we are--human beings who are new, unique, incomparable, who give themselves laws, who create themselves.³⁶

Yet the responsibility of creating a morality brings anxiety and fear, from which we retreat by denying that we create law, and insisting that the law must be discovered:

But up to now the [] law has supposed to stand **above** our own likes and dislikes: one did not actually want to **impose** this law upon oneself, one wanted to **take** it from somewhere or **discover** it somewhere or **have it commanded to one** from somewhere.³⁷

It is we who create the concept of "natural rights," then project this text onto the world (we 'naturalize' the text), and finally claim that we have discovered these rights in nature.³⁸ The best course of conduct is to be aware of this process, lest we forget that we have created these conventions out of our own need to preserve life, and can alter, change, or abolish these conventions if necessary.

The natural law theorist might respond to all of this by saying that natural law is prescriptive, not descriptive. It is not about the modes of human conduct which can be found in an empirical study of how people do behave, but rather, it specifies how we should behave given our capacity for moral reasoning. Nietzsche would no doubt

³⁶ GS, book IV, #335, p. 266.

³⁷ Dawn, #108.

³⁸ A similar point was made by Jeremy Bentham in his review of the French Declaration of the Rights of Man and of Citizens:

We know what it is for men to live without government----no government, consequently, no rights...[A] reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights;--a reason for wishing that a certain right were established, is not that right--want is not supply--hunger is not bread.

Jeremy Bentham, "Anarchical Fallacies," reprinted in Human Rights, ed. A.I. Melden (Belmont, CA: Wadsworth Pub. Co., 1970), 31-32.

respond that if the natural law theorist is making this claim (that natural law is prescriptive, not descriptive), then she must abandon the idea that natural law can be rooted in an interpretation of human behavior, in which case there is nothing very "natural" about the natural law.

But I think that Nietzsche's critique of natural law goes even deeper than these points, because he seems to reject the natural law notion that there is an unchanging human essence or core self which can serve as the primordial legal subject. Nietzsche's point here foreshadows the postmodern rejection of the so-called 'humanist' idea that the Cartesian 'cogito' is a natural datum which exists prior to, or below, social customs.³⁹ Instead, man is created and constituted as a being who differs from era to era; there is no common 'subject' or 'self' which can be used to generate a series of necessary moral laws. This is the sense in which man is continually "self-overcoming," such that we have no way of knowing what man will become in the future. There is no way to peel off the layers of culture to find a root essence of man beneath the contingent self, no way to find a core of 'humanity', an 'end-in-itself,' or transcendental self which can ground a system of laws:

[P]opular morality separates strength from expressions of strength, as if there were a neutral substratum behind the strong man, which was **free** to express strength or not to do so. But there is no such substratum; there is no "being" behind doing, affecting, becoming; the "doer" is merely a fiction added to the deed--⁴⁰

³⁹ For more on this point, see Keith Ansell-Pearson, "The Significance of Michael Foucault's Reading of Nietzsche," *Nietzsche-Studien* 20 (1991), 267-283.

⁴⁰ *GM*, book I, #13, p.45.

That is, political theory cannot be based upon speculation about how a person (considered as a moral substrate) would have behaved in a state of nature; there is no 'moral self' under the contingent self to serve as the subject for such an enquiry. In place of the natural law notion of the transcendental subject, Nietzsche proposes to ground the legal order in the fact that man is constantly revising himself and self-overcoming.

So to summarize Nietzsche's first critique of natural law theory, we cannot suppose that there are laws of morality "in nature" or deducible by reason, any more than we can suppose that there are laws of physics "in nature." To posit natural rights is to think "mythologically",⁴¹ and to mistake one's prejudices for eternal truths:

[Philosophers] are all advocates who resist that name, and for the most part wily spokesman for their prejudices which they baptize 'truths'.⁴²

We can safely say that Nietzsche's main enemy is the refusal to admit that one's postulates are fallible and interest-driven. Yet this is precisely what natural law theory often fails to do, on Nietzsche's reading.

3.3 Second Critique: Natural Law as Linguistic Error

If Nietzsche is correct that there is no natural law and no irreducible human rights, then he must account for the fact that we continue to speak as if these rights exist. I believe that the explanation for this phenomenon can be found in Nietzsche's theory of language, which can be augmented with some insights from the current debate over

⁴¹ BGE, book I, #21.

⁴² BGE, book I, #5, p. 12-13.

"rights talk." The basic idea here is that rights talk is the result of the sedimentation in language of grammatical and metaphysical errors. The language of rights is mired in bad modes of interpretation and metaphysical assumptions that date back to the beginnings of the Christian era. These time-honored (but mistaken) ways of talking and thinking have led us to believe that the words "natural law" and "natural rights" refer to discoverable entities, instead of being expressions for shifting power relations. In other words, our current rights-discourse actually makes us think that rights are discoverable things, instead of provisional postulates---rights have become reified.

Nietzsche's thoughts on language are set forth most fully in his unpublished essay "On Truth and Lies in a Nonmoral Sense."⁴³ In that essay, he says that the everyday notion of "truth" is the result of an agreement, a peace treaty among men driven by boredom and necessity:

That is to say, a uniformly valid and binding designation is invented for things, and this legislation of language likewise establishes the first laws of truth...It is only by means of forgetfulness that man can ever reach the point of fancying himself to possess a "truth"....⁴⁴

This linguistic legislation creates a shared notion of truth which is based on a shifting stream of metaphors, metonyms, and anthropomorphisms. This does not mean that there is no such thing as truth, or that truth is arbitrary. It only means that we must remember

⁴³ "On Truth and Lies in a Nonmoral Sense," in ed. Daniel Breazeale, Philosophy and Truth (New Jersey: Humanities Press International, 1979)("OTL"). Of course, one must be careful not to rely too heavily upon Nietzsche's unpublished work, including his early essays (some of which are compiled in Philosophy and Truth), as well as the compilation posthumously assembled and published as The Will to Power.

⁴⁴ OTL, p. 81.

that truth is not a static end-state at which we can arrive once and for all, but is a necessary convention, a 'life-preserving error.'⁴⁵ Inevitably we forget that our truths are conventions, and in so doing we mistake verbal designations for actual entities. That is, we forget that the relation of word to object is only relatively stable, and we posit the relationship as fixed and binding. Nietzsche affirmed this point in Human, All Too

Human:

To the extent that man has for long ages believed in the concepts and names of things as in *aeternae veritates* he has appropriated to himself that pride by which he raised himself above the animal; he really thought that in language he possessed knowledge of the world.⁴⁶

But for Nietzsche there could be no static link between word and object, and therefore no fixed basis for human rights, except as a temporary postulate. Therefore, we should not confuse the **usefulness** of rights-talk with the **truth** of rights-talk:

We have arranged for ourselves a world in which we can live--by positing bodies, lines, planes, causes and effects, motion and rest, form and content; without these articles of faith nobody now could endure life. But that does not prove them. Life is no argument. The conditions of life might include error.⁴⁷

So even if we need to posit the existence of human rights to make life tolerable, there is no reason to elevate this postulate to the level of independent or transcendent reality. Even if one wants or needs to assert the existence of human rights, perhaps on the basis of self-evidence (as in the Declaration of Independence), there is no need to insist that this view is the unchangeable truth. Certainly, intuition and ordinary language provide

⁴⁵ GS, book III, #110, p. 171.

⁴⁶ HAH, book I, #11, p. 16.

⁴⁷ GS, book III, #121, p. 177.

a starting point for thinking about rights, but they cannot serve as the first and last authority for the existence or non-existence of rights.

Nietzsche's point in this matter can be illustrated by an analysis of "rights talk," which has received some attention recently from legal scholars.⁴⁸ In Rights Talk, Mary Ann Glendon explains that (at least in America), our linguistic practice is to talk about ever-increasing rights. We talk as if our rights are constantly expanding, and this linguistic convention leads us to believe that these rights actually exist:

A rapidly expanding catalog of rights--extending to trees, animals, smokers, nonsmokers, consumers, and so on--not only multiplies the occasions for collisions, but it risks trivializing core democratic values.⁴⁹

As she describes, our language tends to create rights even when the rights which appear in our language have no basis in the legal system. For Nietzsche, such talk about rights can be explained as linguistic error; it is an example of mistaking the existence of the word (e.g. "smokers' rights") for the thing (an actual right to smoke in restaurants or airplanes).

This same analysis applies to natural rights discourse. Philosophers, theologians, and statesmen have been talking about natural law for centuries, and we therefore tend to see it as something which is built into the fabric of human affairs. But the natural law

⁴⁸ A Nietzschean critique of rights talk is set against Leo Strauss' theory of natural rights in Thomas Haskell's "The Curious Persistence of Rights Talk in the 'Age of Interpretation'," Journal of American History 74 (1987): 984-1012. For an excellent introduction to rights-talk, and a discussion of Haskell's article, see Neal Milner, "The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait," 14 Law and Society Rev. 631-75 (1989).

⁴⁹ Mary Ann Glendon, Rights Talk (New York: Free Press, 1991), xi.

position is essentially a theologically-based approach which is ultimately rooted in the mistaken notion that there are immutable laws of moral conduct discernable by reason. Although the belief in God is now eroding, and with it the notion that there is a divine law which gives rise to natural law, we are still stuck with the linguistic conventions which are premised on His existence. In other words, Christianity dies hard:

After Buddha was dead, people showed his shadow for centuries in a cave,--a tremendous, gruesome shadow. God is dead: but given the ways of men, there may still be caves for thousands of years in which his shadow will still be shown.--And we--we still have to vanquish his shadow, too.⁵⁰

The death of God forces us to realize that human rights are conventions: not 'mere conventions' in the sense of arbitrary designations, but conventions in the sense of human creations.

Further, intellectual honesty requires the admission of fallibilism and the willingness to revise or abandon one's interpretation of nature. Nietzsche's emphasis here is upon the notion that there is a range of possible interpretations, such that the process of interpretation is without end, and is limited only by our needs and interests. There is no point at which interpretation must stop, no point at which truth is reached, no point at which we get to the 'real' or the 'thing in itself':

Rather has the world become "infinite" for us all over again, inasmuch as we cannot reject the possibility that it may include infinite interpretations.⁵¹

So any workable jurisprudence should be willing to modify, change, or abandon its

⁵⁰ GS, book III, #108, p. 167.

⁵¹ GS, book V, #374, p. 336.

grounds in light of new interpretations and new investigations. To do otherwise is to proclaim an end to interpretation and an end to critical analysis of foundations.

So to summarize Nietzsche's second critique of natural law theory, the danger of natural law theory is that it plays on an equivocation in our understanding of the word "natural," which leads people to wrongly believe that rights are grounded in nature. This has the harmful effect of treating rights as if they were discoverable, static entities, which they are actually fluid and malleable. There is something conservative, then, in the natural law notion that the catalogue of basic rights is static and immutable.

3.4 Third Critique: The Genealogy of Law

As discussed earlier, natural law theory has historically claimed that it is possible to conceive of man as existing in a state of nature which pre-dates the advent of civil society. Although natural law theorists differ on whether such a historical condition actually existed, they agree that it is possible to utilize the very idea of such a primordial state in order to determine the legitimacy or illegitimacy of the modern state. Book II of On The Genealogy of Morals contains a critique of the natural law supposition that there can exist a pre-legal state of "justice" or "natural rights" prior to the institution of positive law. Nietzsche's purpose here is to show (against the views of Locke, Rousseau, and Kant) that it is impossible to even conceive of a state that exists prior to the imposition of law because selfhood is the result of a community which already possesses laws. Thus, Nietzsche repeatedly rejects the claim that civil society originated in a social contract:

Human society is a trial: thus I teach it---A trial, O my brothers, and **not** a "contract." Break, break this word of the softhearted and half-and-half.⁵²

I think that the sentimentalism which would have [the state] begin with a "contract" has been disposed of. He who can command, he who is by nature "master"...what has he to do with contracts!⁵³

Nietzsche's point is not only to deny the existence of an historical contract (this much was conceded by many social contract theorists), but to point out that principles of justice cannot be generated by reference to such an idealized state of nature, because such a state can only be conceived as a place which is the **result** of law, not the **absence** of law. That is, people are always situated within one or another legal arrangements, so there is no sense in trying to decide what would have happened in some sort of idealized situation prior to the advent of civil society.

Nietzsche's argument here is genealogical in that he traces the concept of justice back to its primordial sense (in the pre-Christian era) and then argues that the concept of justice underwent a paradigm shift with the arrival of Christianity. His basic point is that conceptions of "legality," "justice," and "rights" are forever shifting because they sit atop a cauldron of power relations:

Our duties--are the rights others have against us. How did the others acquire these rights? By taking us to be capable of contracts and of repayment, as equal and similar to them....This is how rights originate: recognized and guaranteed degrees of power. If power-relations undergo any material alteration, rights disappear and new ones are created--as is demonstrated in the continual disappearance and reformation of rights between nations....Where rights prevail, a certain condition and degree of

⁵² TSZ, book III, ch. 12, #25, p. 212.

⁵³ GM, book II, #17, p. 86.

power is being maintained, a diminution and increment warded off. The rights of others constitute a concession on the part of our sense of power to the sense of power of those others. If our power appears to be deeply shaken and broken, our rights cease to exist.⁵⁴

Nietzsche argues, furthermore, that there have been two paradigms of law since the beginnings of recorded history. The first epoch of law was based on the discharge of power relations among the strong. This was the original notion of justice as mutual standoff between equals (those capable of contracts and repayment) and punishment and retribution toward unequals (those who breached contracts). The basic system of contracts among equals and punishment of unequals was instituted by the aggressive, strong people to govern their relation to those with weaker wills. Justice, then, began as a dramatic tension between equals who sought to trade with each other and preserve themselves by keeping their promises:

Justice (fairness) originates between parties of approximately equal power...[T]he characteristic of exchange is the initial characteristic of justiceJustice naturally derives from prudent concern with self-preservation....Justice is thus requital and exchange under the presupposition of an approximately equal power position.⁵⁵

A second epoch of law arrived with the Christian-based ethic of "ressentiment," in which the weak banded together to struggle against the strong people and their sense of justice. This reactive approach was fueled by the Christian emphasis on mercy, equality, and fairness toward weaker and unequal parties; the aggressive people were now deemed "evil" while the weak people were deemed "good."

⁵⁴ Dawn, #112, p. 66-7.

⁵⁵ HAH, book I, #92, p. 49.

Now the first paradigm of the law corresponds roughly to what Nietzsche calls a 'master morality,' and the second paradigm corresponds to 'slave morality':

Dual prehistory of good and evil--The concept of good and evil has a dual prehistory; **first**, in the soul of the ruling tribes and castes. Whoever has the ability to repay good with good, evil with evil, and also actually repays, thus being grateful and vengeful, is called good; whoever is powerless and unable to repay is considered bad...**Then**, in the soul of the oppressed, the powerless. Here all **other** human beings are considered hostile, ruthless, exploiting, cruel....Our current morality has grown on the soil of the **ruling** tribes and castes.⁵⁶

These two positions have struggled throughout recorded history, and our present system of justice is a mixed typology which contains elements of both paradigms. Nietzsche's larger point here is that the original justice was able to operate without any kind of transcendental grounding, because it was a life-preserving and life-affirming practice. Only later, after Christianity, was it supposed (wrongly) that justice had a metaphysical grounding apart from human interests (hence the idea that God mandates certain arrangements of the legal system). A central purpose of Nietzsche's genealogy is to remind us that justice and law were created to serve human interests and needs, and should continue to do so, in spite of the Christian tendency to justify laws by looking to God's will.

Nietzsche thinks that there has always been some form of law, if only as a relationship of exchange and punishment among the stronger races. Accordingly, the law cannot have arisen as an infringement on a set of pre-existing natural rights:

"Just" and "unjust" exist, accordingly, only after the institution of law...A legal order thought of as sovereign and universal, not as a means in the

⁵⁶ Ibid., book I, #45, p. 36-7.

struggle between power-complexes but as a means of preventing all struggle in general would be a principle **hostile** to life.⁵⁷

From a historical perspective, law represents on earth the struggle against the reactive feelings, the war conducted against them on the part of the active and aggressive powers...⁵⁸

Nietzsche's point here is that all legal systems are an expression of power relations. The ancient system of justice was a more overt system of power relations, and it certainly had its excesses and cruelties, but it was largely life-affirming and "yes-saying." The Christian-based legal system is also a system of power relations, but it is a life-denying and resentment-based system that favors the herd, and is based on mythology, fear of change, and hostility towards life. So Nietzsche's genealogical analysis would have us question whether the Christian system of justice represents an improvement over the ancient system, although Nietzsche certainly stops short of advocating a return to ancient law.

Nietzsche's genealogical approach is designed to expose the historical bases of moral imperatives and to reveal moral categories as creations. His goal is to spoil the enjoyment we get from "grand words" such as "duty" and "conscience."⁵⁹ With Nietzsche, the fundamental question for lawyers should not be, "What laws can we discover?," but rather, "What laws should we create, and to what end?" This question paves the way for a positive program of jurisprudence, to which we will now turn. But before passing to a sketch of Nietzschean jurisprudence, we must first ask if Nietzsche's

⁵⁷ GM, book II, #11, p. 76.

⁵⁸ GM, book II, #11, p. 75.

⁵⁹ GS, book IV, #335, p. 264.

critique of natural law theory is successful.

In answer to this question, I would say that Nietzsche's critique is only **partially** successful. He presents a strong challenge to the classical view of natural law as something which is written into the fabric of the universe and discoverable by reflecting on human nature. Nietzsche also seems to successfully challenge the versions of natural law which appeal to self-evident intuitions or transcendental foundations. But there remain a few potential problems that can be traced to Nietzsche's genealogical approach. While these problems cannot be explored in detail at this juncture, it is worthwhile to mention them briefly.

First, Nietzsche offers an explanation of how the concept of natural law arose (as a resentment-based, Christian reaction to the ancient system of justice), but the fact that it arose under a particular historical situation does not constitute an argument against it. Further, the natural rights proponent might agree with Nietzsche that natural rights cannot be predicated on a teleological conception of nature or upon divine commandment, but she could still hold that natural rights are inherent in the human need for cooperation and association, or in the necessity of communication.⁶⁰

A second problem is that Nietzsche fails to fully appreciate that many theorists in the social contract tradition did not posit an historical state of nature, but understood the state of nature as a postulate that could be used to test the legitimacy of the modern

⁶⁰ For example, see the variations on "natural law" offered by H.L.A. Hart in The Concept of Law, 188-9 ("minimal content" natural law as right to survival), and Lon Fuller, The Morality of Law (natural law as a demand of procedural process, not as a canon of substantive law).

state. The state of nature was considered an idea of reason (or thought experiment) which could be used to determine whether or not the present state is legitimate. Since these social contract theories are not based upon historical assertions, they cannot be directly refuted or challenged by a genealogy into the origin of law and morality.

These are legitimate problems for Nietzsche, and we can safely say that he did not come to grips with the more subtle points of certain versions of social contract theory (especially Kant's notion of the social contract as a thought experiment or 'idea of reason'). Despite this failing, Nietzsche still provided a strong challenge to the idea that natural law could be grounded in self-evidence, reason, God, or nature. In this sense, he provided a critique that challenged the popular versions of that theory, although we must certainly recognize that his critique is incomplete with respect to more complicated versions of the theory.

Now the natural law theorist will doubtless respond to Nietzsche's critique by calling Nietzsche's hand---by asking what Nietzsche proposes as an alternative approach in place of the democracy and rule of law advocated by natural law theory. The natural law theorist will argue that if Nietzsche wants to take a critical stance against natural law theory, then he must propose an alternative legal theory which would be preferable. That is, he must provide some sort of affirmative criterion by which to assert that a particular legal system or law is better than another system or law.

This line of criticism raises the problem of whether Nietzsche is a legal nihilist, i.e. whether he holds the view that there is no justifiable basis for choosing between competing legal arrangements. And this brings me back to the question raised in the

beginning of this chapter: can Nietzsche's account give rise to a normative theory of law (a "positive jurisprudence") or is he simply offering a critique of traditional approaches to the law? This is where the analysis of Nietzsche's position gets murkier, as we attempt to build a positive Nietzschean jurisprudence. In what follows I will first build this edifice and then criticize it.

3.5 Does Nietzsche Offer a Positive Jurisprudence?

I suppose that the cornerstone of a Nietzschean jurisprudence would be the notion that a law (or a legal system) is provisionally acceptable as long as it is life-affirming and power-generating. This simply means that a threshold inquiry must be made to determine if a proposed law seeks justification on the (unacceptable) grounds that it is mandated by nature or God or tradition, or on the (acceptable) grounds that it is a fair reflection of who we are and who we want to be as free, experimental, and "self-overcoming" individuals. The key would be to maximize the Will to Power, not in the limited and literal sense of 'raw power,' but in the sense of self-mastery, human advancement, and self-overcoming.⁶¹ Once we recognize that the legal order cannot be

⁶¹ Many commentators have been too quick to assume that the Will to Power implies solely the release of pure power in any form, including violence. For example, consider Joan Williams' claim that "Nietzsche argued that once God was dead, morality comes tumbling after, leaving only the raw exercise of power." Joan Williams, "Rorty, Radicalism, Romanticism," 1992 *Wisc. L. Rev.* 131, 132 (1992). I think that this is a misreading of Nietzsche's use of the term "power." While there are passages in which Nietzsche seems to speak of the Will to Power in terms of raw power, his refined view is that "power" involves self-mastery, discipline, and self-overcoming:

For Nietzsche 'power' exists as potentiality, so that in the term 'will to power' the word 'power' denotes not simply a fixed and unchangeable entity, like force or strength, but an 'accomplishment' of the will

grounded once and for all as a totality in an unchanging conception of human nature or reason, we can go on to the task of molding the law to fit our changing, but "all-too-human" needs. The loss of metaphysical foundations, and the accompanying temporary phase of legal nihilism, is a necessary precondition for the responsible creation of a legal order that is free from metaphysical baggage. The Nietzschean approach would not be based on a static metaphysical view of human nature, but would try to respect the sense in which man is continually self-overcoming, and would attempt to open up as many avenues as possible for self-exploration and self-mastery.

If this broad outline is plausible, then Nietzsche escapes the charge of legal nihilism (the view that no arrangement of law can be morally superior to others), because he provides a criterion for choosing one legal arrangement over another. First, we must reject all laws or legal systems which are tied to problematic notions of (human) nature, self-evidence, or God. Second, for a law to be acceptable, it must be rooted in our present conception of ourselves as free and creative individuals, and must allow maximum room for power-generation and self-mastery by private individuals.

Now I have just interpreted the Will to Power as a private project, because by reading it in this way we avoid the charge that the state must obey the Will to Power, which might entail some sort of fascism or elitism. This reading of Nietzsche makes him a legal nihilist only in the **weak** sense that (like Rawls and Dworkin) he rejects the possibility of an ultimate and unchanging grounding for the legal order. But he is not

overcoming or overpowering itself.

Keith Ansell-Pearson, An Introduction to Nietzsche as Political Thinker (Cambridge: Cambridge Univ. Press, 1994), 46.

a legal nihilist in the **strong** sense, because he **does** think that some legal systems are better than others.⁶²

Thusly configured, a Nietzschean theory of law would not necessarily require an immediate and radical change in the legal system (though such measures are not incompatible with Nietzsche's theory). I would suppose that Nietzsche's theory could be used to justify a legal order similar in many respects to our own legal system (including full rights, provisionally proscribed). The key point of difference would be that we should obey the law because we **created** it, **not** because we **discovered** it, or because it was laid down by God. The law would then be seen as liberating because it is changeable to allow for the "law of life"-- the self-overcoming of man through his private projects.⁶³ In fact, Nietzsche alludes to this new type of law in his "Notes on Zarathustra":

What is required: the new law must be made practicable--and out of its fulfillment, the overcoming of this law, and higher law, must

⁶² The secondary literature often fails to distinguish between the weak and strong versions of nihilism. For example, consider the definition offered by Peter Goodrich:

Nihilism in the context of legal studies means loss of faith in the community of legal doctrine and refusal to [] believe in the foundational myths of legal doctrine.

"Law and Modernity," 49 Modern L. Rev. 545, 553 (1986). I think that this definition covers only nihilism in the weak sense, i.e. nihilism as the loss of foundations. In this weak sense, which equates nihilism with non-foundationalism, Nietzsche is a nihilist, but so are Rorty, Dewey, and Dworkin (which shows that the term is not meaningfully applied). So I think that full-blown nihilism must mean something more than loss of foundations: it stands for the view that there can be no justifiable basis for choosing one law over another, and no basis for saying that one decision is better or worse than another. This is nihilism in the true, or strong sense, and it is not a position held by Nietzsche.

⁶³ GM, book III, #27, p. 161.

evolve...Laws as the backbone. They must be worked at and created, by being fulfilled. The slavish attitude which has reigned hitherto towards law!⁶⁴

Under this approach, a superior system of law would honestly admit that rights are human conventions that can be granted, repealed, or amended for our life-preserving ends.⁶⁵ We follow a rights-based system of law because it affords the greatest opportunity for control, mastery, and power, in the sense of self-fulfillment and self-overcoming:

We, however, want to become those who we are---who give themselves laws, who create themselves.⁶⁶

What does your conscience say?--You shall become that you are.⁶⁷

All great things bring about their own destruction through an act of self-overcoming: thus the law of life will have it, the law of the necessity of "self-overcoming" in the nature of life...⁶⁸

Nietzsche's position, thus formulated, has the advantage of freeing us from the difficulties of foundations, a freedom described nicely by Joseph Singer:

The absence of secure foundations or decision procedures should be experienced not as a void but as an opportunity...It is not a matter of finding a foundation on which to stand, or of finding the truth. It is a matter of conviction. We have to take responsibility for making up our

⁶⁴ From "Notes on Thus Spoke Zarathustra," in Complete Works of Friedrich Nietzsche, 263.

⁶⁵ For more on this approach, see Margaret McDonald, "Natural Rights," in A.I. Melden's Human Rights, 53-54.

⁶⁶ GS, book IV, #335, p. 266.

⁶⁷ GS, book III, #270, p. 219.

⁶⁸ GM, book III, #27, p. 161.

minds.⁶⁹

The idea here is that the loss of foundations should pave the way for new, positive directions in law.

Now that I have sketched the broad outlines of a Nietzschean approach to law, let's consider how it might fare in specific application to a few well-known cases. First, consider the Georgia law criminalizing sodomy that was upheld by the Supreme Court in Bowers v. Hardwick.⁷⁰ A Nietzschean jurisprudence would reject the assertion that sodomy can be outlawed as an offense against God or nature, or simply because our Christian tradition has historically outlawed sodomy. A Nietzschean analysis would ask whether the kind of society we want to create is a society that tolerates the free choice of others to engage in consensual sex. In short, does a society which tolerates such behavior lead to greater or lesser power, in the sense of greater opportunities for self-mastery and self-overcoming? I think that a Nietzschean would strike the Georgia statute on the grounds that the government should allow individuals to exercise as much autonomy as possible in their effort to become who they want to be, to create themselves.

Of course, this is only a rough sketch of a single decision, but the basic reasoning process can be extended to other contexts. For example, I could imagine a Nietzschean attack on the natural law notion that private property is an inherent right, which might have the result of leading us into alternative legal arrangements, such as state ownership

⁶⁹ Joseph Singer, "The Player and the Cards," 66-7.

⁷⁰ 478 U.S. 186 (1986).

of the means of production, or restrictions on the right of inheritance. Also, Nietzsche's emphasis on self-mastery would seem to provide a basis on which to allow women the right to have an abortion if they choose. Using this type of thinking, it is possible to draw the rough outlines of a Nietzschean approach to law, including a justification for a legal framework that includes a liberal democracy, the rule of law, and minimal state interference with self-regarding behavior. This would be a legal system in which each person would be free to pursue, as a private matter, the version of the good life which she finds most life-affirming. This political and legal structure lacks an immutable foundation, and must only respect man's capacity for self-overcoming, i.e. the "law of life." The downside to all of this is that since Nietzsche is not a rights-foundationalist, there can be no absolute guarantee that a Nietzschean jurisprudence will always lead to liberal democracy; as I discuss below, it **might** lead to fascism if this is the direction that the Will to Power must take. But for now, liberal democracy can be justified on the Nietzschean grounds that it is the system that allows the greatest expression of power, understood as a life-preserving and life-affirming force.

Perhaps a more difficult case to support on the Nietzschean theory of law would be Brown v. Board of Education of Topeka.⁷¹ At first blush, this decision would seem to cut against those passages in which Nietzsche says that order and rank are important, and that slavery may be necessary in order to produce a higher type of man.⁷² Yet I think that it is possible to see how Nietzsche's approach could be used to justify the

⁷¹ 347 U.S. 483 (1954).

⁷² See, e.g., AC #57, GS #337.

decision in Brown, perhaps on the argument that freedom from segregation is necessary for meaningful self-overcoming to take place by African-Americans. In other words, we must eliminate all barriers to human realization, including racist laws (or homophobic laws, as in Bowers). The idea would be to create a **public** sphere that allows maximum self-overcoming in the **private** sphere. This interpretation of Nietzsche bears a strong resemblance to Rorty's depiction of a Nietzschean politics:

[T]o see one's life, or the life of one's community, as a dramatic narrative is to see it as a process of Nietzschean self-overcoming...**Privatize** the Nietzschean-Sartrean-Foucauldian attempt at authenticity and purity...⁷³

Now this view of Nietzsche is no doubt wildly different from the traditional view of Nietzsche, which holds that Nietzsche would praise the political and legal system that authorized the maximum release of force and raw power, which would probably lead to a class society ruled by an aristocratic elite. A common belief is that Nietzsche sought a return to the Greek "master morality," and would never grant the existence of human rights. This view is explained by Andre Mineau:

Nietzsche does not accept the human rights founding principle that all men are values in themselves simply because they are human. It is natural differences that are relevant here, and his hope for the revival of the spirit of Archaic Greece entails, in a certain sense, a desire to return to ancient law based on statuses, and expressing differences that were considered more significant than men's common humanity.⁷⁴

⁷³ Richard Rorty, Contingency, Irony, and Solidarity (Cambridge: Cambridge Univ. Press, 1989), 54, 65.

⁷⁴ Andre Mineau, "Human Rights and Nietzsche," 880. This view is also put forth by Ted Sadler, "The Postmodern Politicization of Nietzsche," in Nietzsche, Feminism, and Political Theory, ed. Paul Patton (New York: Routledge, 1993), 225-243. Sadler argues that the only political theory consistent with Nietzsche's writings is an a-political longing for an aristocratic society based on rank ordering. This view is confirmed in

This interpretation has ample textual support--indeed it has enough support to cast serious doubt on my own reading of Nietzsche as a person who might be persuaded to embrace democracy and the rule of law.⁷⁵ However the traditional view is nevertheless somewhat misleading, because it fails to see that Nietzsche's comments on law are not critical of democracy and law *per se*, but only at the pretension that law can be fully and finally grounded, whether in reason, humanity, or God. He is critical of any static approach to law, any method whereby interpretations come to an end. So Mineau's reading of Nietzsche, while supported by relevant passages, avoids the central problematic raised above: namely, that Nietzsche was disdainful of **all** foundations for law, and this would include Greek foundations. What attracted Nietzsche to Greek law and morality (and what distinguished it from the Christian tradition) is that it was less deceptive and less pretentious about its origins in human needs, and less tied to universalist claims about laws of nature and universal human rights. Nietzsche does not so much advocate a return to Greek law as turn away from the Christian tendency to seek

large part by J.P. Stern, *A Study of Nietzsche* (Cambridge: Cambridge Univ. Press, 1979), 122-5; and Ofelia Schutte, *Beyond Nihilism: Nietzsche Without Masks* (Chicago: Univ. of Chicago Press, 1984)(see chapter four, "Nietzsche's Politics"). For a discussion of whether Nietzsche was "anitpolitical" or "unpolitical," see Peter Bergmann, *Nietzsche, The Last Antipolitical German* (Bloomington, IN: Indiana Univ. Press, 1987), 1-8.

⁷⁵ Even if we grant that Nietzsche rejects innate rights, we can still debate whether Nietzsche would allow the use of a rights-hypothesis on other grounds, namely as a life-preserving fiction. As Mineau observes, what Nietzsche finds objectionable is not so much the notion of rights as the notion of a "rights founding principle." A Nietzschean can still justify rights as a provisional hypothesis without also holding a position of rights foundationalism, by allowing the provisional rights to be overridden under limited circumstances.

the origin of law outside of human needs and human will. It is not the substance of ancient law which is superior to Christian law, but the lack of masks and disguises offered to support it.

To summarize, a Nietzschean jurisprudence would be non-foundational (because no principle of law is so sacred that it cannot be repealed if necessary) and experimental (because new laws could be adopted and repealed to satisfy our changing conception of ourselves). This would be a piecemeal jurisprudence that is skeptical of any totalizing, static conception of justice, and it would follow Nietzsche's game plan as set forth in the Will To Power:

Proud aversion to reposing once and for all in any one total view of the world. Fascination of the opposing point of view: refusal to be deprived of the stimulus of the enigmatic.

No limit to the ways in which the world can be interpreted... plurality of interpretations a sign of strength. Not to desire to deprive the world of its disturbing and enigmatic character.⁷⁶

Based on the passages and inferences which I have set forth above, I think it can be argued that there are strong reasons to suppose that Nietzsche is not a legal nihilist.

Now it might be objected that Nietzsche remains stuck in a variant of foundationalism because he proposes to judge legal systems according to whether they foster the human capacity for creating and overcoming the self (i.e. whether they respect the Will to Power, understood as a quest for self-mastery). This jurisprudence would, like Natural law theory, still be founded on a conception of human nature, albeit on the rather unorthodox version put forth by Nietzsche, which is static in the sense that it sees

⁷⁶ WTP, #470, p. 262; WTP, #600, p. 326.

human nature as inevitably caught up in the quest for self-mastery and self-creation. In a sense this objection is correct because Nietzsche is a foundationalist to the extent that he rejects the law of nature only to embrace "the law of life."⁷⁷ Yet we might say that this is not a truly foundational approach because it allows the law to continually overcome itself and change as our self-conception changes, unlike natural law which is rooted in an unchanging conception of the person. So if Nietzsche is a closet foundationalist, his version of foundationalism is sufficiently unorthodox to question whether the term "foundationalist" can be meaningfully applied in this context.⁷⁸ But there is some truth to the charge of foundationalism because (like Aquinas, Hobbes, and Smith) he begins with a view of human 'nature' and then designs a political and legal platform around that conception; unlike those thinkers, though, Nietzsche allows for this 'nature' to change.

One potential danger of a Nietzschean jurisprudence is that it denies the existence of fundamental, unchanging human rights. The cause for concern is that a change in man's self-concept (i.e. the rise of a violent and destructive notion of 'power' or 'self-mastery') may take the law in unexpected and unsavory directions. For example, suppose that our changing concept of self leads us to believe that a single elite group of individuals should exercise prior restraint over the publication of political books, that this is demanded by the Will to Power. For a Nietzschean, there is no possibility of vitiating

⁷⁷ GM, book III, #27, p. 161.

⁷⁸ For a similar conclusion, see Keith Ansell-Pearson, Nietzsche Contra Rousseau, 102 (rejecting the notion that Nietzsche is offering a "new natural law" based upon the will to power).

this result by appealing to a fundamental right of free speech based on a God-given or self-evident right of autonomy. A Nietzschean jurisprudence **could** lead to a Nazi state, if such a state were truly the most life-affirming and power-generating state that we thought possible. But it is doubtful that this need be the case, so long as a liberal state continues to afford its citizens with the best opportunities for self-mastery and experimentation. That is, the existing constitutional democracy can be justified on the Nietzschean grounds that it creates a public realm that maximizes the possibilities for a private life which is life-affirming and power-generating. For these reasons, I think that Nietzsche can escape the oft-recited charges of nihilism and fascism, though he offers no foundational backstop which would rule these arrangements out of court.

3.6 Problems for a Nietzschean Positive Jurisprudence

At the beginning of this chapter I said that one of my goals was to explore the difficult claim that Nietzsche's theory can be used to generate a positive jurisprudence. This claim is difficult precisely because it lacks overt textual support and must be constructed from scattered aphorisms that touch only indirectly on the topic of law. This is a questionable mode of interpretation because it downplays much of what Nietzsche actually said about the legal and political affairs of his day. Someone could take the opposite strategy: by focusing on Nietzsche's specific comments on legal and politics matters, a reader might reasonably conclude that no positive jurisprudence (or political theory) can be generated from Nietzsche other than a sort of anarchism or elitism, because there are so many passages in which Nietzsche ridicules ideals such as

democracy, feminism, equal rights, and so on. The charge of anarchism or elitism would seem to rest on the following types of passages, which occur with alarming frequency in Nietzsche's work:

At least, it seems to be all over for a species of man (people, races) when it becomes tolerant, allows equal rights and no longer thinks of wanting to be master--⁷⁹

In the age of universal suffrage, i.e .when everyone may sit in judgement on everyone and everything, I feel impelled to re-establish order of rank.⁸⁰

Every enhancement of the type "man" has so far been the work of an aristocratic society---a society that believes in the long ladder of an order of rank and differences in value between man and man, and that needs slavery in some sense or other.⁸¹

'The emancipation of women'--this is the instinctive hatred of the physiologically botched--that is to say, barren--women for those of their sisters who are well constituted...⁸²

I am opposed to: 1. Socialism, because it dreams quite naively of "the good, true and beautiful" and of "equal rights"...2. Parliamentary Government and the press, because these are the means by which the herd animal becomes master.⁸³

Only where the state ends, there begins the human being who is not superfluous...⁸⁴

⁷⁹ WTP, #354, p. 195.

⁸⁰ Ibid., #854, p. 457.

⁸¹ BGE, book IV, #257, p. 201.

⁸² EH, #5, p. 267.

⁸³ WTP, #753, p. 397.

⁸⁴ TSZ, book I, #11, p. 51.

Injustice never lies in unequal rights, it lies in the claim to 'equal' rights.⁸⁵

These passages seem to indicate that Nietzsche was essentially a-political and aristocratic. And of course this reading is supported by Nietzsche's frequent anti-democratic diatribes against the "herd mentality" and the "botched and bungled." It is no wonder that some thinkers have seen these type of statements as conclusive evidence that it is not possible to build a Nietzschean justification for democracy, the rule of law, equal rights, and pluralism.⁸⁶ This is certainly the safest interpretation of Nietzsche, because it does not take the difficult step of extending Nietzsche's program beyond Nietzsche's particular comments on the political affairs of his day.

Yet I think that this interpretation of Nietzsche (while no doubt supported by many passages) fails to appreciate the more general political and legal implications of Nietzsche's work. That is, in order to construct a coherent Nietzschean view of law we must try to go beyond such vitriolic passages and formulate a jurisprudence that is consistent with Nietzsche's entire philosophic enterprise, including his experimentalism,

⁸⁵ AC, #57, p. 179.

⁸⁶ For example, Ted Sadler argues that Nietzsche's repeated insistence on a rank order of individuals and perspectives rules out the possibility of a Nietzschean justification for pluralism. See "The Postmodern Politicalization of Nietzsche." Ofelia Schutte is equally skeptical:

Nietzsche erroneously believed that the overcoming of nihilism required the crushing of democracy and of all movements inspired by the French Revolution: death of liberty, equality and fraternity for all.

Beyond Nihilism, 161.

his fallibilism, and his genealogical focus.⁸⁷ Now I readily acknowledge that my reconstruction of a Nietzschean jurisprudence lacks abundant textual support, and it runs into trouble on key issues, such as women's rights, welfare, affirmative action, and other liberal policies which Nietzsche himself would certainly disapprove, but which seem justifiable on a Nietzschean framework.

This leads us, I think, to an impasse in our quest for a positive jurisprudence. Throughout this Chapter, I have tried to view Nietzsche's theory in its best light, to see it as a coherent and plausible attempt at creating a positive jurisprudence. This project is not without its difficulties, because every time that we try to find a Nietzschean argument for democracy and the rule of law we can be confronted by a quote in which Nietzsche ridiculed these very concepts. This means that our 'Nietzschean theory of law'

⁸⁷ For a similar approach to Nietzsche's more outrageous passages on political matters, see Mark Warren, Nietzsche and Political Thought (Cambridge, MA: MIT Press, 1988). Warren argues that Nietzsche's outlandish political comments were weighed down by a series of false assumptions, and therefore such comments must be discounted in order to formulate a coherent Nietzschean politics based upon the more philosophical works. In other words, Nietzsche himself failed to follow through on the political implications of his own philosophy. I take the same methodological approach in my formulation of a Nietzschean jurisprudence: I think that it is necessary to overlook some of Nietzsche's specific comments in order to get a coherent approach to law.

Not everyone agrees with this approach, and it is easy to see why: the selective approach to Nietzsche may have a distorting effect. The dangers of this approach are nicely set forth by Ofelia Schutte:

The weeding out of the least attractive elements in Nietzsche's work amounts to self-deceit or censorship, and, in any case, this practice keeps us from understanding the whole of Nietzsche's vision.

Beyond Nihilism, 186. But this is true only if Nietzsche's political views follow strictly from his philosophic views. If Nietzsche's political views were **not** based on a consideration of his philosophic positions (but were more akin to general observations 'off the cuff,' so the speak), then it seems to me reasonable and worthwhile to attempt to take Nietzsche's philosophy into political directions that Nietzsche himself did not explore.

will contradict many of Nietzsche's actual opinions on law and politics, with the result that we will often be theorizing Nietzsche against himself, as it were.

The big problem here is that, all things considered, Nietzsche does not provide enough theoretical material to support a coherent vision for the legal system in a just state, nor does he provide consistent answers to legal problems. We can use his overall philosophical work to justify, say, gun control, but we can just as easily find passages which cut the other way. His work stands so far outside the existing legal system (the critical distance is so great) that it is difficult to use Nietzsche's work to step back inside the system and advocate particular solutions to legal problems. To get specific solutions from Nietzsche requires a major stretch, and perhaps we should take this as a sign that his work was not meant to be stretched in this way.

Nietzsche's anti-foundationalism and experimentalism is most useful not as a general theory of law, but as a set of reminders or cautions that we should take into account when doing legal theory. For example, we should be cognizant of our fallibility, our tendency to reify rights-talk, and our tendency to confuse interpretations with reality. Nietzsche also reminds us to be open to experiments in the law, that we should be aware of the genealogy of basic concepts of legal theory, and that we should be wary of discovering immutable laws of human nature. Most importantly, Nietzsche shows that our current paradigm in legal theory (which is based largely on the Christian 'slave morality') is contingent and fallible.

What we get from Nietzsche in the final analysis is the above set of methodological tools and 'reminders for a particular purpose.' These insights are not

couched in the language of mainstream legal theory, nor can they be used to dictate particular outcomes in court cases (though perhaps they might be of limited use to legislators who are enacting laws). Nietzsche's work is therefore 'external' in the sense discussed in Chapter One; his work is of limited use in the internal debates which currently rage over abortion, affirmative action, privacy, government takings, and so on. Nietzsche's writings on law are worthwhile, yet they fall well short of providing the positive jurisprudence that we seek.

I am sure that this view of Nietzsche will satisfy neither postmodernists nor mainstream legal thinkers. There will be postmodernists who insist that Nietzsche's work **can** support a full blown legal theory of the just state and the ideal legal system, although I have shown that we have reasons for doubting that this can be done. And there will be mainstream thinkers who will argue that Nietzsche's work is wholly useless for legal theory and is a mere distraction from genuinely pressing questions in the law. I have split the difference between these views by showing that Nietzsche's work is important when viewed as a check against some of the chief postulates and assumptions of mainstream legal theory, but it cannot support a rich, full-blown positive jurisprudence.

CHAPTER 4

FOUCAULT ON LAW: MODERNITY AS NEGATIVE UTOPIA

The purpose of this chapter is to provide a charitable, but critical, reading of Michel Foucault's remarks on law. Ultimately, I conclude that Foucault's work on law depicts the existing legal system as a 'negative utopia,' a seemingly humane but ultimately coercive product of Enlightenment rationality gone awry. To my mind, Foucault's approach is similar in many respects to the critique of modernity set forth in Aldous Huxley's Brave New World or George Orwell's 1984. Like Huxley and Orwell, Foucault warns us about a future that may have already arrived, a future in which inhuman laws are heralded in the name of humanity. And like Huxley and Orwell, Foucault depicts the underside of certain disciplines which have their roots in the Enlightenment.¹

Over the last five years or so, legal scholars have become increasingly interested

¹ Foucault is often interpreted as a critic of the 'Enlightenment Project,' and he is therefore seen as continuing the critique put forth by Max Horkheimer and Theodor Adorno in Dialectic of Enlightenment (New York: Continuum, 1972). See Stephen Best and Douglas Kellner, Postmodern Theory (New York: Guilford Press, 1991) especially chapter two, "Foucault and the Critique of Modernity." Orwell and Huxley have also been interpreted as critics of the Enlightenment. See Sheldon Wolin, "Counter-Enlightenment: Orwell's 1984" in Reflections on America, 1984: An Orwell Symposium (Athens, Ga.: University of Georgia Press, 1986), 98-114.

in Foucault's work. The growing interest in Foucault is somewhat surprising, given that the topic of law was not a central concern for Foucault, and he certainly did not write a book-length study of law. Perhaps it is precisely Foucault's lack of focus on the topic of law which allows his work to be taken in so many disparate directions. For instance, some commentators have taken Foucault to be a legal historian who made empirical claims about the evolution of legal systems, namely that the pre-modern legal system was based on coercive law but eventually evolved into a modern (and postmodern) legal system governed by disciplinary normalization.² Other commentators have downplayed Foucault's historical claims, and have instead explored the way in which Foucault's writings can ground a Feminist approach to legal theory.³ Still others have explored the similarities and differences between Foucault and Marx's comments on law.⁴ Some

² Laura Engelstein, "Combined Underdevelopment: Discipline and the Law in Imperial and Soviet Russia," American Historical Review 98 (1993): 338. Engelstein argues that since Foucault makes empirical claims about the emergence of a disciplinary society from a pre-modern society of coercive law, his claims should be tested against the actual evolution of the legal systems in various countries. Engelstein tests Foucault's account by asking whether it can predict and explain the changes in the legal system in 19th and 20th Century Russia. She concludes that Foucault's account is incorrect, because it does not accurately predict the way in which law and discipline developed in Russia. The responses to Engelstein's paper raise the important issue of whether Foucault's work should be judged primarily as a strict historical account, or alternatively, as a form of social criticism that is not dependent on historical validation. See Rudy Koshar, "Foucault and Social History: Comments on 'Combined Underdevelopment'," *ibid.*, 354-363, and Jan Goldstein, "Framing Discipline with Law: Problems and Promises of the Liberal State," *ibid.*, 364-375.

³ Annie Bunting, "Feminism, Foucault, and Law as Power/Knowledge," 30 Alberta L. Rev. 829 (1992). See, also, Carol Smart, Feminism and the Power of Law (New York: Routledge, 1989), 6-14 ("The Influence of Foucault").

⁴ Bob Fine, Democracy and the Rule of Law: Liberal Ideals and Marxist Critique (London: Pluto Press, 1985), 189-202. For further comments on this point, and for an excellent and thorough reading of Foucault's writings on law, see Alan Hunt, "Foucault's

writers have tried to tease out the ways in which Foucault's "post-structuralist" stance might generate new insights for legal theory.⁵ And finally, Foucault's ideas have been applied to particular legal issues, such as the right of privacy, the ownership of intellectual property, and punishment.⁶

On my reading, Foucault's principle contribution to the study of law is three-fold. First, he wants to challenge the presumption of progress in law, the idea that the law is becoming increasingly humane and less coercive. Foucault's point here is that the legal rights to privacy and autonomy have been undercut by a quasi-legal system of coercion and discipline. Second, he wants to expose and challenge a theoretical framework which, he argues, continues to dominate jurisprudence and political theory: the "classical

Expulsion of Law: Toward a Retrieval," 17 Law and Social Inquiry 1 (1992)(Hunt's article is followed by several commentaries and a reply), as well as Alan Hunt and Gary Wickham, Foucault and Law: Toward a Sociology of Law as Governance (London: Pluto Press, 1994). It was after I began this manuscript that I came across Hunt's reference to Foucault's depiction of the disciplinary state as a "negative utopia." For a more general overview of Foucault's approach to law, see Jerry Leonard, "Foucault: Genealogy, Law, Praxis," 14 Legal Studies Forum 3 (1990); Jerry Palmer and Frank Pearce, "Legal Discourse and State Power: Foucault and the Juridical Relation," 11 Int'l J. of Sociology of Law 361 (1983); and Gerald Turkel, "Michel Foucault: Law, Power, and Knowledge," 17 J. of Law and Society 170 (1990).

⁵ Gillian Rose, Dialectic of Nihilism: Post-Structuralism and Law (London: Basil Blackwell, 1984), 171-207; Daniel Williams, "Law, Deconstruction, and Resistance: The Critical Stances of Derrida and Foucault," 6 Cardozo Arts and Entertainment L. Rev. 359 (1988).

⁶ On privacy, see, e.g., Jed Rubenfeld, "The Right of Privacy," 102 Harvard L. Rev. 737, 770 (1989), and Kendall Thomas, "Beyond the Privacy Principle," 92 Columbia L. Rev. 1431, 1478 (1992). On intellectual property, see David Lange, "At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millenium," 55(2) Law and Contemporary Problems 139 (1992). Regarding punishment, see Adrian Howe, Punish and Critique (New York: Routledge, 1994), especially chapter 3, "The Foucault Effect: from Penology to Penalty."

juridical theory" which arose with the social contract theorists. This approach sees power solely in terms of state power, and ignores the ways in which power is exercised from non-central locations (in Foucault's words, 'at the capillaries'). Third, and finally, Foucault wants to show how law has become increasingly tied to the rise of the so-called "disciplines," which means that law has become increasingly regulatory, administrative, and normative (instead of merely coercive and repressive).

To best understand Foucault's comments on law, we must first examine the view that he rejects, namely the so-called "classical juridical theory." **Part I** of this chapter will involve a presentation of this "classic juridical model," followed by a discussion of Nietzsche's attack on this model, which anticipates Foucault's critique. This paves the way for the discussion in **Part II**, which presents Foucault's writings on law as a continuation, and extension, of the Nietzschean critique of the classical juridical model. In that section, I discuss the relationship between law and discipline, and I explain in some detail Foucault's critique of contemporary political and juridical theory. I turn in **Part III** to a critical assessment of Foucault's project: I point out that Foucault failed to appreciate the beneficial aspects of modern law, and he lacked a normative ground from which to condemn the role of law in modernity. Finally, in **Part IV**, I conclude that Foucault's comments on law do not provide the grounds for a full-blown positive jurisprudence, nor does he have much of a program for liberation. But despite the lack of a positive jurisprudence, Foucault provides us with a sort of negative utopian vision of mainstream political and legal theory, and negative utopias of this sort are useful, in a limited but important sense.

4.1 The Classical Juridical View and Nietzsche's Critique

A. Classical Juridical Theory

Foucault does not have a 'theory of law' in the strict sense. Rather, he seeks to problematize a dominant approach (or paradigm) in jurisprudence and political science, a view which Foucault refers to alternatively as the "classical juridical" view or the "sovereign-juridico" view.⁷ The classical juridical view derives from the social contract theorists of the 16th to 18th Centuries (Hobbes, Locke, and Rousseau), but the assumptions and basic framework of this view are still very much operative today. The hallmark of the traditional view is that power should be analyzed in terms of the relationship between the state and the individual. It holds that the individual is free in all areas of his life except those areas in which he is subject to the power of the state: where the state is silent, the individual is free to enter into contracts with others and pursue her own projects. Under the classical theory, power is state power, and it is repressive power. As we shall see, Foucault points out that this conception of power is more fitting for a pre-modern than a modern society because modern forms of power are not necessarily aligned with state power, but are a complex web emanating from disparate sources. So the classical juridical focus on state power tends to obscure the

⁷ Duncan Kennedy points out that Foucault sometimes refers to the view which he is challenging as the "Law-and-Sovereign" model. Duncan Kennedy, "The Stakes of Law, or Hale and Foucault!," 15 Legal Studies Forum 327 (1991). While this formulation is used occasionally by Foucault, I will stick with Foucault's more common terminology for the liberal approach to political and legal theory, which he variously designates as the "classical juridical" model, the "sovereign-juridico" model, the "sovereignty" model, and the "contract-oppression" model.

ways in which the individual is dominated by other forces (schools, hospitals, the military, psychiatry).

Foucault associates the classical liberal view with the social contract tradition which arose at the end of the Medieval period, especially Thomas Hobbes' Leviathan.⁸ The central problematic of social contract theory is the legitimation of state power over the individual, that is, the issue of whether there can be a rational justification for the state. Social contract theory answers this question by supposing that the state can be justified as the product of a free choice among individuals in the state of nature. The basic idea is that each individual in the state of nature is endowed with certain natural powers, such as the rights of self-preservation, self-defense, liberty, contract, and property. The individual cannot peacefully co-exist with others in the state of nature, so she agrees with others that they will each alienate some or all of their natural rights in order to create a neutral, sovereign state to protect them. On this model, the state is the result of a contract, so the state is legitimate to the extent that it satisfies the mandate of the individuals who participate in the contract. As Foucault explains:

[I]n the case of the classic, juridical theory, power is taken to be a right, which one is able to possess like a commodity, and which one can in consequence transfer or alienate, either wholly or partially, through a legal act or through some act that establishes a right, such as takes place through cessation or contract. Power is that concrete power which every individual holds, and whose partial or total cessation enables political power or sovereignty to be established.⁹

⁸ Michel Foucault, "Two Lectures" in Power/Knowledge ("P/K") (New York: Pantheon Books, 1980) 97-8.

⁹ *Ibid.*, 88.

This point can be seen in Hobbes' claim that the parties in the state of nature come together to alienate their power to the sovereign, and they agree that the sovereign shall be solely responsible for the exercise of power in the state. Thus only the sovereign can punish, make laws, and coerce the subjects. On this model "power" must be understood only in terms of the power of the state over the individual, and in all other realms, the individual is free, according to Hobbes:

In cases where the Sovereign has prescribed no rule, there the subject has the liberty to do, or forbear, according to his own discretion...The liberty of the subject lies therefore only in those things which the Sovereign has permitted; such as the liberty to buy, and sell, and otherwise contract with one another; to choose their own abode, their own diet, their own trade of life, and institute their children as they themselves think fit, and the like.¹⁰

Foucault points out that Hobbes saw power as purely repressive, as something which is instituted from the top-down, from the state to the individual. And where there is no state action or interference, the individual is totally free, according to Hobbes: "Liberty, or freedom, signifies (properly) the absence of opposition."¹¹ The basic idea is that the individual need not submit to any forces or powers which he has not himself authorized by consent. The individual can exist in a sphere of individual liberty, a zone of self-regarding conduct in which he is free to live according to his own dictates.

Another theme running through the classical juridical theory is the notion that the creation of a democratic state and the adoption of a system of formal law represents moral progress. That is, the modern state signals the end of tyranny, the end of rule by

¹⁰ Thomas Hobbes, Leviathan (New York: Penguin Books, 1968) 276, 264.

¹¹ *Ibid.*, 261.

divine right or brute power, and the establishment of a legitimate government based on the dictates of reason. This belief was held so strongly by Hobbes and Kant that they refused to recognize a right of rebellion against the modern state, since the civil state represents a tremendous advance over pre-modern modes of government. For the social contract theorists, it is through the triumph of reason that we were delivered from a government by the rule of men, into a government by the rule of law.

B. Nietzsche's Critique

Nietzsche took issue with three aspects of the classical juridical model set forth above: the idea of a social contract, the idea of a neutral "subject" existing below and beneath social conventions, and the idea of moral progress. Since all of these themes were picked up by Foucault, I think that it is important to stress his connection to Nietzsche on these points.¹²

As we saw in Chapter Two, Nietzsche rejected the basic premise of social contract theory, namely that there could be a pre-legal state of "justice" or "natural rights" prior to the institution of positive law.¹³ Nietzsche wanted to show (against the views of Locke, Rousseau, and Kant) that it is impossible to even conceive of an

¹² Foucault's most explicit discussion of Nietzsche is set forth in the essay "Nietzsche, Genealogy, History" ("N,G,H") in The Foucault Reader, ed. Paul Rabinow (New York: Pantheon Books, 1984). For a brief discussion of Foucault's debt to Nietzsche, see Barry Smart, Michel Foucault (New York: Tavistock Publications, 1985), 14-15.

¹³ Friedrich Nietzsche, On the Genealogy of Morals ("GM") (New York: Random House, 1967), especially the second essay, "'Guilt,' 'Bad Conscience,' and the Like."

individual who exists prior to the imposition of law, but who is nevertheless capable of consenting to the creation of the state. Nietzsche rejected the notion of a social contract among pre-existing individuals because it is only possible for a person to be an individual within the confines of an already existing state.

The interesting point here is that Nietzsche was attempting to eliminate the Kantian appeal to a transcendental subject which pre-dates the imposition of power relations:

And just exactly as the people separate the lightning from its flash, and interpret the latter as a thing done, as the working of a subject which is called lightning, so also does the popular morality separate strength from the expression of strength, as though behind the strong man there existed some neutral substratum, which enjoyed a caprice and option as to whether or not it should express strength. But there is no such substratum, there is no "being" behind doing, working, becoming; "the doer" is a mere appendage to the action. The action is everything.¹⁴

But Nietzsche's critique went even further: he argued that the classical juridical theory erred by supposing that the imposition of civil law would establish a condition of perpetual peace in which individuals are free from power relations. For Nietzsche, there is no such thing as a realm in which the individual is exempt from power relations. To be sure, power relations may shift (for example, from a Pagan exercise of power to a Christian system of power), but there is no escaping power itself. At every stage and every facet of one's life, one is confronted with, and constituted by, power relations:

This is how rights originate: recognized and guaranteed degrees of power. If power-relations undergo any material alteration, rights disappear and new ones are created...Where rights prevail, a certain condition and degree of power is being maintained, a diminution and increment warded

¹⁴ Ibid., #13, at 45.

off.¹⁵

Nietzsche's point is that a civil state which exists under the rule of law obtains its stability by virtue of the dramatic tension of power relations between individuals. A situation that seems to be rule-governed and devoid of power relations is actually steeped in power relations. Nietzsche would claim that our smoothly running society is itself held together by a dramatic tension between claims of power, with the forces of 'slave morality' struggling against the last vestiges of 'master morality.' Democracy, no less than fascism, is a system of power relations, according to Nietzsche.

C. Foucault's Debt to Nietzsche

Foucault's debt to Nietzsche can hardly be overemphasized, and Foucault picks up on each element of Nietzsche's critique of social contract theory. Just as Nietzsche argued against the existence of the "subject" as a substrate beneath the subject's attributes, so Foucault heralded the 'death of the subject.'¹⁶ Like Nietzsche, Foucault thought that we should get rid of the notion of a pre-existing subject who serves as the substrate (or "prime matter") that is molded by the imposition of law and discipline. The individual does not pre-exist the imposition of power, but rather it is power which creates

¹⁵ Nietzsche, Daybreak (Cambridge: Cambridge Univ. Press, 1982) #112, at 66-7. I should add that Nietzsche flatly rejected social contract theory:

Human society is a trial: thus I teach it--A trial, O my brothers, and **not** a 'contract.' Break, break, this word of the softhearted and half-and-half.

Thus Spake Zarathustra (New York: Penguin Books, 1954) Bk III, ch 12, #25, at 212.

¹⁶ See the final passages from Foucault's The Order of Things (New York: Vintage Books, 1973).

the individual in the first instance. As Foucault explains:

My objective [] has been to create a history of the different modes by which, in our culture, human beings are **made subjects**.¹⁷

The individual is no doubt the fictitious atom of an 'ideological' representation of society; but he is also a reality fabricated by the specific technology of power that I have called 'discipline.'¹⁸

Foucault wants to focus on how the individual is produced and turned into a subject by a series of disciplines, especially those which are not allied with the state, such as the school system, hospitals, the military, and the prison system. As we shall see, Foucault insists that the traditional understanding of power (as state power over the individual) is radically one-dimensional because it wrongly assumes that power must be repressive power (as opposed to productive power). The classical model fails to capture the ways in which the individual is shaped by powers other than state power, primarily in the form of the "disciplines."¹⁹ So the "self" or "subject" is merely what results from these

¹⁷ Foucault, "The Subject and Power" in Hubert Dreyfus and Paul Rabinow, Michel Foucault: Beyond Structuralism and Hermeneutics (Chicago: Univ. of Chicago Press, 1982) 208 (emphasis added).

¹⁸ Foucault, Discipline and Punish: The Birth of the Prison ("DP") (New York: Vintage Books, 1977) 194.

¹⁹ Foucault uses the word "disciplines" to designate procedures whereby the body is regulated, coerced, and subject to constant surveillance:

These methods, which made possible the meticulous control of the operations of the body, which assured the constant subjection of its forces and imposed upon them a relation of docility-utility, might be called disciplines. [DP, 137].

Note, however, that the disciplines were not entirely repressive; they also constituted the subject. In other words, the disciplines gave us a framework for understanding the subject, and thus 'create' the subject. For example, the discipline of psychiatry once held that gays were aberrant, disturbed. And this label in part constituted the identity of gays at that time. The method of classifying, isolating, and medicalizing gay behavior was not only a repressive act, but also a productive act, a way of turning gays into

forces, not something over and apart from them---there is no Cartesian 'cogito,' no Kantian 'transcendental ego' as had been supposed by social contract theory.

Foucault is also heir to Nietzsche's incredulity toward the claim of moral progress.²⁰ Nietzsche argued that Christian morality did not bring about the end of abusive power relations, but was itself an expression of a particular type of power, namely the power of the herd, the weak, the 'botched and bungled.'²¹ That is, power seeps through all facets of human behavior, such that even the most pious Christian morality is built upon an indirect exercise of power turned upon itself ("ressentiment"). Just as Nietzsche uncovered the hidden power relations behind Christian morality, Foucault wants to uncover the hidden power relations at work in the creation of the modern legal system, which is touted as an advancement over the pre-modern state. If Nietzsche and Foucault are correct, then we cannot confidently claim that humanity has progressed from an age of domination into an age of liberty. Rather, humanity moves through different stages of domination, and our present system is merely a high-tech and decentralized version of the centralized brute power which ruled during the pre-modern

subjects, albeit subjects of a denigrated variety. Of course, it is this very "subjectivization" of homosexuals that can serve as the rallying point for a "queer politics" which resists their marginalization at the hands of the dominant culture. See David Halperin, Saint Foucault (New York: Oxford University Press, 1995), 15-125 ("The Queer Politics of Michel Foucault").

²⁰ Foucault, "N,G,H," 76-100.

²¹ Nietzsche argued, in effect, that there have been two paradigms of morality and law since the beginning of recorded history. The first epoch of law was based on the discharge of power relations among the strong---this is the so-called "master morality." The second epoch arrived with the Christian-based ethic of ressentiment, in which the weak banded together to rebel against the strong---this is the so-called "slave morality." See Nietzsche, Beyond Good and Evil (New York: Vintage Books, 1989), #260.

period. Foucault explains this point in vivid detail:

[I]t would be false to think that the total war exhausts itself in its own contradictions and ends by renouncing violence and submitting to civil laws. On the contrary, the law is a calculated and relentless pleasure, delight in the promised blood, which permits the perpetual instigation of new dominations and the stagings of meticulously repeated scenes of violence....**Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination.**²²

This is an anti-Enlightenment position which questions the possibility of progress in law and politics. Whereas Nietzsche was concerned with the genealogy of Enlightenment-era (Christian) morality, Foucault was concerned with the genealogy of the classical juridical theory. Foucault thought that he could unmask the classical theory by exposing its roots in a genealogical analysis:

My general project over the past few years has been, in essence, to reverse the mode of analysis followed by the entire discourse of right from the time of the Middle Ages. My aim, therefore, was to invert it.²³

To flesh out Foucault's view, let us now turn to an in-depth look at his rejection of classical juridical theory.

4.2 Foucault on Law and Discipline

Foucault's central contribution to legal theory is critical: he argues that the dominant paradigms in political theory and jurisprudence commit a grave and fundamental error by focusing solely on the power relations between the state and the

²² Foucault, "N,G,H," 85 (emphasis added).

²³ Foucault, "Two Lectures," in P/K, 95.

individual.²⁴ A genealogical analysis of the classical approach shows that its focus on state power is due to the fact that this model arose as a method for legitimating state coercion over the individual.

A. Genealogy of the Classical Model

Foucault uses the genealogical method to situate the emergence of the classical juridical model in the 16th and 17th Centuries. He wants to force a rejection of the juridical model by exposing its origins--by showing that this model purports to set limits to state power, but actually arose as a way of legitimating and extending state power. The Hobbes-Locke-Rousseau project of seeking a philosophic justification for the state arose as a way of granting the state the right to control the individual. Foucault thinks that this genealogical insight will change the way in which we view social contract theory. Specifically, we will realize that social contract theory is not concerned primarily with individual freedom but with social control: it purports to protect the individual from the state, but has the perverse effect of extending and rationalizing state

²⁴ In addition to distancing himself from the liberal understanding of power as state power, Foucault also wants to distance himself from the Marxist understanding of power as class power. Foucault thinks that the Marxist position is too reductionist, because it sees power solely in terms of economic relations, and therefore views social relations as a reflection of the forces of production. Foucault argues that while some law and discipline can be explained as the mechanism by which one class tries to control another class, the disciplines cannot be wholly explained as mechanisms which provide for the smooth functioning of capitalism. Further, Foucault rejects the Marxist notion of the self ("species being"), and hence disagrees with the Marxist concept of emancipation through the abolition of private property. See Foucault, DP, 220-221. See, also, Best and Kellner, Postmodern Theory, 56-59.

control over the individual.²⁵

Foucault points out that the social contract model did not spring full-grown from the minds of political theorists, but arose at a particular time, for a particular purpose. Specifically, it arose at the end of the Middle Ages, during the decline of feudalism and the rise of monarchical European empires. The coming together of large populations at this time gave rise to a unique problem of how a large collection of individuals could be governed by a centralized authority. Here is where social contract theory proved useful, as a way of rationalizing the sovereign's need to organize large numbers of people. Under the social contract model, the sovereign could reason that the individuals living within his borders had voluntarily consented to state rule, and had willed their own submission to the government.

As we saw, the classical juridical model conceives of power as a right held originally by individuals, typically in the form of natural rights held in a state of nature. Under this model, the individual vests the government with the authority to establish civil and criminal laws, set up schools, put together an army, build roads and bridges, and so on. The free social contract among individuals sets up a centralized government (a monarchy) that restrains the citizens through the criminal laws, taxation, and conscription. Foucault claims that this social contract model (with its focus on

²⁵ Foucault's overall conception of social contract theory is best instantiated by Rousseau's Social Contract, which begins with several chapters establishing the legitimacy of the state, and then turns to mechanisms for controlling the population, including the establishment of a civil religion, and the right of the state to censor. Foucault, "Governmentality" in The Foucault Effect: Studies in Governmentality, eds. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: Univ. of Chicago Press, 1991), 101.

a centralized state government) served the interests of the monarchs, who espoused the model in conjunction with a revival of Roman law. This package (social contract ideology and a Roman legal system) served the monarchs well, because it provided a basic framework for the management of a large centralized state. By adopting the Roman legal system, the monarchs manufactured, or produced, a new system of thought ("juridical science") which spoke in neutral terms about justice, rights, liberties, contracts, and freedom. But paradoxically, this was a discourse that was adopted, produced, and generated in support of the monarchy. So the resulting law betrays a double gesture---it speaks of individual freedom, but tends to legitimate the exercise of state power. That is, the legal system purports to protect the individual, but this same legal system has been the mechanism for state control over the individual:

Western monarchies [] were constructed as systems of law, they expressed themselves through theories of law, and they made their mechanisms of power work in the form of law.²⁶

The social contract model of classical juridical theory has undergone many permutations, but its various formulations have been put in the service of state interests:

This [] juridico-political theory of sovereignty of which I spoke a moment ago [] had four roles to play. In the first place, it has been used to refer to a mechanism of power that was effective under the feudal monarchy. In the second place, it has served as an instrument and even as a justification for the construction of large scale administrative monarchies. [] Finally, in the 18th Century, it is again this same theory of sovereignty, re-activated through the doctrine of Roman law, that we find in its essentials in Rousseau and his contemporaries, but now with a fourth role to play: now it is concerned with the construction of [] parliamentary

²⁶ Michel Foucault, A History of Sexuality: An Introduction, Volume I ("HS")(New York: Vintage Books, 1990), 87.

democracy.²⁷

Foucault's claim here is that the discourse of rights arose, and continues, as a way in which the individual could be coerced or dominated by the monarch. The liberal state is itself a mechanism whereby large numbers of people can be rendered docile so that they are willingly classified, organized, and dominated, not only by the state but by private interests.

Foucault's claim is completely contrary to our present way of thinking, in which rights are seen as trumps against state interference; that is, we think that the system of rights protects us from state power.²⁸ But Foucault wants to claim that the legal system as a totality arose as a way of legitimating the use of state power:

The system of right, the domain of the law, are permanent agents of these relations of domination, these poly-morphous techniques of subjugation. **Right should be viewed, I believe, not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates.**²⁹

So the "domain of law" is itself a form of domination and a smokescreen for domination, and it should not be understood as a system which protects the individual from state domination (as was supposed by Hobbes and Locke, and more recently, by Ronald Dworkin's notion that rights are trumps against state coercion).

²⁷ Foucault, "Two Lectures" in P/K, 103.

²⁸ Foucault certainly recognizes that while the juridical system as a whole has been adopted to benefit the monarchies, this system also gave rise to certain rights (privacy, autonomy, property) which have been used to justify rebellion against the monarchies: "Moreover, law, particularly in the 18th Century, was a weapon of the struggle against the same monarchical power which had initially made use of it to impose itself." Foucault, "Power and Strategies" in P/K, 140-1.

²⁹ Foucault, "Two Lectures," in P/K, 96 (emphasis added).

B. The Rise of "Governmentality"

Foucault argues that at the end of the Middle Ages, large nation-states began to form above the myriad feudal estates, raising the problem of "governmentality."³⁰ Prior to that time, there was no question of the legitimacy of the state, since the state was seen as divinely authorized. But with the decline of religion during the Enlightenment, and the emergence of large centralized populations, the monarchs needed a method of extending state power. So there was a shift from concern over how the king should run his own affairs to how the state could be managed as an independent enterprise. In other words, the state began to emerge as an entity in its own right. As proof for this shift in emphasis, Foucault points out that political treatises in the Middle Ages took the form of guidebooks for "advice to the prince" about proper princely behavior (e.g. Machiavelli's The Prince), but at the end of the Middle Ages, from the 16th to the 18th Centuries, we see the rise of treatises concerned with the "art of government." It was at this time that the question of state control over the population becomes problematized. In the political treatises of the 17th and 18th Centuries, we see the rise of the contractual model, as a way of explaining how subjects can be contractually (and morally) bound to obey a powerful centralized government. These treatises raised a series of legal and political problems which are still central today in jurisprudence and political philosophy: the problem of natural rights, the enforcement of contracts, the bounds of legitimate government action, and the right to disobey the law. But these are all problems from **within** a framework of law that was a tool for monarchs to extend their power in the pre-

³⁰ Foucault, "Governmentality," in The Foucault Effect, 87-104.

modern era. Foucault wants to dispel the notion (which he sees as endemic in political theory) that these problems are eternal problems that plague all approaches to law and politics. In contrast, he sees these as specific problems that arose for specific reasons.

As sovereignty was emerging as an important issue in the 16th to 18th Centuries, treatises were being developed that extended the concept of "governance" to all aspects of life. This led to the emergence of a series of disciplines which proved useful for organizing and regulating large numbers of people. The new fields of statistics, economics, public health, geography, and political districting all signalled the beginning of a new set of tactics whereby the centralized state began to exercise subtle control over the citizens. These disciplines were aimed at centralizing and extending the power of the state over the subjects, on the analogy of the "pastoral power" of the shepard over a flock. In short, the 17th and 18th Centuries saw the convergence of the Enlightenment, the rise of the centralized state, and the concern with sovereignty and government. Given all of these factors, we can understand the central role played by social contact theories in the 17th and 18th centuries: these theories dealt with the problem of how large numbers of people could be regulated and brought under the control of a centralized state. By the late 19th and 20th centuries, however, it was no longer the state that was the exclusive source of control and regulation; by this point, power had become diffuse, 'capillary,' issuing from various sources.

Foucault makes the important observation that classical juridical theory focuses on the coercive relationship between the state and the individual, which was a genuine problem back in the 17th and 18th Centuries, before the rise of the disciplines. But the

rise of the disciplines have created new forms of power which cannot be understood on the social contract model. In other words, and this is Foucault's central insight on law, there is a time lag between the way in which we conceptualize power-relations, and the way in which we are actually confronted by power-relations. In our political theory, we remain largely stuck in a pre-modern notion of power as repressive force by the state, and we wrongly assume that the absence of state power translates into freedom for the individual. Foucault's comments on law are designed to force a re-thinking (or rejection) of the contract-oppression model, and to show that law is now tied to the disciplines. The contract-oppression model may have been appropriate for the 17th Century, but it is inappropriate for the modern state:

We must eschew the model of Leviathan in the study of power. We must escape from the limited field of juridical sovereignty and state institution, and instead base our analysis of power on the study of the techniques and tactics of domination.³¹

That is, the sovereign-juridico model cannot explain the myriad ways in which modern individuals are shaped by the disciplinary system. Political philosophy tends to revolve around the issue of state sovereignty, but the state alone is no longer the only apparatus which dominates the individual:

But in the 17th and 18th centuries we have the production of an important phenomena, the emergence, or rather the invention, of a new mechanism of power possessed of highly specific procedural techniques [] which is also, I believe, absolutely incompatible with the relations of sovereignty.³²

³¹ Foucault, "Two Lectures" in P/K, 102.

³² Ibid., 104.

Since the juridical model sees power as the force of the sovereign, it cannot grasp other ways in which individuals are constrained, especially in non-political contexts, such as hospitals, schools, and factories. So the classical juridical approach is not so much "wrong" as "outdated" in that it fails to explain how the individual is coerced by forces other than the centralized state. The picture of the free individual offered by the classical theory is belied by the way in which individuals are coerced and manipulated by the disciplines in the modern era. Our concern should no longer be with repressive laws (state punishment, taxation, conscription), but with the way in which the individual is turned into a subject by productive laws and regulations (public health codes, zoning restrictions, public aid regulations, registration requirements, social security):

We must cease once and for all to describe the effects of power in negative terms: it "excludes," it "represses," it "censors," it "abstracts," it "masks," it "conceals." In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.³³

And so we must now turn to an examination of the disciplines, which constitute the central way in which power is exercised in the modern state.

C. The Disciplines and Law

The classical juridical theory (which Foucault rejects) sees the state as the source of power, and this may have been reasonable in an era when kings ruled with an iron hand. But with the rise of the disciplines, there is no centralized source of power. Rather, power is diffuse, it is exercised at the 'capillaries.' So the problem with the

³³ DP, 194.

juridical model is that it locates power in a single source (the state), and ignores other sources:

[R]ather than ask ourselves how the sovereign appears in his lofty isolation, we should try to discover how it is that subjects are gradually, progressively, really and materially constituted through a multiplicity of organisms, forces, energies, materials, desires, thoughts, etc... **This would be the exact opposite of Hobbes' project in Leviathan.** ³⁴

The Hobbesian project was to ask how free, sovereign individuals could transfer their power to a centralized state. The problems raised on the Hobbesian model are typical of the problems addressed in Anglo-American jurisprudence, which concerns itself with rights, contracts, reason, fairness, violence, and the problem of state interference with liberty. For Foucault, this way of thinking is based on a model of society that is pre-modern:

To conceive of power on the basis of these problems is to conceive of it in terms of an historical form that is characteristic of [] the judicial monarchy....And it is true that the juridical system [] is utterly incongruous with the new methods of power whose operation is not ensured by right but by technique, not by law but by normalization, not by punishment but by control, methods that are employed on all levels and in forms that go beyond the state and its apparatus.³⁵

In essence, Foucault calls for a shift away from the juridico-political theory of sovereignty to a study of the way in which individuals are shaped by non-judicial forces:

What we need is a political philosophy that isn't erected around the problem of sovereignty, nor therefore around the problems of law and prohibition. **We need to cut off the King's head: in political theory that still has to be done.**³⁶

³⁴ Foucault, "Two Lectures" in P/K, 97 (emphasis added).

³⁵ Foucault, HS, 89.

³⁶ Foucault, "Truth and Power" in P/K, 121 (emphasis added).

Foucault offers two explanations for why the theory of sovereignty persists even though it is outdated. First, he thinks that it serves an ideological function, namely it offers a sort of smokescreen which prevents us from seeing the disciplines as loci of power relations. That is, if power is understood on the sovereign-juridico model, we will fail to recognize alternative types of power, which in turn allows these new forms of power to flourish. Secondly, our legal codes are based on the paradigm of state power, and thus we cannot very well conceive of power which is outside of state power.³⁷ That is, political theorists do not see hospitals, schools and factories as sources of "power" because they tend to think of power as "control by the state." So the theory of sovereignty is an ideological gloss over the actual ways in which disciplinary practices work to shape the individual. Foucault's project forces a shift in focus toward "non-sovereign power," a type of power which he terms "disciplinary power."³⁸

D. The Move From State Power to Power at the Capillaries

For Foucault, the new forms of disciplinary power consists of normalizing techniques issuing from a plurality of sources:

The discourse of discipline has nothing in common with that of law, rule, or sovereign will...The code they [the disciplines] come to define is not that of law but that of normalization...It is human sciences which constitute their domain, and clinical knowledge their juris-prudence.³⁹

So a dual picture of law begins to emerge from Foucault's analysis. Our current legal

³⁷ Foucault, "Two Lectures" in P/K, 105-8.

³⁸ *Ibid.*, 105.

³⁹ *Ibid.*, 106-7.

system arose as an ideological framework for allowing the European monarchs to develop techniques for controlling their subjects. The classic example of law in this period was the criminal code---a set of prohibitions issued from the state to the individual. But in the modern era, a system of discipline has arisen below, around, and on top of the old system of law, and this new system is far more intrusive than the pre-modern repressive legal system. This new network of power-relations is a seamless web that never leaves the individual alone, but actually constitutes the subject as a subject:

In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.⁴⁰

To understand the ways in which the individual is affected by power, we must look not only to the system of codified laws (as in Anglo-American jurisprudence) but to the system of disciplines which supplement the law:

Law is neither the truth of power nor its alibi. It is an instrument of power which is at once complex and partial. The form of law with its effects of prohibition needs to be resituated among a number of other, non-judicial mechanisms.⁴¹

To understand the way in which the older forms of repressive state action have been complimented by the disciplines, we can turn to Foucault's study of the evolution of the prison system since the 18th century. In Discipline and Punish, Foucault chronicles the paradigm shifts in punishment since the 18th Century. At that time, punishment took the form of direct action by the sovereign against the individual. Punishment was a species

⁴⁰ Foucault, DP, 194.

⁴¹ Foucault, "Power and Strategies" in P/K, 141.

of torture, a show of excess in which the sovereign demonstrated its absolute power over the individual. In the beginning of the 19th Century, punishment became less of a spectacle, and punishments were tailored to fit the crime; the key for this paradigm was the representational function of punishment--cutting off a finger for theft, putting a drunkard in stocks, and so on. But in the middle to late 19th century, new forms of knowledge were brought to bear on the body (and the mental life) of the offender, and this caused another shift in the method of punishment, this time to the model we presently use: confinement, isolation, regulation, examination, and normalization.

These changes in the methods of punishment parallel the de-centralization of the state as a locus for the disciplining of subjects. Indeed, many of the various disciplines (including statistics, economics, political science, military science) arose primarily as methods for governing large populations, yet are now employed in a variety of non-governmental contexts. The disciplines do not flow from the state alone, and indeed they seem to have no particular 'source' as that word is typically used. Rather, there is a sort of endless loop of disciplinary strategies in which we are caught, and the loci of these disciplines includes schools, hospitals, factories, prisons, and the military.⁴²

The rise of the disciplines took place against the framework of the system of liberal rights. One might say that the disciplines were the "underside" of the juridical system, inasmuch as the juridical system guaranteed the sanctity of individual liberty and

⁴² This position is what separates Foucault from the Marxists, who trace the rise of disciplines to the need for docile laborers in a capitalist economy. While Foucault acknowledges that certain disciplines had this function (i.e. creating a class of docile workers), he thinks that the disciplines arose for reasons other than capitalism, although "each makes the other possible and necessary." DP, 221.

privacy, while the disciplines were busily eroded such rights. That is, the disciplines undercut the rights that were announced on the formal juridical system:

The general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that were essentially non-egalitarian and asymmetrical that we call the disciplines.⁴³

That is, while the jurists were busy establishing the formal rights of equality, liberty and fraternity, the disciplines were eroding these formal liberties by creating a carceral society, a "panopticon" in which each person is watching the other:

The [social] contract may have been regarded as the foundation of law and political power; panopticism constituted the technique, universally widespread, of coercion...**The 'Enlightenment,' which discovered the liberties, also invented the disciplines.**⁴⁴

Foucault goes on to characterize the disciplines as "counter-law" and "anti-law," since the law purports to set a limit beyond which the individual cannot be coerced, yet the disciplines pass beyond this limit, invade individual autonomy, and thus pervert the letter of the law.⁴⁵ The disciplines are not an "infra-law," nor a system of micro-laws, but an "underside of the law," which "undermines the limits that are traced around the law."⁴⁶

The rise of the disciplines allowed subjects to be controlled without the force of the sovereign. By creating a system of "subsidiary judges," the disciplinary era

⁴³ Ibid, 222.

⁴⁴ Ibid. (emphasis added).

⁴⁵ Ibid.

⁴⁶ Ibid., 223.

fragmented the legal system into a constellation of mini-punishing tribunals. So it was that schools, military barracks, and factories came to resemble prisons---they all shared a common interest in disciplining and shaping the subject. But whereas the pre-modern law worked by virtue of **sanction**, the disciplines and their regulatory apparatus work through **normalization**. The disciplines shape the person in a way that the law is incapable of doing, namely by continually subjecting the individual to normalizing modes of regulation. If Foucault is correct, then we must replace the classical question, "What are the legitimate limits of state power?" with the question, "What are the ways in which I am presently a product of power relations and disciplines over which I have no control, whether these are imposed by the state or otherwise?"

Foucault is not arguing that the law is fading away and being replaced by the disciplinary system. Instead, he is arguing that the law is beginning to conform to the disciplinary system (and vis versa), such that the disciplinary system is now encoded in the form of laws and regulations:

I do not mean to say that law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the juridical institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.⁴⁷

That is, the law is becoming increasingly regulatory and administrative, and less punitive. One is no longer subject to the commands of the all-powerful sovereign, but to the mini-judgments of the Secretary of State, the Department of Motor Vehicles, the Internal Revenue Service, the local Zoning board, and the Municipal Code. And while

⁴⁷ Foucault, HS, 144 (emphasis added).

the law is becoming more disciplinary, the disciplines are becoming more "legal-ized."

E. Some Examples of Law and Discipline

Foucault provides many striking examples of the relationship between law and discipline, and perhaps the best illustration involves a trial that took place in France in 1978, where an admitted rapist refused to respond to questions put to him by the judge about his motive for committing the crimes. That is, he admitted that he was guilty of the offenses and he was willing to accept the punishment, but he refused to open up about his motives. In this case everything seemed to be in order: the law was clear, the evidence was uncontroverted, and the accused admitted his guilt. But the judge and jury wanted more--they wanted a confession and an admission of depravity. When the accused refused to respond, a juror cried out, "For heaven's sake, defend yourself!"⁴⁸ The need to get inside the head of the criminal in order to regulate and normalize his thoughts is a product of the combined disciplines of psychiatry and penology, which became intertwined in the 19th century. Foucault thinks that this case shows that the sovereign-juridico model (where the state is a purely punishing or repressive force) cannot account for the way in which power is presently exercised, because on the sovereign-juridico model, all the elements of the offense had been satisfied, and the judge and jury should have been happy. But the sovereign-juridico model no longer fits our society, because the disciplines have moved to the forefront: law is no longer merely

⁴⁸ Michel Foucault, "The Dangerous Individual" (1978) 1 Int'l Journal of Law and Psychiatry 1-18, reprinted in Foucault: Philosophy, Politics, and Culture, ed. Lawrence Kritzman (New York: Routledge, 1988), 125.

punishment of external behavior (though of course this remains essential), but it now also consists of exposing and regulating the internal thoughts of the perpetrator. So in this case, the judge and jury wanted more from the criminal than the mere admission of guilt:

Much more is expected of him [the criminal]. Beyond admission, there must be confession, self-examination, explanation of oneself, revelation of what one is. The penal machine can no longer function with [solely] a law, a violation, and a responsible party.⁴⁹

That is, we now have new forms of domination which are more subtle and insidious than the blunt repression which was once doled out by the all-powerful sovereign. The new forms of domination strike at the body of the subject (and hence constitute a "bio-power" and "anato-politics"), but they also strike at the subject's internal world. The new form of domination is both repressive and constitutive of the individual---it creates at the same time that it prohibits. In the example discussed above, the criminal law does not merely punish, but it constitutes the criminal as a criminal, as a person who possesses criminal thoughts, who longs to confess, who is mentally disturbed. In this sense, the criminal justice system does not merely punish criminals: it creates them.

For another instance of the increasing intersection of law and discipline, consider an example that Foucault mentions briefly in Discipline and Punish: the workplace

⁴⁹ Ibid., 126. Of course, one can turn this analysis back on Foucault, by arguing that the question of the perpetrator's intent is without doubt a relevant question, and that any system of penology which failed to take this into account is flawed. For example, the perpetrator may have been under a delusion during the attacks, or he may have committed the attacks under the influence of drugs, which would affect the sentence to be given to him. One could argue, *contra* Foucault, there is nothing sinister about questioning the mental state of a criminal. After all, even Socrates was asked to say something in defense at his trial!

contract.⁵⁰ Under traditional legal theory, the workplace contract is seen as the result of a free choice between employer and employee: the individual freely gives his time and labor, and the employer undertakes responsibility for payment of wages, work assignments, and so on. From a legal perspective, the employer-employee relationship is regulated by common law principles of contract and by state and federal regulations affecting work environments.

But, and here is Foucault's key point, this legal framework only goes so far in capturing the power relations at work in the employer-employee relation. To fully understand the employer-employee relationship, we need to examine not only the terms of the employment contract and the governing statutes, but also the various ways in which the worker is normalized, subject to control and regulation, classified, ranked, and penalized. To see the full range of micro-regulation of the employee, we need only turn to the employee handbook to find a complex web of micro-punishments and petty rules governing everything from the proper use of office equipment to the allowable number of bathroom visits. The employee is "free" but her every step is monitored, assessed. And in addition, we find a growing use of surveillance devices in which managers can eavesdrop on workers, bosses can monitor the managers, and workers can spy on each other. Further, managers have access to software which can chart employee work hours, profitability, and efficiency to the smallest detail. The combined effect of such micro-regulation is to create an un-free work environment, despite the fact that the workplace contract is deemed a free contract from the legal perspective. In this way, Foucault's

⁵⁰ Foucault, DP, 223.

approach can be used to explore the way in which a **seemingly** free work contract is weighed down with invasive mechanisms which rob the individual of freedom. So where the law is silent, the individual is not necessarily free. Rather, where the law is silent, the disciplines take over, and they do so by assuming the form of laws and regulations. These new regulations are not to be confused with the clearly coercive pre-modern laws ("Pay a tenth of your money to the state or you will thrashed"), but they are nonetheless coercive in a more subtle way. And unlike the repressive laws of the old regimes, the new system of discipline and quasi-law is all-pervasive and reaches thoughts and behaviours which the repressive law could never reach.

4.3 Does Foucault Offer a Positive Jurisprudence?

Paradoxically, Foucault's central point about law is that jurisprudence should not focus so heavily upon law, that is, upon laws enacted by legislatures and case decisions rendered by judges. Rather, jurisprudence should focus on the way in which the pre-modern type of (repressive) law has been melded together with the disciplines, and how modern law has enabled the expansion of the disciplines (and vis versa). Foucault's overall approach to law and discipline is perhaps best exemplified in Discipline and Punish, where he argues that the pre-modern system of punishment involved an excessive display of sovereign power, whereas the modern system of punishment involves isolation, normalization, regimentation, confession and moral re-education. What holds for punishment also holds for law: the **law** has become less repressive yet more regulatory; less severe yet more pervasive; less coercive yet more administrative. The danger in this

movement is that the individual's thoughts and behaviors have been increasingly regimented, such that there is no longer any private space (no "outside") from which the individual can resist or rebel. And since power is so diffuse, there is nobody against which to rebel.

Certainly, Foucault's analysis generates insights into the law, but can it provide the **normative** grounds for a program of legal reform? In what follows, I argue that Foucault does not have a program for a positive jurisprudence, and therefore should be understood chiefly as a social critic who points out the failure of the Enlightenment to live up to its own emancipatory pretensions. In other words, I see Foucault as offering a critical perspective on modern law (from an external perspective), but I don't see him as offering a program of legal change within the system of modern law.

Much of Foucault's work seems to play out the Nietzschean theme that "the highest values devalue themselves."⁵¹ Foucault wants to show that what seemed like progress in politics (the arrival of democracy, the power of reason, and the humanitarian reform of the prisons) is in fact an excuse for repression and discipline. That is, the social changes which have been made in the name of humanity (and freedom, truth, and liberty) have led to the creation of a society which is just as coercive as the barbaric practices from which we were trying to liberate ourselves. Foucault points out that the civil state of the 18th century was heralded as the delivery of the individual from brute power, yet it has delivered the individual over to another type of power, only this time the power is more diffuse, decentralized, and involves constant monitoring and

⁵¹ Nietzsche, The Will to Power (New York: Vintage Books, 1967) #2, at 9.

normalization. Foucault's overarching theme is that there is a "dark side" to the Enlightenment.⁵² As he explains, "My point is not that everything is bad, but that everything is dangerous."⁵³ Foucault's questioning of "everything" extends to a problematization of the very use of "reason," which thereby calls into question the Enlightenment notion that reason is a neutral court of appeal. Instead, we should see reason as a tool, a tactic, employed for specific ends:

I think that the central issue of philosophy and critical thought since the eighteenth century has always been, still is, and will, I hope, remain the question: **What is this reason that we use? What are its historical effects? What are its limits, and what are its dangers?**⁵⁴

Not only is 'reason' suspect, but 'justice' is suspect as well:

I will be a little bit Nietzschean about this...it seems to me that the idea of justice in itself is an idea which in effect has been invented and put to work in different types of societies as an instrument of a certain political and economic power or as a weapon against that power.⁵⁵

Judging from these comments, Foucault's approach to law can be seen as questioning our most basic ideas in jurisprudence, such as neutrality, objectivity, reason, freedom, and justice. We often silently assume these as the building blocks for jurisprudential theory, and we seldom see them as problematic in and of themselves. For example, we employ

⁵² See Foucault, DP, 222: "The 'Enlightenment,' which discovered the liberties, also invented the disciplines."

⁵³ Foucault, "On the Genealogy of Ethics: An Overview of a Work in Progress" in Michel Foucault: Beyond Structuralism and Hermeneutics, 231.

⁵⁴ Michel Foucault, "Space, Knowledge, and Power" in The Foucault Reader, 249.

⁵⁵ Foucault, "Human Nature: Justice versus Power" in Reflexive Water: The Basic Concerns of Mankind, ed. Fons Elders (London: Souvenir Press, 1974), 187, in The Foucault Reader, 6.

legal reasoning as a way of reaching a just decision in a legal case, but we seldom bother to ask questions of legal reasoning itself as a "discursive practice": when was it first employed? For what reason? Who determines the parameters of acceptable legal reasoning, and to what effect? These are important, critical questions that can (and should) be asked of traditional jurisprudence.

But to make the claim that the new methods of discipline are "bad" or "morally impermissible," Foucault will need to employ these time-honored (but discredited) concepts of reason, neutrality, and inherent dignity. In short, he must have recourse to some sort of normative ground in order to anchor his critique of the carceral society. And make no mistake, Foucault's hidden normative agenda rises to the surface time and again, as evidenced in the following call for struggle against the seemingly neutral institutions of the modern state:

It seems to me that the real political task in a society such as ours is to criticize the working of institutions which appear to be both neutral and independent: to criticize them in such a manner that the political violence which has always exercised itself obscurely through them will be unmasked, so that one can fight them.⁵⁶

But if Foucault doesn't like the way in which the disciplines and the law are headed, then he needs some mechanism whereby he can critique them as immoral. It is hard to see how Foucault's positivistic, descriptive analysis of modern law could give rise to a value judgement that this law has been erected at the expense of mankind? Most importantly, who is this "man" (if he exists for Foucault) that has been harmed by modernity? It seems that Foucault's theory implies (and needs to imply) a particular view of man which

⁵⁶ Ibid., 6.

he never outlines or discusses, but silently assumes as the victim of disciplinary society.

And here is precisely where Foucault's theory poses the most problems. In order to generate a program for legal change, Foucault must provide some test for whether a law is good or bad, moral or immoral, just or unjust. And this can only be done if there is some notion of the "man" or "self" who must be liberated from the legal system which enables the disciplines. Yet Foucault is curiously silent on the status of this "man" or "soul." This is a problem for Foucault. If the soul is merely a historical construct (and not a deep structure with an innate yearning for freedom) it isn't clear how the soul (or mankind) is injured by the trend toward the disciplinary society and the carceral network.

Traditionally, we look to the Constitution and the legal system to provide some limits on the extent to which the individual can be controlled and dominated. Unfortunately, Foucault thinks that one cannot contest the disciplinary network by invoking inherent rights against oppression, because Foucault rejects the framework of innate rights as part of the problem in the first place---it was precisely under cover of such notions that we ended up in a carceral society. So Foucault thinks that we cannot look to the legal system for protection, but we must seek an alternative escape from domination:

If one wants to look for a non-disciplinary form of power, or rather, to struggle against disciplines and disciplinary power, it is not towards the ancient right of sovereignty that one should turn, but towards the possibility of a new form of right, one which must indeed be anti-disciplinarian, but at the same time liberated from the principle of sovereignty.⁵⁷

⁵⁷ Foucault, "Two Lectures" in P/K, 108.

What Foucault is saying here, oddly enough, is that since the juridical notions of emancipation (freedom, privacy, autonomy) are themselves merely devices which facilitate power relations, there is no point in using these notions as protection against an abuse of power:

[I]t is not through recourse to sovereignty against discipline that the effects of disciplinary power can be limited, because sovereignty and disciplinary mechanisms are two absolutely integral constituents of the general mechanism of power in our society.⁵⁸

Foucault's point is that we cannot use juridical principles (e.g. the law) as a defense against discipline, because the law is in fact part of the disciplinary network. The disciplines are coercive, but so are the laws which purport to protect the individual from the disciplines. Given this, it is hard to see an escape from domination, and Foucault can only point toward the possible emergence of a "new form of right" that is neither disciplinary nor based on juridical principles.

To flesh out this "new form of right" which struggles against the disciplines, perhaps we could look to Foucault's final works on the history of sexuality. In these works, Foucault explored the possibility of an ethics of self-mastery in which the subject could create herself through an aesthetic process. As Foucault explained:

From the idea that the self is not given to us, I think that there is only one practical consequence: we have to create ourselves as a work of art.⁵⁹

⁵⁸ Ibid.

⁵⁹ Foucault, "On the Genealogy of Ethics: An Overview of Work in Progress," in The Foucault Reader, 351. For a discussion of the shift in Foucault's later work, see Best and Kellner's Postmodern Theory, 60-61, and Jon Simons, "From Resistance to Polaesthetics: Politics after Foucault," Philosophy and Social Criticism 17 (1991): 41.

Presumably this project would have political ramifications, in that the "just state" would be the state which allowed this type of aesthetic transformation. Ostensibly this would require a "new form of right" divorced from the classical juridical model, but unfortunately Foucault cannot tell us very much about this new form of right, apart from some vague statements about the need for new forms of subjectivity:

[T]he political, ethical, social, and philosophical problem of our days is not to try to liberate the individual from the state, and from the state's institutions, but to liberate us both from the state and from the type of individualization which is linked to the state. We have to promote new forms of subjectivity through the refusal of this kind of individuality which has been imposed on us for several centuries.⁶⁰

It seems that Foucault is calling for the creation of new forms of right and new forms of subjectivity, yet he fails to specify the parameters of such new forms. Frankly, Foucault seems to be fumbling around in his effort to envision a more desirable political and legal system. Foucault certainly says that at each point at which power is exercised there is the possibility of resistance, but it is unclear how Foucault could generate an overarching program which explains why we must resist, who is resisting, and where and when resistance should be offered. Foucault may have his reasons for abstaining from these types of claims, but they are precisely the questions that we need to answer if we want to generate a positive jurisprudence.

Here, I think, we must finally admit that Foucault cannot generate a positive jurisprudence. By arguing that we cannot look to the juridical notions of privacy and autonomy as a defense against the disciplines, Foucault cuts off the possibility of an

⁶⁰ Foucault, "The Subject and Power," 216.

emancipatory program of jurisprudence. For it is these juridical notions of autonomy and privacy, however jaded, which are the only available way to challenge the disciplinary network. That is, even though the law has historically enabled the disciplines (and it was under cover of the law that individuals were subjected to discipline), the law remains the best way to resist the disciplines, on the grounds that they are violative of basic Constitutional rights. For example, the best way to challenge inhumane police tactics is to claim that they infringe on privacy, or that they are cruel and unusual, or that they violate the right against self-incrimination. It may be a cliché, but our rights are the last line of defense against inhuman treatment.

But Foucault cannot make this move, because he thinks that these rights are mere chimeras which have in fact furthered the domination of the individual. By making this move, Foucault paints himself into a corner: he decries the disciplines and the legal system, and he refuses to see the law as an avenue for protection of the individual. This nihilistic attitude may strike the reader as overly defeatist, as Colin Gordon explains in his comments on Foucault:

Readers of Foucault sometimes emerge with a dismaying impression of a paranoid hyper-rationalist system in which the strategies-technologies-programs of power merge into a monolithic regime of social subjugation.⁶¹

This analysis points up a major problem with Foucault's understanding of law, namely that he focuses too closely on the genealogy of modern law, and therefore he fails to appreciate the way in which the modern legal system (especially Constitutional law) has

⁶¹ Colin Gordon, "Afterword," in P/K, 246.

protected individuals against coercion. Even if we grant Foucault's genealogical point that the judicial system arose as a way of exploiting the individual, this does not mean that it continues to have this function. In the United States, for example, the First Amendment-based rights to a free press, privacy, and association, are intended to prevent the individual from being forced to think in a particular manner---to protect the individual from domination and normalization. Further, the Fifth Amendment "takings clause," the Third Amendment prohibition against quartering soldiers, and the Fourth Amendment right against search and seizure, are all designed to protect the individual against intrusions. It would seem that any plausible program of liberation must incorporate these rights.

Foucault might respond by agreeing that these Constitutional rights appear to set limits on state interference, but they are powerless to stop more subtle abuses of power, such as workplace monitoring, involuntary confinement for mental disorders, and moral reeducation in our schools. That is, liberal jurisprudence focuses too closely on the elimination of state power over the individual, instead of focusing on the way in which the legal system allows other forms of domination. There is some truth to this observation, but this way of thinking doesn't leave Foucault with many options for changing or reforming the legal system. Foucault sees power relations as so pervasive that there is no coherent possibility of escape: "there is no outside" to the "carceral network," and we are condemned to the ever increasing mirco-physics of power relations.⁶² The modern age is an inexorable march toward more highly developed

⁶² DP, 301.

modes of discipline, increased surveillance, mass normalization, and the eroding of subjectivity. Foucault often talks as if this trend should be resisted, yet without a normative foundation of some kind, and without a belief in fundamental rights, it is hard to see how Foucault's critique could amount to a positive program for change. At best, I think, we can read Foucault as advocating a system in which power relations are no longer rigid, but rather allow the individual an opportunity to resist:

The important question is not whether a culture without restraints is possible or even desirable but whether the system of constraints in which a society functions leaves individuals the liberty to transform the system.⁶³

The idea here is that power relations are not *per se* immoral or illegitimate, but can become objectionable if they rigidify to the point where they cut off all resistance and become transformed into relations of domination.⁶⁴ The problem with this approach, however, is that it refuses to specify the grounds upon which resistance can be justified, and it remains silent about the type of society that must be created to counteract the dominant regime of power relations.

4.4 Foucault as Negative Utopian and Enlightenment Critic

Given these comments, we can safely say that Foucault lacks the grounds for a

⁶³ Michel Foucault, "Sexual Choice, Sexual Act: Foucault and Homosexuality," in Foucault: Philosophy, Politics, and Culture, 294.

⁶⁴ In his final works, Foucault said that power relations are inevitable ("I don't believe there can be a society without relations of power"), yet he seemed to advocate a system in which there would be a "minimum of domination." See Foucault's "The Ethics of Care for the Self as a Practice of Freedom," in The Final Foucault, eds. J. Bernauer and D. Rasmussen (Cambridge: MIT Press, 1988), 18.

positive theory of legal reform. This means that even if his understanding of the legal system generates critical insights, he nevertheless fails to provide a plan for making the system more just or more ethically sound. Instead of looking to Foucault for a full-blown legal theory or a program of legal reform, we should probably view his comments on law as making the somewhat modest (but important) claim that the law has undergone an important shift from being primarily repressive to being primarily regulative and normative, and that power has gone from being primarily negative (prohibitory) to being primarily positive (or constitutive). He also makes the excellent point that jurisprudence as a discursive practice is a self-perpetuating way of producing a truth, a discourse which offers to protect the individual, but can (if mishandled) have the opposite effect of legitimating the abuse of the individual. Foucault also makes the important point that political theory continues to focus on problems of state legitimacy when the more pressing issue of our time is the extent of non-governmental forms of power.

By offering these types of insights, Foucault provides a much needed critical perspective on our legal system. He shows us the underside of our practices, and forces us to rethink the assumption that jurisprudence can be a neutral science. Further, he shows us how legal subjects are not found in the ready-made order of things, but are constructed by power relations. Most importantly, he problematizes the use of reason, and shows us that the laws and practices developed in the name of humanity often result in new forms of tyranny that are more insidious and intractable than the practices which they were designed to remedy. This casts doubt on the idea of moral and legal progress.

The secondary literature on Foucault is divided on the question of whether

Foucault's work can be understood to provide a normative basis for a political (or activist) program, or alternatively, whether Foucault is better understood as a critical theorist who offers a 'way of seeing,' a sort of jaundiced look at contemporary society.⁶⁵ With regard to his writings on law, I would put Foucault in the latter category. Foucault's work is essentially an external (historical) critique of the legal system which fails to take a stance on internal issues within legal doctrine (abortion, affirmative action, flag-burning).⁶⁶ But while Foucault's work does not force an immediate change in the legal order, it **does** change the way that one thinks about the legal system. After reading Foucault, we somehow think differently about the law. And that alone is worthwhile, if only as a counterbalance against some of the more mainstream approaches in political and legal theory.

⁶⁵ A series of critical articles appeared in the early and middle 1980s, pointing out that Foucault lacked a normative basis for decrying the rise of the disciplinary state. See, e.g., Michael Walzer, "The Politics of Michel Foucault," Dissent 30 (1983): 481; Charles Taylor, "Foucault on Freedom and Truth," Political Theory 12 (1984): 152, and Nancy Fraser, "Michel Foucault: A 'Young Conservative?'," Ethics 96 (1985): 165. Some commentators have responded by arguing that Foucault's 'aesthetics of the self' (set forth in his later writings) could ground a political program of localized resistance to domination. See, e.g., Jon Simons, "From Resistance to Polaesthics," 48-53.

⁶⁶ In an interesting book on punishment, Mark Tunick confirms that Foucault takes an external perspective on the legal system. See Punishment: Theory and Practice (Berkeley: University of California Press, 1992), 18.

CHAPTER 5

DERRIDA ON LAW AND JUSTICE: BORROWING (ILLICITLY?) FROM PLATO AND KANT

Jacques Derrida is a controversial but undeniably influential French philosopher whose method of "deconstruction" is beginning to make itself known within legal theory.¹ Derrida has been active in French philosophy since the mid-1960s, but his early work was not overtly political. A gradual turn toward social issues began when Derrida offered a deconstruction of the Declaration of Independence in honor of the 1976 Bicentennial.² In the mid-1980s, Derrida went on to write about Nelson Mandela's struggle for justice in apartheid South Africa, and about Kafka's famous parable, "Before the Law."³ This movement toward social issues reached a focal point in 1989 when Derrida was the keynote speaker at a Cardozo Law School symposium entitled

¹ See, for example, J.M. Balkin, "Deconstructive Practice and Legal Theory," 96 Yale L. J. 743 (1987); Clare Dalton, "An Essay in the Deconstruction of Contract Doctrine," 94 Yale L. J. 997 (1985).

² Jacques Derrida, "Declarations of Independence," New Political Science 15 (1986): 7-17.

³ Jacques Derrida, "'The Laws of Reflection: Nelson Mandela, in Admiration," in For Nelson Mandela, eds. J. Derrida and M. Tili (New York: Holt & Co., 1987); "Before the Law," in Derrida, Acts of Literature (New York: Routledge, 1992).

"Deconstruction and the Possibility of Justice."⁴ It was in this lecture that Derrida outlined his approach to law and justice, so my comments will focus closely on this lecture.

Derrida's speech at Cardozo Law School was entitled "Force of Law: The 'Mystical Foundation of Authority'" (hereinafter, "Force of Law").⁵ As the title of the symposium indicated, the conference was organized to address, and perhaps quell, the widely-held impression that deconstruction lacks a coherent conception of justice. Derrida's lecture is a bold response to those critics who have charged deconstruction with political nihilism, irrationalism, and conservatism.⁶ Surprisingly, in "Force of Law,"

⁴ The proceedings of the Symposium, including the text of Derrida's lecture and the responses thereto, were published in "Deconstruction and the Possibility of Justice," 11 Cardozo L. Rev. 919-1726 (1989). Many of these papers, along with Derrida's text, were later compiled in Deconstruction and the Possibility of Justice, eds. Drucilla Cornell, Michel Rosenfield, and David Gray Carlson (New York: Routledge, 1992). All subsequent page references to Derrida's lecture will be to 1992 version published by Routledge.

⁵ Due to time constraints, Derrida presented only the first half of his text during the colloquium. The remaining half was delivered at UCLA in 1990, at a conference on "Nazism and the 'Final Solution': Probing the Limits of Representation." See Deconstruction and the Possibility of Justice, *ibid.*, 3. The first half of the lecture (upon which I will be focusing) deals directly with issues of law and justice, while the second half involves a close reading of Walter Benjamin's essay, "Critique of Violence." Derrida's reading of Benjamin was the subject of a second symposium at Cardozo Law School, and the papers were published in 13 Cardozo L. Rev. 1081-1355 (1991).

⁶ For the notion that deconstruction cannot generate a coherent ethical program, see Thomas McCarthy, "The Politics of the Ineffable: Derrida's Deconstructivism," in Ideals and Illusions: On Reconstruction and Deconstruction in Contemporary Critical Theory (Cambridge: MIT Press, 1991). For the notion that deconstruction ultimately lapses into a sort of conservative inaction, see Jurgen Habermas, The Philosophical Discourse of Modernity (Cambridge: MIT Press, 1987), 161-184. For a possible line of defense against Habermas' critique, see David Couzens Hoy, "Splitting the Difference: Habermas' Critique of Derrida," in Working Through Derrida (Evanston: Northwestern Univ. Press, 1993), 230-251.

Derrida comes very close to setting up a full-scale theory of justice and an accompanying account of law. And because Derrida's recent work affirms the account of justice set forth in "Force of Law," his lecture merits close scrutiny.⁷

In this chapter I will provide a charitable reading of Derrida's lecture on law and justice, yet I will ultimately conclude that Derrida's conception of justice is largely problematic because, ironically, it carries metaphysical and epistemic claims which Derrida has elsewhere rejected. Specifically, Derrida's conception of justice borrows quite heavily from Plato and Kant, and thereby retains much of the "logocentric" metaphysics of presence which he has found objectionable in these and other thinkers. **Part I** of this chapter provides a charitable and thorough explanation of Derrida's position on law and justice. In **Part II**, I show that Derrida's approach to justice is heavily indebted to Plato's notion of justice as a transcendent idea (or form), and to Kant's notion of justice as a regulative idea. I also point out that Derrida's rejection of traditional metaphysics and epistemology does not permit him to hold the quasi-

⁷ In this paper my arguments will focus upon Derrida's "Force of Law" essay, but this text will be supplemented with some of Derrida's other writings that deal more or less directly with the issues of justice and law (of which there are, surprisingly, quite a few). In "Force of Law," Derrida points out that many of his earlier works address the problematic of law and justice, especially "Declarations of Independence," New Political Science 15 (1986): 7-17; "'The Laws of Reflection': Nelson Mandela, in Admiration," in For Nelson Mandela, eds. J. Derrida and M. Tlili (New York: Holt & Co., 1987); "Before the Law," in Acts of Literature (New York: Routledge, 1992); and "Violence and Metaphysics" in Writing and Difference (Chicago: Univ. of Chicago Press, 1978).

Some of Derrida's more recent work also touches upon issues of justice and law, especially Specters of Marx (New York: Routledge, 1994), xix, 59, and 183-4; Aporias (Stanford: Stanford Univ. Press, 1993), 16-20; and The Other Heading: Reflections on Today's Europe (Bloomington: Indiana Univ. Press, 1992), 76-83.

transcendent view of justice which he appropriates from Plato and Kant. In Part III, I elaborate further on the notion that Derrida's position on law and justice has a hidden 'metaphysics of presence' and is therefore undercut by Derrida's own epistemic and metaphysical skepticism. Finally, in Part IV, I conclude that Derrida's ultimate goal is laudable: to set forth a concept of justice that demands a tireless, impossible, and incalculable vigilance to ensure that justice is done to the 'Other.' But however laudable this position may be, it nevertheless carries metaphysical baggage that must be rejected on Derrida's own critique of logocentrism. This means that Derrida's recent writings on justice and law are inconsistent with his earlier, more deconstructive writings.

5.1 Derrida on Law and Justice

Several important themes emerge in Derrida's "Force of Law," but the following points are essential: (i) deconstruction is not politically nihilistic--to the contrary, it recognizes an unceasing call to do justice to the other at all costs; (ii) there is a distinction between law and justice, such that justice is **not** deconstructible, yet law **can** be deconstructed; (iii) deconstruction reminds us that law can never reach a stage of complete justice, since justice is transcendent and never wholly imminent; (iv) justice takes the form of an experience of three aporias; and (v) justice requires a commitment to traditional emancipatory ideals and the recognition of marginalized groups. I will address these points in turn.

(i) Deconstruction as Anti-Nihilism

The central undertaking of Derrida's lecture is to defend deconstruction against the mischaracterization that it is indifferent to political and ethical issues.⁸ Derrida thinks that this misunderstanding of deconstruction may have been caused by the fact that deconstruction does not operate from **within** the dominant discourse of law and justice, in the sense that it does not engage in specific internal debates over particular rights, duties, and laws. Nevertheless, deconstruction is centrally concerned with matters of law and justice, albeit from an external or critical perspective, whereby deconstruction calls into question the justice of the entire legal apparatus. Deconstruction seeks to problematize traditional notions of law and justice, especially the notion that a system of laws can be said to be "just" at a given time. Deconstruction points to a

reinterpretation of the whole apparatus of boundaries within which a history and a culture have been able to define their criteriology.⁹

Derrida insists that deconstruction does not correspond to a "quasi-nihilistic abdication before the ethico-politico-juridical question of justice."¹⁰ Not only is deconstruction not nihilistic--on the contrary, it posits the greatest, unattainable, infinite duty to do justice to the other. Unlike traditional jurisprudence, which errs by conflating positive law with justice, deconstruction holds out justice as "beyond" the legal system. So Derrida wants to argue, against the legal positivists, that justice is something over and apart from the rights and remedies available under the existing legal system. Specifically, justice is an ethical relation that cannot be encoded in the form of statutes, rules, and legal precedents.

⁸ "Force of Law," 3-5.

⁹ Ibid. at 19.

¹⁰ Ibid.

Now Derrida claims that deconstruction has only **seemed** to avoid the issue of justice, when in fact it has been discussing justice all along, although Derrida concedes that his previous interrogation with justice has been somewhat oblique. The reason for this indirect engagement with justice is that, according to Derrida, justice cannot be approached directly without making the mistaken claim that "this [law] is just," a move which Derrida finds problematic, since justice is unrepresentable and cannot be identified with particular decisions.¹¹ So whereas Derrida's earlier writings have addressed justice somewhat indirectly, "Force of Law" represents Derrida's most direct engagement to date.

(ii) 'Justice' versus 'Law'

Derrida makes a fundamental distinction between "justice" and "law" (by which he means "positive law," man-made law). And since this distinction is crucial for his theory, we must dwell on this point at length. Derrida seems to think that justice is outside law; it is a relation or debt from one person to another, an irreducible and incalculable duty to act without consideration of repayment. Derrida thinks of justice as something that "exceeds" law, and can perhaps even contradict the law in extreme cases. Justice is deemed an "experience that we are not able to experience," and involves an experience of *aporia*.¹² Although these comments seem cryptic, Derrida's main point is that justice, properly understood, should not be confused with positive law.

¹¹ *Ibid.*, 10.

¹² *Ibid.*, 16.

Some clues to Derrida's notion of justice can be gleaned from his comments that justice is an "incalculable" demand to treat the other on the other's terms. Derrida's exemplifies this demand in his delivery of the lecture in English, which evidences his attempt to speak the language of the other:

To address oneself in the language of the other is, it seems, the condition of all possible justice...¹³

Now justice takes the form of an unconditional duty to recognize the other, and this debt of justice is incalculable, excessive, such that one can never fulfill it, and it cannot be measured because it is infinite. This means that justice is a duty to the other which can never be satisfied, yet must be attempted. Hence the "aporia" of justice:

I think that there is no justice without this experience, however impossible, of aporia. Justice is an experience of the impossible. A will, a desire, a demand for justice whose structure wouldn't be an experience of aporia would have no chance to be what it is, namely, a call for justice.¹⁴

Now this formulation of justice (as a "call" to the other) has unmistakable Levinasian overtones. And indeed, Derrida cautiously acknowledges his debt to Levinas, especially on the issue of the infinity and incalculability of the debt to the other.¹⁵ In addition,

¹³ Ibid., 17.

¹⁴ Ibid., 16.

¹⁵ Derrida stops short of wholesale adoption of Levinas' notion of justice toward the other, since Levinas' analysis carries additional commitments (presumably of a religious character) that Derrida wants to avoid in his lecture on law. Ibid., 22. Derrida's appropriation of Levinas in this lecture serves to extend and solidify Derrida's earlier discussion of Levinas in "Violence and Metaphysics":

"Ethics, in Levinas' sense, is an Ethics without law and without concept, which maintains its non-violent purity only before being determined as concepts and laws...Levinas does not seek to propose laws or moral rules, does not seek to determine a morality, but rather the essence of the ethical

Derrida's discussion of justice as an "aporia" seems to parallel his continuing interest in aporetic structures, most notably his recent work on gift without exchange, in which he tries to articulate a gift which does not entail a reciprocal return.¹⁶ Like a one-way gift without exchange, justice demands that we fulfill our duty without repayment, that we must perform without expectation of reciprocity:

[T]he deconstruction of all presumption of a determinant certitude of a present justice itself operates on the basis of an infinite "idea of justice" because it is irreducible, irreducible because owed to the other, before any contract, because it has come, the other's coming as the singularity that is always other.¹⁷

The call to justice reveals a responsibility without limit, a sort of bottomless duty to the other.¹⁸

In contrast to justice, "law" is a system of determinate rules. Law involves a process of calculating between claims, a determination of proper rule-following, and the subsuming of particular cases under general rules. Derrida's understanding of law

relation in general."

See Writing and Difference, 111. Interestingly, in this relatively early essay, Derrida was critical of the transcendental elements of Levinas' work, although (as I will argue) Derrida's own later works contain a strong transcendental component.

¹⁶ Given Time 1. Counterfeit Money (Chicago: Univ. of Chicago Press, 1992).

¹⁷ "Force of Law," 25.

¹⁸ The notion of a duty beyond law is explored further in Aporias, 16: Duty must be such an over-duty, which demands acting without duty, without rule or norm (therefore without law)...[A] responsible decision must obey an "it is necessary" that owes nothing, it must obey a duty that owes nothing, that must owe nothing in order to be a duty, a duty that has no debt to pay back, a duty without debt and therefore without duty.

That is, a genuine duty is categorically binding, regardless of the empirical situation in which one finds oneself, and regardless of whether one will be rewarded for doing one's duty.

follows Pascal (who in turn was following Montaigne) in the notion that the legal system is not founded on reason or justice, but upon an act of interpretive violence. Montaigne recognized that law is "nomos" (convention), and hence it derives from custom, which is itself arbitrary and groundless. Of any particular law, it can be asked, "What is the authority for this law?," and then again "What is the authority for this authority?" By tracing the chain of authority backwards, we must eventually acknowledge that the law is not "based" on anything beyond arbitrary custom backed by state violence. Because there is no rational point of origin for the law, it is self-grounding, according to Montaigne.¹⁹ That is, the founding law (typically, a Constitution or Charter) is itself merely a construct, a fiction installed by an act of force. This realization led Montaigne to hold that:

"Custom is the sole basis for equity, for the simple reason that it is received; it is the mystical foundation of its authority. Whoever traces it to its source annihilates it."²⁰

Montaigne's point is that the law is mired in practices and customs, and hence is not a system that has been constructed to fit the demands of justice: "And so laws keep up their good standing not because they are just but because they are laws."²¹

Now Derrida wants to focus on Montaigne's notion that law is a 'construct,'

¹⁹ Wittgenstein provides an excellent example of this process of tracing justifications back to their source in mere customs:

If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: "This is simply what I do."

Ludwig Wittgenstein, Philosophical Investigations (New York: MacMillan, 1958) sec. 217 at 85e.

²⁰ Quoted by Derrida in "Force of Law," 12.

²¹ *Ibid.*

because it follows from this that the law is **deconstructible**. Derrida thinks that the law is self-grounding in that it arises by an 'autobiographical fiction,' a performative act which is a 'coup of force.'²² In other words, at the moment of the foundation of the legal system, there must be an originary act of violence which sets up an initial standard of legality.²³ And since this standard is itself the criterion for other laws, it cannot itself be measured by any external standard of legality (for example, the Constitution of the United States was not authorized under the prior Articles of Confederation, so in a certain sense the founding of this country was "extra-legal"). Using this logic, Derrida says that the origin of law is beyond law--it is neither legal nor illegal, but is what creates the category of legality:

Since the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are in themselves unjust, in the sense of 'illegal.' They are neither legal nor illegal in their founding moment.²⁴

Derrida has elsewhere pointed out that the origin of law is an autobiographical fiction that becomes forgotten over time: the birth of the state is achieved through a creative act

²² *Ibid.*, 13.

²³ There are problems with Derrida's claim that the founding of every state involves an act of interpretive violence. This formulation renders every foundation violent, and therefore obscures the fact that some foundations are truly violent (apartheid South Africa, the former military dictatorship in Haiti) while other foundations are based largely on the consent of the governed (as in the United States). By saying that all law involves force, Derrida fails to distinguish between legitimate force which follows a rule of law, and illegitimate force which occurs at the whim of the powers that be. See my "Derrida and Lyotard's Misreading of Founding Documents" (unpublished manuscript). A similar point is made by Nancy Fraser, "The Force of Law: Metaphysical or Political?" 13 Cardozo L. Rev. 1325 (1991).

²⁴ "Force of Law," 14.

that is forgotten, such that a higher moral justification is presumed to underlie the founding of the state.²⁵ In other words, people begin to believe that the law is grounded in a higher order (God, reason, natural law), instead of realizing that the law is largely a fictional creation which self-perpetuates (in the sense that laws get their authority from other laws, in a circular system of self-referencing support). So there is a tendency to collapse justice into positive law, which results in a sort of naive legal positivism: the view that there is no justice over and apart from the rights and remedies available on the existing legal system. In order to combat this position, Derrida adamantly insists that justice **cannot** be collapsed into law. So we can never say, in good conscience, that "the law is [fully] just."²⁶

Now the key difference between law and justice is that justice is **not** deconstructible, whereas law can be deconstructed, since it is a construct.²⁷ Presumably, the 'deconstructibility' of law means that it is possible to trace the chain of authority back to an originary act of founding, an original positing of placeholders which enable the legal system to operate, but which are themselves not justified on the legal system which they enable. In other words, we ultimately reach an origin of the legal

²⁵ See "Before the Law," in Acts of Literature, 191-194, and "The 'Laws of Reflection'" in For Nelson Mandela, 18.

²⁶ Derrida's more recent work affirms that the call to responsibility requires an experience of the impossibility of justice. By experiencing this aporia, we avoid "good conscience," a term which denotes the mistaken belief that one has successfully encapsulated the infinite demand of justice into a technical rule. See Aporias, 19, and The Other Heading, 81. The notion of "good conscience" has a Sartrean ring to it, and in essence Derrida's "good conscience" resembles Sartre's "bad faith," in that both are a flight from infinite responsibility.

²⁷ "Force of Law," 14.

system which, paradoxically, grounds the system of authority but is itself ungrounded, and hence self-justifying. So the deconstruction of law shows that the legal system is a giant construct without ground; in other words, its foundation is groundless and 'mystical':

Here the discourse comes up against its limit: in itself, in its performative power itself. It is what I here propose to call the mystical. Here a silence is walled up in the violent structure of the founding act.²⁸

But unlike law, justice is not deconstructible, because it is a fundamental category of experience, and not a construct. As such, it cannot be fully coded in the legal discourse of specific rights, duties, and obligations without losing its irreducible character. One is called to do justice toward the other, yet this justice is excessive, incalculable, unreachable. There is no point at which it can be said that justice has been reached, and there is no point at which we can say definitively that a decision is "just."²⁹ But all the same, paradoxically, justice seems to appear as present, because it insinuates itself as a call to the other and thereby affects legal decisions. So even if there is no justice, "**there**

²⁸ Ibid., 14. Drucilla Cornell has focused heavily on Derrida's notion that deconstruction exposes the structural conditions which make a legal system possible in the first instance, but which are themselves outside the system. The Philosophy of the Limit (New York: Routledge, 1992).

²⁹ At times, Derrida seems to contradict this claim that justice cannot be (fully) present. For example, he argues that it is just to address the other in the language of the other, and that it is unjust for one group of people (say, imperialists) to impose its language upon a minority. I think that in such cases, Derrida is committed to saying that a particular action is "just" or "unjust", which seems to entail that justice or injustice is present in such cases. Of course, since Derrida eschews the metaphysics of presence, he has difficulty explaining (without using metaphysical language) how justice can be present as such in these cases.

is justice."³⁰ And hence justice (however infinite and unrepresentable) emerges as a standard against which we can interrogate the legal system.³¹

(iii) The Non-Presence, yet Presence, of Justice

Derrida thinks that justice cannot be fully present, and can only be experienced as something other than itself. That is, its presence is always deferred, always "to come." And while justice can never be truly "done," one is still called to do justice. So it follows that justice presents itself as an aporia, a blocked passage, an "experience of the impossible."³² But while justice is an aporia that cannot be fully laid out as a system of rules, the law can be presented as a system of rules, and for this reason the law is often confused with justice. That is, some thinkers (especially some extreme legal positivists) have argued that the realm of law is coterminous with the realm of justice. For these thinkers, justice is completely served when a decision has been rendered in accordance with existing law, since these thinkers refuse to recognize any justice which is outside the existing system of positive law.

Derrida is adamant in his rejection of legal positivism, and he argues that under no circumstances should the law be mistaken for justice. Yet at the same time that justice and law are separate, they necessarily converge at the instant of the judicial

³⁰ "Force of Law," 15.

³¹ Derrida's notion that justice is never fully present harkens back to his critique of the metaphysics of presence and to his notion of *differance*. See "Differance" in *Margins of Philosophy* (Chicago: Univ. of Chicago Press, 1982).

³² "Force of Law," 16.

decision. At the moment when a case must be decided, or a law enacted, one is called to justice, and one is forced to do the impossible--to encode infinite justice into a finite decision. This fundamental aporia can be broken down into three separate aporias which arise when a decision must be reached. The aporias arise from the simultaneous need for justice to be rendered immediately in the form of a legal decision here and now, and the competing need for justice to be infinite, beyond calculation.

(iv) Justice as the Experience of Three Aporias

The first aporia is the "epokhe [suspension] of the rule."³³ This aporia arises because a judge must follow the law (in the form of legal precedent), yet she must decide each case on its own terms and she must be free to overturn or reject (or distinguish) the precedents which impinge upon her. If the judge merely applies the rules mechanically, as might be the case if the judge read the law literally or if she searched for an original intent, then she would be acting in accord with the law, but she would be blind to the possibility that the law was itself immoral or wrong. On the other hand, if the judge suspends the law altogether and decides the case *de novo*, she effectively 'invents' the law in derogation of her duty to follow the law. To be just, the judge must follow the law but she must also stand ready to overrule the law. This means that she will be regulated yet unregulated--she must "conserve the law and also destroy it."³⁴ Thus for a judge to do what is "legal" may require her to make a decision that is unjust; and to do what is just may require a decision that has little or no legal support. In this way,

³³ Ibid., 22.

³⁴ Ibid., 23.

justice runs up against the limitations of law, and law runs up against the impossibility of justice.³⁵

The second aporia is "the ghost of the undecidable."³⁶ Derrida's focus here is **not** on the fact that a legal case can be decided in favor of either party, depending on the precedents. Rather, Derrida is focused on the fact that there must be a rapprochement between justice (incalculable, infinite, excessive, and unconditional) and law (calculable, determined, contingent, and rule-governed). Justice resists formulas, so we can never say that a particular formulation of law is "just," in the sense of rendering complete justice to the other. But at the same time that justice resists encapsulation, there is a demand for a decision to be made. So while there is no justice prior to a decision ("for only a decision is just"), no decision can completely capture justice. Derrida also wants to point out that even though there is an encounter with justice inherent in each decision, this encounter gets forgotten after the case is decided. So once a decision has been

³⁵ Query whether this is a genuine "paradox" or "aporia." For example, H.L.A. Hart points out that legal rules must be open-textured to allow for flexible application to new situations, so uncertainty is built into the judicial process, for good reason. H.L.A. Hart, The Concept of Law (Oxford: Oxford Univ. Press, 1961), 127-8. No doubt Derrida is correct that a judge should not be a mere "calculating machine," nor can a judge ignore precedent altogether, and this makes the judge 'regulated yet unregulated,' in a certain sense. However, *contra* Derrida, it seems quite possible for a judge to successfully juggle these two demands. That is, a judge could avoid the aporia by following the law in most cases, unless she felt that the law was unconstitutional or unjust, in which case she would overrule the law with reference to a higher authority. Hence there is no true "aporia" here, but only contradictory demands between following precedent and being free to ignore precedent when equity demands it. And indeed, one could use similar reasoning to dissolve all three of Derrida's aporias of justice, since the mere existence of competing demands on a judge does not necessarily give rise to unpassable aporias.

³⁶ "Force of Law," 24.

rendered, the case becomes a "precedent" and is part of the law, such that the judge's struggle with justice (her 'instant of madness') is forgotten.

The third aporia is "the urgency that obstructs the horizon of knowledge."³⁷ Justice must be rendered immediately, but to satisfy the infinite demand for justice, one would need infinite time and knowledge. Derrida quotes Kierkegaard to this effect: "The instant of decision is a madness."³⁸ In other words, the necessity of reaching a decision will bring a premature ending to the process of rendering infinite justice to the other. Derrida wants to stress that justice "has no horizon of expectation," and is always "to come," deferred:

"Perhaps," one must always say perhaps for justice. There is a 'to come' for justice and there is no justice except to the degree that some event is possible which, as event, exceeds calculation, rules, programs, anticipations and so forth...[J]ustice exceeds law and calculation...³⁹

But even though justice is incalculable, we are forced to calculate, in the sense that we must weigh the claims of the parties before the court. Jurisprudence requires an impossible and overwhelming task: to translate incalculable justice into calculable rules--to 'codify' an obligation that is beyond codes. Hence the aporia of justice: there is a need to do justice to the other, yet this can never be accomplished in the form of legally prescribed rights and duties.

(v) Affirming the Classical Emancipatory Ideal

³⁷ Ibid., 26.

³⁸ Ibid.

³⁹ Ibid., 27-8.

Derrida seems to think that his notion of justice, properly conceived as a "call to the other," can provide the basis for what he refers to as an 'ethico-juridico-political' position. The deconstructive project is not to produce new legal codes or to fill in the gaps in the law, but instead requires a "re-doing things from top to bottom."⁴⁰ That is, one should try to show that the foundations of a legal order are illegitimate, as for example when the term "man" is used in founding documents (such as the Declaration of Independence) in a way that is limited to white males, or when the term "family" is deemed to exclude homosexual couples. The deconstructive project is to "reinterpret the very foundations of law such as they had previously been calculated or delimited."⁴¹ Presumably this involves an expansion of those who are granted standing (and a voice) in the legal system, to achieve ever-widening circles of inclusivity. Perhaps it is for this reason that Derrida affirms the process of liberation which is characteristic of the Western democratic tradition:

Nothing seems to me less outdated than the classical emancipatory ideal. We cannot attempt to disqualify it today, whether crudely or with sophistication, at least not without treating it too lightly and forming the worst complicities.⁴²

Derrida also suggests, at the end of the lecture, that deconstruction ought to remain concerned with the recognition and liberation of marginalized groups, presumably including gays, minorities, the homeless and disabled, and animals.

Now that I have completed a summary of Derrida's lecture, I should point out

⁴⁰ Specters of Marx, 184.

⁴¹ "Force of Law," 28.

⁴² Ibid.

that the view of justice and law which is set forth in "Force of Law" has been affirmed by Derrida in his most recent texts. For example, in his 1993 lectures on Marx, Derrida speaks of an "idea of justice" which is "irreducible to any deconstruction," and is "not yet there."⁴³ So we can conclude that Derrida's "Force of Law" sets forth a view of justice which Derrida will continue to hold.

In "Force of Law" and the more recent Specters of Marx, Derrida seems to be laying the groundwork for an approach to jurisprudence which insists upon an almost dialectical struggle between law and justice. That is, justice and law differ **in kind**; justice is transcendent or (quasi-transcendent) and it is not deconstructible, while law is imminent and deconstructible. Justice cannot be formulated as law without losing its infinite qualities, and law cannot reach a point of unity with justice, since law is inherently deconstructible. But, and here is the main point, the law can be changed so that its foundations more clearly reflect the demands of justice. Justice must be vigilant toward law, it must interrogate and haunt the law. Most importantly, deconstruction must remind us that the law should not pass itself off as justice, since there is no possible legal arrangement which could do full justice to the other. At the very least, the deconstructive project forces a shaking or trembling of the legal order such that its foundations are put into question.⁴⁴

⁴³ Specters of Marx, 59, xix. Derrida also speaks of a call to the other which involves the duty of action without repayment, in Aporias, 16.

⁴⁴ It might be argued that Derrida's project is not to erect a notion of 'deconstructive justice' in the sense of providing a positive program for jurisprudence, but rather to provide a method for questioning the very possibility of a successful and complete legal theory. This reading of Derrida would be similar to the reading given by David Couzens

If my interpretation is correct, namely that Derrida is setting up a system in which justice can be used to interrogate the ethical status of the law, then this would place Derrida in a long line of thinkers who draw a (sharp) division between law and justice. The two thinkers that I see as the most important influences for Derrida are Plato and Kant. And in what follows, I argue that Derrida's view of justice borrows heavily, but illicitly, from Plato and Kant.

5.2 Platonic and Kantian Influences

From Plato, Derrida borrows the notion that justice is something ideal and unattainable in our existing practices (in essence, a form that stands apart from the various attempts to render justice within the existing legal system).⁴⁵ From Kant, Derrida borrows the notion that justice is a regulative idea, a horizon that cannot be reached but which serves as a goal at which we should aim. What I want to show is the following: Derrida wants (and perhaps needs) to borrow from the Platonic and Kantian tradition, yet he cannot do so because these positions carry metaphysical and epistemic warrants that are untenable for Derrida. He wants and needs to borrow from Plato and

Hoy in "Splitting the Difference," in Working Through Derrida, 251. Yet I think that "Force of Law" is an attempt to explain what justice and law are, in their essence. On my reading, Derrida appears to sketch the outlines of justice and law as such, and therefore he provides the grounds for a positive legal theory over and above his critique of classical jurisprudence. That is, he is not concerned merely with deconstructing, but also with explaining legal principles that can be used in actual cases.

⁴⁵ For the notion that Derrida's theory of law employs a type of Platonic transcendentalism (including at least some of the accompanying metaphysical baggage), see J.M. Balkin, "Transcendental Deconstruction, Transcendental Justice," 92 Michigan L. Rev. 1131 (1994).

Kant, but he knows that he cannot do this without borrowing trouble. As a result, Derrida adopts a kind of metaphysically stripped-down Platonism and Kantianism, which (to my mind) renders his position untenable. And paradoxically, Derrida ends up espousing a position which carries the very type of metaphysical assumptions that he has found problematic in other thinkers.

Let's begin by exploring the seemingly Platonic elements in Derrida's account of law and justice, and then we will turn to the Kantian elements in Derrida's account. Plato distinguished between the form of justice, which is justice in itself as an intelligible idea, versus the various instantiations of justice in the material world. The various "just" things in the world are deemed just by virtue of their participation in the form of justice.⁴⁶ Plato distinguishes between absolute "Justice itself" versus particular just actions.⁴⁷ Absolute justice (which can be understood only by a Philosopher King trained in the art of dialectical thinking) can be used as a measuring rod to determine whether particular social arrangements (or particular persons) can be described as "just." Now Plato defines **social** justice as a harmony between the social classes, with each class performing its respective function in the just state; and he defines **personal** justice as an inner harmony of the soul. By setting up a standard of justice as harmony in the state

⁴⁶ See, for example, Phaedo at 100d:

[T]he one thing that makes the object beautiful is the presence in it or association with it, in whatever way the relation comes about, of absolute beauty...[I]t is by beauty that beautiful things are beautiful.

Collected Dialogues of Plato, eds. Edith Hamilton and Huntington Cairns (Princeton: Princeton Univ. Press, 1961), 81-2. Similarly, it is by Justice that various actions are deemed just.

⁴⁷ See Republic, at 479e, in Collected Dialogues, 719-20.

and individual, Plato can then assess whether a given state or a given person measures up to the transcendental form of justice.

It is not difficult to see how Derrida might be accused of Platonism. He speaks of justice as something which is never reached, never fulfilled, but manages to present itself as an immediate demand. Further, he seems to hold that justice stands outside the law as a stable ideal when he comments that deconstruction "operates on the basis of an infinite 'idea of justice'" which "seems to be irreducible."⁴⁸ Derrida's separation of justice and law seems, at times, to border on a distinction between a form (Justice) and various attempts at instantiating that form (law):

Law is not justice. Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable.⁴⁹

Of course, the analogy with Platonism is not complete and total, because there are obvious differences between Plato and Derrida's notions of justice. And Derrida has spent a good portion of his career attacking Platonic notions, such as the idea of a fully present and fully knowable truth, the possibility of complete and total mastery of a text, the existence of a stable self, and so on. But while the analogy between Plato and Derrida is not perfect, it is nevertheless illuminating: the description of Derrida's work as "Platonic" seems accurate, at least at some level.⁵⁰

⁴⁸ "Force of Law," 25.

⁴⁹ *Ibid.*, 16.

⁵⁰ As some of Derrida's critics have pointed out, correctly or not, Derrida has a tendency to speak of certain concepts as if they were quasi-transcendental, and hence similar to Platonic forms. This is especially true of Derrida's notion of "différance" and "arche-writing" which sometimes appear as super-transcendental forces with causal

While Derrida's conception of justice sometimes appears to take on a quasi-transcendental Platonic status, at other times Derrida seems to envisage justice as a Kantian regulative idea.⁵¹ For Kant, regulative ideas are ideas that are produced by reason yet have no corresponding empirical object. These ideas prove useful in the realm of **practical** reason: in the context of deciding issues in ethics and politics, we must make use of ideas which have no possible object of experience, but which nevertheless serve as a horizon or goal toward which we must be oriented.⁵² For example, in the realm of practical reason, one must act upon maxims which could bring about a kingdom of ends for all rational beings, yet there is no way to experience such a kingdom of ends. Similarly, freedom must be presupposed in order to make ethics possible, yet this freedom can never be empirically verified. As Kant explains:

Freedom, however, is a mere Idea...Thus the Idea of freedom can never admit of full comprehension, or indeed of insight, since it can never by any analogy have an example falling under it. It holds only as a necessary presupposition of reason in a being who believes himself to be conscious of a will.⁵³

Kant uses the concept of the "limit of moral inquiry" to claim that the regulative ideas

powers. See Dieter Freudlieb, "Deconstructionist Metaphysics and the Interpretation of Saussure," Journal of Speculative Philosophy 4 (1986): 105-131, at 113.

⁵¹ Derrida discusses certain Kantian elements of his work in the afterword to Limited Inc (Evanston: Northwestern Univ. Press, 1988)("Toward an Ethic of Discussion"). In that piece, Derrida speaks of an unconditional responsibility that is not quite outside of all contexts, but manages to penetrate into all contexts. *Ibid.*, 152-3.

⁵² Immanuel Kant, Critique of Pure Reason (New York: St. Martin's Press, 1965), 533; Groundwork of the Metaphysics of Morals (New York: Harper & Row, 1964), 126-131.

⁵³ *Ibid.*, 127.

(freedom, God, kingdom of ends) point to a realm beyond the phenomenal world (that is, the noumenal world), even though we cannot say anything about this world.

Kant's notion of a regulative idea seems to be at work in Derrida's claim that justice is a demand or "call" to the other that can never be fully realized.⁵⁴ Hence, like Kant's regulative ideas which are never substantiated in the phenomenal world, Derrida's "justice" does not correspond to any event or decision in the realm of existing law, yet it intervenes in every legal decision. We can never say "this is just" or "justice is done" about events in the empirical world,⁵⁵ yet we must heed the call of justice in any event. There seems to be little difference between Derrida's "call to justice" and Kant's notion of justice as a regulative idea. To be sure, Derrida would reject Kantian metaphysical postulates, such as the phenomenal and noumenal worlds, and the transcendental subject. But there remains something essentially Kantian about Derrida's notion that justice is a call to the other, an ultimate responsibility that can never be attained or experienced.⁵⁶

⁵⁴ In an interesting parallel, Kant foreshadowed Derrida's point that law should not be confused with justice:

[The jurist] can indeed state what is laid down as right, that is, what the laws in a certain place and at a certain time say or have said. But whether what these laws prescribed is also right, and what the universal criterion is by which one could recognize right as well as wrong--this would remain hidden from him...Like the wooden head in Phaedrus' fable, a merely empirical doctrine of Right is a head that may be beautiful but unfortunately it has no brain.

Immanuel Kant, The Metaphysics of Morals, Part I: Metaphysical First Principles of the Doctrine of Right (Cambridge: Cambridge Univ. Press, 1991) sec. 229-230 at p. 55.

⁵⁵ "Force of Law," 24-5.

⁵⁶ The key question, which is beyond the scope of this paper, is whether Derrida would embrace a version of Kantian theory that has been sufficiently denuded of metaphysics. One example of an ethical theory that fits this description would be Habermas' discourse ethics, which incorporates certain Kantian notions of universality

Given these Platonic and Kantian elements running through Derrida's lecture on law and justice, it is easy to see how Derrida might be taken as a legal Platonist who posits justice as a Kantian regulative idea. And this interpretation has been advanced recently by Merold Westphal, in his thoughtful review of Derrida's "Force of Law."⁵⁷ Westphal argues that Derrida's distinction between justice and law bespeaks a Platonist notion that justice is a "higher law to which every human code is answerable." This makes Derrida a natural law theorist, because he distinguishes between a "higher law" (natural law) and positive law (human law). In Derrida's terminology, "justice" would be the "higher law" that is unobtainable, while "law" would be the human code that is constructed in the shadow of the higher law. Westphal construes Derrida to be saying that justice "intervenes" in the judicial process. That is, justice makes itself present as a transcendent (yet occasionally imminent) standard by which we can judge positive laws.

Now Westphal believes (correctly, I think) that Derrida envisions this Platonic justice as a Kantian quasi-regulative idea. Westphal sees that Derrida cannot accept the metaphysical baggage of either Platonism or Kantianism, and that this puts Derrida in a bind: he must affirm certain elements of two views which he has previously decried as

and reciprocity, yet purportedly eschews Kantian metaphysics. It appears that Derrida finds Habermas' program weighed down with too many metaphysical assumptions, especially concerning the primacy of communicative speech over other forms of expression, the stability of communicative contexts, and the shared horizons of understanding between persons in an ideal speech scenario. For a discussion of a possible rapprochement between Derrida and Habermas, as perhaps suggested by Christopher Norris, see Terry Hoy, "Derrida: Postmodernism and Political Theory," Philosophy and Social Criticism 19 (1993): 243-257.

⁵⁷ Merold Westphal, "Derrida as a Natural Law Theorist," International Philosophical Quarterly 34 (1994): 247-252.

'logocentric,' that is, tied to an unacceptable 'metaphysics of presence.'⁵⁸ The Derridian project as far as justice is concerned, then, is to set forth a Platonic and Kantian notion of justice that is divorced from the metaphysical and epistemic warrants in which these views have been mired.

Westphal is optimistic that Derrida can successfully weed out the unwanted metaphysical claims and bring forth a workable, non-metaphysical notion of justice. Justice so conceived would be quasi-transcendental---it does not exist wholly apart from various contexts, yet it remains categorically binding, and somehow infiltrates itself into the act of judging:

Still, the idea of justice in itself functions as a quasi-regulative idea for Derrida. It is not some thing that exists outside of every human context, and it is not an ideal essence to which we can give a fixed and final meaning. It is a bit like what Kierkegaard had in mind when he spoke of "thoughts which wound from behind." Though we cannot get them out in front of us where they are fully present to us and we can master them, they nevertheless insinuate themselves into our thinking, disturbing its complacency in ways that we can neither predict nor control. They ambush our absolutes. On Derrida's view it is precisely as deconstruction that the idea of justice in itself wounds our legal systems, both as theory and as practice, from behind.⁵⁹

So Westphal thinks that deconstructive justice takes the form of a Kierkegaardian "thought which wounds from behind." To my mind, this interpretation is an ingenious attempt to rescue Derrida from a serious problem: he borrows Platonic and Kantian notions of justice, yet these notions are wedded to metaphysical baggage that cannot be

⁵⁸ Derrida's comments against 'logocentrism' (the idea that metaphysical entities can be made fully present and completely understandable) are set forth most fully in Of Grammatology (Baltimore: Johns Hopkins University, 1976), 6-12.

⁵⁹ "Derrida as a Natural Law Theorist," 252.

removed without deneutering the accompanying concepts of justice. Westphal identifies but then avoids the key problematic in Derrida's text, namely that Derrida wants to posit what he cannot defend: a Platonic notion of justice as a Kantian regulative idea. That is, Derrida wants to reappropriate the ethical thoughts of Plato and Kant (thinkers whom, ironically, Derrida has 'deconstructed' in the past) while removing the metaphysical warrants of these thinkers by equivocating on the exact metaphysical and epistemic status of "justice." This puts Derrida in a double bind that gets played out in his comments on justice: he wants to say that justice is transcendent, yet not in a Platonic sense; and he wants to say that justice is a regulative idea, but not in a Kantian sense. In the end, he picks up the metaphysical language of Plato and Kant, while simultaneously denying that he is putting forth a metaphysical viewpoint.

This simultaneous appropriation and distancing from Plato and Kant is most clearly evidenced in Derrida's 1988 Afterword to Limited Inc. Notice in the following passage how Derrida relies on the Platonic notion that justice is independent and transcendent (outside of all contexts), then takes back this assertion by saying that justice is not present outside of particular contexts, then once again reverts back to the idea that justice is transcendent:

[Unconditional responsibility] is **independent** of every determinate context, even of the determination of a context in general. It announces itself as such only in the **opening** of a context. **Not that it is simply present** (existent) elsewhere, outside of all contexts; rather, it intervenes in the determination of a context from its very inception, and from an injunction, a law, a responsibility that **transcends** this or that determination of a given context.⁶⁰

⁶⁰ Derrida, Limited Inc., 152 (my emphasis).

It is unclear to me how Derrida can hold that justice is "independent of every determinate context," yet "not outside of all contexts." The problem is that he wants to say that justice is transcendent, but he cannot make this claim because it would involve him in a logocentric metaphysics of presence. Derrida does a similar double-take on Kant, at first borrowing from Kant and then realizing that he cannot borrow from Kant:

I have on several occasions spoken of "unconditional" affirmation or of "unconditional" "appeal." Now the very least that can be said of unconditionality (a word that I use not by accident to recall the character of the categorical imperative in its Kantian form) is that it is independent of every determinate context. [] **Why have I always hesitated to characterize it in Kantian terms? Because such characterization seemed to me essentially associated with philosophemes [sic] that themselves call for deconstructive questions.**⁶¹

This double gesture shows that Derrida needs a metaphysical basis for his conception of justice, yet he cannot hold a metaphysical position without contradicting the deconstructive efforts of his anti-metaphysical earlier works such as "Differance,"⁶² "Structure, Sign and Play,"⁶³ and Of Grammatology. And this leaves him without a leg to stand upon, as I will explain further in the next section.

5.3 Some Problems for a Derridean Positive Jurisprudence

As I indicated above, Derrida tries to reappropriate Platonic and Kantian notions of justice while simultaneously distancing himself from Platonic and Kantian metaphysics. The result of this double gesture is that the reader is left in the dark about

⁶¹ Ibid., 153 (my emphasis).

⁶² Margins of Philosophy (Chicago: University of Chicago, 1982), 1-27.

⁶³ Writing and Difference (Chicago: University of Chicago, 1978), 278-93.

the exact status of justice. Derrida never expressly says what he means by "justice," but it appears that (following Levinas), Derrida offers a phenomenological account of justice. This means that justice is derived from the inter-subjective relation of self to other; it is an "ethical relation" which is built into all encounters with the other. It specifies that one owes an incalculable debt to the other, an excessive and ultimate demand to heed the call of the other. This interpretation is bolstered by Derrida's repeated references to Levinas, and by Derrida's quotation of Levinas' statement, "the relation to others--that is to say, justice."⁶⁴ And since this relation is primordial, basic and foundational, it cannot be finally encoded in legal statutes and case decisions, but always remains outside of such encoding, as a 'beyond' to which the legal system points. In this way, justice interrogates the legal order, and allows the legal order (which is a construct, an act of fiction) to be deconstructed. The call to do justice to the other is what spurs the deconstructive process into action, and hence the very process of deconstruction is a process of seeking justice--"Deconstruction is justice."⁶⁵

This sounds inspiring, but problems of the metaphysical status of this "justice" immediately arise. I see no problem with positing a call to do justice to the other, but it is not clear how this call is to be understood outside of metaphysical assumptions about stable subjects, stable meanings, stable contexts for ethical communication, and undistorted relations between oneself and others. These assumptions seem to be just as

⁶⁴ "Force of Law," 22, quoting from Emmanuel Levinas, Totality and Infinity (Pittsburgh: Duquesne Univ. Press, 1969)(see the section on "Truth and Justice").

⁶⁵ "Force of Law," 15.

heavy as the minimal metaphysical assumptions which Derrida finds so problematic in, say, Gadamer's hermeneutics or Austin's speech act theory. Further, Derrida's notion of justice seems to assume a stable and continuous subject who is called to do justice, despite Derrida's earlier rejection of a stable metaphysical subject.⁶⁶ And apart from the metaphysical assumptions in Derrida's notion of justice, there are hidden epistemic claims. The biggest epistemic claim is simply that the demands of justice can be known (at least to Derrida himself), and then used as a sort of litmus test for whether legal decisions and laws are "just." But to posit a stable and knowable "justice" which emerges from an unvarying relationship between stable and knowable subjects seems to carry more metaphysical baggage than Derrida should be willing to tolerate.

And even if the metaphysical and epistemic problems are bracketed, Derrida must come to grips with another problem, namely, the difficulty with explaining the specific demands of justice. That is, how can a system of justice be laid out, if Derrida claims that justice cannot be encoded, is always "to come," and is "unpresentable"? This problem becomes more apparent when we turn to specific issues. For example, does

⁶⁶ See "Differance" and "The Ends of Man," in Margins of Philosophy. My point is that there is a potential contradiction at work in Derrida's simultaneous denial of the unified subject, and his notion that justice involves a duty from one subject to another subject. William Richardson explains the problem nicely:

[H]ow can one talk about emancipation without a conception of a subject that is free and inviolable? ...But there is nothing in Deconstruction that can account for a subject that is stable enough to be capable of response, responsibility or freedom.

"Law and Right," 13 Cardozo L. Rev. 1339, 1340 (1991). Richardson's point captures the key argument in this chapter: for Derrida to generate a notion of justice, he must make metaphysical assumptions (regarding the self, others, communication, stability of contexts) which he has elsewhere rejected.

justice require a system of private property, or does it require collective ownership of the means of production? Or is it consistent with both, or is Derrida bracketing this issue? Again, justice to the other would seem to require freedom of speech so that the other can be heard, but does justice require freedom for hate speech and pornography? What about a mutual sado-masochist society? Should there be a death penalty? What about surrogate parenting, the rights of future generations, and affirmative action? It would seem that Derrida's notion of justice cannot provide a sufficiently determinate ground for deciding these issues. To be sure, these are difficult questions for any theory, yet it seems that they are especially difficult for Derrida, as opposed to, say, Rawls or Dworkin.⁶⁷ And this is because Rawls and Dworkin think that justice can be encoded into specific principles and put to work in our practices and institutions.⁶⁸ Derrida, by denying that justice can be formulated into concrete principles, gives justice a transcendental status that is too far removed from the everyday world in which justice must be rendered.

Further, Derrida's formulation of justice lacks a practical strategy for determining

⁶⁷ Like Derrida, Dworkin feels that positive law must be interpreted in light of principles of justice. However, Dworkin feels that these principles are historically contingent, whereas Derrida seeks a more transcendental source of justice.

⁶⁸ It would be interesting to explore the ways in which Derrida's Kantianism is similar to Rawls' Kantianism. Rawls and Derrida agree with Kant that laws should be assessed on the basis of whether they respect fundamental justice owed to others. But Rawls wants to argue that particular arrangements of positive law can be deemed "just" if they satisfy certain enumerated principles of justice, whereas Derrida thinks that one can never say that the law is just. So Derrida's view is more utopian (and more vague), in the sense that he holds out justice as a transcendental idea that cannot be instantiated in the imminent legal order. For a short comparison, see Drucilla Cornell, The Philosophy of the Limit, 182.

the demands of justice--he lacks a decision procedure such as Rawls' "original position" or Habermas' "ideal speech situation." The lack of a decision procedure makes arbitration difficult when a dispute arises between competing parties. For example, if there is a dispute on the issue of rent control between a landlords' consortium and a tenant's rights association, how are we to use Derrida's theory to decide whether a rent control statute is "just"? What exactly does 'openness to the other' require in this scenario, and how do we arbitrate a dispute when both parties claim that they are being open to the other? Certainly, openness to the other will require that all sides to a dispute be heard, but at some point a decision must be reached, and we need grounds for such a decision, and a procedure for deciding the dispute. Derrida's notion of justice seems too slender a reed to serve as a workable framework for reaching decisions in hard cases.

Now it might be argued that Derrida's notion of justice is not directed at particular matters of justice, but at the foundations of legal systems as a whole. This is the interpretation provided by Drucilla Cornell:

[Deconstruction] exposes the quasi-transcendental conditions that establish any system, including a legal system as a system. This exposure, which in Derrida proceeds through what he calls the "logic of parergonality" demonstrates how the very establishment of a system as a system implies a **beyond** to it, precisely by virtue of what it excludes.⁶⁹

This is correct, in that Derrida often focuses on the foundations of legal systems as systems. This approach is more apparent in Derrida's piece on Nelson Mandela, where he pointed out that when the South African Constitution proclaimed the formal equality of all men, this proclamation was a performative act of fiction because all men were not

⁶⁹ Ibid., 1.

equal in South Africa. As such, the South African Constitution could be deconstructed as a unjust fictional act based on a lie about the universality of rights and the equality of all (white) men.⁷⁰

On Cornell's reading, Derrida is trying to set forth a notion of justice which is aimed at the level of legal systems, and not at the level of particular laws. He is trying to show how entire categories of legal thought should be deconstructed. This interpretation is consistent with Derrida's statement that:

A deconstructive interrogation [] starts [] by destabilizing, complicating, or bringing out the paradoxes of values like those of the proper and property in all their registers, of the subject, and so of the responsible subject, of the subject of law, and the subject of morality...A problematization of the foundations of law, morality, and politics.⁷¹

This implies that Derrida is concerned with justice at a level **deeper** than the level currently discussed by say, Rawls, who seeks to provide explicit principles that can be used for arrangements of distributive justice. On this reading, Derrida's discussion of justice is 'transcendental' in the Kantian sense: he is exploring the conditions for the possibility of justice.

But this reading of Derrida can only be taken so far. Derrida is not concerned solely with problematizing the foundations of entire legal systems, because he mentions **particular** problems that need to be solved, such as AIDS, the homeless problem, racism, and animal rights. So he does, in fact, seem to have his eye on justice at the level of actual issues, and he is not solely concerned with the foundations of entire legal

⁷⁰ See "The 'Laws of Reflection'" in For Nelson Mandela, 20.

⁷¹ "Force of Law," 8 (emphasis added).

systems. And this is where we run into difficulties in the application of Derrida's concept of justice. The call to do justice to the other, as an incalculable demand to speak to the other in the other's language, is simply too minimalist to serve as the basis of a jurisprudential program. Certainly, Derrida provides grounds for saying that slavery, discrimination, and animal testing are unjust because they fail to do justice to the other; but he does not provide a mechanism for deciding other important questions of law, including (most importantly) the economic structure of the just state.⁷²

It might be objected that even Kantian theory is itself vague on particular legal matters. All things considered, Derrida's notion of justice is perhaps no more unwieldy than Kant's categorical imperative, which has proved difficult to apply in hard cases. This response has some merit, but it only goes so far, because Kant at least made the effort to extend his theory to particular legal issues, such as the structure of the just state, inheritance laws, civil disobedience, the death penalty, and so on. I believe that Derrida will have severe problems fleshing out his theory (more so than Kant), given his critical writings on 'logocentrism,' and particularly his critique of classical metaphysics and epistemology.

To start with, given that Derrida rejects transcendental entities as "logocentric"

⁷² It might be argued that Derrida conceives of justice solely as the procedure of questioning the foundations of legal systems, and that he does not put forth a **substantive** theory of justice. That is, Derrida sees justice as 'procedural' and not 'substantive,' since he does not provide substantive principles of justice, but only a procedure for interrogating the law. From my perspective, this view fails to capture the fact that Derrida spends a great deal of time discussing justice *per se*, as if it were something apart from the mere process of interrogating the legal system. I take Derrida's account to be both procedural and substantive.

fictions and decries the 'metaphysics of presence,' it is unclear how he can accord justice with the status of a "call" or "ghost" which stands in judgment of law. What exactly is the **metaphysical** and **epistemic** status of this "justice"? How can this justice be "present" in all contexts when Derrida has elsewhere said that nothing is ever fully present in and of itself?⁷³ I suppose that Derrida would say that justice is not a material thing, nor a form, but (following Levinas) an "ethical relation," a way of being. This perhaps circumvents the metaphysical problem, but it raises the epistemic problem: how can we know when we have approached justice? Given two interpretations, which interpretation is more just? Who should decide which interpretation is better? Further, is there a single "justice" for all people, wherever situated, or does justice vary with history and tradition?

More importantly, how is it possible to even broach the issue of justice, when justice is the experience of the impossible? Derrida wants to hold that justice is elusive:

It is possible, as an experience of the impossible, there where, even if it does not exist (or does not yet exist, or never does exist), **there** is justice.⁷⁴

Derrida needs to make justice this elusive because, as I have pointed out, he wants to uphold a Platonic and Kantian theory of justice while disclaiming the Platonic and Kantian baggage typically accompanying their conceptions of justice. But a justice thusly severed from all epistemic and metaphysical warrants is not sufficiently strong to support a coherent legal or political program. There is simply not very much to say about

⁷³ "Differance," in Margins of Philosophy, 10.

⁷⁴ "Force of Law," 15.

Derrida's justice, except to say that it is the type of thing of which very little can be said, since it can never be codified or set down as a group of principles. We can only affirm this type of justice at the cost of having very little to say about it. When viewed in this way, it is understandable why Derrida holds that justice cannot be addressed directly--he has so escervated the concept of justice that there is literally nothing left to say about it: "Justice as the experience of absolute alterity is unrepresentable."⁷⁵ But an "unrepresentable" justice which has been so removed from our existing practices and principles is hardly useful in hard cases.

A final problem is that Derrida seems to speak of justice as a universal call to the other, an event beyond events which permeates every context:

Justice as the experience of absolute alterity is unrepresentable, **but it is the chance of the event and the condition of history.** No doubt in an unrecognizable history, of course, for those who believe they know what they're talking about when they use this word, whether its a matter of social, ideological, political, juridical or some other history.⁷⁶

This seems perilously close to a claim that justice has a single meaning that holds constant for all history, through all epochs, as the ground or condition for history itself.⁷⁷ The claim that justice has a fixed meaning as the "condition of history" would

⁷⁵ Ibid., 27.

⁷⁶ Ibid., 27-8 (emphasis added).

⁷⁷ Derrida makes a similar claim in "Before the Law," namely that the duty to the other is beyond history:

To be invested with its categorical authority, the [moral] law must be without history, genesis, or any possible derivation. That would be the law of the law. Pure morality has no history: as Kant seems at first to remind us, no intrinsic history.

Acts of Literature, 191.

seem unwarranted given Derrida's previous insistence that "there are only contexts without any center of absolute anchoring."⁷⁸ It is not clear how Derrida can say that justice is "the condition of history," which "transcends this or that determination of a given context," and then turn around and criticize other philosophers as stuck in a logocentric metaphysics of presence.

5.4 Towards an Assessment

I have argued that Derrida's notion of justice borrows heavily from the Platonic and Kantian tradition, yet removes all of the metaphysical and epistemic baggage that made these theories powerful in the hands of Plato and Kant. As a result, Derrida's notion of justice is somewhat empty. And apart from reasons of internal inconsistency, there are problems of vagueness in application. So how are we to assess Derrida's project?

On the one hand, I can see how it might be argued, strangely enough, that Derrida's approach is attractive precisely because it imposes a seemingly supererogatory demand to do justice to the other, even though this justice can never be fulfilled. I suggest that this is the interpretation of Derrida that has been offered by Drucilla Cornell. Cornell argues that deconstruction reveals that every legal system points beyond itself, beyond law, and hence triggers a "quasi-transcendental analysis."⁷⁹ For Cornell, deconstruction resists the collapse of justice into positive law, and therefore provides a

⁷⁸ "Signature, Event, Context," in Margins of Philosophy, 320.

⁷⁹ Philosophy of the Limit, 8.

program for transforming the legal order. In this sense, deconstruction is "utopian":

Deconstruction keeps open the "beyond" of currently unimaginable transformative possibilities precisely in the name of Justice. And so we are left with a command, "be just with Justice," and an infinite responsibility to which we can never close our eyes or ears through an appeal to what "is"...

Derrida's account gives greater attention to the necessary "utopian" moment in the vigilant insistence on the maintenance of the divide between law, established norms, and Justice.⁸⁰

If this is the proper interpretation of Derrida's position, then deconstruction can hardly be accused of nihilism or irrationalism in jurisprudential matters, because it imposes eternal vigilance in the service to the other, and is therefore more demanding than most ethical theories. And Derrida does, in fact, speak of justice as an impossible demand, an incalculable duty to speak to the other in the other's language, to give to the other without expectation of return. So in a certain sense, we can rightly say that Derrida provides a deeply rigorous ethical theory. And although he relies on Plato and Kant, he tries to avoid the logocentric metaphysics which he finds so problematic in these and other thinkers (including, surprisingly, Gadamer and Austin).⁸¹

⁸⁰ Ibid., 182-3.

⁸¹ Some of the problems at issue between Derrida and Gadamer (and Habermas, though less directly), are discussed in Ernst Behler, "Deconstruction Versus Hermeneutics," in Confrontations: Nietzsche/Heidegger/Derrida (Stanford: Stanford Univ. Press, 1991), 137-157. Interestingly, Habermas argues that his discourse ethics is sufficiently removed from traditional philosophic claims about truth, presence, and totality: "so little is this totalitarian, that there is no call for a totalizing critique of reason against it." The Philosophical Discourse of Modernity, 408-9. Habermas claims that since discourse ethics is fallibilist and non-metaphysical, there is no reason for deconstructionists to suppose that Habermas is caught in a totalizing metaphysics of presence. As for Derrida's engagement with J.L. Austin's speech-act theory (and with John Searle), see Limited Inc.

But I'm hesitant to allow Derrida to have it both ways; he cannot retain the deconstructive critique of foundational systems which runs through his earlier works, then turn around and erect a seemingly foundational notion of justice that works as a quasi-transcendental idea. He cannot decry the metaphysics of presence and the Cartesian 'Cogito,' then turn around and say that justice is grounded in the relation of incalculable indebtedness from one **subject** to another **subject** qua participation in humanity. I would suggest that there is something highly paradoxical, even contradictory, about Derrida's double gesture of deconstructing Western metaphysics, then turning around and lauding the "classical emancipatory ideal" which relies upon Western metaphysics.

The basic problem for Derrida is simply this: all ethical positions require some metaphysical or epistemic commitments. The commitments may be great (as in Plato's forms and Kant's noumenal world) or they may be weak (as in Habermasian ideal speech act conditions), but there must be some constraints for an ethical theory to get off the ground. It seems to me that Derrida's notion of justice (as something which transcends the law but is never reached and cannot be encoded) carries metaphysical and epistemic baggage that is equal to, or greater than, the warrants required on, say, Gadamer or Habermas' approach. Derrida wants to reject alternative approaches as metaphysically weighed down, yet Derrida fails to see that his own theory presupposes quite a few metaphysical claims, including a quasi-transcendental justice that has a stable and univocal meaning through time. My suspicion is that Derrida's longstanding deconstructive efforts in other areas of philosophy have rendered him incapable of

holding a workable position in the area of ethics and politics. Ultimately, something has to give: either he learns to live with the metaphysical assumptions that are necessary to ground an ethical and political theory, or he learns to live without these types of theories.

Time will tell, but I suspect that Derrida will need to posit the following: the existence of a reasonably unified and stable self who hears the call to justice; the primacy and universality of an ethical relation between two subjects; the inherent value of each subject and each "other" to whom a duty is owed; the existence of justice as a stable idea that impinges on every ethical decision; and, finally, Derrida will have to grant that there are better and worse interpretations of the demands of justice, that is, some laws are a better approximation of justice than other laws. But at the moment that Derrida grants all of this, he will be contradicting his earlier, more deconstructive work.

Derrida's "Force of Law" is a bold entry into the political arena, and it successfully demolishes the widespread belief that deconstruction lacks a conception of justice. But "Force of Law" creates a new problem: it announces a notion of justice which rests upon the types of metaphysical claims which Derrida has found problematic in other thinkers. Something in Derrida's overall approach will be need to be re-shuffled in order to make room for his emerging conception of justice. As things stand, Derrida does not offer enough to generate a positive jurisprudence.

CHAPTER 6

LYOTARD: POSTMODERN GAMING AND A PLURALITY OF JUSTICES

In this chapter I examine and critique Jean-Francois Lyotard's writings on law and justice. One of my reasons for including Lyotard in this manuscript is that his work is oft-cited but rarely discussed in detail by legal scholars, who are doubtless put off by his obscure and often difficult texts. However, a familiarity with Lyotard's work is essential for anyone who wants to understand postmodernism, and indeed most studies of postmodernism begin with Lyotard's seminal The Postmodern Condition, because it was that work which has come to define the genre. Because Lyotard is perhaps the central postmodern figure, I want to spend an entire chapter teasing out his position on justice and law.

Lyotard is somewhat unique among so-called "postmodern" and "post-structuralist" philosophers in that he does not shrink from a direct discussion of issues in ethics, law, justice, and politics. But while Lyotard devotes considerable attention to questions of justice, his approach is highly complicated, even convoluted at times, drawing variously from esoteric and obscure strains in Continental philosophy, speech-act theory, Greek philosophy, and aesthetics. In what follows I will try to render Lyotard's notion of justice intelligible and coherent to a lay audience of Anglo-American legal scholars. The first part of the chapter discusses Lyotard's general theoretical approach

to justice and law. After putting Lyotard's position in its best light and explaining its attractions, I then subject it to a searching critique. Ultimately I conclude that Lyotard's work on law serves as a useful 'check' against some of our basic liberal values (including consensus, tolerance, and neutrality), but his own conception of justice is largely unworkable. From reading Lyotard we gain an increased respect for the cultural differences which should not only be tolerated, but encouraged; Lyotard makes a strong and moving plea for toleration under the law because he understands the subtle ways in which minorities are silenced and disempowered. Yet, ironically, Lyotard's anti-foundationalism provides no firm basis for insisting that the law should be tolerant in the first place. My conclusion, then, is that Lyotard gives us insight into some of the problems with our existing system of justice, but he fails to erect a convincing system of his own: that is, he articulates a negative jurisprudence but fails to erect a positive jurisprudence.

6.1 Lyotard on Postmodern Justice and Law

Lyotard has been an important contributor to the philosophical scene in France since the 1960s, but he has come to worldwide prominence over the last ten years or so, which was about the time that his focus shifted to issues of justice, especially the problem of reaching justice in a multi-cultural society that is deeply divided by race, class, and gender.¹ These questions are treated at length in three of Lyotard's books,

¹ The shift in Lyotard's work is chronicled in Geoffrey Bennington, Lyotard: Writing the Event (New York: Columbia University Press, 1988), 1-5.

each of which is required reading in order to get a good idea of his conception of justice: The Postmodern Condition (1984, orig. 1979), Just Gaming (1985, orig. 1979), and The Differend (1988, orig. 1983).² Although Lyotard has continued to address issues of law and justice in his more recent work, we would do well to focus initially on these three works, augmenting our analysis periodically with selections from his later writings.³

(i) The Postmodern Condition (1984)

The Postmodern Condition was ostensibly a report on the state of knowledge in advanced industrial societies, a state of affairs which Lyotard terms "postmodern." Lyotard thinks that 'the sciences' (by which he means all academic inquiries from physics to sociology to literary studies) have historically sought legitimation from 'grand narratives' which served as justifications for the scientific endeavor. These narratives arose as ways of legitimating science---they purportedly answer the question, "Why do we engage in physics, sociology, philosophy, economics, or political science---what are we moving towards or hoping to find?" According to Lyotard, the two dominant

² Jean Francois Lyotard, The Postmodern Condition: A Report on Knowledge (Minneapolis: University of Minnesota Press, 1984)(hereinafter "PMC"); (with Jean-Loup Thebaud), Just Gaming (Minneapolis: University of Minnesota Press, 1985)(hereinafter "JG"); The Differend: Phrases in Dispute (Minneapolis: University of Minnesota Press, 1988)(hereinafter "TD").

³ Of particular interest is Lyotard's recent essay on Kafka's "In the Penal Colony," in Towards the Postmodern (Atlantic Highlands, N.J.: Humanities Press, 1993), as well as some of the political essays in Lyotard: Political Writings (Minneapolis: University of Minnesota Press, 1993), and The Lyotard Reader (Oxford: Basil Blackwell, 1989). Lyotard's views on political legitimation and totalitarianism are reiterated in The Postmodern Explained: Correspondence 1982-1985 (Minneapolis: University of Minnesota Press, 1993).

narratives that justified the pursuit of knowledge were the **emancipatory narrative** and the **speculative narrative**. The **emancipatory narrative** supported the scientific enterprise by supposing that the pursuit of knowledge would lead to emancipation and increased liberty. This narrative can be traced back to Kant's claim that the Enlightenment represents man's escape from tyranny through the use of reason and public debate.⁴ The **speculative narrative** (which has its roots in Continental thinkers like Hegel) supported the scientific enterprise by supposing that all knowledge could one day be unified into a coherent totalizing scheme, a sort of unified field theory that would bring unity and order to all human endeavors from affairs of state to everyday life.⁵

An example of the **emancipatory narrative** would be the claim that political scientists can discover the best political and economic structure for a just state in which the citizens voluntarily and autonomously give assent to the law, and are thereby free and emancipated. Certainly, this narrative finds a home in Jefferson's notion that the government should foster a coming together of citizens to deliberate in a public forum about the laws that will govern them. The emancipatory narrative is also at home in the Marxist claim that science will provide the proletariat with the skills by which they can emancipate themselves.⁶

The **speculative narrative** is perhaps less common in Anglo-American countries than it is 'on the Continent.' Lyotard exemplifies this narrative by referring to

⁴ Immanuel Kant, "What is Enlightenment," in Perpetual Peace and Other Essays (Indianapolis: Hackett Publishing Company, 1983).

⁵ PMC, 31-37.

⁶ Ibid., 37.

Heidegger's claim (during his days as a university rector and Nazi party member) that the Nazis would unify the German state in line with the demands of the Germanic race and spirit.⁷ The speculative narrative can be found in any claim which supports science as a way of serving the greater good of, say, the 'national spirit' or the 'American way.'

According to Lyotard, these types of grand narratives are no longer believable:

The grand narrative has lost its credibility, regardless of what mode of unification it uses, regardless of whether it is a speculative narrative or a narrative of emancipation.⁸

Part of the reason for the loss of credibility is that these narratives have not delivered on their promise: the emancipatory narrative did not lead to liberation and the speculative narrative did not bring unity of purpose. After two hundred years in furtherance of these narratives, we seem to be no closer to emancipation or rational government:

Auschwitz refutes speculative doctrine. [] Berlin 1953, Budapest 1956, Czechoslovakia 1968, Poland 1980 (I could mention others) refute the doctrine of historical materialism. [] May 1968 [the Paris disturbances] refutes the doctrine of parliamentary liberalism. The passages promised by the great doctrinal syntheses end in bloody impasses. Whence the sorrow of the spectators in the end of the twentieth century.⁹

In other words, history has proved both liberalism and communism to be less than stellar, or at least, less than promised. We are moving neither toward emancipation nor toward a rational society. This had led to our present state of suspicion in the face of grand claims about the promise of human emancipation and unity. In the eyes of many people living in Western democracies, the scientific knowledge which we have

⁷ Ibid., 37.

⁸ Ibid.

⁹ TD, 179-180.

accumulated (especially the sophisticated computer technology) appears as something enslaving and oppressive, not as something liberating or unifying.

For Lyotard, the breakdown of grand narratives can be used as a criterion to separate the epochs known as "**modern**" and "**postmodern**." A given endeavor or pursuit (say, a political platform, a motion picture, a university's mission, a Constitution) can be termed "modern" if it relies on a grand narrative, and it can be deemed "postmodern" if it relies on a smaller, more localized narrative. That is, modernity and postmodernity are not defined in strictly historical terms but rather in terms of the types of legitimation that is offered in defense of any human activity:

I will use the term **modern** to designate any science that legitimates itself with reference to a metadiscourse of this kind making an explicit appeal to some grand narrative, such as the dialectics of Spirit, the hermeneutics of meaning, the emancipation of the rational or working subject, or the creation of wealth. [] Simplifying to the extreme, I define **postmodern** as **incredulity toward metanarratives**.¹⁰

Lyotard thinks that the breakdown of grand narratives has left in its wake a diffuse and complicated web of micro-narratives (sometimes referred to as 'petite' or 'small' narratives). These small narratives are relatively self-contained, in that they hold jurisdiction over a small piece of life, and do not aspire to govern all other areas of life. Unlike grand narratives, the small narratives do not seek hegemony over all other narratives. We can understand each small narrative as a sort of "game" which has "moves" which differ from the moves in other small narratives. With the loss of grand narratives, "all we can do is gaze in wonderment at the diversity of discursive species

¹⁰ PMC, xxiii-iv.

[of localized narratives]."¹¹

Lyotard thinks that each person lies at the intersection of dozens, or perhaps hundreds, of these small narratives and games. Indeed, the 'personhood' of the individual is **created** by these narratives: the self is a narrative construction. Lyotard often refers to these small narratives as "language games" (adopting the term from Wittgenstein), and for Lyotard, the individual is constructed by her participation in these language games. That is, the individual does not use language and language games as a tool, but rather is played by the games themselves (the games determine the individual):

There are many different language games--a heterogeneity of elements. They only give rise to institutions in patches--local determinism. [] Each of us lives at the intersection of many of these.¹²

Examples of these games might include my participation as a tenant in the game of landlord-tenant relations, or my participation as a graduate student in a game with the school administration, or my role as a Jew in a country that is mostly gentile. This means that there is no single legitimating formula that applies to all of my endeavors (as a student, a son, a worker, a Jew, and so on). Rather, each of these "games" has its own set of rules, and no set of rules ought to apply beyond the scope of its own local game. For example, it would be wrong for me to take the rules that bind me as a worker and apply these rules to my relationship with my girlfriend. Further, **within** the

¹¹ Ibid., 26.

¹² See PMC, xxiv. Lyotard amplifies on this point in his interview in Diacritics: A Review of Contemporary Criticism (Fall 1984), 17.

boyfriend-girlfriend relationship game, I might undergo a series of shifts, sometimes playing the role of addressor and sometimes addressee, each time using different rules to govern my behavior. For Lyotard, each game has its own rules and its own conception of justice in accordance with those rules. For example, in my relationship with my parents it may be necessary and just that I reveal my secret hopes and dreams, but this would not be just in the game which I play with the Internal Revenue Service. This means that justice is local and imminent within each game, such that there can be no overarching and transcendental principle of justice which applies to all people all of the time in all of their affairs.

But if our experience is informed by a series of radically incommensurate and heterogeneous language games, and justice is only local, how can we find a rule for regulating the complex web of language games through which we pass? That is, how can we find a political structure which governs the various language games in which we find ourselves situated? Lyotard poses this very question at the beginning of the book: "Where, after the metanarratives, can legitimacy reside?"¹³ His answer, which will be discussed in detail below, is that we should abandon hope for a single hegemonic principle of justice, and instead embrace the idea of a "multiplicity of justices, each one of them defined in relation to the rules specific to each game."¹⁴ Paradoxically (as we shall see), the multiplicity of games is ensured by a single overarching principle of justice (analogous to a Kantian categorical imperative) which forces us to keep the various

¹³ PMC, xxv.

¹⁴ JG, 100.

games distinct and autonomous.

It is crucial to understand that Lyotard sees classical liberalism (of the type espoused by Hobbes, Locke, Kant and Jefferson) as a particularly **modern** approach because it relies on a grand narrative--in this case, the narrative that autonomous subjects can come together freely to reach consensus on the rules which will govern them: hence the liberal sees the workplace, personal relationships, and politics as the product of agreement or consent between autonomous individuals. This idea that consensus between free people is the global solution to all of our problems is characteristic of a modern approach in which a single formula is used to govern the rules of disparate language games. Now Lyotard thinks that the imposition of a single standard to all aspects of life (the standard of "consensus") results in a kind of terrorism: "consensus does violence to the heterogeneity of language games."¹⁵ Further, given that each of us occupy different roles in a complex web of games, consensus in the liberal sense is an "impossibility" because any consensus will be "manufactured."¹⁶ In layman's terms, consensus is a legitimating myth that has been used as an excuse for state tyranny, a way of rationalizing the accumulation of knowledge that only enslaves us, but does not lead to the emancipation that it promised.

For Lyotard, the social bond is constituted as an aggregate of the disparate language games, such that "the social subject itself seems to dissolve in this dissemination

¹⁵ PMC, xxv.

¹⁶ JG, 3, 81.

of language games."¹⁷ No single game is more legitimate than any other, since each carries its own unique mode of legitimation. As a result, there is no overarching principle by which the games can be ordered and regulated: "there is no possibility that language games can be unified or totalized in any metadiscourse."¹⁸ Yet it is precisely the goal of liberal society to subject all discourses to a master principle of consensus, whereby all people could agree to the rules which will bind them. Consensus involves a tyranny by the majority through which Western democracies impose a single set of values on the disparate language games, silencing some of the players in an act of terrorism:

By terror I mean the efficiency gained by eliminating, or threatening to eliminate, a player from the language game one shares with him. He is silenced or consents, not because he has been refuted, but because his ability to participate has been threatened.¹⁹

This means that consensus is "outmoded" and "terroristic" because it silences minorities and other marginalized groups by denying them a role as a player in the political game. So Lyotard rejects the idea of a single standard of justice in favor of a series of micro-justices, each tied to a localized small narrative. This will give a voice to those who are excluded:

The answer is: Let us wage a war on totality; let us be witness to the unrepresentable; let us activate the differences and save the honor of the name.²⁰

¹⁷ PMC, 40.

¹⁸ *Ibid.*, 36.

¹⁹ *Ibid.*, 63-4.

²⁰ *Ibid.*, 82.

[T]here is no genre whose hegemony over others would be just.²¹

Everyone of us belongs to several minorities, and what is important, none of these prevails. It is only then that we can say that the society is just.²²

In other words, let us give a voice to groups who have been excluded by the dominant culture, let us give voice to positions which have gone unrepresented.

The reader should realize at this point that while The Postmodern Condition is subtitled "A Report on Knowledge," it quickly turns into a position paper on justice and legitimation in the postmodern age, themes which are treated more fully in Just Gaming.

(ii) Just Gaming (1985)

Most of the themes introduced in The Postmodern Condition can be found in Just Gaming, although Lyotard adds a few interesting twists that must be explored. Lyotard begins with the now familiar claim that consensus is impossible.²³ Lyotard then argues that political theory has moved through three paradigms: the classical approach, the modern approach, and the pagan (postmodern) approach.²⁴ In the classical approach, exemplified by Plato, the philosopher begins with a model of the just society and then attempts to manipulate the existing society so that it matches the model. Justice is understood only by the philosopher or statesman who announces a grand plan for the

²¹ TD, 158.

²² JG, 95.

²³ "The Impossible Consensus," *ibid.*, 3.

²⁴ *Ibid.*, 31.

state. In Plato's model, each person is given a role in the service of the state, and people are not free to experiment with new roles or invent new lifestyles; society is static and immobile. On this system, a single form of justice is imposed from above to govern every aspect of the citizens' behavior.

In the autonomy model, exemplified by Kant and Rousseau (and I would add, Hobbes and Locke), justice is derived from the free choice of autonomous individuals who come together to express their consensus in a social contract. According to Lyotard, the modern approach is the dominant paradigm today, holding

that justice lies in the self-determination of peoples. In other words, there is a close relation between autonomy and self-determination: one gives oneself one's own laws. [] And so we get the idea of autonomy that has dominated, and still dominates, the modern problematic of politics and justice.²⁵

Now Lyotard argues that the modern approach (the autonomy model) must be rejected on the grounds that people are **not** free and autonomous, but are determined by the narratives in which they are situated. Lyotard compares people in our society to the members of the Cashinahua tribe, whose lives are framed by a series of shared narratives. When a member of the Cashinahua tribe tells a narrative, he gives his name **after** the story. For Lyotard this is very significant, because it shows that the story comes before the individual--the self is created and constituted as a product of the collectively shared narrative. Lyotard thinks that our situation is similar to the situation of the Cashinahua in that we too are created by narratives, except that we lack a **grand** narrative and instead stand at the intersection of a vast network of disjointed stories. Just

²⁵ Ibid., 30.

like the Cashinahua, individuals in our society are "named" by the stories they hear, which means that they are not autonomous:

This implies the very opposite of autonomy: heteronomy. It also implies that, ultimately, it is not true that a people can ever give itself its own institutions.²⁶

[I]n paganism [postmodernism], there is the intuition, the idea [] that no maker of statements, no utterer, is ever autonomous. On the contrary, an utterer is always someone who is first of all an addressee, and I would even say that one is destined.²⁷

Now individuals are free to make changes (experimental "moves") within the context of their narratives, but they get their identity through the narrative itself, which means that people are not free and autonomous in the deep sense that they might be able to create a government from scratch through the use of reason. One can subvert the narrative in which one is situated by inventing new moves, but there is no way to step outside of the narratives altogether in order to be truly and deeply autonomous.

Liotard parlays this analysis into the claim that there can be no "metadiscourse" which grounds political and ethical decisions.²⁸ This leads to the third approach to justice discussed above, the pagan (postmodern) model, in which we abandon the mistaken search for a fail-safe conception of justice. The pagan approach does not really specify a model or paradigm for the just state, but rather points out the dangers of adopting a large-scale model. In other words, there are no ultimate grounds for choosing, say, capitalism over communism, and therefore the choice must be based on

²⁶ Ibid., 34 (emphasis added).

²⁷ Ibid., 31.

²⁸ Ibid., 28.

"opinion" instead of reason. The error of **modern** thinkers lies precisely their supposition that questions of justice revolve around issues of truth and reason. For Lyotard, we must be content with a politics of opinion, since there can be no politics of reason.²⁹

Lyotard concludes from this line of thinking (wrongly, I think) that when a person makes a judgment, they judge **without criteria**.³⁰ Part of the claim here is that there is an unbridgeable gap between a descriptive claim (say, Hobbes' claim that "mankind is naturally aggressive") and a prescriptive claim ("so we ought to create a Leviathan"). For Lyotard, a prescriptive claim ("we ought to do X") cannot be grounded in a descriptive claim (a claim about ontology):

There is a change of language game [from descriptive to prescriptive]. One describes a model of strategy, of society, of economy, and then, when one passes to prescriptions, one has jumped into another language game. One is without criteria, yet one must decide.

I believe that one of the properties of paganism is to leave prescriptives hanging, that is, they are not derived from an ontology.³¹

Lyotard thinks that the law (the legal system) is a futile attempt to legitimate prescriptive claims on the basis of descriptive claims about human nature, consensus, or autonomy. For any given piece of legislation, even if it is true **descriptively** that the elected representatives voted in favor of the legislation, it does not follow **prescriptively** that we

²⁹ Ibid., 82.

³⁰ Ibid., 14.

³¹ Ibid., 7, 59.

ought to obey it, nor does it follow that the particular law is thereby just or binding.³² There is an unbridgeable gap between the descriptive claim that "this law has the assent of the people" (a claim which Lyotard denies in any event) and the prescriptive claim that "you ought to obey this law because it has the assent of the people."

Lyotard concludes from this that there is no valid overarching principle of justice: "there is no just society."³³ We cannot have recourse to models of justice (a la Plato) and we cannot rely on consensus (a la Rousseau and Kant). That is, we cannot tie ethics or law to ontological claims about "human nature" or "human destiny" or "autonomy" or "consensus." What's worse, we can't seem to get beyond justice at the local level; there is justice only within the imminent logic of each language game, but there is no overarching political justice by which to run the country. Any master principle of justice will, according to Lyotard, commit an injustice against those who do not share the language game from which the overarching principle is derived.

But if there is no overarching principle, what can be left for ethics and law? On what grounds can we decide how to act? It seems that the realm of law is precisely where we need overarching principles so that people can live peaceably. Without an overarching principle (a grand narrative for the political arrangement), what's to stop society from declining into a war of all against all?

Lyotard offers a solution of sorts to this dilemma, first on the level of ethics, and then on the level of law. On the level of ethics, he says that even though there is no

³² Ibid., 65.

³³ Ibid., 24.

overarching principle of ethics, we experience something like an imperative to do the right thing. We find ourselves as addressees of an obligation that has no sender--we are called to be ethical and to behave justly, yet we must remain ignorant about the source of this obligation. This obscure claim is analogized by Lyotard to the Judaic notion that God gives commands without revealing His exact status; we must act while bracketing any doubts about the source of our obligation.³⁴ To put the point differently, we experience an imperative "You Must," yet this imperative cannot be deduced from a descriptive claim and it cannot be grounded. We experience obligation, but it is ungrounded: "it is proper to prescription to be left hanging in mid-air."³⁵ Lyotard thinks that this conception of obligation is a legacy from Kant and Levinas.³⁶ From Kant he borrows the notion that obligation is merely an Idea of reason that cannot be traced to a source in the phenomenal world, and from Levinas he borrows the claim that one is called to do justice to the "Other." Lyotard claims that this obligation is 'contentless': it does not provide criteria or substantive grounds for our choices, but simply tells us that we must decide.³⁷ As such, we lack grounds for our decisions and must decide on a case-by-case basis. For example, at one point in Just Gaming Lyotard is asked whether it would be just to blow up an American computer that was programming the bombing of Hanoi. Lyotard says that it would be just to blow up the

³⁴ Ibid., 64.

³⁵ Ibid., 45.

³⁶ Ibid., 45.

³⁷ Ibid., 77.

computer, but he refuses to give grounds for the decision:

Who is right? It is up to everyone to decide. If you asked me why I am on that side, I think that I would answer that I do not have to answer to the question "why?," and that this in on the order of... transcendence. That is, here I feel a prescription to oppose a given thing, and I think that it is a just one. This is where I feel that I am indeed playing the game of the just. [] When I say "transcendence" it means: I do not know who is sending me the prescription in question.³⁸

Strangely enough, Lyotard then appeals to the Kantian notion that the bombing of Hanoi is morally wrong because it "was doing something that prohibited that the whole of reasonable beings could continue to exist."³⁹ This appears very close to the Kantian claim that moral principles must be universalizable: "Act only on that maxim through which you can at the same time will that it should become a universal law."⁴⁰ Now despite Lyotard's reliance on a seemingly universal principle of justice, Lyotard continues to insist that no single principle should govern all of the language games, and that the games should remain autonomous. But this leads to a serious problem: if there is no principle of justice outside of the various language games, then there would seem to be nothing unjust about one game overtaking another. For example, what is to stop the game of fascism from overtaking the game of pacifism, and what grounds can we appeal to in our belief that the Neo-Nazis are being unjust when they propose to deport all immigrants? If there is no metadiscourse of justice, then how can Lyotard claim that each game should be left intact, or that the game of socialism is better than the game of

³⁸ Ibid., 68-9.

³⁹ Ibid., 69-70.

⁴⁰ Immanuel Kant, Groundwork of the Metaphysics of Morals (New York: Harper and Row, 1964), 88.

fascism? It would seem that some sort of choice between games is necessary, that a meta-principle is required for political action.

Lyotard's response to this dilemma is to argue that we should seek to preserve a plurality of differing conceptions of justice, each appropriate for a limited sphere:

And the idea that I think we need today in order to make decisions in political matters cannot be the idea of the totality, or of the unity, of a [political] body. It can only be the idea of a multiplicity or of a diversity.

Yes there is a multiplicity of justices, each one of them defined in relation to the rules specific to each game.⁴¹

In order to ensure that each sphere remains intact, Lyotard further proposes that we adopt a universal rule of justice which operates as a referee, keeping the language games separate so that no single conception of justice is hegemonic:

And then the justice of multiplicity: **it is assured, paradoxically, by a prescriptive of universal value.** It prescribes the singular justice of each game.⁴²

This is supposed to solve the question of how we can have a diversity of language games without having any single game dominate the others.⁴³ But this "universal" prescription

⁴¹ JG, 100.

⁴² Ibid., 100 (emphasis added).

⁴³ I take it that this principle would prevent, say, Neo-Nazis from physically harming immigrants because in so doing they would be imposing their own game on others, which would violate the universal prescription that the games must be kept autonomous and distinct. But notice how this approach not only rules out undesirable behavior, but also rules out desirable coercive behavior, such as taxation, which involves the imposition of one form of life (redistribution of wealth) on many people who do not share in this language game, such as tax resisters. It seems that in law and politics there is an inescapable amount of coercion, such that one language game must overtake others for society to function at all. If this is correct, then Lyotard will have difficulty explaining how a just political arrangement will keep language games heteronomous and distinct.

('keep the games distinct') cannot be justified by Lyotard, since he earlier denied that there is a metadiscourse that covers all of the disparate language games.⁴⁴ Lyotard recognizes the paradox, and concludes Just Gaming (which takes the form of a dialogue) by laughing at his new, paradoxical role as "the great prescriber."⁴⁵

Lyotard's conclusion, then, is that we should be tolerant toward the various small narratives within our culture, and that we should resist the impulse to subsume all narratives under a single conception of justice. He clearly feels that application of a single master narrative across the board results in a silencing of minorities, much in the same way that adopting a state-sponsored 'History of the United States' from the perspective of propertied white males would perhaps silence the version of history offered by Native Americans. In order to be just, we must listen for the silencing of dissident voices,⁴⁶ and we must experiment with new moves in our existing language games so that we "work at the limits of what the rules permit, in order to invent new moves."⁴⁷

(iii) The Differend (1988)

The Differend is an update and modification of Lyotard's earlier work, but certain factors remain constant. From The Postmodern Condition, Lyotard retains the notion

⁴⁴ JG, 28.

⁴⁵ Ibid., 100.

⁴⁶ Ibid., 71-2.

⁴⁷ Ibid., 100.

that the postmodern political situation appears as a war between disparate language games which advocate diverse and incommensurate political solutions such as market capitalism, socialism, and fascism. Again, there is no overlapping consensus (no collective criteria) by which we could deduce grounds for choosing between these language games: "heterogeneity makes consensus impossible." Lyotard affirms that postmodernity has given up on the modern quest for a neutral meta-language and he reiterates the growing implausibility of grand schemes such as "liberation of the masses," "the forward march of history," or "the victory of the proletariat." Instead, we now find a vast array of localized micro-narratives which are not translatable into each other, and which compete for political recognition. Within and between these games there is little rational dialogue, but much "agonistics" (verbal jousting). From Just Gaming, Lyotard retains the idea that the differing conception of justice are heterogenous, and that the hegemony of one version over others will lead to a 'silencing' of the party who is dominated by the controlling narrative.

In The Differend, Lyotard drops his earlier references to language games, and he now speaks in somewhat similar terms about "phrases" and "phrase-systems." He argues that the postmodern era appears as a vast system of incommensurate phrase systems. And just as he argued in Just Gaming that each type of statement has its own logic, he now argues that each type of statement belongs to a unique "phrase regimen."⁴⁸

⁴⁸ Lyotard also finds heterogeneity at the level of **names** (words), which exist one level below the level of phrases (which contain names) (TD, 47). For Lyotard, names are loci of conflicting meanings, such that a given name (say, "Stalin") has a fluid meaning depending on context. This means that Lyotard finds our language to be permeated with heterogeneity and dissensus from the most elementary level (names) all

Lyotard also introduces the term "**differend**" to denote the remainder or leftover produced by the incommensurability of phrases and phrase systems. The term "differend" implies a conflict, an imperfect matching between phrase systems, where one system is not translatable into the other. The differend is produced in the clash between two conflicting systems of justice, where the subordinate individual (the person who is judged) does not share the basic tenets of the system under which she is judged.

Lyotard also points out that there is a harm which consist precisely in denying a forum and a language to a person so that she can explain how she has been harmed. For example, the wrongs perpetrated against blacks do not derive merely from the fact that the government reneged on a promise to them ("three acres and a mule"); a deeper source of harm was that for centuries they lacked the standing as free men to bring actions for the cruelties inflicted upon them by the dominant Southern culture. It is not that they were simply violated under the law, but that they were victimized by the absence of a forum in which they could speak. In such cases, the justice system excludes the individual from having a voice that can be heard on terms which the system will understand. Lyotard describes the differend in precisely this way:

I would like to call a 'differend' the case where the plaintiff is divested of the means to argue and becomes for that reason a victim.

[A] differend would be a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments.⁴⁹

the way up to the level of phrase systems and discursive genres.

⁴⁹ TD, 9, xi.

Lyotard distinguishes the differend from "damages" which can be proven to the satisfaction of the dominant system of justice and which are therefore reparable in a "litigation" under the law. A person who suffers a wrong that **cannot** be proven on the present system is a true victim, and his claim is a differend lying outside the system of justice. The differend is silent since it cannot be recognized; it does not get a voice or a hearing on the existing system because the plaintiff lacks standing. As a result, the differend is reduced to a kind of mute silence, because it cannot be understood by those who caused the differend to exist in the first place.⁵⁰ This analysis can lead to what some people have termed "the ethics of the differend," which seeks to identify and give voiced to the experience of incommensurability.⁵¹

Lyotard's examples of those who suffer the fate of the differend include Jews (because their reports about the Nazi gas chambers cannot be heard under the 'logic' of Neo-Nazi holocaust deniers); wage-laborers (because their demand for non-alienating labor cannot be heard under a capitalist system in which labor is a commodity); and indigenous people (because their harms cannot be recognized by the justice system of their oppressors). An excellent example of the differend would be the fate of Native Americans who were denied standing to sue in Colonial courts for the encroachment by

⁵⁰ Ibid., xi.

⁵¹ See Allen Dunn, "A Tyranny of Justice: The Ethics of Lyotard's Differend," Boundary 2(20)(1993): 192-220. Dunn is skeptical of Lyotard's attempt to derive ethical implications from his discussion of the differend: "Not surprisingly, Lyotard encounters formidable difficulties in his efforts to present the ethical implications of the differend." Ibid., 197.

colonists on their land.⁵² Since the Native Americans were deprived (by law) of the right to sue, they suffered a harm that was beyond repair on the existing justice system: indeed, they were silenced because they never received a hearing on the merits of their case. The key point for Lyotard is that oppression is insidious and subtle: more often than not one doesn't beat the opponent through an argument **inside** a particular forum, so much as deny him a forum in the first instance. An example of this can be found in the fact that our current system of justice allows for equal access to the courts, but poor people are often incapable of getting a hearing in court because they lack the appropriate resources; as a result, their voices go unheard.

In a familiar move, Lyotard reiterates the claim that different speech acts constitute different phrase systems, and they are heterogenous, such that they constitute different "universes."⁵³ Thus, the universe of prescriptives is separate from the universe of descriptives, and so on:

There are a number of phrase regimens: reasoning, knowing, describing, recounting, questioning, showing, ordering, etc. Phrases from heterogeneous regimens cannot be translated from one into the other.⁵⁴

When one genre or phrase system is mapped over another, the incommensurability produces a differend, a remainder, an injustice, or a wrong that cannot be communicated

⁵² See Ward Churchill, "Perversions of Justice: Examining the Doctrine of U.S. Rights to Occupancy in North America," in Radical Philosophy of Law, eds. David Caudill and Steven Jay Gold (Atlantic Highlands, N.J.: Humanities Press, 1995).

⁵³ See TD, 128. For Lyotard, each "universe" involves four basic components: a referent, a meaning, an addressor, and an addressee. (TD, 14). These components undergo strategic shifts depending on the type of statement being offered.

⁵⁴ *Ibid.*, xii.

or translated into the universe of the phrase regime or genre which is responsible for causing the differend.

Turning more specifically to law and ethics, Lyotard thinks that legal and moral standards are associated with prescriptive and normative utterances of the type "You should do X" or "X is the right thing to do." According to Lyotard, we cannot do without prescriptives, but we can never ground them in descriptive statements, as we are wont to do, for example when the statement, "You must obey the law" is grounded in the statement, "Because the law is authorized by God and the general will." For Lyotard, prescriptives cannot be tied to an ontology, to a description of human nature or history:

I believe that one of the properties of paganism [postmodernism] is to leave prescriptions hanging, that is, they are not derived from an ontology. This seems essential to me.⁵⁵

This means that positions in law, ethics, and politics must be left hanging, ungrounded, lacking in justification; the differing positions must battle it out in a "agonistics" against other positions.

Now it is difficult to see how this approach can avoid lapsing into relativism, the view that there is no legitimate basis for choosing one political arrangement over another. Indeed, Lyotard says that there is no politics of reason and he admits that "we do not have a rule for justice."⁵⁶ All the same, Lyotard argues that his approach is **not** relativistic, since he does give us at least one principle of justice, namely that the

⁵⁵ JG, 59.

⁵⁶ Ibid., 82, 65.

disparate games should be kept separate: "the Idea of justice will consist in preserving the purity of each game."⁵⁷ The problem for Lyotard, of course, is to find a way to prove that this prescriptive claim is binding, when he has previously decried universal principles as terroristic.

Part of the solution to this paradox can be found in Lyotard's reliance on the notion of reflective judgment set forth in Kant's Critique of Judgment, especially Kant's notion of the 'sublime' as something which escapes categorization.⁵⁸ Because Lyotard's reliance on the Critique of Judgment is pervasive, yet somewhat difficult to grasp, we must take the time to understand how Kant's work in aesthetics informs Lyotard's ideas on justice. After all, Lyotard has referred to himself as a Kantian "of the third Critique."⁵⁹

Summarizing greatly, Kant distinguishes two types of judgments: determinate and reflective. **Determinate** judgment takes place when a particular representation is subsumed under a universal category in an act of cognition (this can occur in the theoretical judgment that a particular event had a particular cause, as well as in a moral judgement that a given action falls within the purview of the universal moral law). In

⁵⁷ *Ibid.*, 96.

⁵⁸ Immanuel Kant, Critique of Judgment (Indianapolis: Hackett Publishing Company, 1987). My discussion of Kant's views borrows from James Clarke, "A Kantian Theory of Political Judgement," Philosophy Today 38 (1994): 135-148, and David Ingram, "The Postmodern Kantianism of Arendt and Lyotard," Review of Metaphysics 42 (1988): 51-77.

⁵⁹ Jean-Francois Lyotard, Pagan Instructions (Paris: Galilee, 1977), 36. For more on Lyotard's reading of Kant, see Bill Readings, Introducing Lyotard: Art and Politics (New York: Routledge, 1991).

a determinate judgment, a law is applied to a particular case, resulting in a truth claim that can be verified.

In contrast, **reflective** judgment takes place when a particular representation seems to evade criteria and categories, and thereby sets the mind into a free play of faculties, spinning the imagination and the understanding into an effort to bring order to the experience. Once the faculties are put into play in reflective judgment, the free play can result in either a harmony or disharmony of the faculties. If a **harmony** results, we experience the Beautiful, but if there is a **disharmony**, we experience the Sublime. When we experience the Sublime we have a feeling that cannot be put into words perfectly because the Sublime cannot be pointed out in space and time (we cannot prove that a painting is sublime by pointing at it). Now Kant thinks that the feelings triggered in reflective judgment are subjective since they lack objective instantiation, but at the same time they can be held in common by a 'community of sense' (a sort of idealized community of men) in which the feeling is shared by a group of people who can compare their judgments with others in a disinterested fashion. This means that matters of taste cannot be exhaustively formulated by a determinative standard, but we can still discuss them without possessing objective criteria of the beautiful and the sublime.

All of this seems quite removed from the world of law and politics (some would say **too** removed⁶⁰), but Lyotard thinks that we can use this approach as a model for

⁶⁰ For some cautions about whether aesthetics can ground political action, see Terry Eagleton, "The Kantian Imaginary," in The Ideology of the Aesthetic (Cambridge: Basil Blackwell, 1990), 76. For a similar concern, see Christopher Norris, Uncritical Theory (London: Lawrence and Wishart, 1992), especially chapter four, "From the Sublime to the Absurd (Lyotard)," 70-86.

how we might make judgments without objective criteria. It also provides a way of understanding how something fleeting (in Kant's case, the sublime; in Lyotard's case, the differend) could be felt so strongly, yet resist encapsulation in words:

In the differend, something "asks" to be put into phrases, and suffers from the wrong of not being able to be put into phrases right away. [] This state includes silence, which is a negative phrase, but it also calls upon phrases which are in principle possible. This state is signalled by what one ordinarily calls a feeling: "One cannot find the words, etc."⁶¹

Just as we search for an elusive formulation of the sublime, we must be vigilant to ensure that marginalized groups are provided the means to give voice to their silent oppression.

Using this Kantian approach, Lyotard argues that discussions of justice evoke reflective judgments which cannot be placed within rigid categories. The attempt to derive the just from the true (as in Plato) or from majority rule (as in Rousseau) is a misguided attempt to make an indeterminate judgment appear to have a determinate standard:

The just judgment leaves the question of what justice might be open to discussion; it does not allow justice to become a determinate concept.⁶²

Lyotard's fear is that the adoption of a single rigid conception of justice will become terroristic by ruling out all other versions, chilling new "moves" and experiments. Instead of grounding politics in claims of truth and reason, we should think of politics as a process of questioning our existing language games and experimenting with new moves. In this way we "activate the differences" and "wage a war on totality."⁶³

⁶¹ TD, 13.

⁶² Bill Readings, Introducing Lyotard, 125.

⁶³ PMC, 82.

6.2 Problems with Lyotard's Account of Justice and Law

Having set forth the basic framework of Lyotard's thinking on questions of justice, I am now in a position to offer a generalized critique of Lyotard's work. After this critique, I will try to isolate some features of Lyotard's position which are important and useful, even if we must ultimately reject his conception of justice.

(i) The Emptiness of Lyotard's Notion of Justice

The first point that I would like to raise is simply that Lyotard says too little about the structure of the just state. He spends a lot of time talking about justice, and he is aware that in a multi-cultural society there are different social groups with differing conceptions of justice, who must somehow all get along. But at the end of the day he has not said very much about the principles and policies which he thinks should be adopted as a framework for the just state, nor does he propose a procedural process (a la Rawls' "original position" or Habermas' "ideal speech situation") which can be used to reach agreement on these principles. Lyotard argues that we must keep language games distinct and autonomous, and he provides a universal prescription to ensure that this happens, but beyond that, he seems to be curiously silent on substantive issues.

I think that we will get a clear idea of why he comes up short on a specific conception of justice if we look at the extent to which he rules out various possible approaches. As we have seen, Lyotard denies that a given society can employ an overarching principle of justice, and he argues that every attempt at legitimation will fail.

He thinks that we must (practically speaking) enact laws and make judicial decisions, but we have no criteria for such decisions. Further, every decision will create a differend, a remainder lurking "outside" the system as an injustice. Finally, we cannot follow a model or plan for the just state (a la Plato), and we cannot rely on consensus to reach an agreement on the laws that will govern us (a la Rousseau).

Given this set of constraints, it is very difficult to see how a lawmaker or judge could ever begin to do her work, since every move is bound to create unjust differends and every decision must be made without criteria. It is hard to see how this could lead to an endorsement of any public arrangement, whether capitalism or communism, fascism or anarchism. Some reviewers have pointed out that Lyotard's failure to specify which political views are preferable over others leads him into a sort of inactivity or quietism that results in conservatism.⁶⁴ Even if Lyotard believes that we must have a "politics of opinion" instead of a "politics of reason," he would do well to present his opinion and prove to the best of his ability why we ought to share it.

Now it might be argued that Lyotard's notion of the differend can serve as an argument in favor of a limited form of government (perhaps a "minimal state" or "night-watchman state") on the grounds that we should set up a political system which produces the fewest differends, a sort of "politics of least harm."⁶⁵ This is a charitable reading of Lyotard, and it is attractive, because it seems to entail limited governmental intrusion

⁶⁴ Honi Fern Haber, Beyond Postmodern Politics (New York: Routledge, 1994), 32.

⁶⁵ This suggestion comes from David Ingram, in "Legitimacy and the Postmodern Condition," 286-7.

into private affairs so that the disparate language games can flourish in the private sphere. This would be the system in which a hundred flowers bloom, without being trampled by a hegemonic grand narrative.

The problem with this reading of Lyotard, as we have seen, is that we cannot find any support for the overarching principle which serves to keep the language games distinct, given Lyotard's insistence in Just Gaming that we cannot have a meta-discourse of justice. But even if we accept Lyotard's universalist prescription for the time being, there are problems with the consequences of recognizing the equal validity of a multiplicity of justices. It is easy to see how Lyotard's approach would let a thousand flowers bloom, but some of those flowers are dangerous. If we are concerned to give a full platform to all marginalized groups, then we must be sensitive to hate groups like the KKK and the National Socialists, not to mention the Religious Right. It seems that most reviewers of Lyotard's work are content to suppose that when Lyotard's says that we should "activate the differences" he is arguing that we should give a voice to marginalized groups like gays, women of color, socialists, artists' collectives, and so forth. But Lyotard's approach would also require giving a voice to hate groups which perhaps should be silenced by public opinion. What I am saying is simply this: Lyotard's notion of the differend cuts both ways--it maximizes diversity, but in so doing it activates and legitimizes some groups which deserve to remain marginalized. Lyotard's heart is in the right place because he wants to effectuate a truly multi-cultural society that values diversity, but he does not realize that his approach actually empowers dangerous and reactionary groups.

I think that we can best understand Lyotard's position if we see it as a humanitarian effort to avoid all of the pitfalls of traditional political theory, but he does this only at the expense of failing to offer a program himself. Lyotard has a keen ear for the way in which minorities and marginalized groups have been oppressed and silenced, and his rejection of traditional concepts (such as neutrality, consensus, and legitimation) stems from his realization that great atrocities have been committed in the name of these. More so than other contemporary thinkers, Lyotard correctly understands that our current way of life is becoming harder to rationalize: the politicians talk about legitimate government, but the people feel that the government is a joke; the lawyers speak of justice, yet the country is torn apart by race and class divisions; we plunder third world nations in order to 'liberate' them, and we harm indigenous people and deprive them of their right to seek redress; finally, we talk about consensus, but nobody really believes that we actually give ourselves laws---instead, we feel that laws are imposed on us from above. Lyotard is correct in his diagnosis that we have begun to doubt the grand narratives that ruled us in the past. Given this, Lyotard is justifiably concerned about avoiding a simple-minded endorsement of our current system or a simplistic gloss on democracy and consensus as a cure-all. The problem, though, is that Lyotard is so afraid of offering a particular set of principles of justice (for fear that any specific agenda will marginalize particular groups) that he comes up with no specific program. He never says which economic arrangement is just (though he variously criticizes capitalism and communism), nor does he specify the proper bounds of the criminal law (as do liberals like Mill, Feinberg and Dworkin). Given his fear of

consensus and his critique of autonomy, it is not clear whether Lyotard can even endorse democracy, except to say that it makes sense according to one language game but perhaps not according to others. In effect, he has backed himself into a theoretical corner such that no vision of the just state can be endorsed.

(ii) The Paradox of Judging Without Criteria

A second problem that I have encountered in Lyotard's work involves his notion that we must make ethical judgments without criteria, a position which he purports to find in Aristotle's ethics and Kant's aesthetic theory. The philosophical sources which Lyotard cites for this claim do not seem to support him on this matter. To begin with, Lyotard's reading of Aristotle is at odds with Aristotle's warning in the Politics that the just state must follow the rule of law:

Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the mind of rulers, even when they are the best of men. The law is reason unaffected by desire.⁶⁶

Aristotle held that a judge's decision must be based on the criterion that it leads to the Good Life, which serves as the **telos** or guiding principle of ethical judgment and political legislation. The role of the legislator, then, is to inculcate virtuous habits, and this is the criterion for a good law:

For legislators make the citizens good by forming habits in them, and this is the wish of every legislator; and those who do not effect it miss their

⁶⁶ Aristotle, The Politics, sec. 1287a28, in The Basic Works of Aristotle, ed. Richard McKeon (New York: Random House, 1941), 1202.

mark, and it is in this that a good constitution differs from a bad one.⁶⁷

Lyotard's claim that we lack criteria is derived in part from Aristotle's claim that judgment is a habit or practice (a "phronesis") that proceeds on a case-by-case basis. It is true that Aristotle says that ethical reasoning cannot attain the same level of exactitude as mathematics because "fine and just actions [] exhibit much variety and fluctuation," so in ethics we must be content to merely "indicate the truth roughly and in outline."⁶⁸ In other words, we can't have inflexible rules of morality which apply to every situation, but we can have general rules of thumb. The message to take from this is that rules for ethical and political decisions will be somewhat inexact, but it hardly supports the idea that we have **no** criteria.

Aristotle goes on to say that certain precepts of justice are **natural laws**, that is, laws which "exist everywhere [and have] the same force and do not exist by people thinking this or that."⁶⁹ This means that certain types of actions are just no matter where they take place. Given this, it is a mistake to suppose that Aristotle advocated the making of judgments **without** criteria. Aristotle said only that the just man does not possess **perfect** criteria in every case. In most ethical judgments the goal of the virtuous man is to seek the mean, and this is itself a clear criterion in matters of ethics and justice: "Hence it is evident that in seeking for justice men seek for the mean or neutral,

⁶⁷ Aristotle, Nichomachean Ethics, in The Basic Works of Aristotle, 1103b (emphasis added).

⁶⁸ *Ibid.*, 1094b.

⁶⁹ *Ibid.*, 1134b.

for the law is the mean."⁷⁰ This hardly rules out the use of criteria per se, as Lyotard implies.

Apart from the fact that Aristotle never said that men must judge without criteria, we can dismiss Lyotard's claim as *prima facie* absurd. After all, what would it be like to make a choice **without criteria**, as Lyotard implies when he says that we make decisions "without the least criteria"?⁷¹ The only way to satisfy this approach would be to choose arbitrarily, at random, without any sort of reasoning at all. Certainly this cannot be what Lyotard advocates. For these reasons, Lyotard's claim that we must judge without criteria remains oblique and puzzling.

A similar distortion of traditional sources takes place in Lyotard's reading of Kant. By relying too heavily on the Critique of Judgment, and thereby ignoring Kant's writings on law and justice, Lyotard makes the claim that Kant eschewed determinate rules for judgments.⁷² This may be true as for matters of **aesthetics** (that is, for judgments about the beautiful and the sublime), but in matters of justice Kant provided detailed, strict rules. Whatever Kant may have said about the sublime in his **aesthetic** writings, he obviously never felt that we lacked criteria for decisions in law and politics, because Kant gave very specific determinations on such matters as the death penalty, the

⁷⁰ The Politics, 1287b3 (emphasis added).

⁷¹ JG, 14.

⁷² For more on Lyotard's (mis)reading of Kant, see Michael Drolet, "The Wild and the Sublime: Lyotard's Postmodern Politics," Political Studies 42 (1994): 259-273, at 267.

right of inheritance, private property, voting rights, the right to rebel, and marriage.⁷³ Kant even said that the idea of a hypothetical 'original contract' could be used as a **criterion** (Kant's term!) for whether a law is just:

Specifically, it [the original contract] obligates every legislator to formulate his laws in such a way that they could have sprung from the unified will of an entire people []. For this is the **criterion** of every public law's conformity with right.⁷⁴

Kant calls the original contract an "idea of reason" which serves as an "**infallible standard** of right."⁷⁵ He also says that practical reason must "judg[e] according to principles of Right."⁷⁶ Accordingly, it is somewhat odd that Lyotard relies on Kant for the notion that justice requires the presentation of the unrepresentable, and that there can be no formula for the just state. In fact, Kant himself thought otherwise, and **contra** Lyotard, he held that the just state should be founded on the "general (unified) will of the people," and must take the form of a republic.⁷⁷ Kant did not think that these requirements were subjective, nor did he think that they could be thought to be one language game among others: he thought that they were demanded by freedom and

⁷³ Immanuel Kant, The Metaphysics of Morals (Cambridge: Cambridge University Press, 1991), property rights at p. 80, marriage rights at p. 96, the right to rebel at p. 177.

⁷⁴ Immanuel Kant, "On the Proverb 'That May be True in Theory but is of no Practical Use'" ("TP"), in Perpetual Peace and Other Essays (Indianapolis: Hackett Publishing Co., 1983), 77.

⁷⁵ TP, 79.

⁷⁶ The Metaphysics of Morals, 176.

⁷⁷ Immanuel Kant, "To Perpetual Peace: A Philosophic Sketch," in Perpetual Peace and Other Essays, 112.

reason: "The concept of an external right in general derives entirely from the concept of freedom."⁷⁸

Now Kant may have allowed that aesthetic judgments about the sublime were based on subjective feelings that lacked determinate criteria, and Lyotard is within his rights in using Kant's aesthetic theory as a heuristic model to suggest how moral decisions might be made without objective criteria, but Kant himself never relied solely on this approach in matters of ethics and politics. So it is a distortion of Kant's position to imply that he denied the necessity of criteria in political issues.

Finally, we can also see a distortion at work in Lyotard's appropriation of Wittgenstein's notion of "language games." Wittgenstein used the term "language game" to designate primitive scenarios which illustrate the point that language has uses other than the simple naming of objects:

I shall in the future again and again draw your attention to what I shall call language games. **These are ways of using signs simpler than those in which we use the signs of highly complicated everyday language.** [] The study of language games is the study of primitive forms of language or primitive languages.⁷⁹

Lyotard picks up on Wittgenstein's terminology, but he misses Wittgenstein's main point, which is that language games in the real world are tied to customs and traditions: "I shall also call the whole, consisting of language **and the actions into which it is woven**, the

⁷⁸ **TD**, 72.

⁷⁹ Ludwig Wittgenstein, quoted in Ray Monk, Ludwig Wittgenstein: The Duty of Genius (New York: Free Press, 1990), 337.

'language game.'⁸⁰ Language games rest upon forms of life: "And to imagine a language means to imagine a form of life."⁸¹ In other words, language games do not need to be justified rationally, and indeed **cannot** be justified or legitimated as a matter of logic:

What we have rather to do is to accept the everyday language-game, and to note **false** accounts of the matter as false. The primitive language game which children are taught needs no justification; **attempts at justification need to be rejected.**⁸²

Notice how Lyotard misses Wittgenstein's point. Wittgenstein is saying that language games simply **are**; they do not need justification because they are forms of life, customs, and habits. But Lyotard proceeds to ignore Wittgenstein's advice ("attempts at justification must be rejected") by asking how we can ground or justify a language game in politics and law (say, by asking how we can go from a descriptive phrase to a prescriptive claim).

Lyotard correctly sees that in Western culture there is a language game in which laws are justified by a movement from descriptive claims to prescriptive claims: we move from "Man is endowed with inalienable rights" to "We should have a liberal democracy." Now Lyotard focuses on the fact that prescriptive statements are "ungrounded" in that they cannot be deduced from descriptives, but he ignores Wittgenstein's point that language games are not 'grounded' in the first place: as long as prescriptive statements

⁸⁰ Ludwig Wittgenstein, Philosophical Investigations, sec 7 (New York: Macmillan, 1958), 5 (emphasis added).

⁸¹ *Ibid.*, sec 19, p. 8.

⁸² *Ibid.*, 200 (emphasis added).

can be derived from descriptive statements in practice, then they are as grounded as they need to be, regardless of whether they can or cannot be logically derived from descriptive statements.

(iii) The Alleged Gulf Between "Is" and "Ought"

Lyotard's misreading of Wittgenstein is related to his claim that we cannot derive a prescriptive claim from a descriptive claim, i.e. that we cannot go from an "is" to an "ought." In Just Gaming, Lyotard traces this claim to Aristotle's On Interpretation, but a more likely source is David Hume's Treatise of Human Nature, where Hume argued that it is impossible to logically derive an "ought" from an "is."⁸³ Now Hume's view was silently assumed by the majority of philosophers for quite some time, but it came under serious attack by John Searle in 1964.⁸⁴ A flurry of critical responses to Searle was offered by some notable philosophers (such as R.M. Hare and Judith Thomson), and the issue has been controversial ever since. Unfortunately, Lyotard overlooks or ignores the vast literature on this point, and thereby misses Searle's important argument, which (if true) forces a re-thinking of Lyotard's claim that different speech acts occupy different "universes."⁸⁵

Searle's point against Hume was that different phrases are linked together

⁸³ David Hume, A Treatise of Human Nature (Oxford: Clarendon Press, 1978), 469-70.

⁸⁴ John Searle, "How to Derive 'Ought' from 'Is'" Philosophical Review 73 (1964): 43.

⁸⁵ This claim is set forth by Lyotard in TD, 128.

indissociably in "institutional facts," such that a specific descriptive phrase will automatically entail a prescriptive phrase, based upon our collective habits, customs, and shared usage of terms. For example, if I say "Jones borrowed \$5,000 from Smith," then all other things being equal, we can derive "Jones ought to repay Smith." This derivation (or implication) is based on the social institution of promise-keeping which is firmly entrenched in our society, such that the term "promise" implies that if you borrow money, you ought to pay it back. If Searle is correct, descriptive and prescriptive phrases are linked through social institutions, so there is nothing wrong about going from one type of claim to another; in fact, it is perfectly normal and acceptable to do so.

Searle thinks that philosophers have erred by searching for a purely logical reason why one type of statement can lead to another; that is, philosophers asks themselves how it is **logically** possible that a statement of promise can give rise to statement about obligation. Philosophers like Hume and Lyotard see correctly that one cannot **deduce** obligation from promising, and they therefore claim that there is no way to link the phrases logically. This error is caused by looking in the wrong place for a connection between the phrases. The phrases are linked by custom and usage and **not** by logical inference; promising is simply the type of human institution that constitutes the creation of an obligation. Searle explains:

Thus, e.g. some philosophers ask 'How can a promise create an obligation?' A similar question would be 'How can a touchdown create six points?' And as they stand both questions can only be answered by stating a rule of the form 'X counts as Y.'⁸⁶

⁸⁶ John Searle, "What is a Speech Act?" in Language and Social Context, ed. Pier Giglioli (Baltimore: Penguin, 1972), 136-154, 139.

I think that Searle is on to something important here, and his analysis helps clarify the problem with Lyotard's supposition that the various phrase regimes occupy separate "universes" (whatever that means). In fact, the reverse seems to be the case: the various phrase regimes are mutually necessary components of any language. For example, the question, "Did you go to the ball game?" makes sense only if we assume that there are descriptive phrases such as "We went to the ball game," and performative phrases, "We hereby go to the game," as well as imperatives, "Go to the ball game!" To say that these phrases occupy different "universes" seems strange, and I can find no support for this thesis in the field of linguistics or philosophy of language. In fact, structural linguists have created formulas which describe the way in which one type of phrase can be quickly translated into another, which indicates that the phrases are intimately related.

It seems that both Lyotard and Searle follow Wittgenstein's notion that our lives are permeated with disparate language games which rely upon a mix of declarative and performative statements. Yet Searle (following Wittgenstein) is not bothered by this mixture, whereas Lyotard feels that a mixture of different phrase regimes leads to an aporia of legitimation. **But it is hard to see what is wrong with mixing phrase regimes, so long as this is our custom.** If we legitimate our government by a mixture of declarative and prescriptive phrases (as in the French Declaration of Rights or the American Declaration of Independence), then so be it--this mode of legitimation is an acceptable "move" given our practices and our tradition, and it is not somehow invalidated because the one type of speech act is melted in with another. If Lyotard is correct that all governments falsely seek legitimation in an illegitimate move from

descriptive to prescriptive statements, then it follows strictly that all governments are equally unfounded. But Lyotard can't hold this view, since it entails that the American government is no more legitimate than the government of the Third Reich. This conclusion should warn us that something is amiss in Lyotard's argument.

In a difficult series of passages in The Differend, Lyotard argues that the Declaration of Rights is flawed because it purports to derive its legitimacy on the basis of two distinct sources: the a-historical rights of men in general, and the historical events in France at the time of the Declaration. Lyotard says that this move from a universalist discourse to an historical discourse creates an "insoluble differend."⁸⁷ But this seems to be an overly dramatic conclusion. To see my point, consider the following scenario: a battered woman finally leaves her abusive husband and says, "What he did to me violated my human rights as well as our wedding vows." This is a perfectly acceptable, legitimate claim that is easily understood by virtually all people. This type of statement works--it gets its point across and it is legitimate. But on Lyotard's analysis, there is a confusion of genres here, because there is a universal appeal (to human rights) mixed with an historical appeal (to a contract between the parties). Yet this mixture does not seem to have the slightest effect on whether the statement is legitimate or illegitimate. Similarly, a mixture of discourses or genres in the Declaration of Rights does not result in a problem of legitimacy. Indeed, it seems that many important rituals and documents contain heterogenous references, without having this mixture lessen their legitimacy. For example, a Catholic marriage ceremony is a binding contract despite the heterogenous

⁸⁷ TD, 147.

appeals to religious foundations ("holy matrimony") and secular foundations ("I pronounce you man and wife by the powers vested in me by the State of Illinois"). All of this switching of genres takes place without calling into question the legitimacy of the wedding or the legal effect of the marriage.

If I am correct, then political legitimacy and illegitimacy are not a function of linguistics or rhetoric; they are a function of context and custom. Lyotard is correct that the Declaration mixes genres, but he is incorrect in assuming that this has any effect whatsoever on the legitimacy of that document. Legitimacy is based on customs and tradition, and not on the formal logic of linguistic performances. The legitimacy of the Declaration of Rights, or any form of government for that matter, will be based on the events surrounding its creation, not on the linguistic structure of its founding documents.

(iv) Overzealous Fear of Consensus

Passing now to a further area of concern, it is difficult to make sense of Lyotard's claim that consensus is "terroristic." After all, consensus must take place on some level in order for society to function---there must be some base-line agreement on language, customs, traditions, and so on. It is difficult to understand how this is terroristic; in fact the opposite seems more accurate, because if we lacked consensus we would have no social order and no way to prevent terror.

Now perhaps Lyotard's point is more subtle. Perhaps he is saying that we cannot achieve a perfect consensus, so every attempt at consensus has the result of excluding or marginalizing certain groups who disagree with the prevailing order. But if this is his

point, then he is not saying anything very extraordinary, since I know of nobody who supposes that we can reach a perfect consensus in a pluralistic society; there will always be what DeToqueville called the "tyranny of the majority." However, we can certainly all consent to a democratic system in which we agree to disagree, that is, where we can agree that differences should be tolerated. This type of overlapping consensus (an agreement to hear each other out) seems to be absolutely essential to any civilized society. Further, it would seem that Lyotard would want to hold that certain types of consensus are healthy, such as the consensus among migrant workers that they are being exploited by farm owners, or the consensus among South Africans that a free election should be held. Now Lyotard is right to worry about cases in which the views of a majority are imposed on an unwilling minority, thereby silencing and marginalizing the minority. But this is hardly a problem of **consensus** per se, but rather a problem of how to avoid a consensus which is intolerant of those who do not consent. Given this, it is difficult to see why Lyotard claims that "Majority does not mean large number but great fear."⁸⁸

(v) Problems with the Claim of Incommensurability

A further problem relates to Lyotard's notion of the differend, a problem which might be explored in connection with Donald Davidson's work on conceptual schemes

⁸⁸ This is the title of a chapter in Lyotard's Just Gaming.

and radical translation.⁸⁹ Put bluntly, I am not convinced that Lyotard's examples of differends involve cases of true incommensurability. Lyotard wants to claim that the differend is such that it **cannot be translated** into the terms of the dominant genre or phrase regime. But if this were true, then it must (by definition) be impossible to identify the differend as a **differend**. Take the example of the differend created by Western imperialists when they colonize third world countries and dig up ancient burial grounds. If the natives can make their claim known to the imperialists, then it seems that we don't have a case of **incommensurability** between language games, but rather a case of disagreement over fundamental values. The imperialists can understand the natives' claim, but they don't find it to be convincing. In other words, we can only know that we have harmed someone if we can understand the basis for their complaint against us, but if they make this known, there is no **true** incommensurability.

Lyotard's examples of differends don't seem to involve cases of incommensurate conceptual schemes so much as cases where the parties disagree (which is something quite different than incommensurability). Take Lyotard's example of the wage laborers: they cannot reproach the capitalists at the bargaining table for turning labor into a commodity, but instead must must bargain on the assumption that labor is a commodity. Now it seems perfectly clear that the wage laborers are capable of making their claim known to the capitalists in terms that the capitalists can understand, e.g. by reading them passages from Marx's works, by appealing to inherent human dignity, by describing a

⁸⁹ See Donald Davidson, "On the Very Idea of a Conceptual Scheme," in Proceedings and Addresses of the American Philosophical Association 47 (1973-4): 5-20.

future world where people are satisfied at work, etc. The capitalists may disagree, but there is no sense in saying that the laborers are denied a voice completely. The parties have different beliefs and different political power, but I don't see what is gained by claiming that they have **incommensurate** belief systems, given that, after all, they are able to negotiate with each other. I fail to see how anything constructive can come from the notion that phrase regimes constitute "separate universes." Indeed, Lyotard's claim might have the perverse effect of discouraging our efforts to keep open the lines of communication between competing interests on the grounds that such communication is impossible.

(vi) The Questionable Reliance on Kant

We now come to the most problematic aspect of Lyotard's work, namely his reliance on the Kantian idea of obligation as something beyond the empirical world. As we have seen earlier, Lyotard's retreat to Kant involves him in a contradiction: he says that there is no metadiscourse of justice, then he turns around and announces a universal prescriptive which requires that language games be kept distinct. What I find most troubling about this position (apart from its inconsistency) is that it involves a kind of messianic claim that one is called to "be just." Lyotard says that this imperative "has no addressor," that is, its source must be "left hanging." This is all very mystical, especially for a person who argues that the self is a 'narrative construction'; indeed, if the self is a narrative construction, then why isn't morality a narrative construction as well---Why does morality have to issue from a higher authority?

It strikes me that Lyotard gets into trouble time and again by failing to see that ethical and political positions are tied to traditions, customs, and shared narratives: moral claims are not derived from some nameless and faceless and anonymous 'addressor.' **For all his talk about how people are constructed in narratives, Lyotard fails to make the obvious step of grounding our ethics and law in our shared narratives and traditions.** This has the result that his work retains Kant's transcendentalism while failing to follow Kant's lead in specifying principles of justice and law. Strangely, Lyotard spends hundreds of pages talking about matters of justice and law, but he never actually discloses the arrangement which he thinks to be the most defensible. There is a lot of verbal gymnastics about ideas of reason and linguistic incommensurability and multiple notions of justice, but in the final analysis, at the end of the day, Lyotard comes up somewhat empty. And the reason for this, as I have suggested earlier, is that Lyotard has tried so hard to avoid the problems of traditional approaches to justice (the Platonic approach, the Kantian approach, the majoritarian approach, the autonomy-based approach, the communist approach), that he is left without a remaining platform on which to stand.

6.3 Conclusion: The Lessons of Lyotard's Work

If I am correct, Lyotard's work leads to a single (insupportable) principle of justice, namely that we must keep the language games pure and distinct. This is too slender a reed on which to build a vision for the legal system and the just state. But while Lyotard does not construct a vision of a just set of laws, his work is useful as a

way of 'checking' our existing approach to justice and law.

Lyotard is at his best when he is pointing out the subtle ways in which people have been marginalized and silenced. He makes the excellent point that marginalized groups are not only at a disadvantage when they seek redress from within the legal system, but in many cases they are excluded from this system altogether. He makes the interesting point that we cannot expect to hear the voices of the oppressed unless we take steps to give these people the means to make their voices heard. As far as legal scholarship goes, this could lead to some radical approaches. For example, Lyotard's notion of small narratives might lead to an examination of the criminal justice system from the point of view of defendants as a way of complementing the usual perspective of prosecutors and defense lawyers. Further, Lyotard would certainly have us approach legal history from viewpoints other than the dominant approach, which might give expression to the ways in which women and minorities have been denied access to the legal system. Finally, Lyotard would have us question the way in which the structural foundation of the current legal system gives rise to differends, for example by assuming the legitimacy of private property, commoditized labor, negative rights, and so on. In all of these ways Lyotard's work can lead to an "activation of the differences" and a "war on totality."⁹⁰ This can and should lead to a thorough questioning of our current system of justice as well as a re-thinking of what counts as acceptable legal scholarship. Lyotard's work takes us in interesting directions, and he forces a de-centering of the dominant perspective in legal theory, such that we will be more likely to incorporate

⁹⁰ PMC, 82.

different points of view on the law than the standard views offered by judges and lawyers. Yet in the final analysis Lyotard frustrates us with his agnosticism toward specific solutions in politics and law. Lyotard captures a certain "feeling" or "condition" of postmodernity, but he fails to give us a workable postmodern justice.

CHAPTER 7

RORTY'S POSTMODERN ANTI-FOUNDATIONALISM

7.1 From Postmodernism to Anti-Foundationalism

In the Introductory chapter, I presented the postmodern position that the self is an effect of language and tradition, and not what Foucault called a 'founding subject' or Cartesian 'cogito.'¹ This point is perhaps best expressed in Althusser's statement that the subject has become "de-centered."² This means that there is no innate faculty of reason or morality that will "out" itself, and no Cartesian ego that somehow pre-dates its immersion into a particular language and culture. In extreme versions of this thesis, as in the work of Jacques Lacan, the claim is that 'language speaks the individual.'³ The central idea behind these seemingly cryptic messages is that the self is always situated **in media res**, imbedded in (and constituted by) a specific language, history, and tradition. This stance is sometimes called 'anti-humanism' because it does not proceed by trying to locate a core of humanity that exists within each of us: to the contrary, it

¹ Michel Foucault, "The Order of Discourse," in Untying the Text, ed. Robert Young (Boston: Routledge, 1981), 65.

² Louis Althusser, "Freud and Lacan," in Lenin and Philosophy (New York: Monthly Review Press, 1971), 218-9. Foucault also speaks of the "decentering" of the subject in The Archaeology of Knowledge (New York: Pantheon Books, 1972), 13.

³ See Umberto Eco, Semiotics and the Philosophy of Language (Bloomington: Indiana University Press, 1984), 45.

holds that we differ radically because our contingencies "go all the way down."

Richard Rorty is an influential American philosopher who purports to set forth an ethical and political theory which fully respects the contingency of the individual and his culture. Although he once referred to his position as "postmodern" (and he is often treated by others as a postmodernist), Rorty now favors the label "anti-foundationalist" or "pragmatist." For Rorty, anti-foundationalists and pragmatists understand that contingency is inevitable, and for this reason they hold that ethical and legal theory must be based upon principles and practices which are imminent within a particular culture, but which cannot pretend to be based on anything more exalted. Indeed, the anti-foundationalists hold that we must look closely at our traditions and customs in order to tease out a notion of justice and legality which already exists (more or less explicitly or implicitly) within our traditions. The point here is simply that all attempts to find a trans-cultural, ahistorical account of justice and morality have failed. Now it might be possible that a future philosopher will formulate such a neutral conception (e.g. someone might locate morality as such), but the failure of this project to date gives us strong inductive reason to suspect that the entire project of finding universal rules of morality is ill-conceived. This starting point (the failure of the grand search for objectivity in morality and politics) is not exclusive to Rorty. For example, it can also be found in Alasdair MacIntyre's claim that every notion of justice is always embedded within a given culture, which casts doubt on the search for 'justice itself':

Morality which is no particular society's morality is to be found nowhere. There was the-morality-of-fourth-century-Athens, there were the-moralities-of-thirteenth-century-Western-Europe, there are numerous such

morality, but where ever was or is **morality as such**?⁴

A similar point is made by Michael Walzer:

Justice is relative to social meanings. [] A given society is just if its substantive life is lived in a certain way--that is, in a way that is faithful to the shared understanding of the members.⁵

Like these thinkers, Rorty argues that we should give up on the search for 'rationality as such,' since every conception of rationality is already within a tradition:

I do not have much use for notions like "objective value" and "objective truth." I think that the so-called "postmodernists" are right in most of their criticisms of traditional philosophical talk about "Reason."⁶

The loss of objectivity means that philosophy (including ethical and legal theory) will necessarily be ethnocentric: "We must start from where we are."⁷

Now Rorty has published only three essays to date which deal specifically with legal theory,⁸ yet his work has been discussed in hundreds of law review articles and is having a profound effect on legal studies. Although he does not profess to offer a legal theory as such, his writings on the law have received special attention from such

⁴ Alasdair MacIntyre, After Virtue (Notre Dame: University of Notre Dame Press, 1984), 265-6.

⁵ Michael Walzer, Spheres of Justice (New York: Basic Books, 1983), 312-3.

⁶ Richard Rorty, "Wild Orchids and Trotsky," in Wild Orchids and Trotsky, ed. Mark Edmundson (New York: Penguin, 1993), 33.

⁷ Richard Rorty, Contingency, Irony, and Solidarity ("CIS") (Cambridge: Cambridge University Press, 1989), 198.

⁸ "Unger, Castoriadis, and the Romance of a National Future," 82 Northwestern L. Rev. 335 (1988), "The Banality of Pragmatism and the Poetry of Justice," 63 So. Cal. L. Rev. 1811 (1990), and "What Can You Expect from Anti-Foundationalist Philosophers?: A Reply to Lynn Baker," 78 Virginia L. Rev. 719 (1992).

luminaries as Richard Posner and Ronald Dworkin.⁹ In this chapter I want to formulate a Rortian perspective on the law, despite the absence of a central text on such matters by Rorty himself. I argue that Rorty's writings on ethico-political issues can be brought together with his short papers on the law to generate a coherent, but flawed, approach in legal theory. I begin, then, with Rorty's take on ethical and political issues, and I demonstrate how Rorty's views on these matters support his pragmatist approach to the law. I conclude by pointing out the problems with a Rortian approach in legal theory.

7.2 Rorty's Anti-Foundational Pragmatism (on Ethics, Politics, Law)

Rorty's articles on legal theory presuppose a familiarity with his work on ethics and politics, so I will begin by taking a close look at his work in these areas before turning to his papers on law. I will first examine some of Rorty's earliest musings (from 1983-87) and I will then discuss his influential book, Contingency, Irony, and Solidarity (1989).

(i) Rorty on Ethics and Politics

A useful point of departure is Rorty's controversial 1983 article, "Postmodern Bourgeois Liberalism," which presents much of Rorty's mature position in an early,

⁹ See Richard Posner, The Problems of Jurisprudence (Cambridge: Harvard University Press, 1990); Ronald Dworkin, "Pragmatism, Right Answers, and True Banality," in Pragmatism in Law and Society, ed. Michael Brint and William Weaver (Boulder: Westview Press, 1993).

abbreviated form.¹⁰ In this article, Rorty identifies two competing groups of thinkers in contemporary ethical theory: "Kantians" and "Hegelians." The Kantians attempt to ground their ethical and political positions by referring to a-historical notions such as human dignity, natural rights, and humanity as an end-in-itself. The Kantians see a sharp line between matters of justice (which issue from the categorical imperative) and matters of prudence (which involve hypothetical imperatives). Kantians sometimes speak as if they are appealing to a moral law which might hold for a 'supercommunity' of all people (what Kant called a "kingdom of ends"), where membership is based on humanity as such. Kantian theory is deeply universal.

The Hegelians, in contrast, argue that morality is not universal, but local. The Hegelians tend to see "humanity" as a biological classification that is relatively fruitless when fashioning a moral theory. Hegelians seek to derive moral and political principles from the contingent traditions of a specific community, eschewing the demand for a deeper grounding in something **essentially** and **ahistorically** human (such as autonomy or freedom). Hegelians think that the Kantian concepts of freedom and autonomy are useful ways of summarizing our local commitments, but they cannot be used as justifications or foundations for political arrangements, which have no a-historical grounding. For a Hegelian, for example, Kant's categorical imperative is a useful metaphor for describing an ethical belief that happens to be widely held by 20th Century

¹⁰ Rorty, "Postmodern Bourgeois Liberalism," The Journal of Philosophy 80 (1983): 583-9, reprinted in Richard Rorty, Objectivity, Relativism, and Truth: Philosophical Papers, Vol I (Cambridge: Cambridge University Press, 1991). All references to this article will be to the version in Philosophical Papers ("PP").

Americans and Europeans, but it does not go below the surface of our contingent communities to express some universal layer of humanity or rationality.

Now it is clear that Western democratic traditions (which include fundamental rights to liberty and property, a free press, an independent judiciary, and due process) have traditionally been defended on some variant of the Kantian approach, such as an appeal to natural rights, innate human dignity, or the golden rule. These Kantian notions have served as a buttress or foundation for some of our most cherished political institutions. For this reason, many Kantians believe that the removal of these buttresses will lead to the collapse of democracy:

Kantian criticism of the tradition that runs from Hegel through Marx and Nietzsche [] rests on a prediction that such [Democratic] practices and institutions will not survive the removal of the traditional Kantian buttresses, buttresses which include an account of "rationality" and "morality" as transcultural and a-historical.¹¹

Rorty, however, denies that Kantian foundations are necessary to support the institutions and practices of Western democracy. This means that democracy is free-standing in that it cannot be justified *sub species eternatis*.¹² Rorty thinks that the Hegelian approach is a more promising method of defending our cherished institutions and practices because

¹¹ PP, 198.

¹² In a recent interview, Rorty affirmed that we cannot justify democracy:
Interviewer: Why is democracy important if we really can't justify it?
Rorty: There are lots of things you can't justify that are important. Your mother, for example. There are things that are so basic to one's identity that one wouldn't know who one was if one stopped cherishing them. John Dewey felt that way about democratic institutions and I suppose I do, too.

"Towards a Liberal Utopia: An Interview with Richard Rorty," Times Literary Supplement (June 24, 1994).

it avoids the untenable Kantian claims about a-historical human attributes. A suitably non-metaphysical Hegelian approach for the late 20th Century might be called "postmodern bourgeois liberalism":

I shall call the Hegelian attempt to defend the institutions and practices of the rich North Atlantic democracies without using such [Kantian] buttresses "postmodern bourgeois liberalism."¹³

Each element of this formulation ("postmodern," "bourgeois," "liberalism") deserves careful attention.¹⁴

Rorty explicitly follows Lyotard's use of the term "postmodern" to designate "distrust of metanarratives," including such metanarratives as Absolute Spirit, Victory of the Proletariat, the March of History, or Natural Law. Rorty uses the term "bourgeois" to indicate that Hegelians are willing to recognize Marx's claim that many of our Democratic institutions and practices are possible only under specific historical conditions, such as advanced capitalism with its division of labor and private ownership of property. The term "liberalism" indicates that Rorty affirms traditional liberal values (democracy, freedom, equality, due process) without making the standard appeal to Kantian foundations.

Rorty goes on to say that the Kantians have erred in thinking that the moral self is a sort of substrate lying below the surface of contingent beliefs and interests. For Rorty, people are simply the sum total of their interests, views, and talents "with nothing

¹³ PP, 198.

¹⁴ Rorty has said that he meant the term "postmodern bourgeois liberalism" as a "joke." See his comments in "Towards a Liberal Utopia," in Times Literary Supplement.

behind it--no substrate beneath the attributes."¹⁵ Morality, then, is entirely a function of the contingent beliefs and institutions that we happen to share with others:

I would argue that the moral force of such loyalties and convictions consists **wholly** in this fact [of contingency], and nothing else has **any** moral force. There is no "ground" for such loyalties and convictions save the fact that the beliefs and desires and emotions which buttress them overlap those of lots of other members of the group with which we identify for purpose of moral or political deliberation...¹⁶

Rorty affirms Wilfrid Sellars' claim that morality is a matter of "we-intentions": morality is a set of claims about the type of things that "we" North Americans do and don't do: it is **not** about what humans, **qua** humans, should do or not do.

If Rorty is correct, ethical and political theory should not attempt to find deep-structure principles which ground a vision of the just state. We cannot look to Locke's "State of Nature," nor Jefferson's "Natural Laws," nor Kant's "End-in-Itself." Instead, our vision of the just state must come from within our existing self-conception as late 20th Century North Americans. This means that moral discourse should move away from general ethical principles and towards Wittgensteinian "reminders for a particular purpose," which Rorty sees as "anecdotes about the past effects of various practices and predictions about what will happen if, or unless, some of these are altered."¹⁷ In effect, Rorty calls for piecemeal social engineering within the framework of welfare-state liberalism.

The view set forth in "Postmodern Bourgeois Liberalism" was affirmed in a

¹⁵ PP, 199.

¹⁶ PP, 200.

¹⁷ *Ibid.*, 201.

subsequent provocative paper, "The Priority of Democracy to Philosophy."¹⁸ The title of this paper was meant as a check against the pretensions of philosophers who assume that democracy requires a philosophical grounding. For Rorty, the reverse is more accurate---a flourishing democracy makes it possible for philosophers to articulate the benefits of democracy; it is the practice (or custom) of democracy which is foundational to the philosophical articulation. In other words, we cannot start at ground zero by considering humanity as such and then work our way towards a justification of democracy as a way of preserving our humanity; rather, we begin with a commitment to democracy and then work our way towards an articulation of it. One of Rorty's goals is to defend John Rawls' recent claim (set forth in his work subsequent to A Theory of Justice) that his account of the Original Position is merely a heuristic device for describing how members of Western democracies already conceptualize their duties to others. As Rawls explains:

[W]hat justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions imbedded in our public life, it is the most reasonable doctrine for us.¹⁹

Rorty approves the notion that liberal democracy does not need a philosophical justification, only a philosophical articulation. Put differently, we cannot get **objectivity** in politics (that is, we cannot prove that democracy is really better than facism in some

¹⁸ Originally published in The Virginia Statute of Religious Freedom, eds. Merrill Peterson and Robert Vaughan (Cambridge: Cambridge University Press, 1988), 257-88, and reprinted in PP, 175-197.

¹⁹ Quoted in PP, 185.

deep sense that would convince all skeptics), but we can get **solidarity** to the extent that within our shared democratic practices (within our 'ethnos') we share a common language and framework for discussing our utopian visions.

Rorty's view is admittedly ethnocentric because it is skeptical about our ability to transcend (let alone justify) the contingent practices which happen to be in place at the moment.²⁰ However, Rorty is not ethnocentric in the **narrow** sense in which a colonialist might claim that his way of life is objectively better than the lives of people in second and third-world countries. Rorty tends to see ethnocentrism "as an inescapable condition--roughly synonymous with 'human finitude.'"²¹ This means that we can justify our practices only from within a community of those who already share our practices and history. For example, an African bushman will have few constructive political suggestions for us, not because he is "backwards" or "primitive" but because he does not share our tradition and history. Rorty thinks that we should try to understand our own culture from the perspective of foreign cultures to see if they have any suggestions for improvement, but in the final analysis their views are only helpful to the extent that they can be meshed with our own self-understanding: "We cannot leap outside our Western social democratic skins when we encounter another culture, and we should not try."²²

²⁰ See Richard Rorty, "On Ethnocentrism: A Reply to Clifford Geertz," Michigan Quarterly Review 25 (1986): 525-34, reprinted in PP, 203-210.

²¹ PP, 15.

²² "Cosmopolitanism Without Emancipation: A response to Jean-Francois Lyotard," in PP, 211-222. Rorty puts the same point differently in his recent interview: "I don't think that anybody is ever able to escape more than about one percent of his or her past

Rorty puts a pragmatist spin on this ethnocentrism, arguing that we can justify our existing and future practices only by looking at their results:

So the pragmatist admits that he has no ahistorical standpoint from which to endorse the habits of modern democracies he wishes to praise...The pragmatists' justification of toleration, free inquiry, and the quest for undistorted communication can only take the form of a comparison between societies which exemplify these habits and those which do not, leading up to the suggestion that nobody who has experienced both would prefer the latter.²³

This means that any justification of our practices will be circular: we judge our practices by our preferences, and our preferences have been shaped by our practices. For example, we should retain the right to trial by jury because it leads to good results and captures part of who we are as late 20th Century Americans, yet our identity as late 20th Century Americans has itself been shaped by the existence of a right to trial by jury. And there is no way to justify our existing 20th Century identity, other than to say that it is the one that we are stuck with, and there is no way to step outside of ourselves to check if we are 'rational' or 'just' in some transcultural sense. Following this line of reasoning, Rorty claims that the welfare state is supportable because it eliminates suffering and accurately captures who "we" are at this time, but it cannot be justified on the grounds that it is 'true to human nature' or 'more rational than other arrangements' or 'more in accord with the categorical imperative.'

Rorty thinks that moral progress is possible, but only from within our traditions, not from some God's-eye perspective. That is, we can find better solutions to social

or the institutions in which they have grown up." See "Towards a Liberal Utopia."

²³ PP, 29.

problems and more humane political arrangements without making the claim that these arrangements are better in a transcendent sense. This means that our political options for the future are somewhat limited, because any viable option must comport with how we see ourselves presently, that is, as members of wealthy North American democracies. If we must start from where "we" are, then it is unlikely that we will favor revolutionary change in either political direction. And according to Rorty, neither the radical left (the Marxists) nor the radical right (the Conservatives) have provided us with a workable picture of an alternative society that retains the institutions that we find worthwhile under our current arrangement of welfare-state liberalism. The Marxist proposals have proven unworkable in Russia and Eastern Europe, and the Conservative proposals would take us back to a time before the welfare state, a period to which we do not want to return. The only viable option, then, is a project of reforming the current system, which luckily provides an opportunity for self-criticism and reform via the free press, political debate, judicial activism, and so on.

After publishing the essays discussed above, many critics accused Rorty of conservatism and quietism on the grounds that his self-confessed 'ethnocentrism' effectively ruled out any radical approaches in politics, especially socialism or communism. Rorty responded to his critics in a 1987 paper, "Thugs and Theorists," which laid out a fairly specific political platform, namely a left-leaning democratic socialism which reflects Rorty's doubts about the programs offered by the extreme left

and right wings of the political spectrum.²⁴ The radicals on the left wing (Marxists) fail to see that Communism has been a failure in two regards: centralized economic planning has crippled growth, and Communist regimes are undemocratic and harsh on human rights. Accordingly, Rorty finds unworkable the left's call for revolution and nationalization of the means of production. On the right wing, politicians in America are continually trying to erode the essential welfare-state reforms which have softened the effects of free-market capitalism. Rorty therefore finds fault with both the left and right wing's visions for a better future, and he tries to walk a line between these two poles by calling for a left-leaning arrangement:

Nobody so far has invented an economic setup that satisfactorily balances decency and efficiency, but at the moment the most hopeful alternative seems to be governmentally controlled capitalism plus welfare-statism (Holland, Sweden, Ireland). There is nothing sacred about either the free market or about central planning; the proper balance between the two is a matter of experimental tinkering.²⁵

This means that "we" social democrats (Rorty includes himself, Rawls, Habermas, and Charles Taylor in what might be called his "Royal we") must find the right balance between leftist reform and free-market capitalism. It is clear from this essay that Rorty is a classic liberal in his embrace of J.S. Mill's notion that the government should not interfere with individual decisions regarding lifestyle choice, yet Rorty favors government re-distribution of income through taxation and social programs. This places Rorty's political position solidly to the left of center, but certainly to the right of full-blown

²⁴ Rorty, "Thugs and Theorists: A Reply to Bernstein," Political Theory 15(4) (1987): 564-580.

²⁵ *Ibid.*, 565.

socialism.

Rorty's early papers set forth an ethico-political position which was modified somewhat in 1989's Contingency, Irony, and Solidarity. Because this book is divided into three sections (respectively dealing with contingency, irony, and solidarity), I want to treat each of these concepts separately and then I will tie them together with Rorty's insistence on a split between public and private spheres.

Rorty's discussion of contingency is divided into three essays which point out respectively that language, selfhood, and community are "contingent," i.e. the product of historical accidents. That is, each of these (our language, our selves, our community) very well might have been different if, for example, we had lost World War Two or if we had not fought a Civil War. With regard to language, Rorty says that language is a tool that is not necessarily hooked-up with reality in the sense supposed by naive positivists. Borrowing heavily from Donald Davidson, Rorty argues that "meaning" and "truth" are a property of sentences, and sentences are human creations, tools for getting things done. This means that there is no "final vocabulary" which hooks up to 'reality,' and there is no Truth to be discovered; there is only a process of re-description in which we fashion increasingly useful metaphors. With regard to selfhood, Rorty follows Freud's notion that the self is a product of community and family, and does not have a necessary or essential 'sense of humanity' or 'inherent decency' or 'faculty of Reason.' The radical contingency of selfhood explains why people behave so chaotically, as exemplified by Nazi prison guards who killed Jews by day and spent their evenings at home with their families. This type of behavior casts doubt on the claim that there are

distinctly uniform human faculties of "reason" and "sympathy" which exist below the surface of personality. Finally, with regard to community, the existing liberal community is contingent in that it has come about largely by accident and social experimentation. We should not suppose that our society is the culmination of reason, history, or truth (as it has been viewed by Francis Fukuyama).²⁶ For Rorty, the contingency of community does not lessen the value of our traditions and practices, because it is impossible for a community to be based on anything grander than contingent traditions and social experiments. Rorty quotes Joseph Schumpeter, and then Isaiah Berlin, to this effect:

"To realize the relative validity of one's convictions and yet stand for them unflinchingly, is what distinguishes a civilized man from a barbarian."²⁷

"To demand more than this is perhaps a deep and incurable metaphysical need; but to allow it to determine one's practice is a symptom of an equally deep, and more dangerous, moral and political immaturity."²⁸

The impact of these statements on Rorty cannot be over-estimated, as we can see from Rorty's self-assessment:

The fundamental premise of this book is that a belief can still regulate action, can still be thought worth dying for, among people who are quite aware that this belief is caused by nothing deeper than contingent historical circumstance.²⁹

²⁶ Francis Fukuyama, The End of History and the Last Man (New York: Free Press, 1992).

²⁷ CIS, 46.

²⁸ Ibid., 46.

²⁹ Ibid., 189.

This means that we are 'situated' to such a degree that we cannot step outside of our culture to judge it according to some neutral moral framework, although as noted above we can criticize our society from alternative non-neutral perspectives.

Rorty's position has strong negative implications for philosophers and political theorists who believe that they are working at a level below that of mere re-description, that they are working on a fundamental justification for democracy, free speech, and due process. For Rorty, there is no way to begin one's inquiry with fundamental truths about rationality or freedom and then work one's way toward a justification of democracy and welfare-state liberalism. Theoretical constructions such as the State of Nature, the Original Position, and Rational Choosers in the free market are merely thought-experiments (re-descriptions) which have been offered to articulate a particular vision of a just democracy, but they are not fundamental or essential to democracy itself. If Rorty is correct, then genuine advancements in politics are rarely brought about by theory, but rather by the creative use of language and imagination. It is for this reason that the cultural hero of his liberal utopia is the "strong poet" (the term is borrowed from Harold Bloom) who envisions a better future or warns us about the dangerous direction that we are headed.³⁰

Because our practices and institutions are contingent and subject to re-description, Rorty thinks that we should have a strong sense of irony about the views which we

³⁰ Ibid., 53. Of course, this raises the problems of the forces (economics, race, gender) which prevent certain people from articulating a voice for the future. Thus we may have to make an effort to find "strong poets" who are not simply a collection of white males who are supposed to speak for all others. See Allan Hutchinson, "The Three Rs: Reading Rorty Radically," 103 Harv. L. Rev. 555, 565 (1989).

happen to hold at any given time. An ironist is a person who, among other features, has doubts about the finality of her current vocabulary. She doubts that her vocabulary is any closer to the truth than alternative vocabularies, although she thinks that her current vocabulary helps to articulate a vision of a better world. Most importantly, the ironist knows that any practice or institution can be made to look good or bad by re-description. For this reason, Rorty extols the virtue of the literary critic over the metaphysician, because the metaphysician believes vainly that he can discover something within human nature which can ground a political vision, while the literary critic (and the journalist) search for new ways to articulate the suffering of people we previously didn't care about: "We should be on the lookout for marginalized people--people whom we still instinctively think of as 'they' rather than 'us.'"³¹

We might understand Rorty's emphasis on the importance of re-description by looking at the civil rights movement of the early 1960s, an example suggested by Rorty. The legislative advancements of the 1960s (the Voting Rights Act of 1965, the Civil Rights Act of 1964) did not come about because white people suddenly made a metaphysical discovery that blacks were equal to whites, or that blacks were rational

³¹ See CIS, 196. Rorty sees an important role for separatist groups (radicals, feminists) who work outside of the mainstream to create new narratives and linguistic practices as a way of articulating their marginalized status. These groups try to formulate "new ways of speaking" which enable them to "gather the moral strength to go out and change the world." Rorty, "Feminism and Pragmatism," The Tanner Lecture on Human Values at the University of Michigan (December 1990), Michigan Quarterly Review 30 (1991): 231-258. Rorty also stresses that dominant social groups (such as white males) should sensitize themselves to the sufferings of marginalized groups by reading novels and manifestos produced by such groups. See Rorty, "Two Cheers for the Cultural Left," South Atlantic Quarterly 89 (1990): 227-229.

beings, or had value as ends-in-themselves. Rather, the speeches of Martin Luther King, Jr. produced a re-description of a better world, a world in which his children could play with white children, go to white amusement parks and not feel inferior. This produced a change in our description of a better society; the liberal utopia had been re-described to include black people alongside the whites. The liberal ironist wants to make a similar move by keeping on the lookout for new and critical ways of describing our practices, with the hopes of bringing about a change in these practices by re-description. A good example of this would involve the work of George Orwell, whose negative utopian masterpiece 1984 (discussed at length by Rorty in Contingency) provides an excellent vision of the society we want to avoid.³²

Turning from irony to solidarity, Rorty thinks that solidarity between people (or between countries) does **not** come about when people recognize the existence of a common human nature. Rather, solidarity is created when people recognize a contingent connection with others:

[O]ur sense of solidarity is strongest when those with whom solidarity is expressed are thought of as 'one of us,' where 'us' means something smaller and more local than the human race.³³

³² Rorty's emphasis on re-description explains his contentious reluctance to "answer Hitler" by refuting him, i.e. by proving that Hitler was evil in some objective or trans-cultural sense. Rorty thinks that if we were in a conversation with a philosophically sophisticated Nazi, we couldn't prove Hitler wrong; the best that we can do is to re-describe Hitler in language that might convince the Nazi that Hitler is not a great man, or that the Nazi state is not a utopia. But there is no way to demonstrate conclusively that Hitler is wrong in any sense deeper than the fact that he stands opposed to the things which we value. Rorty, "Truth and Freedom: A Reply to Thomas McCarthy," Critical Inquiry 16 (Spring 1990): 633-643, at 636-7.

³³ CIS, 191.

That is, solidarity is **not** dependent on some neutral substrate common to all people, but is based rather on people's upbringing and their ability to see themselves in others. Rorty illustrates this point with the fact that during World War Two, Jews had a better chance of escaping deportation to the death camps if they lived in Denmark than if they lived in Belgium. This was not because the people of Belgium failed to recognize something inherently valuable about the Jews, nor was it because the Belgians lacked reason. Rather, the Belgians had a dangerously narrow sense of group solidarity--their sense of "we" was so narrow that it excluded the Jews. What protected the Jews in Denmark was the Danish sense of identification and solidarity with other ethnic groups. Rorty makes a similar point about the attitude of American liberals to the plight of urban blacks; the liberal's desire to improve conditions in the ghettos is not motivated so much by the fact that urban blacks deserve better treatment as humans, but as fellow Americans.³⁴

Rorty's point is that solidarity has a contingent source---it derives from a culture's ability to see outsiders as similar to "us":

[S]olidarity is not to be thought of as recognition of a core self, the human essence, in all human beings. Rather, it is thought of as the ability to see more and more traditional differences (of tribe, religion, race, customs, and the like) as unimportant when compared with similarities with respect to pain and humiliation--the ability to think of people wildly different from ourselves as included in the range of "us."³⁵

The lesson of history is that moral progress seems to come about (or, at least, we are

³⁴ Ibid., 191.

³⁵ Ibid., 192.

less dangerous) when we strive for an expanding sense of inclusion, a wide sense of the "we" which includes marginalized groups. And the task of broadening the "we" is best accomplished by novelists and ethnographers because (more so than philosophers) they sensitize us to the sufferings of others. This is why Rorty devotes two chapters of Contingency to Nabokov and Orwell: they portray the dangers of cruelty in the private sphere (Nabokov) and the public sphere (Orwell).

The fundamental basis of the liberal's sense of solidarity is her willingness to acknowledge the pain and humiliation of others. Put differently, the liberal thinks that "cruelty is the worst thing we do" (Rorty borrows this phrase from Judith Shklar). In keeping with Rorty's anti-foundationalism, there is no non-circular way to defend this conception of solidarity, no non-question-begging way to prove that cruelty is the worst thing we do. The best that we can say is that positive social changes have been brought about by broadening the sense of "we" from white European males to other groups (women, blacks, foreigners): "Solidarity is not discovered by reflection but created."³⁶ And literature has proven better than philosophy at creating solidarity.

Now that I have discussed Rorty's notion of contingency, irony, and solidarity, I would like to address a fourth component which runs through Contingency, namely the public-private split. Rorty argues that the public sphere (law, politics, economics) should be kept distinct from the private sphere (lifestyle, personal projects). The public sphere should be devoted to eliminating suffering and ensuring that each American has the means to actualize himself in the private sphere. The private sphere should be devoted

³⁶ *Ibid.*, xvi.

to self-actualization through work, hobbies, association with others, the arts, etc. Rorty's division of the public and private spheres borrows heavily from John Stuart Mill's "Harm Principle," which states that the sole legitimate ground of government interference with personal liberty is the prevention of harm to others:

Indeed, my hunch is that Western social and political thought may have had the last **conceptual** revolution it needs. J.S. Mill's suggestion that governments devote themselves to optimizing the balance between leaving people's private lives alone and preventing suffering seems to me pretty much the last word.³⁷

Rorty thinks that certain philosophers are relevant to the public sphere while others are relevant to the private sphere. Thinkers such as Marx, Rawls, and Habermas are useful in conceptualizing ways in which we can lessen suffering in the public sphere. Thinkers such as Derrida, Nietzsche, and Foucault are relevant to the private project of self-actualization:

Privatize the Nietzschean-Sartrean-Foucauldian attempt at authenticity and purity, in order to prevent yourself from slipping into a political attitude which will lead you to think that there is some social goal more important than avoiding cruelty.³⁸

Rorty sees the public sphere as an area for "conversation" in which the free exchange of ideas will lead to new proposals for ways to lessen suffering and bring about an enlargement of the leisure class so that everybody can have a chance at private self-actualization. The discussion within the public sphere aims at the construction of a "liberal utopia," and this is achieved not by theory but by creatively describing a better

³⁷ Ibid., 63.

³⁸ Ibid., 65.

version of society--a "liberal utopia." This is part of Rorty's "general turn against theory and toward narrative":

Instead of appealing from the transitory current appearances to the permanent reality, appeal to a still only dimly imagined future practice. Drop the appeal to neutral criteria, and the claim that something large like Nature or Reason or History or the Moral Law is on the side of the oppressed. Instead, just make invidious comparisons between the actual present and a possible, if inchoate, future.³⁹

This approach is referred to by Rorty as "pragmatism," although it might also be described as a shotgun wedding of utilitarianism, communitarianism, and anti-foundationalism.

(ii) Rorty's Work on the Law

My discussion of Rorty's ethical-political theory has been detailed and protracted for two reasons. First, Rorty has not written very much on law per se, so my construction of a 'Rortian jurisprudence' relies heavily on his non-legal works. Secondly, the few papers that Rorty has written on the law presume a familiarity with his earlier work, so there is no way to avoid an engagement with those texts.

Turning now to the articles that deal specifically with law and legal theory, Rorty's most important comments on law are set forth in two law review articles that were published in the early 1990s. In these articles Rorty identifies himself repeatedly as a "pragmatist" and an "anti-foundationalist." On my reading, two important jurisprudential positions are raised in these articles: a critique of formalism and a

³⁹ Rorty, "Feminism and Pragmatism," 231-258, at 242.

pragmatic/experimental approach to legal matters.

In 1990's "The Banality of Pragmatism and the Poetry of Justice," Rorty admits that his brand of pragmatism is "banal" in that it does not offer a series of formulas for deciding cases, nor does it offer a legal theory in the strict sense of a theory about the nature of law or justice. Instead, pragmatism follows Holmes' truism that "The life of the law has not been logic: it has been experience."⁴⁰ Pragmatism stands opposed to Legal Formalism, especially the version espoused by Dean Christopher Columbus Langdell of Harvard Law School, who saw the law as a consistent set of first principles which could be applied straightaway to various fact scenarios.⁴¹ Rorty points out that Langell's notion of law as "science" has been thoroughly discredited, and lawyers are now willing to consider more open-ended approaches to the law, incorporating critical perspectives from Marxism, literary theory, and feminism. Rorty sees this trend as evidence of a growing anti-formalism that bespeaks an acceptance of pragmatism, and Rorty includes Richard Posner, Roberto Unger, and Ronald Dworkin under his very loose conception of "pragmatism."⁴²

Rorty follows Dewey's belief that pragmatism favors social experimentation over theory:

[O]ne advantage of pragmatism is freedom from theory guilt. Another

⁴⁰ Oliver Wendell Holmes, The Common Law (Boston: Little, Brown, 1881), 1.

⁴¹ See Thomas C. Grey, "Langdell's Orthodoxy," 45 Pitt. L. Rev. 1, 2, and note 6 (1983): According to Langell, "legal judgments are made by applying pre-existing law to facts.")

⁴² Dworkin vehemently rejects the pragmatist label. See his "Pragmatism, Right Answers, and True Banality," in Pragmatism in Law and Society, 359-388.

advantage is freedom from anxiety about one's scientificity. So I think it is in the spirit of Dewey to say that the test of the power and pertinence of a given social science is how it works when you try to apply it.⁴³

The basic idea is that lawyers and judges should be formulating new visions for the legal system and then putting these visions into practice. These visions do not have, and do not need, philosophical backup: "To put forth a vision is always one of Fitz-James Stephan's 'leaps in the dark'." The visionary leap is a "romantic" move which tries to forge new legal paradigms through a creative, "poetic" act of imagination.

Rorty makes the interesting point that some of the best legal decisions of this Century were aberrations and anomalies from a legal perspective because they circumvented settled areas of law. The Supreme Court decisions in Brown v. Board of Education (1954) and Roe v. Wade (1973) were the result of judicial activism in which the Court refused to defer to either pre-existing case law or legislative solutions to segregation and abortion. In both cases, the Court could have followed the racist or sexist precedents or passed the buck to state legislatures, but instead took a leap, making a new social experiment by articulating a wider scope of fundamental rights. The Court could not have known in advance that they had made the right decision, but they created an experiment that turned out well, and we can't seriously countenance a return to the era before these decisions were made.

Rorty rejects the notion that cases like Brown and Roe involved the discovery by the Court of pre-existing rights; these decisions are better understood as visionary experiments, leaps in the dark that seemed morally correct at the time and have proven

⁴³ Rorty, "The Banality of Pragmatism," 1815.

their mettle as good decisions. There is no generalized legal theory which can show that these decisions are "right" and that others are wrong, just as there is no formula which can tell a judge how to make "right" decisions in the future. The best that a judge can do is to try to be a visionary, taking into account our shared traditions and aspirations. This means that judges will act in a way that is somewhat "unprincipled," but Rorty thinks that we have little to gain by imposing restrictive formulas which would tell judges how to decide cases. Rorty thinks that there is no theoretically interesting way to prevent judges from making bad decisions, no overarching principles (such as those offered by Dworkin and others) which would ensure that the best decision is always reached. Only in the fantasies of legal philosophers can it be thought that the right theory will somehow magically lead to right answers in actual legal cases.⁴⁴

Rorty thinks that we occasionally need visionary paradigm shifts to break up a chain of bad precedents which have become embedded as binding law. For example, consider the right to privacy which was first announced as a "penumbral" right in Griswold v. Connecticut (1965).⁴⁵ Rorty would reject the notion that the Court discovered a pre-existing right to privacy, a right that had been laying below the surface of the law, imbedded somehow in the aura of the Constitution. Rather, he would see Griswold as a visionary effort to create a better world, a world where people are free

⁴⁴ Rorty makes a similar point in his essay, "Thugs and Theorists," 569: I cannot find much use for philosophy in formulating means to the ends that we social democrats share, nor in describing either our enemies or the present danger. It's main use lies, I think, in thinking through our utopian visions.

⁴⁵ 381 U.S. 479 (1965).

from state interference with personal reproductive decisions. Rorty offers a similar anti-formalist reading of other key cases:

I think of Brown as saying that, like it or not, black children are children too. I think of Roe as saying that, like it or not, women get to make hard decisions too, and of some hypothetical future reversal of Bowers v. Hardwick as saying that, like it or not, gays are grown ups too.⁴⁶

This anti-formalist stance is continued in Rorty's 1992 article, "What Can You Expect from Anti-Foundationalist Philosophers?," which stresses Rorty's pragmatist perspective. Rorty sees the "good prophet" (in this case--the good lawyer or the good judge) as someone who thinks of herself as a person who has a good idea for solving a problem, much as an inventor creates a new and useful product. The good prophet does not see herself as possessing "legitimacy" or "authority," nor does she claim that her proposal is backed by Reason, Autonomy, Human Nature, and so on. The good prophet keeps her eyes on a "utopian future" and she measures the worth of her vision by its results, not by whether it seems philosophically grounded in conceptual niceties.⁴⁷

A striking implication of this position is that "theory" (broadly construed as an activity divorced from praxis) is not very important in jurisprudence. There is no interesting way that we can create a formula which will prove the moral superiority of the decisions we favor and the moral bankruptcy of the decisions we dislike. As Rorty

⁴⁶ Rorty, "The Banality of Pragmatism," at 1818.

⁴⁷ Rorty cites Dewey's famous position:

It is no longer enough for a principle to be elevated, noble, universal, and hallowed by time. It must present its birth certificate, it must show under just what condition of human experience it was generated, and it must justify itself by its works, present and potential.

From Dewey's Reconstruction in Philosophy, quoted in "What Can You Expect?," 722.

puts the point elsewhere, "There is no way to consolidate our enemies [nor our heroes] in any interesting 'theoretical' way."⁴⁸ This means that legal philosophy of the sort practiced by Dworkin will not be of much use to the visionary judge, because Dworkin prescribes a set of complicated rules for judges to use when searching for the 'right answer.' For Rorty, there can be no guarantees when deciding cases--we can only formulate a vision and then say "Let's try it!"⁴⁹ Rorty's thinks that positive change comes about by piecemeal tinkering in the real world:

The fantasy that a new set of philosophical ideas--a new contribution to the Aristotle-Wittgenstein sequence--can do quickly and wholesale what union organizers, journalistic exposes, activist lawyers, charismatic left candidates, and the like can do, at best, very slowly and at retail, seems to me the result of a failure of nerve.⁵⁰

In summary, Rorty doubts that we can create a legal theory that will solve our problems by telling judges how to behave; the best that we can do is to suggest a better vision of the future and to hope that the vision pans out in practice.

7.3 What Would a Rortian Jurisprudence Look Like?

Reading together Rorty's ethico-political writings with his work on law, we can begin to formulate a Rortian jurisprudence, as it were. Although the details must remain somewhat sketchy, we can say that he favors an anti-foundational, pragmatic, experimental and ironic approach to the law. Now, Rorty never provides an answer to

⁴⁸ Rorty, "Thugs and Theorists," 566.

⁴⁹ "What Can You Expect?," 719.

⁵⁰ *Ibid.*, 724.

one of the key questions in legal theory---"How should judges decide cases?" The omission is deliberate, I think, because Rorty eschews formulas in favor of experimental tinkering. In a similar move, Rorty refuses to provide answers to questions about how much time we should devote to fighting injustice, or how many innocent people we should allow to be tortured to save a greater number of innocents, or whether we should save a family member before helping a stranger in the event of a natural disaster:

Anybody who believes that there are well-grounded theoretical answers to this sort of question--algorithms for resolving moral dilemmas of this sort--is still, in his heart, a metaphysician. He believes in an order beyond time and change which both determines the point of human existence and establishes a hierarchy of responsibilities.⁵¹

Rorty would probably say that there can be no specific method which tells a judge how to decide a case in advance; in effect, this will be a matter of judgment, vision, openness to new perspectives, and willingness to engage in piecemeal social engineering.⁵² Certainly judges must follow precedents, but there are cases in which the precedents would lead to injustice, as in Dred Scott v. Stanford (1857) or Bowers v. Hardwick (1986), and there are also cases in which the precedents should be followed, as in the cases falling under Roe v. Wade (1973). There can be no **a priori** workable formula for

⁵¹ CIS, xv.

⁵² We might recall Holmes' list of the forces outside of logic which undoubtedly affect a judge's decision:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining how men should be governed.

Holmes, from The Common Law, quoted in Thomas Grey, "Holmes and Legal Pragmatism," 41 Stan. L. Rev. 787, 806 (1990).

deciding when to step outside of precedents and endorse a new social vision. Our best hope is that a judge will be compassionate and sensitive enough to know how to decide cases in an appropriate manner that is consistent with the tradition of great judges in America. Unlike most legal theorists, Rorty does not provide a theoretical stop-gap which prevents another Dred Scott v. Stanford or Plessy v. Ferguson by appealing, for example, to "natural law" or "law as integrity." From Rorty's perspective, it is a mistake to suppose that **theory** will provide such a stop-gap: "as a pragmatist, I do not believe that legal theory [] can do much to prevent another Dred Scott decision."⁵³ All that we can do is to ask that judges work toward a better society, yet this cannot be accomplished in a systematic manner by a jurisprudential formula.

In place of providing some sort of formula for deciding cases, Rorty sees the primary role of the pragmatist as one who clears the "philosophical underbrush" which has grown up around legal philosophy.⁵⁴ That is, the pragmatist program is essentially critical: it does not embrace a totalizing end-state program but adopts instead an openness to social experimentation. For this reason Rorty agrees with Richard Posner (a recent convert to pragmatism) that "judges will probably not find pragmatist philosophers--either old or new--useful."⁵⁵

Richard Posner also claims that the new legal pragmatism espoused by Rorty

⁵³ Rorty, "The Banality of Pragmatism," 1818.

⁵⁴ *Ibid.*, 1815.

⁵⁵ *Ibid.* Rorty also says that "we do not need 'a unified principle that would provide the basis for judicial decisions.'" *Ibid.* at 1818, quoting Farber, "Legal Pragmatism and the Constitution," 72 Minn. L. Rev. 1331 (1988).

harkens back to the pragmatist positions of Justice Oliver Wendell Holmes and Justice Benjamin Cardozo, who both eschewed formal rules in favor of social engineering.⁵⁶ This seems correct, and in addition I would accept Hilary Putnam's suggestion that the new (Rortian) pragmatism draws upon certain existentialist themes that can be found in the work of William James and Jean-Paul Sartre.⁵⁷ We can look to these thinkers to flesh out Rorty's approach to the law.

Holmes' pragmatism was evidenced by his critique of the legal formalism so popular in his day, and by his insistence on the importance of experience over formal logic: "The life of the law has not been logic, it has been experience." A similar understanding comes through in Cardozo's work:

My analysis of the judicial process comes down to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall predominate must depend largely upon the comparative importance or value of the social interests that will thereby be promoted or impaired....If you ask how he [the judge] is to know when one interests outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.⁵⁸

Cardozo thought that hard cases presented genuine options which could not be systematically ranked through a formula or code for deciding cases. In the final analysis the judge must "gather his wits, pluck up his courage, go forward one way or the other"

⁵⁶ See Richard Posner, "What has Pragmatism to Offer Law?," 63 S. Cal. L. Rev. 1653 (1990).

⁵⁷ Hilary Putnam, "A Reconsideration of Deweyan Democracy," 63 S. Cal. L. Rev. 1671 (1990).

⁵⁸ Benjamin Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921), 112-3.

and pray that he has made the right choice.⁵⁹ Cardozo acknowledges that most cases will be resolved quite easily through the application of settled precedents, but occasionally there are cases which present an opportunity for major change in the law, and these cases provide an avenue for social engineering through the creative act of fashioning a new legal solution. These hard cases are not decided by looking at relations between concepts but by an ad-hoc mixture of logic, history, common sense, sociology, precedent, and personal prejudice.

With regard to the influence of James and Sartre, Rorty's notion that legal theory involves a 'leap in the dark' harkens back to James' quotation from Fitz-James Stephen in the Will to Believe:

We stand on a mountain pass in the midst of swirling snow and blinding mist, through which we get glimpses now and then of paths which may be deceptive. If we stand still we shall be frozen to death. If we take the wrong road we shall be dashed to pieces. We do not certainly know whether there is any right one. What must we do? 'Be strong and of a good courage.' Act for the best, hope for the best, and take what comes...⁶⁰

This does not mean that the pragmatist must take a wild, unprincipled leap in the dark when deciding difficult questions. Rather, the point concerns the **limits of theory**---it can only take a person so far, at which point there must be an educated guess as to the best option in light of the background factors. A similar point is made by Sartre:

We cannot decide **a priori** what there is to be done. I think that I pointed

⁵⁹ Benjamin Cardozo, The Growth of the Law (Westport, Conn.: Greenwood Press, 1975), 59.

⁶⁰ Fitz-James Stephen, from Liberty, Equality, Fraternity, quoted in William James, "The Will to Believe," in Essays in Pragmatism (New York: Macmillan, 1948), 109.

that out quite sufficiently when I mentioned the case of the student who came to see me, and who might have applied to all the ethical systems, Kantian or otherwise, without getting any sort of guidance. Never let it be said that this man [] has made an arbitrary choice. Man makes himself. He isn't ready made at the start. In choosing his ethics, he makes himself, and force of circumstances is such that he cannot abstain from choosing one.⁶¹

A good judge will not act in "bad faith" by mechanically applying precedents, nor can she act as a free-wheeling philosopher king who tries to enforce her own private moral vision. There is no formula that the judge can use to decide cases--she must cope with the anxiety of decision and try to be a visionary.

I hope that this detour through Holmes, Cardozo, James, and Sartre has been useful in fleshing out the contours of a Rortian jurisprudence. As a final point, we must keep in mind Rorty's debt to Dewey and the importance of Deweyan social experimentation. When all of these factors are combined, the result is an anti-formalist, anti-foundationalist, pragmatic call for judges to act as piecemeal social engineers by exploring new visions for a better democratic society. This **sounds** liberating because it purports to release legal theory from the metaphysical baggage which it has been carrying for so long. But is this approach workable in the final analysis?

7.4 What is Objectionable About Rorty's Pragmatism?

I think that Rorty's theory is quite unobjectionable precisely because it is not a legal theory in the strict sense, but rather a set of reminders for judges and legal theorists

⁶¹ Jean-Paul Sartre, Existentialism and Human Emotions (New York: Citadel Press, 1990), 43.

about the pitfalls and mistakes they should avoid. These reminders are about legal theory but they are not within legal theory: they are meta-theoretical but not within the practice of legal theorizing. This means that his theory is somewhat empty in terms of its practical use to people who are trying to use legal theory to arrive at solutions to particular problems (abortion, affirmative action, flag-burning). This point, however, is somewhat vitiated by the fact that Rorty concedes that pragmatism is "banal."

Now Rorty is quite right that we should not try to ground legal theory in a-historical conceptions of human nature, utility, reason, or history. He is correct that "we must start from where we are," in the sense that our endeavor to do justice will be based on the concepts of justice already embedded in our contingent institutions and practices. This is all good advice but it does not provide grounds for changing the legal system in any coherent way; it leaves the language games of the law intact. Rorty's "pragmatism" admits that there are no formulas for deciding legal cases, but Rorty fails to offer even an amorphous game plan for how we should proceed, other than to suggest that we should be experimental and imaginative. The problem is that we need grounds for deciding hard cases, and it will not do to simply state that judges must take a leap in the dark and hope for the best.

This problem can be seen when we look to specific cases, such as Bowers v. Hardwick (1986), the Supreme Court case on "sodomy" which I discussed earlier in this manuscript. Rorty says that he is looking forward to a reversal of this decision, and he hopes that the reversal has the following message: "like it or not, gays are grown ups too." It is hard to see how this message could serve as a guide for a legal determination

of an actual court case that is reconsidering Bowers. I suppose that Rorty's point is that a good decision would recognize that gays, like others, have a right of autonomy, and this right is broad enough to encompass the liberty of the individual to engage in unpopular acts of consensual homosexual sex. But if this is Rorty's point, then he has taken a lazy path to it: instead of **showing** how "we" value autonomy to the extent that we should allow autonomous decisions like this, he merely asserts that this is the case. A more thorough approach would be to check our legal precedents for holdings that support this interpretation and then show how our precedents and shared values demand a reversal of Bowers. This task might be accomplished by pointing out that a strong respect for autonomy is implicit in the right to vote and the right to free speech, such that in the Bowers case the right of autonomy should have outweighed public sentiment against homosexual sex.⁶²

The problem here is that Rorty's pragmatism is an amorphous strategy for reaching specific decisions. Rorty's salute to bravery and experimentation fails to explain when we should bravely experiment, and in what direction. For some reason Rorty tends to assume that Deweyan experimentation would require the adoption of left-leaning arrangements, but there is no reason to suppose that experimentation would exclude forays into conservatism or perhaps fascism. And when we look at the particular decisions that Rorty favors (Brown, Roe, a reversal of Bowers), we can see that they are linked not by experimentalism nor pragmatism, but by a concern with human autonomy

⁶² This argument has been made by Vince Samar in The Right of Privacy (Philadelphia: Temple University Press, 1991).

and freedom. Each decision held that the right to autonomy outweighed popular sentiment that would have effectively limited it (through segregation, abortion laws, and criminal laws against homosexual sex). Rorty would have us believe that these decisions were unprincipled experiments, but this depiction does not do justice to the rationale behind these cases. The job for a legal theorist is to articulate the rationale or theory which drives these 'good' decisions, not to throw up one's hand and say that there is simply no formula at work here.

We should pay attention to Rorty's claim that just political arrangements can be determined on an ad-hoc experimental basis, by adopting novel arrangements and then seeing how well they work. For example, Rorty suggests that third-world countries might experiment with absolute equality of income for all citizens to see what effect it might have (though he recognizes that this arrangement is inconsistent with the values and traditions in America).⁶³ The problem with this suggestion is that it simply pushes back the key issue, which is the problem of determining when an arrangement "works." Experimentalism, standing alone, does not solve the big problem, which is that we are deeply divided as to when a situation can be said to "work." Liberals may think that the welfare state "works" while conservatives feel the opposite, so what we need is a theory which will convince one side to reconsider its position. The disagreement is precisely over what we mean by "works," which means that "workability" is not a decisive standard for political and legal arrangements. This problem also plagues Rorty's advocacy of "invidious comparison" as a way of choosing between the present system

⁶³ "Unger, Castoriadis, and the Romance of a National Future," 349-50.

and its alternatives. Certainly he is correct that few people would choose to live in a Nazi state or a pure communist society, but how are we to compare the current system with alternatives that are less extreme, such as socialism or limited government? Once again mere comparison is not enough: we need grounds for saying that one arrangement is better than another, and it will not do to say that one "works" better than the rest.

Rorty is correct, I think, in his anti-foundationalist notion that political and legal arrangements (and the justifications offered to support them) are inescapably contingent. Rorty is also correct to say that contingency should provide us with a certain sense of irony about the values which we presently hold. Yet we might question whether there isn't something foundational lurking beneath Rorty's claim that solidarity should be the key to ethics, politics and law. This idea that our efforts should be directed toward the elimination of suffering sounds rather like a utilitarian meta-narrative which tells us that we have a duty to eliminate suffering and maximize utility. Where does this duty come from? Now perhaps this duty is itself merely a contingent imperative, which is fine, but Rorty fails to show how this commitment is central to our contingent institutions and practices. He has not shown that we (in the narrow sense of "we Americans") have been particularly dedicated to the elimination of suffering. Furthermore, it would seem that legal issues such as abortion and affirmative action are questions of principle (questions about desert, equality, neutrality) and not questions about the elimination of suffering.

These are just a few of the problems for Rorty's theory. In reaching my claim that his theory is not very helpful to legal theorists, I have specifically avoided passing judgment on Rorty's public/private split, nor have I focused on the obvious problems

with formulating the "we" in a society that is split down the lines of race and class. These objections to Rorty have been raised elsewhere and I won't dwell on them here, except to say that they spell out important limitations for Rorty's theory.

Now there is a very real sense in which Rorty's message of contingency is liberating. As Elizabeth Mensch reminds us,

The most corrosive message of legal history is the message of contingency. Routinely, the justificatory language of the law parades as the unquestionable embodiment of Reason and Universal Truth; yet even a brief romp through the history of American legal thought reveals how quickly the Obvious Logic of one period becomes superceded by the equally obvious, though contradictory, logic of subsequent orthodoxy.⁶⁴

But we have to ask what follows from the insight that the categories of the legal system are contingent and fluid? I suspect that the lesson to be taken from this insight is that we ought to be ironic and fallibilistic about the legal doctrines which we advocate. Well enough, but at any given time we are unavoidably situated within a certain stage of this evolving system and we must design solutions to legal problems by using the categories that are in operation **now** in this system. The reminder about contingency is just that--a reminder. And therein lies its limited scope of power, because it does not provide one solution or another in particular cases. I suspect that Ronald Dworkin is correct in his assessment that the Pragmatist's tendency to see legal concepts as contextually relative does not affect the inside of legal practice:

But though contextualism provides a needed reminder to the complacent, it is essentially external to the argumentative and justificatory side of science, morality, and law. It cannot count as an argument against

⁶⁴ Elizabeth Mensch, "The History of Mainstream Legal Thought," in The Politics of Law, ed. David Kairys (New York: Patheon Books, 1990), 13.

someone's scientific or moral or legal opinions that he would not have had these in other times and circumstances. If that were a sound skeptical argument, little would be left of our beliefs and convictions.⁶⁵

In other words, the message of contingency does tell us how to handle legal disputes within the current legal scheme of rules and principles; for that we need a positive jurisprudence.

7.5 Why Rorty Stops Short of a Positive Jurisprudence

All of the problems raised above should not, and do not, radically undermine Rorty's important central message that that there is no way to stand outside of our traditions to assess them from some sort of neutral archemedian point. The legal system is itself merely a contingent tradition, and Rorty is correct that we stand **in media res** when doing legal theory, so our practice will be unavoidably ethnocentric and circular.

Now it may be asked, "Why ought one support a legal system that cannot be philosophically grounded in basic truths about human nature, autonomy, or reason? Why give credence to the Declaration of Independence if we no longer believe in God or 'natural law?'" The anti-foundationalist response to this question is to point out that such a grounding was a mistaken ideal in the first place, so there is no choice other than to adopt a circular, ethnocentric justification of our practices. This strategy can be understood as an "hermeneutic turn" of sorts, in which political theorists and lawyers turn away from universal first principles toward the social meanings that are embedded

⁶⁵ Ronald Dworkin, "Pragmatism, Right Answers, and True Banality," 370.

in local practices and institutions.⁶⁶ Rorty takes the hermeneutic turn because he correctly sees that there can be no sense in identifying sources of law which are transcendental, but having made this point, he fails to take the necessary step of identifying the contingent sources of law which are appropriate for "us" as we are presently situated.

This is why I say that Rorty "stops short." He sees, correctly, that legal theory is a matter of coherence, not correspondence: that is, the best legal decision in a court case is the decision which is most faithful to the contingent traditions which are held by our society, yet these contingent traditions cannot themselves be tested against some objective standard. But having made this point, Rorty should go on to explore our contingent traditions, to find out what they demand as a matter of justice. This is the path that has been taken by John Rawls in his recent Political Liberalism, and it is also the path attempted by Ronald Dworkin in Law's Empire and Michael Walzer in Spheres of Justice. Rorty's law review articles seem to take the position that there is very little interesting philosophical work to be done once we have eliminated the last vestiges of Platonism and metaphysics from legal theory:

I find it hard to see any interesting philosophical differences between Unger, Dworkin, and Posner; their differences strike me as entirely political.⁶⁷

Rorty is correct that these thinkers share a distrust of metaphysical first principles of law, but he fails to see that they are radically divided on the question of how courts should

⁶⁶ Georgia Warnke, Justice and Interpretation (Cambridge: MIT Press, 1993), vii.

⁶⁷ Quoted in Dworkin, "Pragmatism, Right Answers...", 369 (underlining added).

decide cases. Indeed, Posner has written extensively against some of Dworkin's main points, and vis versa.⁶⁸ If Rorty feels that the **sole** task of the philosophy of law is to remove transcendental foundations, then he is correct that these thinkers are similar. But the loss of metaphysical foundations is where philosophy of law must begin anew, teasing out a contingent notion of justice for our society. This second effort is indeed a philosophical matter, although Rorty fails to recognize it as such.

Like the other postmodernists discussed in previous chapters, Rorty's take on legal theory is essentially external: his goal is to attack the foundational and metaphysical principles which have long plagued legal theory. He is correct that ethics and law can be grounded only in shifting, contingent traditions, and he is correct that the search for a-historical criteria to ground political visions ("species being," "human reason," "utility") has been something of a failure. Like the other postmodernists, he points out that legal theory is always situated, always embedded in power relations and discursive practices.

All of these are important points, but once again they are external to the business of legal theory. Once we weed out the Platonism from particular viewpoints, there remains a level of internal debate at which Rorty cannot help us. In the end we must join those thinkers who are trying to interpret our contingent, local, fallible institutions and practices to determine if proposed laws and case decisions are in harmony with our collective moral commitments. Rorty doesn't see anything philosophical going on at this

⁶⁸ Richard Posner, The Problems of Jurisprudence (Cambridge: Harvard University Press, 1990), 197-219, 286-289; Ronald Dworkin, "Is Wealth a Value?," in A Matter of Principle (Cambridge: Harvard University Press, 1985).

internal level, but I would suggest that if philosophers such as Walzer and Dworkin are working at this level then something philosophical is indeed going on. And it is at this internal level that additional work must be done once Rorty has completed the important task of 'clearing the philosophical underbrush' of legal theory.⁶⁹

⁶⁹ Rorty, "The Banality of Pragmatism," 1815.

CHAPTER 8

CONCLUSION: DOES POSTMODERNISM HAVE ANYTHING TO OFFER LEGAL PHILOSOPHY?

We have now completed a preliminary review of the key postmodern thinkers, and it is time to take stock of the accomplishments and drawbacks of postmodern legal philosophy as a collective movement. In this chapter I would like to focus initially on the benefits to be derived from postmodernism, in keeping with my commitment to explore postmodern legal theory by presenting it in its most favorable light. I will then criticize postmodern legal theory by returning to the two large-scale problems which I raised in Chapter two, namely the adoption of the external viewpoint and the extreme rejection of foundations. I will then answer in the **negative** the big question raised at the beginning of this manuscript, which was whether postmodernism could offer what I call a "positive jurisprudence." But despite the lack of a positive jurisprudence, postmodernism **does** have something to offer to legal theory by virtue of what I will refer to as "thinking the Other of the law." And in the conclusion of this chapter I try to delineate the circumstances under which postmodernism can offer this contribution.

8.1 The Insights of Postmodern Legal Theory

I think that there are four general categories of insights generated by postmodern

legal theory: (i) the importance of genealogy and an awareness of contingency, (ii) the awareness of incommensurability and marginalization, (iii) the deconstruction of supposedly neutral doctrines, and (iv) the awareness of language and discourse in the law. Collectively, these insights establish a reasonable justification for our foray through the work of the enigmatic postmodern thinkers.

(i) Genealogy and the Awareness of Contingency

First, there is something important to be taken from Nietzsche and Foucault's genealogical analysis of the law. Both thinkers point out that our existing conceptual scheme in the law (that is, our legal categories of rights, crimes, causes of action, and property interests) are not some sort of changeless and static set of principles written into the fabric of the universe, but are "contingent" in the sense that they could have been strikingly different had different power relations prevailed in the past. For example, Nietzsche shows that the present system of equal rights is not inevitable or natural (as Jefferson thought it to be), but is an historical outgrowth of a "transvaluation" of the values which were held prior to Christianity. Similarly, Foucault points out that our present system of punishment (in which imprisonment, normalization, and re-education have replaced all other methods of dealing with criminals) is merely the latest in a series of experiments in methods of punishment, and the present method may seem humane yet it is largely ineffective and subtly dangerous. The effect of these genealogical and

historical insights is that they loosen up our tendency to reify the existing legal order into the realm of necessity or "reasonableness," a process in which we grow to see our existing arrangement as the only available option. This tendency toward reification can be seen in the incredulity which meets radical thinkers who assert previously unrecognized rights, such as rights to meaningful work or housing. These rights are beyond the widely-accepted negative rights to liberty and due process, so they seem to be "too much" or "impracticable" to those who are deeply embedded in the current legal framework.¹ The genealogical critique shows that the current system parades as "natural" but is no more natural than other arrangements.

One of the best ways to illustrate the power of the genealogical approach in legal philosophy is to look first at the way in which it affects a different social practice, namely psychiatry. Let us consider the analysis of madness put forth by Foucault in Madness and Civilization.² In that book, Foucault pointed out that "madness" was in some sense a socially constructed malady. To be sure, certain people in any society can be classified as unquestionably insane under any possible definition of "sanity." But Foucault points out that throughout history there have been 'outsiders' who were classified as insane for say, not having a job, or for having a different sexual orientation, or for not conforming to the particular social roles of their day. This means that people who were not insane in any deep sense were nevertheless classified as insane to serve

¹ See Mark Tushnet, "The Politics of Constitutional Law," in The Politics of Law, ed. David Kairys (New York: Pantheon Books, 1990), 232.

² Michel Foucault, Madness and Civilization (New York: Vintage Books, 1973).

various social purposes (getting the unemployed off the street, filling the empty lepersaureums, streamlining those who appear different, teaching 'hysterical' women their proper place in society).

Now we might rightly ask how Foucault's genealogical work in this context can be of use to psychiatrists? Well, Foucault's investigation does not help in the day-to-day tasks which these doctors face---Foucault does not make specific arguments about, say, whether manic-depression has a physical or mental cause, nor does Foucault provide a general psychological framework for assessing the mental well-being of patients. And he certainly does not offer a theory of the mind in the grand style of Freud or Jung. However, his work is important in a more oblique way, because his genealogical point about the social construction of madness can act as a check or reminder against the blind application of psychiatric classifications that seem to be socially constructed. A psychiatrist who reads Foucault may be more likely to understand that a patient who is homosexual does not have a mental disorder for that reason, even though homosexuality has historically been treated as a mental disease to be "cured." Furthermore, Foucault's work teaches that many psychological illnesses only seem to be a matter of individual pathology but are actually caused by the society at large, as in the case of anorexia and bulimia, which are certainly afflictions that affect particular individuals, but also have a social component due to the unrealistic conceptions of female beauty which dominate our culture. As a historian, Foucault cannot change the practice of psychiatry on its own terms, but he can force a 'relativizing' or critical posture toward the standard practice; the external, historical insight might affect the internal practice of psychiatry, if only by

providing a measure of caution or an element of doubt about the practice as presently configured.

Just as Foucault's work on madness can act as a reminder that our categories of **mental** disorder are fluid, so his (and Nietzsche's) work on law can remind us that **legal** categories are constructed by shifting power relations. And just as Madness and Civilization does not present a comprehensive theory of the mind, so Foucault's work on the prison system, Discipline and Punish, does not present a general theory of criminality, though he does make the important point that our present system of incarceration actually breeds criminality and produces criminals under the guise of reforming them. Foucault's notion that criminality is socially constructed is driven home by the fact that most of the prisoners in federal prisons are serving time on drug charges. These "criminals" have merely engaged in consensual arrangements for the sale and purchase of drugs (not unlike other business transactions in a capitalist society), and they would not be considered "criminals" in other Western countries which have a more tolerant attitude toward consensual drug use. This insight does not force an immediate change from the inside of criminal law and practice (for example, Foucault does not provide the blueprint for a new criminal code), but his work can force a re-thinking of our present mode of classifying criminal behavior and treating criminality.

The genealogical analysis, then, is not useful if one is looking for a large-scale meta-theory which provides a foundation for legal decisions from within the current arrangement. However it has a more limited use as a way of countering our tendency to see the present arrangement as natural and unchangeable. Growing up under a

particular legal system, we find it difficult to conceive of a different way of structuring the law. As one Critical Legal Theorist put it, "The dominant system of values has been declared value-free; it then follows that all others suffer from bias and can be thoughtlessly dismissed."³ By way of illustration, many people think that private property is inevitable, or that it would be absurd for there to be a Constitutional right to shelter, just as they find it unthinkable that we might tolerate lifestyle experiments by, say, allowing gay marriages. Marx correctly pointed out long ago that people tend to replicate the social order of which they are a part, and because of this they cannot see any 'outside' to the current arrangement, such that every call for radical change seems unreasonable, reactive, an affront to common sense. The genealogical approach offered by Nietzsche and Foucault counters this tendency by showing that the current arrangement is no more "natural" than the order which it replaced. This does not provide a game plan for creating a new legal system, but it does give us a certain critical distance or irony toward our practices, thereby opening up room for new approaches and ideas.

(ii) Awareness of Incommensurability and Marginalization

A second valuable insight of postmodern theory comes from Lyotard's notion that any legal system will give rise to "differends," that is, to claims which cannot be

³ David Kairys, Introduction to The Politics of Law, 6.

adjudicated for lack of a neutral arbiter.⁴ I think that this point is related to Derrida's deconstructive claim that (in politics no less than literary interpretation) we must focus on the margins as well as the text.⁵ Foucault also echoes this point when he suggests that "to find out what our society means by sanity, perhaps we should investigate what is happening in the field of insanity. And what we mean by legality [by looking at] the field of illegality."⁶ The collective point here is that legal systems (as closed systems) necessarily exclude certain people from receiving a hearing by virtue of the ground rules of the system. Earlier I alluded to the claims by Native Americans against a mining company that planned to dig under an ancient burial site, where the mining company had legal title to the property, but the Native Americans believed that the ground was sacred and could not be disturbed. In that case it seemed that there was no neutral court of appeal in which both claims (of the Native Americans and the mining company) could be adjudicated, because any court would be biased in either direction: a tribal court would follow the same logic as the Native Americans, and a state or federal court would follow the logic of the mining company. Under our current legal system, of course, the mining company would prevail on this claim (unless the Native Americans could find a

⁴ Jean-Francois Lyotard, The Differend (Minneapolis: University of Minnesota Press, 1988).

⁵ Jacques Derrida, "Tympan," in Margins of Philosophy (Chicago: University of Chicago Press, 1982), xxiii.

⁶ Michel Foucault, "The Subject and Power," in Critical Theory: The Essential Readings, eds. David Ingram and Julia Simon-Ingram (New York: Paragon House, 1991), 305.

way to restrict the company under American law, which is doubtful).⁷ This example shows how certain claims are excluded from the discourse of rights which prevails in our legal system. As Lyotard shows, the marginalized discourse is silenced on the language game of the presiding court. And typically, the claims which fall silent are those of the powerless, such as indigenous people, minorities, and women.

Tellingly, there is a specific legal term for a grievance which cannot be recognized under the legal system: "failure to state a claim." The Federal Rules of Civil Procedure which govern proceedings in federal cases (and which have been adopted substantially by state courts) provide in Rule 12(b) that a case will be dismissed if the plaintiff fails to set forth facts sufficient to state a cause of action.⁸ This determination is made by seeing whether the plaintiff has set forth the required elements of an established claim. For example, to state a claim for breach of contract one must allege the existence of an offer, an acceptance, consideration, breach, and damages. Upon motion by the defendant, the court will refuse to "hear" any any claim that does not satisfy the elements of an established "cause of action."

The problem which arises here has to do with the boundaries which are set on whether a claim is "legal" and can find recognition in a court of law. For example, a homeless man may feel, rightly, that any country which can send half a million soldiers

⁷ For more on this issue, see Ward Churchill's, "Perversions of Justice: Examining the Doctrine of U.S. Rights to Occupancy in North America," in Radical Philosophy of Law, eds. David Caudill and Steven Jay Gold (Atlantic Highlands, N.J.: Humanities Press International, 1995).

⁸ F.R.C.P. 12(b)(6).

to Iraq for the Gulf War and can send astronauts to the Moon should guarantee minimal housing to people who have tried to secure work but cannot find a job that offers a living wage. Despite the homeless man's sense that his country should provide him housing, this feeling does not mean that the homeless man has a right to housing, that is, that he has a claim against the state for the provision of housing. A person may **feel** wronged and yet not be able to translate that feeling into a claim that can be stated in legal terms. The task of the legal theorist, then, is to articulate this type of harm as a legal harm, as a damage which can be compensated within the legal system. This process brings something from outside the legal system (an external claim) to a position within the system (as an internal claim). The project here is to change the ground rules or boundaries by which the legal system operates.

This transformation can be seen in the evolving doctrine of sexual harassment. Recall that women were once told that they must simply endure sexual harassment as the price to be paid for holding a job in a man's world. The rationale for the absence of legal protection against sexual harassment was that a law prohibiting harassment would be impossible to police due to the conflicting reports which would be given by the victim and the perpetrator, and thus the law would inevitably require an unwarranted judicial intrusion into private affairs between individual citizens. Because of this logic, women who suffered sexual harassment during the 1960s and 70s lacked a voice that could be heard in the legal system; they were denied a legal forum to express their injury. The innovation of feminist legal scholars was to help formulate the harm which these women suffered in such a way that it could be recognized as a legal harm. As Catharine

MacKinnon explains: "It became possible to do something about sexual harassment because some women took women's experience of violations seriously enough to design a law around it. [] Sexual harassment, the legal claim--the idea that the law should see it the way its victims see it--is definitely a feminist invention."⁹

Now if Lyotard is correct in his notion that the legal system gives rise to differends, then some of our energy should be focused on behalf of Lyotard's admonition that we ought to be listening for the silence of differends which fail to state a claim under the current legal system. The most obvious cases that fall into this category are situations in which somebody feels that a harm has been done, but the legal system does not recognize the harm as something which ought to be remedied under the law. A good example of this would be the crime of spousal rape. From time immemorial, husbands could not be convicted on spousal rape, on the theory that marriage constituted a sort of consent to sexual activity of any kind, however willing or unwilling. Yet a host of women felt that they had been raped within the confines of marriage, notwithstanding the lack of legal recognition that an offense had been committed. Eventually the legal rule was changed to give a voice to this harm.¹⁰

There will certainly be cases where we have great doubts about whether a perceived harm should be recognized under the legal system. A controversy is now raging over whether there should be a tort action or injunctive relief for group slander.

⁹ Catharine MacKinnon, "Sexual Harassment: Its First Decade in Court," in Feminism Unmodified (Cambridge: Harvard University Press, 1987), 103.

¹⁰ For a discussion, see Nadine Taub and Elizabeth Schneider, "Women's Subordination and the Role of Law," in The Politics of Law, 151-176.

That is, should minorities be compensated for the public transmission of epithets directed at their ethnicity---should they be able to enjoin public speech which contains group slanders? There are two views on this issue: the liberal view is that this harm must be endured as the price of free speech; in contrast, the view of certain so-called Critical Race Theorists is that the racial epithets are akin to a slap in the face and ought to be seen as a harm that requires compensation, or at very least, such epithets should not be given the status of protected speech under the First Amendment. Minority groups are starting to challenge the prevailing legal rule that freedom of speech protects racial insults, and in the first week of January, 1996, a Polish-American group sued the National Broadcasting Company for allegedly airing anti-Polish jokes and for allowing programs to air which denigrated Polish-Americans.¹¹ Certainly, there will be much debate on the question of whether this group should be allowed recovery under the law, and this may be a case in which there is a felt harm which cannot be translated into a claim that is recognized by the legal system.

But whatever the solution to that case, Lyotard's work reminds us that the legal system has historically cut off certain claims as inactionable, only to later give a voice to these very claims. Lyotard's point, I think, is that we ought to work to give a voice to people who presently feel harmed but are denied a voice to express this harm:

To give the differend its due is to institute new addressees, new addressors, new significations, and new referents in order for the wrong to find expression and for the plaintiff to cease being a victim. [] In the differend, something "asks" to be put into phrases, and suffers from the

¹¹ See Chicago Sun-Times, January 3, 1996, p. 7: "Polish Group's Suit Accuses NBC of Slur Campaign."

wrong of not being able to be put into phrases right away.¹²

Part of this project involves finding the right terms in which to express a harm that has been lying inchoate. Indeed, one of most fearsome aspects of powerlessness is the lack of a voice, the absence of a language to express one's outrage. Empowerment results when a voice can be found and is given recognition by the legal system. Postmodern legal theory can be of special help in this project because it focuses to a greater extent than Anglo-American legal theory on seemingly external and marginal matters (that is, on people and ideas which are outside of the mainstream), and this orientation forces a rethinking of the boundary which separates the "legal" from that which is marginalized as "non-legal." Postmodernism is especially useful in this regard because it would have us stand outside of our practices to examine the boundaries and parameters which presently constitute those practices.

(iii) Deconstruction of Supposedly Neutral Doctrines

In the chapter on Derrida I argued that Derrida's philosophy of law puts forth a theory of justice which is foundational, and hence inconsistent with his earlier, more deconstructive writings. I now want to argue that Derrida's earlier work can, and has, been used to "deconstruct" some key legal concepts. By "deconstruct" I refer generally to Derrida's method of reading texts, in which special attention is paid to the artificial and tenuous status of binary and hierarchical structures and dichotomies that have been set up by an author or by a system of thought. Deconstruction is concerned to break

¹² Jean-Francois Lyotard, The Differend, 13.

down or destroy the distinctions between part/whole, text/margin, inside/outside, public/private, individual/collective. Typically, one side of these hierarchies is privileged at the expense of the other, and once the hierarchy is exposed as arbitrary or groundless, the text allegedly collapses in on itself and "deconstructs."¹³

It is somewhat surprising that this method of deconstruction is not used by Derrida in his lectures on jurisprudence. Instead, Derrida focuses on deeper questions about the nature of justice and law. Yet some legal thinkers have used Derrida's method of deconstruction to examine specific doctrines in the law, and I think that this is an area where postmodernism can have a positive influence. For example, in an interesting recent article, Clare Dalton focuses on what she calls the "ideology of contract law," an ideology which she uncovers in her deconstructive reading of the so-called "palimony" lawsuits of the 1980s.¹⁴ These lawsuits revolved around the question of whether a live-in girlfriend could recover alimony from her former lover even though the couple was unmarried (hence "palimony"). I will not repeat Dalton's findings, but her close reading of these cases reveals that the courts were engaged in an ideological struggle as well as a struggle to find the correct legal solution to the question of whether these women should receive alimony. On a legalistic level the court spoke in jargon-laden terms about whether there was a contract between the parties analogous to a marriage contract,

¹³ For a useful discussion, see Madan Sarup, An Introductory Guide to Postmodernism and Post-Structuralism (Athens, GA: University of Georgia Press, 1993), 50-1.

¹⁴ Clare Dalton, "An Essay in the Deconstruction of Contract Law," in Critical Legal Studies, ed. Allan Hutchinson (Totowa, N.J.: Rowman & Littlefield, 1989), 195-208.

whether there was consideration for such a contract, whether the relationship was a private matter that was beyond the reach of the court, and so on. All of these are important legal questions. On a more ideological level, however, the courts were exploring various frameworks for understanding the relationship between the female plaintiff and male defendant in these cases. Specifically, when close attention was paid to the language of the judicial opinions, the crux of these cases often revolved around whether women in these situations (that is, living with a man for a long time) should be seen as an angelic quasi-wife or, alternatively, as a harlot who seduced the man into promising to take care of her forever. Dalton's deconstructive reading uncovers a hidden layer of what might be called 'sexual reasoning' in which ideological notions of femininity are glossed over by legal terms such as "contract," "consideration," "public/private," and so on. By taking these decisions apart slowly we can find hidden ideological forces at work in the judicial process and then bring these forces to light where we can deal with them directly. The "deconstructive" project here is to identify a hidden tension at work in these cases, a value choice between different conceptions of femininity lurking below the level of purely legal analysis. Now I don't think that we can generalize from Dalton's work to the claim that deconstruction is a guaranteed path for generating insights into controversial cases---indeed, many deconstructive readings lead nowhere and serve only to make cases more confusing---but it is a viable avenue for insight into the law.

A second method of reading legal texts in a deconstructive manner involves taking an important legal decision and showing how it rests upon an unstable and somewhat

arbitrary balancing of competing interests and doctrines. This approach is popular in Critical Legal Studies, particularly in Duncan Kennedy's argument that most areas of private law (contracts, torts, property) are shot through with two contradictory impulses: an altruistic impulse which harbors a collectivist vision of society and an individualistic impulse which harbors an atomistic vision of society.¹⁵ Some questions of contract or tort law (for example, the question of whether a tortfeasor should be liable for unforeseen damage), cannot be resolved apart from this struggle between the two competing world views. There is no pre-existing legal solution to this type of problem which is not really a political solution dressed up as a supposedly correct legal solution, so the law deconstructs into opposing forces which cannot be ranked or reconciled. In addition to making value choices about which doctrines to apply, judges must choose whether to use bright-line rules ("a person over the age of eighteen can consent to a contract") versus amorphous standards ("consent must be determined on a case-by-case basis, such that a seventeen year-old may be liable on a contract while a twenty year-old may lack capacity to consent). This choice between rules and standards is also a political choice, because a rules-based approach favors a formal society with clear rules of personal interaction, while a standards-based approach favors a more collectivist vision. Now I have argued elsewhere that legal doctrine may not be as indeterminate as Kennedy suggests,¹⁶ but there is something important in his effort to identify the structural constraints and

¹⁵ See Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 Harvard L. Rev. 1685 (1976), reprinted in Critical Legal Studies, supra.

¹⁶ See my "Dworkin and Critical Legal Studies on Right Answers and Conceptual Holism," 18 Legal Studies Forum 135 (1994).

conflicting world-views which permeate legal theory. Ever since the era of the Legal Realists (such as Jerome Frank and Karl Llewellyn) lawyers have been aware that legal outcomes are somewhat indeterminate and unpredictable; perhaps deconstruction can help to uncover the forces which drive this indeterminacy.

One reason that postmodernism can undertake a deconstructive reading of legal doctrine is that it takes an external perspective on the legal system. As I mentioned earlier, internal theory cannot take the view that legal doctrine is hopelessly contradictory because it proceeds from the perspective of the judge, who must assume that the law is pre-existing and clear. A useful aspect of postmodern legal philosophy is precisely its freedom from the institutional constraints that fetter judges' and lawyers' views of the law. Sometimes the most incisive view of the law is not available to those on the inside of the practice. The radical perspectivism of postmodernism might prove useful in this regard by fostering new perspectives on the legal system---for example, by seeing the system from the perspective of criminals, clients, or jurors.

(iv) The Shaping of Legal Discourse and the "Unsayable"

A cardinal virtue of postmodernism is its sensitivity to language and its insistence that the individual is shaped by the discourses in which she is immersed. This claim reaches an extreme form in Lacan's notion that 'language speaks the subject,' and in Foucault's notion that the subject is nothing over and above the product of the prevailing discourses and disciplines. If we recognize that language and discourses shape the individual, then we must pay very close attention to the ways in which language is

controlled and manufactured. In the context of the legal system this means that we must ask questions like, "Who has the right to set the parameters of legal discourse?" "Who sets the 'moves' of the legal system?" "Who decides what can be said and what must be left unsaid?" In The Archaeology of Knowledge,¹⁷ Foucault talks about the way in which social practices (such as law) are perpetuated by a special group of insiders who are authorized to speak and to play specific roles within the practice. The social practice takes on a self-identity as the players learn a new language and a mode of behavior which separates them from the public at large. Within the practice of the law, the "players" are licensed professionals who are law school graduates that have passed the bar exam and been admitted to the bar. Due to the costs of an education through college and law school, it should come as no surprise that in our society, these players have been drawn predominantly from a particular stratum (propertied, white, male), though this is changing. As part of their training, these players are provided with a stock set of concepts in which their arguments must be stated, and they are given certain stock roles to choose from (counselor, litigator, prosecutor). The law as a social practice and as a discursive practice has a very rigid set of boundaries which establish what can be said and what is beyond the sayable. The establishment of a private language (so-called "legalese") helps to keep the majority of people alienated from the law, feeling almost as if the language of the law is a foreign tongue. Lawyers are restricted in what they can say and do by the rules of the discursive practice of the law, yet they customarily work

¹⁷ Michel Foucault, The Archaeology of Knowledge (New York: Pantheon Books, 1972).

within this practice and do not stand outside of it.

There is an additional element of restriction on what can be said or done within the practice of law due to the fact that law works by precedent; under the principle of **stare decisis**, past decisions control present decisions. This tradition ensures a perpetuation of past ways of thinking by keeping alive the language of the remote past ("fee simples," "easements by prescription," "springing remainders") and elevates this discourse to the level of a mystical code which can be understood only by the special chieftains of the law. Legal discourse is manufactured by a series of ground rules which more or less restrict what will be recognized as a legal argument, and who can assert these arguments. To see the force of this point, imagine what would happen if the language of the law was reformed so that ordinary citizens could assert their rights in a court of law through a simplified method of pleading and proof. The lack of a simplified system makes us question why the present system is too complex for **ordinary** citizens (let alone the poor and uneducated) to seek redress in a court of law.

Postmodernism, I think, makes us sensitive to the way in which power relations regulate the production of legal discourse and legal practice. Hence it is no surprise to find that postmodernists will be concerned with law schools and legal education, because it is here that students pick up many of the attitudes and behaviors which they will be using in private practice.¹⁸ As Duncan Kennedy explains,

Law schools are intensely political places despite the fact that the modern

¹⁸ For example, Patricia Williams writes about her experience as a law school professor in The Alchemy of Race and Rights (Cambridge: Harvard University Press, 1992).

law school seems intellectually unpretentious, barren of theoretical ambition or practical vision of what social life might be. [Law school involves] ideological training for willing service in the hierarchies of the corporate welfare state.¹⁹

Postmodernism, then, opens up legal studies to an analysis of ways in which legal discourse is generated. This means that legal studies need not be restricted to looking at the substance of legal doctrine (i.e. "What are the formal elements of a contract?"), but can also look at the way in which legal doctrine is shaped (i.e. "For whom is contract law necessary?") This, I think, is where 'legal studies' meets 'cultural studies,' where legal theory begins to theorize about itself as a cultural artifact. This is also the point at which legal studies intersects with anthropology, semiotics, Marxism, and other external approaches to the law.

This brings to a conclusion my discussion of the four contributions which postmodern theory has to offer the philosophy of law. Now we might pause to ask ourselves what it is about the above insights that is particularly **postmodern**. We can imagine someone asking, "Why must we look to postmodernism to generate the insights discussed above? Can't these insights be found in the work of more mainstream thinkers as well? For example, the Nietzschean point about revolutions in the legal system can be found in Harold Berman's book, Law and Revolution, and more generally in Thomas Kuhn's The Structure of Scientific Revolutions. Foucault's points about the social construction of legal categories can be found in mainstream texts on the evolution of American law, such as Lawrence Friedman's History of American Law. And Derrida's

¹⁹ Duncan Kennedy, "Legal Education as Training for Hierarchy," in The Politics of Law, 38.

deconstructive readings of case decisions are really quite similar to standard ideological critiques offered by Marxists and feminists. So what, then, is the genuinely **postmodern** insight that makes it vitally important to read all of these postmodern thinkers?"

The honest response to this question, I think, is to admit that the postmodern insights **can** be found in other thinkers, and that there is nothing absolutely necessary about reading the postmodernists to get these points. Having said this, I would add that there is at least one major reason to read the postmodernists, and that is this: the postmodernists are having an important influence in areas other than law, such as literary theory, feminism, sociology, art, and of course, philosophy. So by reading the postmodernists one lays the foundation for further work in other areas of the humanities. But apart from this I can offer no special reason that one ought to read these thinkers if one is interested solely in legal theory. Then again, it is difficult to convince a skeptic that she should read anything; there is no way to conclusively prove that a person should (or must) familiarize himself with certain texts. I have tried to articulate the benefits of postmodern legal theory, and beyond this there is nothing more that I can say by way of convincing someone that this work is important and interesting.

8.2 Two Problems: Externality and Lingering Foundationalism

Having set forth what I see as the benefits of postmodern theory, I would now like to turn to what I see as the limitations of postmodern legal theory. I will be returning here to the problems which I discussed in Chapter One: the external perspective taken by postmodernism, as well as its radical distrust of foundations.

(i) Externality

At the beginning of this manuscript I dealt at length with the notion that postmodern legal theory tends to offer an external critique of the legal system because it refuses to speak in the language games and terminology which are used (often unreflectively) by the officials of the legal system. I pointed out that this perspective differs greatly from the internal viewpoint adopted by mainstream Anglo-American jurisprudence, especially in the influential work of H.L.A. Hart and Ronald Dworkin. I now want to focus a little more closely on the problems raised by the adoption of an external point of view.

As Americans, and especially as legal theorists, we have a need for both an internal and an external perspective on the law. Every day we read in the newspaper about legal controversies that are being fought in our courts, and we know that these controversies will be settled under the law as it has been construed by our highest courts. No matter which side of the controversy we personally favor, we know that the bottom line will come down to the law, which means that we must ask ourselves the internally-oriented question, "What is the law on this topic?" We ask that question because we know on some level that the case will be decided from the internal perspective of the judge. Thus if the case deals with an affirmative action program, we have to ask whether such a program is Constitutional in light of the Fourteenth Amendment; if the case deals with abortion we must ask if the fetus constitutes a "person" under the law and whether the mother's right to liberty or privacy encompasses the right to an abortion.

The courts are charged by law with looking at legal doctrine from an internal perspective, and we expect them to do so. Indeed, the existence of an internal perspective is what allows for the rule of law, stability, predictability, and due process for litigants. These are values which are central to our way of life. Nobody, then, can rationally suggest that lawyers and judges should abandon the internal perspective on the law, because the abandonment of this perspective might destroy the practice of law altogether. To see this last point, consider how the game of chess would be destroyed if the players took a purely external attitude toward the game, for instance by sitting around the chessboard discussing the social significance of chess. Like chess, the legal system is a game that must be played from the inside, and the events at this internal level determine the outcome of the game. Therefore, to focus exclusively on the outside or the social context or the history of a social practice (such as the legal system) is to miss the internal side of the practice. If we read a judicial opinion solely from a historical perspective (or for example, if we read an opinion as a symptom of bourgeois illusions) then we miss what Dworkin calls the internal, argumentative aspect of the law.²⁰

On the other hand, legal controversies do not occur in a vacuum, and the law (unlike chess) is not a system of rules closed off from the larger social context. We are a society that is divided by race and class, with the result that legal doctrine is itself shaped by fundamental unspoken assumptions and biases in favor of certain arrangements (private property, competition, wage-labor, negative rights) and against others (positive rights, collective ownership, altruism). The law can harbor ideological distortions and

²⁰ Ronald Dworkin, Law's Empire, 12-15.

it can contain rules which are downright absurd and counter-intuitive. Therefore it is often necessary to see the legal system from the outside, to get a glimpse at the law from the critical perspective which judges usually avoid in their official capacity as judges. For example, in Brown v. Board of Education, the Supreme Court looked to empirical sociological studies to reach the conclusion that the legal notion of "separate but equal" did not conform to the experiences of African-Americans, who felt separate and unequal.²¹ Only through a similar process of stepping outside of the legal system can we determine if the concepts used within the system are "off" or "skewed."

A stunning metaphor for the internal and external perspectives was offered recently by Richard Delgado, a law professor who specializes in Critical Race Theory.²² Delgado recently published his recollection of conversations with a minority law student regarding the law school curriculum, specifically its focus on business matters at the expense of social issues such as homelessness and poverty. The student said that the law faculty (and many of the students) were living in a bubble which they mistook for the real world. Those on the outside of the bubble (this is where the minority student placed himself) can see the curvature of the bubble from the outside, thereby revealing its contours and limitations. Of course, those on the inside see something entirely different because they mistakenly think that there is nothing outside of the bubble. The metaphor is striking, and I think that it is an appropriate way to describe the legal system. To understand the law in a complete sense we must be able to assume both an internal and

²¹ 347 U.S. 483, 74 S. Ct. 686 (1954).

²² Richard Delgado, "Discussion," 45 Stan. L. Rev. 1671, 1684 (1993).

external perspective, in the hope that each perspective will moderate the other so that a complete picture will emerge.

In this manuscript, I have demonstrated that postmodern legal theory takes place at a level of thought which is far removed from the language games in which laws are enacted and cases decided. Postmodern theory questions the foundational concepts of the legal edifice with the intended goal, I think, of destabilizing or criticizing the entire system (or at least of questioning an entire area of law, such as property law or criminal law). Paradoxically, though, this strategy often fails completely, because the critique is so external to the practice of law that it leaves the internal workings of the legal apparatus untouched. As Wittgenstein said in a similar point about philosophy, the questioning of foundations from an external perspective "leaves everything as it is."²³ In other words, the practice is approached from such a critical distance that it is left unchanged. We can agree with the postmodernists that legal theory is becoming incredulous toward metanarratives, that the foundational metaphysical principles are crumbling. But this claim can't change the inner workings of the legal system until the insight is couched in the internal terms of that system. As Wittgenstein said, we can be as clear as possible about foundations, but this leaves our practices and institutions untouched. When Wittgenstein was asked whether philosophical clarity would lead to improvements in mathematics, he said:

Philosophical clarity will have the same effect on the growth of mathematics as sunlight has on the growth of potato shoots. (In a dark

²³ Ludwig Wittgenstein, Philosophical Investigations, section 124 (London: MacMillan, 1958).

celler they grow yards long).²⁴

Similarly, an external critique of the law does little to destabilize the decisions of legislators and judges, for the simple reason that these legal actors are already operating (and must operate) within a different language game than the one used in the external critique. For example, the postmodern critique of the autonomous "self" or "cogito," as a purely theoretical matter, cannot directly influence the legal doctrines (say, in the criminal law) which are built upon the notion of a free cogito, unless it steps into the language game of the law and challenges doctrines based on the cogito, for example by showing that the legal notion of *mens rea* (the mental state which causes a criminal act) is implausible. The grand critique of foundations is of little practical help unless it can be translated into the language game of the law. To illustrate this point in an extreme form, consider how absurd it would be for a postmodernist to appear in a courthouse to argue that election results should be thrown out on the basis of Lyotard's claim that consensus is 'totalitarian.' In this case and others, the external perspective is simply too far removed from the actual workings of the legal system to effect any genuine change in that system. This means that the postmodernists should not be content to state their positions at the level of external generalities, but must try to bring their analysis down to the level at which decisions are made, and this requires a translation from the external to the internal perspective. I have shown that this translation can be done (and indeed, should be done), but most of the postmodern thinkers discussed in this manuscript have

²⁴ Ludwig Wittgenstein, *Philosophical Grammar* (Oxford: Basil Blackwell, 1974), 381.

failed to take this necessary step.

The problem of taking an extremely external perspective is not, of course, particular to postmodernism. This perspective is found quite often in Critical Legal Studies, as can be seen from a leading advocate's summary of some tenets of that movement:

Judges are often the unknowing objects, as well as among the staunchest supporters, of the myth of legal reasoning. Decisions are predicated upon a complex mixture of social, political, institutional, experiential, and personal factors; however, they are expressed and justified, and largely perceived by judges themselves, in term of "facts" that have been objectively determined and "law" that has been objectively and rationally "found" and "applied." [] Social and political judgments about the substance, parties, and context of a case guide [judge's] choices even when they are not the explicit or conscious basis of decision.²⁵

The argument here is that judges are really influenced by political and personal factors (external forces), not by the demands of the law (internal forces), and in any event the legal precedents are so malleable that they can be construed to support any legal position which the judge happens to hold as an external matter. This type of claim holds that the internal rationales offered by judges and lawyers to explain their actions are completely deluded. In Marxist terms, the judges and lawyers have a "false consciousness" which prevents them from understanding the true sources of their decisions. The problem with this line of thinking is that it totally dismisses the first-person accounts of the judges and lawyers who struggle to figure out internal, legal solution to cases in light of the rules, principles, and policies in the law. There is something important going on at this internal level, and this activity should not be defined away or simply dismissed.

²⁵ David Kairys, Introduction to The Politics of Law, 4.

The implausibility of an extremely external point of view can be found in David Kairys statement that, "There is no legal reasoning in the sense of a legal methodology or process for reaching particular, correct results."²⁶ This approach overlooks that there is a unique method of legal reasoning used by lawyers and judges every day, and they feel that this method of reasoning constrains their decisions. Furthermore, if Kairys really believed that there is no such thing as a correct legal solution to a problem, then he would be in the position of holding that there is nothing wrong with any judicial decision whatsoever, because after all, there is no right or wrong about the matter, legally speaking. This radical skepticism cannot give rise to any platform for changing the legal system, let alone the left-leaning platform advocated by Critical Legal Studies. The problem here is that the external critics want to have it both ways: they want to say that the courts err by ruling in favor of big business and the wealthy, yet they turn around and claim that legal reasoning is indeterminate and a sham, that there is no rule of law. These claims are inconsistent. The more reasonable approach is to acknowledge that the legal system does have a coherent decision-making process for solving legal disputes, but this process must be interrogated from a critical, external perspective.

Perhaps this is why some Critical Legal Thinkers hold that legal theory must adopt **both** an internal and external perspective. As Duncan Kennedy explains,

What is needed is to think about law in a way that will enable one to enter into it, **to criticize it without utterly rejecting it**, and to manipulate it

²⁶ Ibid., 3-4.

without self-abandonment to **their** system of thinking and doing.²⁷

Kennedy recognizes that radically external legal theory cannot give rise to a positive jurisprudence because it completely reduces law to politics and fails to see any internal logic to the actions of judges and lawyers. The message of radical external theory (of the type offered by Nietzsche or Foucault, or by Kairys above) is that the entire legal process is trivial or ideological and should be avoided. This in turn leads to a kind of nihilism or quietism in which one has so rejected the legal system that there are no possible grounds for improving it from the inside.

The point here is that a purely negative or critical posture is not very useful in legal theory. Thus when Catharine MacKinnon's "Feminist Theory of the State" pronounces that "the state is male,"²⁸ there is no way to generate a jurisprudence out of such claims, because they are purely external and critical; they do not build anything, yet paradoxically they rest on a hidden and unproven claim that gender neutrality is a good thing in the first place. This is typical of the trouble which awaits when legal theory is too external---it wallows in criticism while **hinting at**, but not articulating, a preferable internal legal practice.

Certainly, there is something to fear from an the opposite extreme, which occurs when a legal theory is exclusively internal to the point where it discounts all external insights. The postmodern distrust of the internal perspective in legal theory is a result,

²⁷ Duncan Kennedy, "Legal Education as Training for Hierarchy," in The Politics of Law, 47 (emphasis added).

²⁸ Catharine MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," in Critical Legal Studies, 61.

I think, of their belief that much liberal theory fails to achieve any critical distance from the concepts which the players in the legal system happen to be using. This seems to be the case when theorists (especially legal philosophers such as Ronald Dworkin and Joel Feinberg) use the same terminology as lawyers and judges, sticking so close to the participants' language game that there seems to be no distance between what theorists are doing and what lawyers are doing. In such cases it seems that the legal philosophers are acting as Monday-morning quarterbacks and are merely mimicking judges. Thus we find much liberal theory concerned with whether the Supreme Court made the right decision in this or that case, yet we rarely find a questioning of the system as a whole, that is, questioning the framework of rights, private property, wage-labor, and so on. The tendency of legal theory to occupy the same universe as legal practice makes the postmodernists worry that liberal theory has collapsed onto the practice of law, such that theorists cannot stand outside of the legal system and critique it in any serious way. Richard Posner has suggested that the prevalence of the internal perspective is probably the result of the way in which the law is taught in law schools, which immerse the students in legal decisions from the judge's perspective but neglects sociological (external) approaches:

[T]he study of law is begun **in media res**, and here I add that this procedure forestalls the emergence of a critical, an external, perspective. It presents law as something not to be questioned, as something that has always existed and in approximately its contemporary form. Within a few months of entering law school the student has lost the external perspective.²⁹

²⁹ Richard Posner, The Problems of Jurisprudence (Cambridge: Harvard University Press, 1990), 468.

The problem with being stuck in the internal perspective is that this perspective tends to cut off possibilities for advancements and radical shifts in the law. From an internal perspective on the law it is difficult to justify, for example, the abolition of inheritance or the existence of a right to shelter, because there is no precedent for these within the legal system. The external critic who wants to promote these types of radical reforms in the law will face the nearly impossible task of proving that these reforms are necessitated from within the framework of the existing system, perhaps as a function of our commitment to equality or liberty.³⁰ There is indeed a sort of conservatism within the internal perspective, if only because it gives great weight to the demands of past precedents (Dworkin refers to this weight as "gravitational force") which tends to rule out new approaches. The conservative effect of this gravitational force is captured nicely in Dworkin's claim that a good judge must conform his decisions to the prevailing ethos of the law:

Judges should enforce only political convictions that they believe, in good faith, can figure in a coherent general interpretation of the legal and political culture of the community. [] A judge who accepts this constraint, and whose own convictions are Marxist or anarchist or taken from some eccentric religious tradition, cannot impose these convictions on the community under the title of law, however noble or enlightened he believes them to be because they cannot provide the coherent general interpretation he needs.³¹

Dworkin is by and large correct that judges are institutionally constrained to enforce the

³⁰ For an example of this argument, see D.W. Haslett, "Is Inheritance Justified?," Philosophy and Public Affairs 15(2)(1986).

³¹ Ronald Dworkin, A Matter of Principle (Cambridge: Harvard University Press, 1985), 2.

law as written, such that they can be a Marxist or anarchist only "in private," whereas they have to be liberals in public. It is easy to see why a **judge** must adopt this internal perspective, but it is harder to justify when adopted by a legal **philosopher**, especially if she hopes to achieve some critical distance from her object of study.

In effect, then, we have something of a stand-off between the internal and external approach. The postmodern thinkers are externalists who discount the internal perspective and thereby cut themselves off from the important project of arguing about decisions in particular cases or fashioning a program for legal reform within the current system. At the other end of the spectrum, the internalists fail to take into account any external insights and therefore operate in what seems to be a sort of self-perpetuating vacuum, a limited spectrum of possibilities for the law. What we seek, I think, is either an external theory that is not afraid to step into legal practice and debate legal doctrine from the inside, or an internalist view which can expand at crucial times to take an external perspective on the language games and practices at work within the law. This combined approach is offered neither by traditional postmodern theory nor by mainstream Anglo-American legal theory, but perhaps will be forged by those who can somehow negotiate the ground between these two approaches.³²

³² See J.M. Balkin, "Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence," 103 Yale L. J. 105, 110 (1993):

A critical perspective does not reject the importance of the internal perspective...[but] Instead of taking for granted the primacy of the internal viewpoint of the participants in the legal system, a critical perspective asks how this internal perspective comes about.

(ii) Lingering Foundationalism

As I demonstrated in Chapter One, postmodern legal theory begins with a critique of the foundational concepts of classical legal theory (concepts such as the autonomous legal subject, consensus, natural law, God). When the postmodern **critique** of these foundations turns into a full-blown **rejection**, a vacuum is created which makes it look like postmodernism will slide into relativism and nihilism because it lacks any basis on which to ground a vision of a just political order. Given this, there is a perceived need to offer substitute foundations to take the place of the foundations swept away with the classical theories of the modern period. This results in a second movement in which there is a search for new foundations. Unfortunately, the search for new foundations has not resulted in anything sufficiently robust to merit the title of a 'positive jurisprudence.' The Nietzschean Will to Power, the Derridean notion of justice as a call to the Other, Lyotard's heterogeneity of discourses, Foucault's aesthetics of the self: each of these are offered somewhat sheepishly by postmodernists as potential new foundations for revising the political and legal system, but I have shown that they are too weak to provide the richness which we seek in a workable program of legal reform. In every case, the philosopher's critical movement (the "negative jurisprudence") was so sweeping that no basis for political action remained upon which to build something positive.

This assessment extends to every philosopher discussed in the first part of this manuscript, with the possible exception of Rorty. In each case, the philosopher undertakes a critical movement that is so powerful that it nullifies any later attempt by the same philosopher to justify a position in law or politics. A brief reminder of my

arguments may suffice to demonstrate this point. First, Derrida's early deconstructive works are so critical that they 'deconstruct' Derrida's later notion of justice. That is, in order to expound a theory of justice, Derrida lapses into the sort of metaphysical claims that he found problematic in other thinkers. The same goes for Lyotard: he argues that political theories based on consensus and universal rules are 'terroristic,' yet his own version of justice lapses into the very sort of universalizing claims which he found problematic in other thinkers. Finally, we saw that Nietzsche warned against the reliance on foundations, but ultimately used the Will to Power as a sort of foundation on which to ground his view of the law. In each case, the first, critical attack on foundations destroys or undercuts the second, system-building movement. My point is simply this: postmodern legal theory purports to remove us from foundational thinking in matters of law and politics, but its attempt to do this has been something of a failure because in each case there is a retreat to foundations of a new but unworkable sort. Perhaps some type of foundation is necessary to get a legal theory off the ground in the first place. Rorty, I think, is the one postmodern thinker who recognizes that our existing institutions and practices provide all the foundation that we need to ground an ethical-politico-legal theory.

This points up a troubling aspect of much postmodern theory, namely its tendency to hold that our entire way of life is suspect, that things are rotten to the core. For example, it is possible to read Nietzsche as saying that most of our legal system should be rejected as a type of slave morality, and it is possible to read Foucault as saying that the entire legal apparatus may be a rationalization for the exercise of power relations.

Similarly, one can read Derrida as saying that much of the legal system is based on logocentric fictions, and Lyotard seems to be saying that the consensus which supports our traditions is a bogus or manufactured consent. It is difficult to see how any political or legal theory (apart from, say, anarchism) could follow from such an attitude of distrust toward our practices and traditions. Hilary Putnam has summarized this point nicely:

Many thinkers have fallen into Nietzsche's error of telling us that they had a 'better' morality than the entire tradition; in each case they only produced a monstrosity, for all they could do was arbitrarily wrench certain values out of their context while ignoring others. We can only hope to produce a more rational conception of rationality or a better conception of morality if we operate from within our tradition.³³

It seems that Rorty is the only postmodernist who correctly sees that there can be no foundation other than our contingent institutions and practices, and that these will have to do. It is certainly important to question our traditions, but there is no sense in escaping them altogether.

It is somewhat remarkable that Rorty is the only postmodernist who understands fully that the contingent traditions and practices of our society are foundation enough on which to build a positive jurisprudence. As I mentioned in Chapter One, Anglo-American theorists such as Dworkin and Rawls are no longer advocating a foundational liberalism based on conceptions of innate human nature, natural law, or some primordial social contract. Instead, they see the foundation for legal theory as supplied by the contingently held aspirations and overlapping values held by the members of our society. For these thinkers, political and legal theory is an attempt to articulate values which we

³³ Hilary Putnam, Reason, Truth, and History (Cambridge: Cambridge University Press, 1981), 216.

already hold, not an attempt to find eternal values which can steer us to justice in some absolute, objective sense. We can illustrate the move away from modern foundations with an example offered by Dworkin to illustrate that legal theory does not require objective, eternal, rock-solid foundations:

Suppose I say that slavery is wrong [according to the local traditions in our culture]. I pause, and then add a second group of statements: I say that slavery is "really" or "objectively" wrong, that this is not just a matter of opinion, that it would be true even if I (and everybody else) thought otherwise, that it gives the "right answer" to the question of whether slavery is wrong, that the contrary answer is not just different but mistaken. What is the relation between my original opinion that slavery is wrong and these various "objective" judgments I added to it?³⁴

For the modernist, the second statement (that slavery is objectively wrong) is thought necessary to ground the first statement (that slavery is wrong locally). What I have tried to show in this manuscript is that the postmodernists are critical of foundational attempts by "modern" thinkers to make the deep-structure type of statement discussed above, but they end up offering foundations of their own which, like the modernists they reject, often appeal to a level below that of our contingent traditions. Rorty, I think, is the only postmodernist who recognizes that we cannot go to this level, and perhaps it is for this reason that he stresses that we cannot get an ethical or political theory out of Nietzsche, Foucault, Lyotard, or Derrida.³⁵

If I am correct, the important task for legal philosophy is to theorize without transcendental foundations, aiming only at making the legal system the best it can be by

³⁴ Ronald Dworkin, Law's Empire, 80.

³⁵ See his comments in "Thugs and Theorists: A Reply to Bernstein," Political Theory 15(4)(1987): 564-580, 571.

bringing it into line with our intra-cultural aspirations and standards, while striving to incorporate insights from alternative traditions and perspectives. The implausibility of the postmodern agenda is that it wants to simultaneously reject the traditional metaphysical foundations while also claiming that our contingent traditions cannot serve as the basis of a program for political and legal change. This move can be made only at a high cost: once we reject **both** transcendental values and contingent values, there are no viable options left for a positive jurisprudence other than a vague and implausible sort of anarchism or nihilism.

Finally, then, all of this fuss over foundations is something of a red herring. In the final analysis, metaphysical foundations of the type once offered by Hobbes, Smith, Locke, and Aquinas are not necessary, and the most sophisticated versions of political and legal theory have already shed these foundations. The postmodern critique of metaphysical foundations arrives somewhat late in the day, and the postmodern critique of contingent foundations is overly pessimistic because it cuts off the only ground which remains when we have shed the metaphysical foundations. When these two critiques are combined, there is no possibility for creating a viable postmodern jurisprudence.

8.3 The Use of Postmodernism in Thinking the Other of the Law

Earlier in this chapter I discussed the Nietzschean and Foucauldian point that legal systems (and legal philosophy) pass through paradigm shifts in which the central elements of the law (contract, tort, property, liberty) change their meaning. We can understand the legal system as it exists at any time as a conceptual framework for resolving disputes.

At any given time these concepts are relatively stable, with the result that there will be a sort of "map" or "scheme" or "gestalt" of the law. If this is correct, we might expect to find some theorists working from within a paradigm of mainstream scholarship while others will be working at the margins of the current system. In what follows I want to stress the importance of those thinkers who occupy the margins, who push the law in new directions, especially because postmodernists tend to be working at the margins more than mainstream thinkers.

One of the purposes of any conceptual scheme is to make sense of the world, to unify experience and bring order out of what William James once called "a booming, buzzing confusion." The basic categories of the law function as a conceptual scheme which allows us to solve interpersonal disputes in a systemic way. For example, consider a dispute between landowners that arises over an apple tree that has its roots on one person's property but drops unwanted apples which spoil the grass on another person's property. A question might arise as to whether the owner of the "servient" estate can force his neighbor to cut down the tree entirely (assuming that the tree cannot be trimmed to prevent apples from falling on the servient estate). Now disputes such as these fall within the basic categories of property law, so we have an existing framework by which we can assess the rights and remedies of the parties: we might analyze the case in terms of "fee simples," "easements by prescription," "nuisance," "encroachments," and "quiet enjoyment." Now this framework may be relatively stable or unstable for many different reasons: the area of law may be in a state of crisis, there may be a "majority" and "minority" rule, proposals may be in the works for changing the law, and

so on. Yet the very existence of the legal framework provides a starting point for approaching the dispute, and the existence of a settled rule of law allows for stability and predictability in the ordinary course of events.

Yet notice that there is always something that is "Other" or "outside" these legal categories. In the example of the property dispute over the apple tree, notice that we look at the dispute between landowners from the assumption that property should be held privately and not collectively. This assumption is itself not in play in the dispute precisely because it is an assumption of property law. This shows that legal categories at any time will be determinate enough to assume certain arrangements as permissible while ruling out others as impermissible. As I mentioned earlier, perhaps there is a role to be played by postmodernism in thinking about what is "Other" or "outside" the existing law, by proposing new foundations or assumptions for the legal system.

To see the relationship between what is inside and outside the parameters of the law, recall that for much of our legal history, women were outside of the legal system. Although it now boggles the mind, there was once a time when women couldn't vote, couldn't serve on juries, couldn't hold title to property, and couldn't practice law.³⁶ In fact, the Supreme Court upheld the refusal by the State of Illinois to grant a license to a female law graduate, stating:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life...The paramount destiny and mission of women are to fulfil the noble and benign offices of wife

³⁶ The restrictions on women's rights were laid out by the Supreme Court in Frontiero v. Richardson, 411 U.S. 677 (1973).

and mother.³⁷

Now this sounds absurd to us today, as it should, but we must remember that this was not written yesterday, but 120 years ago, when a different mindset prevailed. It is all too simplistic to assert that the Supreme Court was merely stupid or ignorant of women's obvious equality with men. Under the thinking at the time, women were Other: non-man, non-legal subject. Somehow, though, they eventually won standing on the terms of the legal system.³⁸

Now the Other to the legal system is not merely composed of people who have been denied a voice (women, Native Americans, blacks); it is also composed of doctrines or ways of thinking which stand outside the accepted practice of the legal system at any given time. To use an obvious example, it was once inconceivable that our legal system would countenance federal or state regulation of the workplace, and this is why legislation limiting working hours for bakery employees was struck down by the Supreme Court as unconstitutional in the famous decision in Lochner v. New York (1905). Yet by the 1940s there was a wave of cases upholding government intervention in the workplace to prevent industrial accidents and employee overwork.

The most recent example of what is Other to contemporary legal philosophy arose in the controversy surrounding Lani Guinier's failed appointment to the civil rights division of the Attorney General's office. The controversy over Guinier surrounded her

³⁷ Bradwell v. Illinois, 83 U.S. [16 Wall.] 130, 141 (1873).

³⁸ On the status of woman as Other and man as Subject, see Simone De Beauvoir, The Second Sex (New York: Vintage Books, 1989), xxii: "He is the Subject, he is the Absolute--she is the Other."

claim (published mainly in law review articles) that the traditional principle of majority rule has had an adverse impact on minorities.³⁹ Guinier's proposals for alternative voting schemes to ensure minority representation were seen as an attack on democracy itself, and she was roundly criticized by conservatives, and some liberals as well, for challenging the one-man/one-vote orthodoxy. Yet it might be pointed out with some irony that alternative voting schemes (such as cumulative voting) have long been used in corporations to ensure adequate representation of minority directors; and indeed, alternative voting schemes were given consideration by the Founding Fathers. The Lani Guinier episode illustrates the opposition which people will muster in refusing to consider new approaches in the law.

Changes in the law can be instigated by those who are willing to think the Other of the legal system, those who practice what Kuhn called "revolutionary science" by swimming against the grain of "normal science."⁴⁰ There is a sense in which the great judges were able to effectuate silent revolutions in the law which amount to gestalt switches, and there is no disputing that such revolutions (such 'paradigm shifts') fuel the progress of the law. As a result we value those who have risked their reputations by pushing the parameters of the law, and our most esteemed judges, legislators, and scholars are those who could break with the past. Postmodern theory, because of its external perspective and its rejection of foundations, is free from traditional approaches

³⁹ Lani Guinier, The Tyranny of the Majority (New York: Free Press, 1994).

⁴⁰ Thomas Kuhn, The Structure of Scientific Revolutions (Chicago: University of Chicago Press, 1970).

to such an extent that it will be quite helpful in this task of thinking the Other of the law.

One could even argue that the legal system advances principally by decisions and events which are extra-legal.⁴¹ That is, many of the great decisions of the past have an element of free-wheeling about them, as if the judges have gone outside of the lines previously laid down for them. For example, consider the famous case of Marbury v. Madison (1803),⁴² which established judicial review in America. There was little genuine precedent for the process of judicial review, and no other country on earth allowed a judicial branch to declare legislative acts void. In one fell swoop, Justice Marshall effected a movement that would transform the judicial branch from the weakest to arguably the strongest branch of government. Consider also the Supreme Court's decision in Griswold v. Connecticut (1965) which was the first case to announce the existence of a right to privacy.⁴³ The court argued that a "zone of privacy" existed within a penumbra carved out by several Amendments, and this zone was infringed by a Connecticut statute which criminalized the distribution of materials designed to prevent pregnancy. The majority opinions spoke of the right of privacy as something that was "older than the Bill of Rights." In a strong dissent which took an internal perspective, Justice Stewart said, "I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."

⁴¹ See Bruce Ackerman, We The People I: Foundations (Cambridge: Harvard University Press, 1991), 41: "Modern lawyers are perfectly prepared to admit that the Constitutional Convention was acting illegally in proposing its new document in the name of We the People."

⁴² 5 U.S. (1 Cranch) 137 (1803).

⁴³ 381 U.S. 479, 85 S. Ct. 1678 (1965).

The decision in Griswold is still controversial today, and such notable thinkers as Robert Bork have argued that the Court made a fundamental error by recognizing a right that was nowhere mentioned in the Constitution.⁴⁴ Yet Griswold is now an accepted part of our Constitutional heritage, serving as the cornerstone of Roe v. Wade (1973), not to mention the powerful dissent in Bowers v. Hardwick (1986). The rationale in Griswold had little or no textual support in the Constitution or the case law, but nevertheless exerted a powerful legacy. Griswold would seem to support Justice Cardozo's claim that judging is not merely a process of finding the law, but a process of creating it as well.⁴⁵ And sometimes we create by finding new sources for the law from outside the rationales and doctrines which have heretofore ruled the law.

Here, I think, is where we finally reach the chief point of usefulness for postmodern legal theory: it opens up the range of conversation in legal theory by holding out a perspective that is Other, that negates the system. The importance of "negative thinking" was captured nicely by Herbert Marcuse:

⁴⁴ Robert Bork, The Tempting of America: The Political Seduction of the Law (New York: Free Press, 1990), 95-100.

⁴⁵ See Benjamin Cardozo, The Nature of The Judicial Process (New Haven: Yale University Press, 1921). There is something of a charade which must take place when judges announce what is undeniably a new rule only to claim that the rule is a well-established principle of law. This charade is somewhat necessary given the basic notion that citizens of a democratic society should be given fair advance notice of the laws which will govern their conduct. Basic considerations of due process and notice mandate that judges refrain from subjecting litigants to ad-hoc principles of law. On the other hand, judges must have the flexibility to announce new rules to fit the cases brought before them. This need to satisfy the demands of precedent while also fashioning new remedies gives rise to the charade of which I spoke earlier, where the judge announces a new rule while denying that the rule is new.

[It] frees thought from its enslavement by the established universe of discourse and behavior, elucidates the negativity of the Establishment (its positive aspects are abundantly publicized anyway) and projects its alternatives.⁴⁶

This, I think, is the spirit in which postmodern legal theory should be taken---it offers a critique from 'outside,' a critique that purports to negate the established universe of legal thought. This is a project that is worthwhile, even if we must ultimately conclude that the negative jurisprudence offered by postmodern legal theory cannot be wedded to a larger vision for a positive jurisprudence.

⁴⁶ Herbert Marcuse, One-Dimensional Man (Boston: Beacon Press, 1964), 199.

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The dissertation is hereby accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

July 3, 1996
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