1996

Reading personal legal narrative : deconstruction, jurisprudence, & textual politics.

Elizabeth A. Myrick
University of Massachusetts Amherst

READING PERSONAL LEGAL NARRATIVE: DECONSTRUCTION, JURISPRUDENCE, & TEXTUAL POLITICS

A Thesis Presented

by

ELIZABETH A. MYRICK

Submitted to the Graduate School of the
University of Massachusetts Amherst in partial fulfillment
of the requirements for the degree of

MASTER OF ARTS

September 1996

Political Science

READING PERSONAL LEGAL NARRATIVE: DECONSTRUCTION, JURISPRUDENCE, & TEXTUAL POLITICS

A Thesis Presented

by

ELIZABETH A. MYRICK

Approved as to style and content by:

Barbara Cruikshank, Chair

Nicholas Xenos, Member

Eric Einhorn, Chair
Political Science

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

> We can avoid these self-defeating pitfalls by regarding rape not as a fact to be accepted or opposed, tried or avenged, but as a process to be analyzed and undermined as it occurs. . .Another way to refuse rape as the real fact of our lives is to treat it as a *linguistic* fact: to ask how the violence of rape is enabled by narratives, complexes and institutions which derive their strength not from outright, immutable, unbeatable force, but rather from their power to structure our lives as imposing cultural scripts.
>
> Sharon Marcus[1]

In "Fighting Bodies, Fighting Words," Sharon Marcus suggests that women view rape as a script, a cultural--rather than truthful--narrative about women's submissiveness and man's inevitable aggression. Rather than fixing either "identity" and focusing upon the social/legal *consequences* of rape, Marcus suggests the metaphor of a script over which actors have ultimate control. Disrupting the rape script by engaging the rapist as his equal, then, creates a new script and a new politics of rape no longer hinged to a *de facto* female victim. Marcus' argument centers upon a conflation of "real" and "text." The political implications of viewing the "real" as a text that can be re-written are profound. Gendered, racial power relationships appearing to be "cast in stone" become malleable and inauthoritative as we disrupt the flow of the narrative and create a new text. This paper takes a similar instinct to conflate the "real" or natural or fixed with the textual, the constructed, the changeable. For this paper, however, the conflation is reversed. I will explore the ways in which the text (or Marcus' "script") is "real" or political and how such a view of texts might alter our notion of writing and introduce a different location of politics.

Jacques Derrida's concept of deconstruction as a method for reading texts will play an important role in altering the relationship between reader and text and in accessing a

---

[1]Marcus, 1993: 388.

textual politics. Deconstruction elicits strong reactions from almost any political position and from almost every intellectual field. Such widespread rancor speaks not only to the complexity of deconstruction as an idea, but also to the vast "success" Derrida has had in jolting the consciousness of both Western European and American intellectual endeavors. Derrida's post-*Of Grammatology* (1974) works have predominantly been acts of deconstruction. Deconstruction is proposed and defined through Derrida's engagement with texts by Austin, Lévi-Strauss, and Lacan to name a few. Through these engagements, the presumptions of linguistic theory, western humanism, and psychoanalysis are devastated, played with, exposed and interrogated. That Derrida has been called a nihilist and deconstruction, *destruction*, then, is unsurprising. Nevertheless, as literary critic Barbara Johnson writes,

> *Deconstruction* is not synonymous with *destruction*. . .It is in fact much closer to the original meaning of the word *analysis*, which etymologically means "to undo"--a virtual synonym for "to de-construct." The de-construction of a text does not proceed by random doubt or arbitrary subversion, but by careful teasing out of warring forces of signification within the text itself. If anything is destroyed in a deconstructive reading, it is not the text, but the claim to unequivocal domination of one mode of signifying over another. (1981: 5)

As Johnson describes it, the destruction of unequivocal, dominating modes of signification would appear to have great potential for a politics of marginalized, oppressed groups. Yet, Derrida and his method of deconstruction has been met with as great an antipathy from many feminist theorists and members of the Left, as it has from those whose voices *maintain* the unequivocal domination of one mode of signifying over another. As Chapter two will argue, deconstruction does not produce a retreat from politics, but has instead produced a different *and textual* level of engagement with identity and representation. Personal legal narratives operate on this textual level.

What is a legal narrative? Legal storytelling is hardly a new convention. From Biblical to contemporary American times, stories about the law and about justice and injustice have pervaded western culture. The proliferation of stories about the law is not a

new or startling cultural event. What *is* new is the location of these stories within traditional, conservative, and impersonal law journals and reviews. This location affords legal storytelling a new critical position. That is, it is not just the authors of these narratives (often law professors and lawyers) who are attempting something new, the audiences to whom these narratives are directed are *also* being asked to read and think in a new way. Legal theory has predominantly been the site of abstract writing about nameless and faceless judges and lawyers engaged in, according to whom you believe, either indeterminate and political or determinate and inherently legal decision making. In both cases, legal theorists seek a theoretical center for law--something I will call legal myth-making. Whether upholding or challenging the notion of law as a neutral and apolitical force, these theories reinforce the existence of a theoretical "center" in which law is demarcated as "distinct" or specialized knowledge. Even the legal realists' contributions, with their rejection of positivism and their interest in who judges were *as people*, looked to provable fact and broad statistical and sociological patterns to support their analysis of the law. Legal fictions as well as autobiographical stories introduce the concept of unknowable and un-testable knowledge to the legal canon.

This epistemological shift in legal theorizing can be identified with the introduction of literary scholarship into the law as well as the introduction of women and people of color whose "stories" differed from the neutral and objective "non-stories" of legal doctrine and theories. Law professor Derrick Bell is both the originator and the most well-known employer of the fictional method of legal theorizing. His work has been influential to both the genre of legal narrative and to the critical race movement which several of his students founded. His creation and various uses of the strong-willed, super-lawyer and civil rights activist Geneva Crenshaw as a literary device for challenging civil rights doctrine and the founding fathers themselves opened the door for other legal scholars to experiment with the form of legal theory as well as its content. Initially skeptical that such a literary approach

would be accepted by prominent law reviews and prominent legal scholars, Bell admits, "And to my great relief, the *Harvard Law Review* editors accepted my unorthodox approach and contributed their energy, skill, and enthusiasm to the editing process" (1987: *xii*). Richard Delgado's *Rodrigo Chronicles* (1995) followed Bell's lead by inventing Geneva Crenshaw's younger, half-brother Rodrigo--a law student of African and Latino descent--engaged in conversations (actually, book reviews in the form of a dialogue) with an older crit law professor.

Bell's use of fictional narrative and allegory implicitly proposes a distinction between *fiction* and non-fiction in legal writing. Like any writer, Bell chooses his genre, diction, audience, etc. While Bell makes similar arguments in more traditional forms concerning race and racism in the law, the use of fictional characters and "imaginary" conversations offer Bell a new expanse in which to explore the meaning of race and legal reasoning:

> In order to appraise the contradictions and inconsistencies that pervade the all too real world of racial oppression, I have chosen in this book the tools not only of reason but of unreason, of fantasy. . . [F]airy tales in their early versions did not always have happy endings but, rather, usually reflected, through the folktales on which many were based, the harsh life of eighteenth-century peasants. . . .The role and fate of civil rights measures can be compared to those of the brides in the French fairy tale *Bluebeard's Castle* . . .The brides are rebellious rather than redemptive. . .(1987: 5)

Bell likens his own "metaphorical tales" to these folk tales, mirroring back to the culture the failures and hopelessness of its own present. Contrary to their Disney-ized reifications, Bell's antecedents do not necessarily end happily or even hopefully. Instead, these tales rely upon the reader to respond to the dilemmas and crises depicted in Bell's tales. As Gary Minda suggests, "Bell uses this imaginative narrative much in the way novels are used in literary studies to evoke awareness about the human condition" (1995: 156).

Neither Bell nor Delgado place themselves "literally" in their stories. Instead, they "strive to make themselves disappear" (1995: *xv*). Like all fiction writers, the authors

deflect identification of themselves with their characters arguing that the characters are composites of people they know in and outside the law. Delgado refers to Rodrigo as simply "my exuberant alter ego." While the relationship between author and character is open to interpretation, the issues within each text are undeniably autobiographical in essence. Both Bell and Delgado (the authors) are established and successful minority legal scholars with years of experience both in the traditional academy and in civil rights activism and critical race scholarship. DuBois' theory of "double consciousness," then unsurprisingly becomes a topic of conversation for Delgado's alter ego:

> Rodrigo explained. "You've heard, I assume, of double consciousness?"
> "Of course". . .
> "And you know that many members of minority groups speak two languages, grow up in two cultures?" . . . . "And, so," Rodrigo continued, "who has the advantage in mastering and applying critical social thought? Who tends to think of everything in two or more ways at the same time? Who is a postmodernist virtually as a condition of his or her being?" (1995: 8)

Delgado's use of a conversation between intellectuals, much like Plato's dialogues, allows not only the deflection of his identity from the narrator or any other character (as in the old argument, is Plato Socrates or is Plato the inventor of Socrates?), but also (and perhaps as a consequence) a blank canvas upon which to propose, interject, reject, and accept any and all arguments surrounding race and the law in contemporary times.

The reader of the fictional legal narrative is left not simply to accept or reject the claims *as claims* made by the characters, but to interpret these characters as creations of an external author. Should we accept Geneva Crenshaw as a reliable character? Does the narrator respect her opinion? Does Bell? Is Rodrigo a naive and over-zealous punk as the narrator sometimes suggests, or is Rodrigo the prophet and the narrator, the punk? Layers of textual meaning are created and offered for interpretation by the fictional form. How these layers of characterization, argument, tone, etc., are analyzed continually places the theorist/author apart from and a part of the interpretive process. The reader is asked to read a law review article that is merely a story about the law, and, as a result, can not help but

apply that allegorical and mythical style of reading to the "truths" he or she may encounter elsewhere in that law review or in the law itself. Patricia Williams describes the effects of reading Bell's Geneva Crenshaw: "[I]t is easy to forget that Geneva Crenshaw is not a real, objective, third person, but part of the author. She is an extension of Bell, no less than the doctrines of precedent and of narrow constructionism are extensions of the judges who employ them. She is an opinion, no less than any judge's opinion, an invention of her author; an outgrowth of the text; a phantom" (1991: 199). The opinions encountered in Bell's and Delgado's fictions have a didactic element by virtue of their inclusion in the highly academic law reviews. The ways these opinions teach, however, rely upon a different kind of readerly participation.

As Robert A. Williams writes in the foreword to Delgado's *Rodrigo Chronicles*, "An Indian Storyteller is much more interested in the "truth" contained in a story. And a great storyteller always makes that "truth" in the story fit the needs of the moment" (1995: *xii*). Readers are required to search out the meaning or "truths" embedded in these fictional stories. A similar type of reading is demanded by the authors of the next set of legal narratives taken as the focus of this paper. If fictional legal narratives like those of Bell and Delgado are veiled autobiography or, at least, autobiographic*al*, are personal legal narratives unveiled, identical representations of the authors' or their clients' lives? The answer is often *yes* and *no*. The "truths" of "non-fictional" personal legal narratives are much like those of their fictional counterparts. Their force lies in their ability "to fit the needs of the moment," rather than their chronological and historical accuracy.

Unlike those legal theorists who attempt to reproduce clients' or legal outsiders' experiences in review articles,[2] law professors have incorporated their own experiences as

---

[2]See, for instance, Martha Mahoney's "Legal Images of Battered Women: Redefining the Issue of Separation" in *Michigan Law Review* (Oct. 1991) or Mari Matsuda's "Public Response to Racist Speech: Considering the Victim's Story," in *Words That Wound* (1993).

legal "outsiders" into their legal theorizing. Catharine MacKinnon's *Only Words* (1993) advanced a narrative relying to some extent upon her experience creating and attempting to pass anti-pornography statutes. While this text could not be accused of lacking a cogent issue or a legal principle as is the case with other personal narratives, MacKinnon's autobiographical storytelling mixed with her writing style created a narrative about women's oppression. MacKinnon herself might be more inclined to argue that she is telling a truthful and accurate story of women's sexual oppression and abuse. Nevertheless, this collection of speeches is effective, or at least powerful, because of the literary devices MacKinnon commands. Derrick Bell has also contributed to this form of legal theorizing most recently in *Confronting Authority: Reflections of an Ardent Protester* (1994). By placing his own life experience as evidence for how and why to challenge those in power, Bell contributes to the genre of law professors' personal narratives about the law and their attempts to persuade others to join a critique of law.

Marie Ashe's "Zig-Zag Stitching and the Seamless Web" documents her experiences with the impersonal and often degrading process of giving birth within the legal mandates of hospitals. Contrasting the circumstances of the births of her five children and her miscarriages, Ashe espouses the value of homebirthing and midwifery and reproaches the law for imposing upon women's reproductive freedom. Like the fiction of Bell and Delgado, the form of Ashe's writing demands that law review readers approach the text in a different way--not scanning for facts, tests, decisions, and implications, but becoming absorbed in the story Ashe tells:

> I want a law that will let us be -- women. That, recognizing the violence inherent in every regulation of female "reproduction," defines an area of non-regulation, within which we will make, each of us, our own "mortal decisions." (1989: 383)

This sentence is as much and as little as Ashe states concerning legal principles and their relevance to the experiences she spends most of the article discussing. As the quotation suggests, the political and legal implications of Ashe's writing are numerous and

complicated, but Ashe's choice of genre leaves those discussions as products of the reading, rather than pre-ordained, inherent components of Ashe's experience. Of course, such an interpretation is itself open to debate. In addition to these cries for legal theory to function in and around staid legal principles, personal narratives have been described as "committed to a *politics of identity*" (Minda, 1995: 148) [emphasis in original].

As the focus of this paper, the politics of personal legal narratives, particularly those of Patricia Williams, will be described and read in greater detail in chapter four. To preface that reading, chapters two and three discuss the importance of deconstruction and the context of legal theory's mythical temptations. Both chapters help to frame the writing and reading of personal legal narratives. While this frame is drawn from literary and legal theory, this paper does not remain within one disciplinary field, nor does it suggest that one field might offer the best interpretive perspective. On the contrary, I will try to argue that personal legal narratives are perched on a fence between competing discourses--avoiding normative claims about one or another. Legal theory has been influenced by many disciplines including critical race theory, economics, linguistics, literary criticism, and the social sciences more generally. For organizational purposes and because of my own specialized interests, I have arranged this paper around feminist theories about both deconstruction and the law, an unstable and contested canon of legal theory, and the personal narratives that have emerged from both. Gleaned from feminist debates about its political value, deconstruction informs my attempt to read personal legal narratives like that of Patricia Williams not only as contests over legal ideas, but as contests over meaning, language, and form within the law--*as textual politics*.

Following an explanation of deconstruction and the feminist theory it has engaged, I explore the debates in the field of jurisprudence concerning law, justice, and judicial discretion. These debates should be seen as continuing and concurrent, rather than as a linear progression from wrong-headed to right-headed views of law. I have organized

legal thought according to several temptations--theories that justify or mythologize the structures of law as distinct; theories that criticize these structures according to other myths or disciplines; and theories that introduce difference or identity politics into legal structures. Chapter Four, then, focuses upon the genre of personal narratives in the law. The interpretation of these texts by the legal academy can be seen as following two interpretive avenues--demanding either a claim to legal distinct-ness or a representative identity politics. The division between law and politics--though criticized--continues to define the parameters of any reading (or interpretation) of personal legal narratives. I argue, however, that personal legal narratives operate in a space between these two worlds. To offer an alternative to these overly-determined readings, I attempt locate personal legal narratives as *textual* politics. By re-thinking the relationship between reader and text and context, personal legal narratives can be seen as an attempt to criticize identity politics without buying into the traditional and overly determined theory of legal distinct-ness. This is what Patricia Williams attempts when she demands that her narrative be listed in card catalogues under "race" and "alchemy"--two words that are legally and politically "nowhere." Personal legal narratives suggest that what appears to be fence-riding or dodging between two (or more) discourses or disciplines is actually a vibrant and politically viable location, a new space producing different theoretical and political questions.

CHAPTER II

DECONSTRUCTION AND POLITICS

A. Introduction

Contemporary feminist theorists are engaged in contradictory and provocative debates about the relationship between acting politically and theorizing "the political." Most feminist theories attempt to coordinate movement politics and theoretical frameworks--both material *and* intellectual revolutions. Emerging from the tenuous but fertile margins of both leftist political activism and canonical political thought, feminist theories, one might argue, should have a certain affinity for a Derridean notion of deconstruction and its de-centering of the center and re-conceiving of the Other. Nevertheless, Derrida's hesitation to address power relations *per se* has endured as feminist critique of the deconstructive method. Perhaps for this reason, feminist theorists have addressed the "politics" of Derrida's deconstruction with varying results. Because of the attempt by feminist theories to engage in politics *while* defining what is "political," a review of the debate concerning deconstruction within feminism is a fruitful way of exploring the use of Derridean thought. Philosophy professor Nancy Fraser and law professor Drucilla Cornell disagree about the usefulness of deconstruction for feminist politics and theory. As Fraser poses the skeptical question: "Does deconstruction have any political implications?" (1989: 69), Cornell responds by re-naming deconstruction "the philosophy of the limit." Cornell suggests that Derrida's de-centering of dominant discourses produces knowledge of the Other or those who have been ignored or erased by the center. This, for Cornell, is an ethical move in Derrida's theory and one that makes it a valuable tool for women and other castaways. By addressing this continuing debate between Fraser and Cornell, I hope to expose some of

the concerns feminist theorists have raised concerning deconstruction and some of the potential Cornell's "philosophy of the limit" might hold for discovering a textual politics.

B. Derrida and deconstruction

Derrida's work "radically" problematizes metaphysics, humanism, any coherent and determined ideas or identities--that is, the philosophical and political foundations of the West. Deconstruction attempts to pursue the indeterminacy of language, the impossibility of determining a "transcendental signified." Derrida interrogates the binary oppositions of a "logocentric tradition [which] stabilize[s] the uncertainties of signification, through a set of 'violent hierarchies' privileging a central term over a marginal one: nature over culture, male over female, and most importantly, speech over writing" (Baldick, 1990: 52). By "deconstructing" these hierarchies, Derrida shows not only that the marginalized term is always at work within the central term (thus dissolving their opposition), but also that any single meaning for these terms is always already deferred, displaced, and multiplied. Derrida calls this deferral and multiplication of meanings "*différance*"--using the two meanings of this French word (to differ and to defer) and the difference between the way this word is written and spoken to characterize the inevitable and prolonged undecidability of language. I will draw out the method of deconstruction as Derrida applies it to language and interpretation.

Responding to John R. Searle's response to "Signature, Event, Context," Derrida's "Limited Inc., a b c. . ." deconstructs the speech/writing dichotomy present in Austin's *How to Do Things With Words* and the presence/absence dichotomy at work in Searle's reply. An authentic speaker or voice is already absent in language because every speech act (written or spoken) iterates (repeats and pollutes) previous acts. Derrida explains:

> Iterability supposes a minimal remainder (as well as a minimum of idealization) in order that the identity of the *selfsame* be repeatable and identifiable *in, through,* and even *in view of* its alteration. For the structure of iteration--and this is another of its

> decisive traits--implies *both* identity and difference. Iteration in its "purest" form--and it is always impure--contains *in itself* the discrepancy of a difference that constitutes it as iteration. (1988a, 53)

Derrida collapses identity and difference not in order to destroy their meanings, but rather, the opposite, to expose them as multiple and continuously altered. In the "context" of language, an iteration (a word on a page, an idiom, a contract) is both ideally recognizable *and* productive of a difference--a remainder (*restance*). In this extensive but crucial passage, Derrida explains how difference in language produces, rather than destroys meaning:

> It is because this iterability is differential, within each individual "element" as well as between the "elements," because it splits each element while constituting it, because it marks it with an articulatory break, that the remainder, although indispensable, is never that of a full or fulfilling presence: it is differential structure escaping the logic of presence or the (simple or dialectical) opposition of presence and absence, upon which the opposition the idea of permanence depends. . .Like the trace it is, the mark is neither present nor absent. This is what is remarkable about it, even if it is not remarked. . .And, it is not negative, but rather the positive condition of the emergence of a mark. (1988a, 53)

The remainder propels meaning to the next iteration. Each mark in language is never full or empty of meaning, never clearly locatable, and always multiplying its identifiability with difference.

Derrida applies his skepticism concerning a determinant theory of language to a theory of interpretation. In interpreting literary and political texts, Derrida looks at margins, at interruptions in coherent readings, and at false oppositions. Following Foucault's turn from a question of "who rules" to "how does rule work," Derrida's textual "play" does not ask "who speaks," but instead, "how does speech work?" Or, more precisely, how does language work? How does, as Derrida writes, "the signature invent the signer"? (1986: 10). Derrida argues that texts perform within a theater[3] of language

---

[3]I realize that this metaphor of performance and theater is suggestive of (and probably suggested by) Judith Butler's (1990) description of gender as a performance within a set of rules. Though I'm not prepared to relate Butler to Derrida here, I do think a metaphor of performance in language works here.

which can not be fully known (identified), nor can it be fully escaped (differentiated). Derrida writes: "[W]e can pronounce not a single destructive proposition which has not already had to slip into the form, logic, and the implicit postulations of precisely what it seeks to contest" (1988b: 395). In "Structure, Sign, and Play," Derrida consciously exposes the way his own text remains inside language. While *sign, signifier, signified* can not help but connote the system that created them, Derrida can not *not* use these terms:

> The concept of the sign. . .has lived only on this opposition [between intelligible and sensible] and its system. But we cannot do without the concept of the sign, for we cannot give up the metaphysical complicity without also giving up the critique we are directing against this complicity, or without the risk of erasing difference in the self-identity of a signified reducing its signifier outside itself. (1988b, 396)

The critique, then, relies as much upon what it criticizes (as a false center, as a universal signified) as it does upon its marginalized difference. For Derrida, a critique that "comes out of nowhere in either space or time" (Honig, 1993: 210) is not only ineffective--it is futilely searching for another false center through a series of "violent hierarchies." Derrida suggests that this futility rests not in the inadequacies of this theory or that, but in the search for a center at all, in our continual search for an original signifier we can re-view and re-pair.

Derrida argues, "if no one can escape this necessity [of using the logic we seek to dismantle], and if no one is therefore responsible for giving in to it, however little he may do so, this does not mean that all ways of giving in to it are of equal pertinence" (1988b: 397) Derrida offers deconstruction of the *system* of sign/signifier as the most pertinent strategy for "giving in." Derrida chooses to distinguish the "deconstruction" of binary terms from the "bricolage" of Lévi-Strauss. While Lévi-Strauss surrenders the historical opposition between nature and culture that has operated in his structural analysis of myths because of the "scandal" of the incest prohibition, he nevertheless maintains its methodological value. With this tool, Lévi-Strauss becomes the "bricoleur [as opposed to an engineer]. . .who uses the 'means at hand,' that is, the instruments he finds at his

disposition around him, those which are already there, . . .not hesitating to change them whenever it appears necessary, or to try several of them at once" (1988b: 400). The engineer, in contrast--in *opposition* that is-- "constructs the totality of his language, syntax, and lexicon" (1988b: 400). In contradistinction to Lévi-Strauss's critic-as-either bricoleur or engineer, Derrida poses the deconstructionist. Deconstruction will be embraced,

> [a]s soon as we cease to believe in such an engineer and in a discourse which breaks with the received historical discourse, and as soon as we admit that every finite discourse is bound by a certain bricolage and that the engineer and the scientist are also species of bricoleurs, then the very idea of bricolage is menaced and the difference it took on its meaning breaks down. (1988b: 400)

The opposition between bricoleur and engineer are broken down, but it is not "nothing" or uncritical-ness that is left in their place. Rather, as Derrida suggests, "the passage beyond philosophy does not consist in turning the page of philosophy . . .but in continuing to read philosophers *in a certain way*" (1988b: 403).

This "certain way" consists in surrendering a search for totalizing theory. The impossibility of creating a totalizing philosophy, as Derrida reads it, is an opportunity for "*play.*" Play becomes the purpose and the method of theorizing. From a literary critic's perspective, Samuel Delany describes this as a shift in the primary questions asked of a text. If the modern period can be said to "begin" at the point when religious questions were asked of aesthetics (having seen religion fail to make us better humans), then the postmodern period may be seen as the point when neither organized religion nor aesthetics could definitively answer the humanist (and fundamentally religious) questions of how we become moral beings. Consequently, the primary aesthetic questions move into a field of play--a decentering and fragmenting of units like theme, tone, character, etc.[4] In Derrida's field of play, signs continuously and infinitely take the center's place and compound meaning:

---

[4]These comments are paraphrased from an insightful class lecture by Prof. Samuel Delany at the University of Massachusetts, May 16, 1995.

> [T]his movement of play, permitted by the lack or absence of a center or origin, is the movement of *supplementarity*. One cannot determine the center and exhaust totalization because the sign which replaces the center, which supplements it, taking the center's place in its absence--this sign is added, occurs as a surplus, as a *supplement*. The movement of signification adds something, which results in the fact that there is always more. . . (1987, 404)

Meaning, for Derrida, is always deferred, always floating, and always being supplemented--it is always present and absent, identical and different, infinite in potential for supplementation and finite in its very need to be supplemented. For the deconstructionist, more meaning is always around the corner, always at play. Derrida describes the alternative to the deconstructionist as one who "seeks to decipher, dreams of deciphering a truth or an origin which escapes play and the order of sign, and which lives the necessity of interpretation *as an exile*" (1987, 407) [my emphasis]. Interpretation may (and actually, can't help but) bring "deciphering dreams" to a text, but should be skeptical of ever having those dreams wholly fulfilled.

In "Force of Law: The 'Mystical Foundation of Authority'" (1989), Derrida addresses the oft-asked questions concerning law, politics, and deconstruction. Derrida directly faces the critics of deconstruction by proposing that a political venture is implicit in the deconstructive method. Towards that end, Derrida suggests that the relationship between law and deconstruction are inevitable. Derrida separates law from the justice toward which it aspires and suggests that the force of violence is always inherent in law. His argument that "there is no law without enforceability" may at first appear to be old news, but under Derrida's reasoning, law's violence encodes the possibility of law's own deconstruction. The violent "of-this-world" force of law brings its supposed transcendent authority, practices, and legitimacy down to earth:

> The structure I am describing here is a structure in which law (*droit*) is essentially deconstructible, whether because it is founded, constructed on interpretable and transformable textual strata. . .or because its ultimate foundation is by definition unfounded. . . (1989: 14)

For Derrida, the violence which both founds and underwrites law renders its existence always in the past and in the future. The presence of law is always indeterminate, conditional, and beyond our grasp. That is, the law is both grounded (in its past and future) and transcendent (in its present). It is this lack of presence, or its "ghost-like" character that makes law deconstructible. Derrida attempts to distinguish this "deconstructibility" from justice *and* as justice:

> We may even see this as a stroke of luck for politics, for all historical progress. But the paradox that I'd like to submit for discussion is the following: it is this deconstructible structure of law, . . .that also insures the possibility of deconstruction. . . .deconstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of *droit* (authority, legitimacy, and so on). 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. Wherever one can replace, translate, determine the *x* of justice, one should say: deconstruction is possible. . .(1989: 15)

Derrida is arguing that at the moment one can argue "I am just" or "This is just" the possibility of justice has been lost. The authorization of justice brings the undeconstructible justice into the present and un-authorized world of law. This is not to say that justice is natural and law conventional. Rather, Derrida would argue that such an opposition is false since both nature and the law are implicit in the creation/negation of law. Justice is simply "incalculable." The attempt to calculate justice, unlike law, would require venturing down non-roads, non-experience:

> 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. Every time that something comes to pass or turns out well, every time that we placidly apply a good rule to a particular case, to a correctly subsumed example, according to a determinant judgment, we can be sure that the law may find itself accounted for, but certainly not justice. (1989: 16)

Derrida argues that justice, rather than opposing law, actually stands as law's un-experienced, un-experience-able aspiration. Justice, as aporia, insures law's inevitable deconstruction. Justice defines the space (or non-space) in which law is problematized. In this problematizing, deconstruction questions,

> the relation between force and form, between force and signification, performative force, illocutionary or perlocutionary force, of persuasive and rhetorical force, of affirmation by signature, but also and especially of all the paradoxical situations in which the greatest force and the greatest weakness strangely enough exchange places. . .It goes without saying that discourses on double affirmation, the gift beyond exchange and distribution, the undecidable, the incommensurable or the incalculable, or on singularity, difference and heterogeneity are also, through and through, at least obliquely discourses on justice. (1989: 7)

With this ironic gesture, Derrida equates deconstructionist discourses with discourses on justice, and necessarily, discourses on "ethics or politics" (1989: 7). The irony, of course, lies in the persistent appeals by critics for Derrida to declare the "politics" of deconstruction. For Derrida, deconstruction as a practice implicitly carries with it a set of imperatives. Derrida argues that the "most necessary" acts of deconstruction do,

> not remain enclosed in purely speculative, theoretical, and academic discourses but rather. . .to aspire to something more consequential, to *change* things and to intervene in an efficient and responsible, though always, of course, very mediated way. . .Not, doubtless, to change things in the rather naive sense of calculated, deliberate and strategically controlled intervention, but in the sense of maximum intensification of a transformation in progress, in the name of neither a simple symptom nor a simple cause. . . (1989: 9)

Deconstruction, undeniably, can not change heads of state or economic structures. Such changes, Derrida argues, would not amount to "real" changes anyway. The violence of law, he argues, is not particular to one regime as opposed to another. The violence within law ordains its existence--good or bad. Instead of replacing one law with another, then, deconstructive politics expose the discursive contexts (rather than transcendental authorities) through which "an industrialized and hyper-technologized society" (1989: 9) functions, founds its laws, propels its future, and remains utterly deconstructible. Derrida's argument relies upon a re-envisioned notion of politics and ethics--a comprehension of the Other and an acceptance of the incalculability of universal themes like justice.

In a rare moment of prescription, Derrida concludes "The Ends of Man" (1982) with a suggestion about what "new writing" might offer the field of interpretation. Derrida

offers a choice between two strategies of deconstruction. The first involves deconstruction "without changing the terrain, by repeating what is implicit in the founding concepts and the original problematic, by using against the edifice the instruments or stones available in the house, that is, equally, in language" (1982: 135). The second involves changing the terrain "by brutally placing oneself outside" (1982: 135). The first choice will inevitably risk co-optation and re-affirmation of the problematic "edifice." The second requires a limiting and potentially counter-productive "blindness" as the rejected structures creep into the "new" terrain. Derrida finally admits that a combination of the two strategies must be developed:

> A new writing must weave and interlace these two motifs of deconstruction. Which amounts to saying one must speak several languages and produce several texts at once. . .because what we need, perhaps, as Nietzsche said, is a change of "style"; and if there is style, Nietzsche reminded us, it must be plural. (Ends, 135)

Like the "monster theory" suggested at the conclusion of "Structure, Sign, and Play," Derrida here offers a potentially political "style" of writing and reading texts. How does feminist theory, with a political platform steeped in the universal rights of women, respond to the lack of emphasis placed upon power relations in Derrida's work? Does this call for a new style amount to a *political* or a philosophical change?

C. Feminist theorize deconstruction

> I have argued that core features of at least one version of Lacanian/Derridean feminism should not be accommodated in the mix. For they work against some decisive feminist purposes.
>
> Nancy Fraser[5]

> It is a mistake, then, to think that Derrida reduces Woman to the definition of lack or fundamental nonidentity. Rather, he argues that "sex" and "gender" are not identical. In the space of that separation we can open up further transformative possibilities.
>
> Drucilla Cornell[6]

This section will explore Fraser's and Cornell's criticism and promotion of deconstruction using Fraser's distinction between politics and the political as a frame of reference. Situated on two decidedly different sides of the Derridean fence (a fence which, Derrida might suggest, does not really exist), Nancy Fraser and Drucilla Cornell each represent a feminist engagement with the method of deconstruction. Fraser, as a "socialist-feminist and former New Left activist" (1989: 2), approaches deconstruction as the practice of "transcendental philosophers" falsely claiming political commitment. Skeptical of deconstructive methods, Fraser offers the framing questions through which deconstruction (and textual politics) can be addressed. That is, Fraser describes deconstruction as a retreat from politics (*la politique*) in favor of the political--"*le politique*, . . .the philosophical interrogation of the political" (1989: 82). Cornell, with a background in Lacanian and Derridean thought, has contributed to a postmodern (a label she would reject[7]) jurisprudence and a theory of ethical feminism stemming from the view that "due to clichés

---

[5] 1995b: 167.

[6] 1992a: 287.

[7] See "Rethinking the Time of Feminism" in *Feminist Contentions* (1995).

that have come to be associated with deconstruction, the usefulness of deconstruction to a legitimate legal and political order has been dismissed" (1992b: 7). Cornell's attempt to undo the damage of these cliché readings by re-naming deconstruction "the philosophy of the limit" (1992b: 1) addresses the political engagement she hopes both her text and Derrida's texts might be seen to encourage.

In "The French Derrideans: Politicizing Deconstruction or Deconstructing the Political," Fraser confronts the Derridean influence upon French scholars who made up the short-lived Center for Philosophical Research on the Political--namely Jean-Luc Nancy and Philippe Lacoue-Labarthe. Beginning with a reading of the 1980 conference at Cérisy, Fraser describes attempts made by participants to politicize deconstruction and their "inevitable" regress into a deconstruction of the political. Focusing upon the dominant voices of this conference (Nancy and Lacoue-Labarthe), Fraser suggests that members of the conference were not interested in political engagement, but rather in philosophical inquiry. Nancy and Lacoue-Labarthe argue that in order to re-think the power of the state "without assuming the 'arche-teleological domination of the subject'" (1989: 80), one must be prepared to deconstruct social bonds, to employ deconstruction "rigorously" to the "political." Such a rigorous deconstruction, Fraser argues,

> refuse[s] the very genre of political debate. . .For there is one sort of difference that deconstruction cannot tolerate: namely, difference as dispute, as good old-fashioned political fight. And so, Nancy and Lacoue-Labarthe are utterly--one might say, terribly--faithful to deconstruction in refusing to engage in political debate. (1989: 82)

Fraser smugly regards as her proof of this refusal of (and retreat from) politics the suspension of the Center's activities in 1984, four years after its inception. Interestingly, Fraser "reads" the influence and use of *deconstruction* itself as the motor of the events surrounding the conference at Cérisy and the Center's demise. Rather than viewing deconstruction as a method of analysis used by theories that then conflict and spar with one another in the politics of conferences, centers, publishing houses, etc, Fraser argues that

deconstruction's inherent apolitical-ness is the cause of the Nancy and Lacoue-Labarthe's retreat from politics:

> Thus, in their "Ouverture," Nancy and Lacoue-Labarthe sketch a program for rethinking the political from the standpoint of deconstruction. It is a program that , in its purity and rigor, is far more faithful to the spirit of Derrida's work than the latter's own comparatively simplistic leftist remarks at Cérisy. But it also--indeed, *therefore*--reveals all the more starkly the limitations of deconstruction as an outlook seeking to confront the political. (1989: 81).

Fraser's treatment lacks a discussion of deconstruction through a reading of Derrida's own work. However, she does include a response from Derrida at Cérisy concerning the absence of a deconstructive analysis of Marxism. According to Fraser, Derrida suggested,

> he did, and *does,* not want to weaken 'what Marxism and the proletariat can constitute as a force in France.' Despite his distrust of the idea of revolution qua *metaphysical* concept, he does not 'devalue what [this idea] could contribute. . .as a force of 'regroupment.' (1989: 74)

Fraser describes these remarks as simplistic. On the contrary, I think that Fraser too smugly denies (or misreads) the importance of what Derrida himself described as a "'signifying blank. . . [a] blank [that] was not neutral. . .It was a perceptible political gesture' " (1989: 74). Derrida's politics lie in his decision to deconstruct certain structures while leaving others alone. The notion of an inevitability of signification, of *différance* , of play does not require philosophers to barrel in and rigorously deconstruct everything in sight. Rather, this method is used (or misused) according to decisions of theorists, activists, real live people. The undecidability of language that makes deconstruction possible is rigorous. Deconstruction--as a method--need not be. The rejection of Spivak's political[8] use of deconstruction at Cérisy is not an indictment of deconstruction--as Fraser would have it be--but an indication of the politics at work at this particular conference.

---

[8]Spivak asked deconstruction to investigate its own political "centered-ness," that is, to deconstruct the practice of deconstruction itself. Spivak argued that "a subtle reading of Marx would reveal a deconstructor *avant la lettre*." Following Marx, the politics of deconstruction, according to Spivak, would be accessible once the scholars at Cerisy had "'confront[ed] the false other of philosophy'" (Fraser, 1989: 71).

This conference was unwilling to support Spivak's choice of deconstruction. Could sexism have played a role in this? Ironically, Fraser does not ask.

While Fraser fails to ask *why* deconstruction was put to the uses it was by Nancy and Lacoue-Labarthe, Cornell is especially concerned with questions of why--as they relate to both deconstruction and the oppression of women more broadly. Cornell's "ethical feminism" employs Derrida's concept of *différance* as it simultaneously affirms difference while deferring static meanings of Other-ness. In *The Philosophy of the Limit*, Cornell argues in greater detail that by re-naming deconstruction the "philosophy of the limit," we are challenged to "refocus attention on the limits constraining philosophical understanding, rather than the negative preconceptions engendered by the notion of 'deconstructing'" (1992b: 1). We are challenged to "reopen the question--to think again" (1992b: 71). The confounding aspect of such a re-thinking (for feminists such as Fraser) is the risk (if the limit is taken seriously) of future deconstruction of any and all systems created even when based upon "good" politics. Through deconstruction, Derrida "demonstrates how the very establishment of the system as a system implies a *beyond* to it, precisely by virtue of what it excludes" (1992b: 1). Cornell argues that while Derrida points out that any system necessarily produces (and includes in its own self) an Other, this limit not only does not produce political paralysis, but it actually contains "an ethical aspiration behind that demonstration" (1992b: 2). Cornell suggests that in the perpetual creation of the Other, we might find the figure of mourning--not for ourselves, but for others because we can only mourn the death of others, never ourselves. Mourning, as a critical practice, is a reminder of our own death--of the ultimate limit. For Derrida, Antigone is *the* classical mourner who allegorically suggests another relationship--that of the Other and Woman:

> Derrida sews together his "reading effect". . .as a gift to her, to open up another way of reading--Woman. Not, however, so he can give us that reading, but instead so that Woman can finally be heard when she speaks for herself and in her own name. . . .It is the Other that leaves within us the trace that we recall. Here again,

> Derrida is emphasizing the precedence of the Other to the subject. The subject only comes to himself by recalling Her. (1992b: 76)

This deconstruction of the Meaning-ful Self can only multiply the recollections of the Other. In these recollections, the distance between self and other are *maintained* in order to avoid seeing "her" as simply part of "his" field of vision. Derrida's "is the 'auratic gaze' that preserves her otherness by respecting her distance, and that by doing so conjures up the 'memory' of a different world, in which she is not seen by man as merely his Other, mirrored in his eyes. . .The Other is allowed to be in her distance precisely so that she can look back" (1992b: 77).

Cornell derives a feminist politics from this Derridean framework and suggests a re-imagining of Woman's absence from the Lacanian symbolic:

> Without a challenge to the very definition of the feminine as the "castrated other" and heterosexuality as the norm, there is no true possibility of overcoming that shame. . .Given the connection in the Lacanian analysis between sex, gender identity, and heterosexuality, this experience of shame is not only that of women, as already suggested, but is also shared by those who live outside the heterosexual matrix. (1992b: 288)

For Cornell, Lacanian theory answers the question of *why* there is a gap between the constructions of woman and the lived experience of women. Without an understanding of the encoded, psychoanalytic explanations of women's identification as Lack, Cornell argues, feminist politics will continue to flounder in its struggle for some Habermasian ideal that fails to comprehend the complexities of gender inequity: "The attraction of Lacan to feminists is that he offers us powerful cultural narrative of why the struggle to expand the symbolizations of the feminine within sexual difference has been so difficult" (1995a: 95). The phallus, for Lacan, is the transcendental signifier that has no "positive existence" but is masculinized (identified as the penis) as Woman becomes the Castrated Other void of meaning, an example of that which can not be known. Described as a "bar" by Lacan, Cornell suggests that the bar is a metaphor and that actually, this bar or limit to meaning can be described *only* through metaphor and allegory. Changing those allegories or writing

new stories might be a key to *how* the cultural narrative that forces women's subordination could be undermined or destroyed.

Derrida finds space within Lacan for new and different narratives. While Lacan's theory alone might render Woman the forever-unsignified, Cornell adds Derrida's reading of Lacan in which he argues that idea of the "barred woman" is "an expression of the law of the phallus"--a law which Derrida deconstructs:

> [Derrida's] deconstruction is of Lacan's philosophical claim that these codes of representation will be shielded from the iterability of their meaning. The bar itself cannot be conceptualized as an absolute limit. We can only know the bar as a metaphor, and like all metaphors the excess inherent in the identification through transference points beyond itself. Thus paradoxically, the limit recedes before its linguistic expression. (1995a: 94)

That there can be no absolute signifier barring meaning from or conferring "lack" upon Woman does not erase Woman nor does it create one transcendent meaning, but instead, Derrida's notion of *différance* multiplies meaning for women and for men. Cornell argues that such a reconfiguration and rejection of the transcendent has a great deal to offer feminism:

> But there is an ethical moment in the endless demonstration of this paradox. It is the significance of this ethical moment that is particularly crucial to feminism. The demonstration of the limit of meaning loosens the binds of convention. . .As the boundary recedes, we have more space to dream and re-imagine our forms of life. The very impossibility of knowing the boundaries that guarantee meaning is unsettling if one seeks security in an established world of sense. But as feminists know only too well, we have been tied down by the bounds of meaning of femininity. . .we have every reason to push against and beyond the boundaries. (Cornell, 1995a: 95)

The politics of deconstruction, as far as feminism is concerned, is a congruous ethical commitment to destabilizing seemingly fixed understandings. While ethical feminism imagines a "nonviolent relationship to the Other," Cornell contends that she is not advocating (or even imagining that she could expound) one absolute system of rules. Instead, Cornell offers attitudes of fallibility linked with musement which create both ethical and political actions. Judgments are not deferred or ignored, but are guided by an

understanding of the limits to any claim of Truth and by a Derridean deconstruction of the violence inherent in the self/Other dualism.

The "philosophy of the limit" that Cornell describes and advocates is neither neutral nor groundless. It does not exist for its own sake, but carries within it an ethical treatment of Otherness--a treatment being called for by contemporary political debates especially within feminism and critical race theory. Reading and writing, according to this understanding of deconstruction, carries with it an ethical, but not a moralizing, prerogative. The "play" of deconstruction, far from withdrawing from politics, actually offers a strong indictment of traditional politics--a politics which relies upon metaphysical origins and transcendent truth claims. Fraser has suggested that Cornell's use of deconstruction towards an ethical, even utopian end fails to,

> theorize actually existing cultural contestation among competing significations that are on par with one another. . .For if all of conscious language is phallogocentrically genderized, then the only acceptable alternative is the "Wholly Other." (Fraser, 1995a: 165)

Fraser reads Cornell as re-establishing a gender binarism in which Woman's "otherness" becomes her essential property. That is, Woman as Other could never--within current language structures--engage in (let alone win) political contests. Yet, Fraser argues, we know that women do this every day. Fraser's criticism, however, follows from a misreading of both Cornell and Derrida. When Cornell calls for a "new 'feminine Symbolic which feeds off the feminine imaginary' " (Fraser, 1995a: 165), she is not, I believe, essentializing what it would mean to be feminine--though it might first appear that way. Rather, Cornell is speaking in Lacanian terms through which the feminine is the great unsignified, the empty set. A new feminine symbolic would simply (or not so simply) address the fiction of the phallus as transcendental signifier and "mak[e] that process of resymbolization possible" (Cornell, 1995b: 151). Cornell writes:

> the phallus is erected only as the transcendental signifier through a erasing of what the mother desires, and that her desire is read within a pre-given script that

> translates desire through the grid of the already established symbolic. But what is read can always be reread. . .there can be no "autonomy" for women without the re-evaluation of our "sex" and with this re-evaluation the redefinition of the ideal of autonomy. (1995b: 151)

Far from offering an essential notion of what that "sex" or "autonomy" would be, Cornell places these words in quotation marks and suggests that the very investigation of these words will necessarily open up entirely new conceptions of their meaning and value. Reading and re-reading, for Cornell as well as Derrida, is not a passive dalliance, but rather is a throwing into disarray "established" meanings and accepted dualisms. With deconstruction as your method, Cornell argues, reading becomes a political gesture--a productive activity with the potential "power" to renegotiate what we think, or if we think at all, of "the political."

Before returning to the method of deconstruction and the reading of personal legal narratives, Chapters Three and Four explore jurisprudence as texts, practices, and a frame within which personal legal narratives are written and read. These chapters explore the lexicon of legal theorists in an attempt to discover the ways legal texts are interpreted and the ways theoretical boundaries between politics and law are maintained.

CHAPTER III

THE TEMPTATIONS OF JURISPRUDENCE

> A coherent political theory, such as might be used to justify the law of a community as a whole, must be grounded at bottom either in some idea of the collective welfare of citizens, or in some conception of their political and social rights, or in some theory of their moral duties.
>
> Ronald Dworkin[9]

A. Introduction

In this chapter, jurisprudence is divided according into two temptations, the justifying and the critical. Further, the temptations of jurisprudence have been divided according to three dominant tasks--an explanation, often justification, of legal practices vs. a critique and rejection of legal practices vs. the introduction of different legal identities to both the explanation and critique. Whether or not the law can be called "political" has been an on-going theme in each of these battles. Traditional scholars argue that while politics exist in the legislative and executive branches and may even exist in the bedroom and the boardroom, politics has failed to undermine the distinct and neutral character of legal practices and legal knowledge. This distinction between law and politics has been mythologized into aphorisms like "No one is above the law"--not governors of southern states, not Presidents of the United States, not famous ex-football players. . .obviously, the myth and the experience are not identical. But, myths are never intended to be identical with experience. Rather, myths are,

> a kind of story. . .through which a culture ratifies its social customs or accounts for the origins of human and natural phenomena usually. . .in boldly imaginative terms. . .a myth is a false or unreliable story or belief. . . (Baldick, 1990: 143)

---

[9]Dworkin, 1977: 13.

Because of their air of falsity, there is always more than one myth available. Like the culture from which they emerge, myths are adaptable and contestable. In legal culture, the dominant myth of "finding law" outside of politics remains staid in some circles--Supreme Court nomination hearings and formalist jurisprudence. Other schools of jurisprudence, however, have struggled to replace the traditional myth with one of their own, to create a new story around which law might be understood. This chapter organizes jurisprudence as a set of temptations toward legal myth-making.

Rather than a steady or enlightened evolution from one school of thought to another, legal theory has been drawn from a myriad of contesting discourses including common law, positivism, social science and the contemporary scholarship of literary critics, critical legal scholars (CLS), critical race and feminist scholars. Despite the sweeping disciplines from which legal theory borrows, "jurisprudence's major constituency is clearly a legal professional one" (Cotterell, 1992: 5). Because of legal theory's cloistered character, the instinct toward creating disciplinary "distinct-ness" has remained prevalent even after the introduction of different legal identities--e.g. women and people of color. Rather than a response to broad social and political movements, political movements in legal theory corresponded with a shifts in the professional communities of law--i.e., the introduction of women and minorities into law schools, lawyering, and law school teaching. Thus, legal theorizing--even from "different voices"--has remained an practice of elite scholars[10] within the legal academy. The "insider" perspective of

---

[10]If legal theorists constitute such an ivory-towered minority, how have these scholars (or have they at all) influenced the legal profession? Why not look to the practitioners of law--the public defender, the "hired-gun" defense attorney, the courthouse clerk? Many scholars have done just that. Social science behavioralists and legal anthropologists have conducted "gap studies" and performed participant observation to locate gaps between the law as it *is* and the law as it *ought* to be. The latter, in fact, points exactly toward an explanation of why legal theory does matter. That is, jurisprudence has had an undeniable role in constructing what we believe law ought to be, what it ought to do for us, and how we ought to behave toward it. Many of these "gap" studies proved only too well that what legal theory had told us about the law was at best, utopian and at worse, patently false. The "insider" character of legal theory and its impetus toward justification rather than critique has been challenged again and again during the past century.

jurisprudence, however, has not always been the case. The common law tradition relied upon broader communities and representative practitioners to construct the law's meaning.

Common law has stood as both a foil and a springboard to modern notions of justice and substantive law. Common law is a pre-literate, pre-legislative constellation based upon contextualized facts and "community values." The English legal tradition bases itself upon theorists such as Sir William Blackstone and his explication of "common law." These ideas helped to construct and delimit American legal consciousness. Common law is defined as:

> a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments. The "common law" . . .consists of those principles, usage, and rules of action applicable to government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature. (*Black's Law Dictionary*, 276)

Common law is drawn from particular cases in particular societies and relies upon accepted social values or natural reason. Judges, rather than legislatures, were the driving force behind common law decisions. Consequently, the emphasis was upon the decision or judicial response, rather than upon the rules which guide or inhibit those decisions. Judicial behavior under common law is a reactive process. Common law judges were educated by their community and represented that community's values. As such, the common law judge "interprets and applies the law but does not create it, for the law has no individual authors. It is the product of the community grounded in history" (Cotterell, 1992: 25).

In the Anglo-american tradition, common law can be closely aligned to the philosophical maxims of natural law. Natural law collapses moral and legal questions. The "slogan" (Soper, 1984: 51) often associated with natural law perspective--"an unjust law is not law"--places the will of the individual and his or her own morality at the center of law, rather than a secular judge, legislator, or sovereign. That is, natural law asserts that legislated laws are secondary both to man's own sense of right and wrong and to the

ultimate adjudicator, God. During the seventeenth century, the western world as "community" had as its moral center a liberal notion of natural laws and "the rights of man." That is, natural and common law was "something not residing in rules but in more fundamental principles expressing a transcendent reason or ancient wisdom" (Cotterell, 1992: 120). Consequently, many of the tenets of common law which founded the "new world" are derived from a theory of individual rights, human reason, and a vague notion of the common good. The ambiguous nature of natural law and common law, what Cotterell describes as "only a set of truisms that indicate broad areas in which some kind of regulation must, as a matter of natural necessity, exist" (1992: 145), as well as an increasing professionalization of legal practices, spawned the critique of common law by a new science of pro-active or positive rules.

The grounding of the law in science, rights, or political identity has been a recurring temptation for legal theory during the past one hundred years. Whether religious, positivist, or anti-racist in character, jurisprudence has attempted either to justify or criticize legal practices. In both cases, theories have improved our understanding of law, standardized that understanding, and rendered "law" a distinct knowledge. Rather than promoting one or another of these attempts, I have contextualized legal theory by representing what I will call the temptations of jurisprudence. By exploring legal theory as a set of disciplinary temptations, I hope to articulate the reading and writing "constraints" around which personal legal narratives operate. Michael Shapiro (1992) argues that present meaning emerges from "well-entrenched historical scripts." In order to locate the possible present meaning(s) of personal legal narratives, I explore the historical temptations of jurisprudence.

B. Temptations: Justifying Jurisprudence

1. legal positivism

Drawing heavily upon the utilitarianism of Jeremy Bentham, nineteenth-century jurist John Austin aspired toward a scientific law. A science of law would place a set of organized and systematic rules, rather than common customs and ambiguous precedents, at the center of a judge's decisions. Austin narrowed his concerns to the rules created and administered by the sovereign, to *positive* laws, and located these concerns within the field of jurisprudence. Cotterell explains:

> The most significant category of human laws comprises what Austin calls *positive law*. These are laws set by political superiors acting as such or by people acting in pursuance of legal rights conferred on them by political superiors (that is, acting as the delegates of political superiors in making laws). . . .only positive law is the appropriate concern of what Austin considers to be jurisprudence. (1993: 59)

Austin does not ignore laws that fall outside of the bounds of sovereign will, but rather labels these laws differently, i.e. as *positive morality*. Law, for Austin, is a command made by a political superior whose power is delegated to judges. This systematized jurisprudence relied upon a pre-legal antecedent embodied in an authoritative, highly centralized government (Cotterell: 1993, 52-82). Practical for consolidated monarchies, Austin's theory proved less so for the decentralized authority of twentieth-century liberal democracies. While positive or scientized law maintained its appeal, the narrow definition of law as a sovereign command gave way to broader, more "open-textured" (Hart, 1965) interpretation.

As Oxford chair of jurisprudence from 1953 to 1968, H.L.A. Hart's contribution to jurisprudence grew from a similar vision of positivist law and the distinction between law and morality. Labelled analytical (as opposed to sociological) jurisprudence, positivist thought demanded a theoretical explanation for those aspects of law which did not fit within the rubrics of a command. Breaking with Austin, Hart rejected law as sovereign-centered commands and argued that law was a collection of *rules* (Cotterell, 1993). Hart drew upon

the philosophy of language and sought to contextualize legal decisions in the actual practices of judges, to create "new resources for a more realistic analysis of legal concepts" (Cotterell, 1993: 89). From these linguistic practices, Hart asserted that "the concept of law" could be defined according to two types of cases, the core and the penumbra. The core or concrete case was solved or decided according to a determinate set of rules. Those cases with "a penumbra of uncertainty" required "the rule-making authority [to] exercise discretion" (Hart, 1961: 132). Rules, according to Hart, are a step beyond commands. As a society becomes more complex, the "primary rules" (or Austin's commands) give way to secondary rules which allow for change or evolution and adjudication when things do not go as planned. The latter rules are "power-conferring," rather than "duty-imposing," and become open to interpretation. As Cotterell argues, the conferee of power is itself open to interpretation since Hart appears to suggest that his system of rules becomes self-propagating and self-governed:

> The rule of recognition and the other secondary rules are seen as governing the entire process of production, interpretation, enforcement, amendment and repeal of rules within the legal system. In contrast to Austin's picture of a legal order as the expression and instrument of all-too-human political power (the power of the sovereign and its delegates), Hart's image of law is that of a system in which rules govern power-holders; in which rules, rather than people, govern. (Cotterell, 1993: 99)

This portrayal of rules, rather than people, organizing the legal system establishes law as a specialized and scientific knowledge. That is, if rules determine judicial decision, judges must become accountable to this body of rules. Decisions are no longer the will of the sovereign, but neither are they the will of every random judge. Judicial decision-making becomes, in Hart's theory, something to be learned and guarded. Still, Hart does not suggest that judges locate "law" as if it is some pre-existing *gestalt.* Hart writes,

> Fact situations do not await us neatly labelled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision. (1958: 23).

Hart walks the very thin line between judges' specialized knowledge (in the case of penumbra) and an over-riding legal formalism. Hart maintains that formalism, or the core case, is, for lack of a better word, the rule rather than the exception.

Despite his allowance for judicial discretion in the "penumbra" cases, Hart steadfastly maintains his conviction that many cases could be and, in fact, were decided according to a "rule of law" (Hart, 1958). Hart argued that penumbra cases were decided according to a rational inclination toward what law "ought to be." The "ought" which is drawn upon in making these decisions, however, is not the "ought" of moralistic, common law claims. Rather, "[t]he word 'ought' merely reflects the presences of some standard of criticism; one of these standards is a moral standard, but not all standards are moral" (Hart, 1958: 27). The standards presented to judges and, one imagines, for legal theorists in general remain *inside* and *specific* to the legal realm. Law, in the Hart's positivist scheme, stands immune to the *moral* convictions of one or another judge and wedded to and constrained by the rules and standards that have evolved with it. As Sopel suggests: "Hart is willing to say that. . .it is possible that judges might even admit that the rules they accept are immoral yet continue to enforce them" (1984: 35). Nevertheless, Hart refuses to overstate the role of penumbra in the everyday practice of law. He argues instead that the exaggeration of the number of penumbra cases misdirects analysis away from the rules that undeniably constrain legal decisions:

> And preoccupation with the penumbra is. . .as rich a source of confusion in the American legal tradition as formalism in the English. Of course we might abandon the notion that rules have authority; we might cease to attach force or even meaning to an argument that a case falls clearly within a rule and the scope of a precedent. We might call all such reasoning 'automatic' or 'mechanical,' which is already the routine invective of the courts. But until we decide that this *is* what we want, we should not encourage it by obliterating the Utilitarian distinction [between law and morals]. (1958: 29)

Hart, however, does not clarify his point with anything other than hypothetical cases. Hart remains firmly in the philosophical mode. As Cotterell suggests: "Thus, there is no real

clarification of the relationship between rule and discretion, certainty and uncertainty in law" (1993: 106). Jurisprudence becomes further complicated by a critique of positivism as the questions of discretion and interpretation are more closely addressed.

2. righting positivism

Replacing Hart as chair of jurisprudence at Oxford and remaining in that position today, Ronald Dworkin has displaced Hart's legal positivism by "restructuring. . .common law thought" (Cotterell, 1993: 151) and establishing a theory of rights, rather than rules. Dworkin complicates the positivist position that law is a set of rules that are capable of determinate meaning and application. He argues instead that rights are a precursor to rules and inform their use. Cotterell explains:

> Rights, for Dworkin, are thus antecedent to and give meaning to legal rules. His rejection of the model of rules is not expressed, like [Roscoe] Pound's, as a claim that law contains more than rules. It is a claim that law is *more fundamental* than rules and that rules are incomplete and problematic expressions of the content of law. (1993: 168)

Dworkin rejects positivism's idealization of judicial rules as fundamental to judicial decisions. Rules should not be found to explicate principles that follow them in logic and in practice. Rather, it is principles of the common law variety so eagerly ignored by the positivist tradition that direct us toward rules:

> If no rule of recognition [Hart's concept] can provide a test for identifying principles, why not say that principles are ultimate, and *form* the rule of recognition in our law? The answer to the general question 'What is valid law in an American jurisdiction?' would then require us to state all the principles (as well as ultimate constitutional rules) in force in that jurisdiction at the time, together with appropriate assignments of weight. (1967: 64)

Dworkin first divides cases into soft and hard and then suggests that, especially in regards to hard cases, law consists of "principles, policies, and other sorts of standards" (Dworkin, 1967: 43). While rules have an either-or, black-or-white quality, principles are more fluid. Principles articulate social goals, rather than judicial directives. Principles have varying

social weight and, consequently, can be related to one another should two principles come into conflict. The question when a conflict occurs is not, as in rules, which one applies, but rather which principle has more social value? Dworkin argues that rules can not be compared:

> one legal rule may be more important than another because it has greater or more important role in regulating behavior. But we cannot say that one rule is more important than another within the system of rules, so that when two rules conflict, one supersedes the other by virtue of its greater weight. (1967: 48)

Dworkin offers examples of each concept. He contrasts a legal rule: "A will is invalid unless signed by three witnesses" with a legal principle: "A man may not profit from his own wrong" (1967: 48). While both standards serve as guide-posts for judicial decision-making, the latter invites interpretation and steps outside the parameters of a sovereign command. Judicial interpretation, however, does not draw upon the judge's politics, social values, or *any* extra-legal knowledge. Dworkin takes issue with positivists' use of the term 'discretion' to explain judicial decisions on hard cases.

Discretion, according to Dworkin, has been not only over-emphasized, but misused in describing judicial behavior. Dworkin asserts that principles, not discretion, help to explain judicial behavior when it can not be explained by uniform rules. And, principles, unlike discretion, are legal concepts dependent upon and constitutive of a legal context:

> A principle like 'No man may profit from his own wrong' does not even purport to set out conclusions that make its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision. . .There may be other principles or policies arguing in the other direction. . .If so, our principle may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive. All that is meant, when we say that a particular principle is a principle of law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another. (Dworkin, 1967: 47)

Legal principles construct the content and constraints of judges' choices. Principles, unlike rules, do not tether a judge to one choice, but neither do they leave judicial decisions (in hard cases) entirely up to discretion. While admitting that many more questions remain

regarding which principles count and where we find them, Dworkin argues that positivism's theoretical weakness lies in its concept of discretion because it "stops short of just those puzzling, hard cases that send us looking for theories of law" (Dworkin, 1967: 65). In his later work on judicial interpretation, Dworkin begins to offer his own answers to these "puzzling" questions.

Contrary to the rule-centered law articulated by legal positivists, Dworkin replaces the judge or legal actor as the center of the decision-making process. Principles carry fundamental weight in Dworkin's scheme, but are by definition open to conflict and judgment. Nevertheless, judges choose legal principles and locate facts within a system of interpretation. This system contains "propositions of law" which, for Dworkin, do not follow from sovereign intentions (as Austin argued), nor do they follow (except in the more simple cases) from description of "some event of a designated law-making kind" (what Hart might call a legal rule). Instead, propositions of law are derived from an interpretive act. Dworkin draws from literary interpretation and suggests that the interpretive act is performed in order to make the interpreted text or work of art better in some way. This critical impulse is, therefore, grounded in a philosophical frame-work--a conception of good and better art: ". . .anyone called upon to defend a particular approach to interpretation would be forced to rely on more general aspects of a theory of art, whether he realizes it or not" (Dworkin, 1982: 536). Dworkin rejects, however, an interpretive school which relies upon authorial intention to affix meaning to a text. Dworkin's distaste for psychological interpretation becomes more instrumental as he connects literary criticism to legal interpretation. In neither case does Dworkin believe it possible to secure an author's intention or attitude for any length of time. Consequently, interpretive conclusions relying upon authorial intention become ephemeral and ineffectual. Dworkin likens legal interpretation to a group of authors working collectively on one narrative. Each author writes one chapter and then passes the text along for the next to interpret and then to

supplement. The interpretive process, for both legal and literary texts, must be guided by past texts. Dworkin explains:

> Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively *done*, in the way that each of our novelists formed an opinion about the collective novel so far written. . .Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history. . . (Dworkin, 1982: 542)

Judges, while at the center of the interpretive process, are not lone rangers searching the countryside for brash new forms of justice. They are constrained by the first author, the constitution, a preceding case, a legal principle. In other words, judges are locked inside "the proposition of law" and must draw their interpretations, their very existence from that body of knowledge: "He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own" (Dworkin, 1982: 542). Nevertheless, judges are not automatons. They arrive at decisions with their own "legal philosophy," an amalgamation of political theory, legal history, and the institutional constraints and responsibilities with which he or she lives. Dworkin's legal theory paints the judge as a stoic, but active reader, immersed in law and balancing (but not ignoring) his or her own political impulses. This shift in legal theory from rules to principles, from sovereign to judge does not, however, shift legal theory's predominant emphasis on normative and insider jurisprudence.

Austin, Hart, and Dworkin maintain a descriptive, scientific disposition, what Philip Soper (1984) has regarded as legal theory's distinction from moral or political theory. Each of the theorists discussed so far have constructed theories that were meant to justify law's role and prevalence in their societies. In doing so, they have each attempted to systematize legal knowledge and to establish the "legal" as a distinct and professional field of knowledge--guarded from social and political intrusion. In that sense, each has been

tempted to view legal theory as a scientific enterprise, to supplement the law in a specific and explanatory way. The result--often intended, sometimes not--of such theory is a cultural narrative which excludes "outsider," non-legal knowledge. During the late nineteenth century, this inward turn toward specialized legal knowledge can be associated with the trend toward scientized knowledge more generally (see Foucault, 1979). It can be further associated with attempts to professionalize the law and the controversies surrounding the creation of specialized schools for the sole purpose of training lawyers (Fisher, 1993). The more precise and scientific the knowledge associated with jurisprudence generally, the greater the need and rationale for professional lawyers. Within mainstream legal theory, as Dworkin's work suggests, normative theory directed toward lawyers, judges, and academic jurists ("insiders") has remained dominant as has the narrow focus upon law and precedent as the only "relevant" knowledge. During the past century, however, analytical legal theory has been disrupted by progressive lawyers, social scientists, and other "outsider" voices.

C. Temptations: Criticizing jurisprudence

1. legal realism: replacing the myth of law

American legal realism evolved in the 1920's from criticisms of formalist legal theory by jurists Roscoe Pound and Oliver Wendell Holmes. While these "sociological" theories turned a skeptical eye toward the legal formalism best represented at the time by Harvard law professor Christopher Columbus Langdell, legal realists attacked legal formalism and the Rule of Law not only with a progressive political agenda, but with an entirely new epistemological framework. The science of law, legal realists argued, should be a *social* science, not a science of rigid rules and "found" law. Realism was often misrepresented by traditional theorists, such as Hart (1958) as being singularly interested in judicial role and the debunking of mechanical jurisprudence or formalism. This was,

undeniably, the ultimate criticism lodged against early twentieth-century law, but legal realists proposed a myriad of criticisms and analyses of legal practices and jurisprudence. The "birth" of legal realism has been associated with a scholarly debate between Pound and Karl Llewellyn (Fisher, 1993). Pound's somewhat dismissive account of legal realism, "Realist Jurisprudence" (1931), in the *Harvard Law Review* provoked a response by Llewellyn and Jerome Frank, "Some Realism About Realism" (1931), which systematically confronted and disproved each of Pound's descriptions of legal realism while announcing several, albeit vague, realist motivations. All the while, Llewellyn insisted, "A *group* philosophy or program, a *group* credo of social welfare, these realists have not. They are not a group" (1931: 75).

Legal Realists, nevertheless, have been remembered as "a group." Primarily a movement of leftist law professors, especially from Columbia and Yale, legal realists were responding to the dominant judicial fervor of the day, classical legal thought. It was this mode of judicial reasoning that delivered the conservative, business-friendly decisions like *Lochner vs. New York*. which established the supposedly non-political, purely legal concept "liberty of contract." The supposedly non-political nature of this ruling was legal realists' first point of attack. Realists argued:

> *Lochner* was wrong because it involved judicial partisan decision making: the court decided the case by favoring the ideology of *laissez-faire economics*. The realists contended that the problem with this way of thinking was not just judicial activism, but the way the Court conceptually defined the word "liberty" in the due process clause of the Fourteenth Amendment. (Minda, 1995: 27)

Legal realists took issue with the "concept"-ualizing of law into steadfast legal rules. Life was too contradictory to allow for "the theory that traditional prescriptive rule-formulations are *the* heavily operative factor in producing court decisions" (Llewellyn, 1931: 73). This criticism led realists to suggest other reasons for jurists and judges to employ the Rule of Law in their analyses: "This involves the tentative adoption of the theory of rationalization for the study of opinions" (Llewellyn, 1931: 73). That is, realists suggested that "[b]y

making each decision seem inevitable, opinions deflect popular criticism of the courts' rulings and conceal from the judges themselves the true bases of their rulings" (Fisher, 1993: 165). Legal realists not only criticized the legal system, but offered several avenues toward change. One of the most radical asserted that judicial decisions should promote social and political goals--and that these goals and attitudes be transparent, rather than opaque and guarded by so-called "rule of law" deduction. Realists believed that "social values are implicated by every legal issue" (Fisher, 1993: 171) and that some explicit vision of the common good was absolutely crucial to legal reasoning. Without it, implicit encouragement of conservative and anti-worker political agendas and would remain beyond reproach (and political debate). Jerome Frank likened classical legal reasoning to "father-authority" and, in his important 1930 text *Law and the Modern Mind,* proclaimed:

> Myth-making and fatherly lies must be abandoned--the Santa Claus story of complete legal certainty; the fairy tale of a pot of golden law which is already in existence and which the good lawyer can find, if only he is sufficiently diligent; the phantasy of an aesthetically satisfactory system and harmony, consistent and uniform, which will spring up when we find the magic wand of a rationalizing principle. We must stop telling stork-fibs about how law is born and cease even hinting that perhaps there is still some truth in Peter Pan legends of a juristic happy hunting ground in the land of legal absolutes. (1930: 207)

This inspiring prose offers a glimpse into the brash and radical claims being railed by legal realists against their older mentors. Legal realists attempted to dispel legal myths and discover the reality of law--that legal truths were subject to and made up of social and political interests. Unfortunately, this reasoning, however accurate it might be, left realists with an epistemological quandary. Their debunking of the "myth of law" left law without a "truth claim" upon which to stand--and, consequently, left legal realists without an authoritative legal claim to religious freedom, worker's right, their own political vision of the common good that they believed law should work to support. Many realists had deeply-held political and moral beliefs steeped in progressive politics, Marxism, and social and religious freedom. That is, legal realists rejected the legal "myth-making" of formalist

jurisprudence, but did not see their own political interests as seeking similar mythical goals--if in the opposite political direction. Legal realists sought to replace the story of legal neutrality with a story of individual freedom. After rejecting formalism as "myth," legal realist could not make a theoretical case for their political goals having precedence over any others. This theoretical problem as well as legal realists' rejection of a "group" identity led to their losing relevance during the 1950's and 1960's.

As suggested by the positions of Hart and Dworkin as the prevailing voices of jurisprudence, legal realism did not turn jurisprudence away from classical legal reasoning. Many Supreme Court nominees, especially those nominated by conservative presidents, maintain the image--at least during their hearings--of the "myth of law." While it may be surprising that Clarence Thomas would testify that he had never thought about the abortion issue because he had never judged a decision concerning abortion, it is more telling that the majority of Americans, media, and Congress did not challenge this claim as ludicrous--something legal realists undoubtedly would have done. Nevertheless, legal realism did have a profound impact upon strains of, especially American, legal thought. The law and economics movement, legal anthropology, the law and society movement each owes its inception in part to the introduction of social science into the legal arena. It was only in the late 1970's, however, that the more radical strain of legal realism re-emerged in the law schools of the United States. Critical Legal Studies re-introduced legal skepticism into the academy and served as a springboard for other "postmodern" legal movements (Minda, 1995).

2. critical legal studies: rejecting law

Critical Legal Scholars (CLS), a group made up almost exclusively of law professors and lawyers, emerged in the late 1970's. The scholarship encompasses such diverse efforts at non-traditional legal theory that the introduction to the 1987 *Stanford Law*

Review symposium on CLS wrote: "[A]ny attempt to reduce these ideas to some universal characterization would only destroy much of the rich detail of these writings." Nevertheless, recurring ideas have taken form during the past two decades. The abundance and radical tendencies of CLS writing and the impassioned response from both the right and the left has chiselled a place for "Crits" alongside the non-conformists of the turn-of-the-century's Legal Realism movement (see Kairys, 1982). CLS, like legal realism, hopes to illustrate the inability of "formalism" to accurately represent social/legal issues.

> CLS scholarship starts from the premise that legal theory is an ideological product, part of the process through which unequal and unjust relationships are produced and reproduced in society. . .The issue is: How does one carry on transformative politics in legal theory? (Trubek, n/d: 33)

Law, according to critical legal studies, does not gain its power from an Austinian sovereign, nor from inherent or God-given natural rights. CLS differs from legal realism in that CLS does not look to replace those who have abused the power of law with others who would not. Instead, CLS accepts a more complex definition of power in law and in other social relationships. Power, simultaneously derived from and extant in everything, does not stand with totalizing "sovereignty." Torres describes the productive power of law in his description of CLS:

> The formal neutrality at the foundation of legal discourse hides the distributive choices which are made. In this way, law accomplishes political ends while effectively divorcing itself from political means. . .Law does not stand outside the process of legitimation, for it is both producer and product of the dominant social culture. Legal culture and institutions are. . .important elements in the function of both popular beliefs about commonplace relationships and popular acquiescence to the existing distribution of social goods and power. In this construction, law is the mechanism for legitimizing the existing hierarchy of social relations and, hence, for crystallizing existing patterns of domination. (Torres, 1988: 1051)

CLS, then, rejects the notion of Truth in Law. Not only do the politics of legal actors and the arena from which they come affect justice, but the law *itself* preordains certain conclusions and expectations. Judges' attitudes and litigants' relative power each affect the distribution of justice. The actors are, in effect, playing with a loaded deck. According to

David Kairys (1982), evidence of this distortion is excused by American society as a "deviation from the idealized [formalist] model" (Kairys, 1982: 2). The ability of an idealized system to re-invent and re-legitimize itself speaks to the productive capabilities of power. Law's role in upholding American power structures is extremely important to CLS writers.

In the CLS volume *The Politics of Law* (1982), Duncan Kennedy writes of the hierarchal nature of legal education and the ideological implications of "thinking like a lawyer." Rational and logical modes of thinking and reasoning are appropriate and revered while approaches traceable to illogic or the irrational generate ridicule for their "non-legal" perspective. CLS scholars suggest:

> [m]ost CLS scholars would probably agree that the first task is to understand the political nature of the work of producing legal theory and doctrine, and to be self-conscious about how one's teaching and scholarship affects cultural definitions that have political implications. (Trubek, n/d: 33)

CLS avoids the pitfalls of legal realism by rejecting the ability of law to reform and improve American society. CLS does not attempt to draw common law or natural human rights back into the law. Instead, CLS argues that law's language and institutions taint any claim made within them and produce results that will only serve to bolster *law's* control over the rest of society.

To expose law's hegemony, CLS "talks about basics" (Kairys, 1982: 3), i.e. the principles at work within legal discourse. One fundamental building block is the concept of rights. CLS rejects liberal ideology and offers what conservative legal scholars have called a "nihilistic" interpretation of the law. Two major tenets distinguish CLS's critique of liberal law: [1] liberalism takes for granted dichotomous pairs that, among other things, separate the world into the public and private; [2] Liberal, legal discourse is inhibited by a hyper-individualistic imperative. These concepts have significance for the construction of "rights discourse":

> Rights claims only perpetuate these dichotomies, limiting legal thinking and inhibiting necessary social change. . .Because rights "belong" to individuals--rights rhetoric portrays individuals as "separate owners of their respective bundles of rights". . .--they are necessarily individualistic. (Schneider, 1991: 302)

By privileging individual concerns, rights seldom effect broad-based group interests. Further, by privileging public concerns, Schneider argues, rights often ignore the "private" issues associated with women's lives. In addition to these important criticisms, CLS offers a critique stemming from liberalism's construction of rights: "Legal strategies based on rights discourse tend to weaken the power of a popular movement by allowing the state to define the movement's goals" (Schneider, 1991: 302). It is around this critique of rights discourse that CLS makes its argument for a political disengagement with law. It is with this proscription that CLS's critics have taken issue.

The ability of CLS to wholly reject even the most progressive legal measures should and has begged the question of how important such measures have been for CLS scholars themselves. That is, CLS's call to abandon of rights language can be connected to their relative comfort as predominantly white, male scholars in mainstream, elite law schools. Some have even suggested that CLS's apparent nihilism is simply another example of the nothing-if-not-mythical rejection of the father by the prodigal son. In other words, CLS theory might be seen as nothing more than new patriarchal theory emerging from the old. The whole-scale rejection vs. whole-scale justification of the law falls into the same black/white dichotomy of traditional jurisprudence while failing to account for the gray areas in law and society when monied, male, and white interests do not win the day. Even while attempting to deconstruct dichotomies such as public vs. private, CLS has been tempted into the binary logic of traditional jurisprudence. Like Hart's retrieval of positivist law from morality, CLS has attempted to retrieve progressive politics from law. While supporting the basic skepticism toward traditional legal scholarship, both critical race and feminist legal theorists have criticized CLS along these lines.

3. critical race and feminist theory: identity and difference

The introduction of identity as political and legal difference was a response to both traditional claims of legal neutrality and the wholescale rejection of rights language by the predominantly white, male, elite left. Critical race and feminist theorists pointed to a gray area between an assimilated and representative law and a law-less, de-centered existence. Many scholars suggested that CLS did not truly comprehend the political and social status (civil rights legislation, rape statutes, battery and property law) one would be giving up should one reject law completely. Because the identities of CLS and traditional scholars happened to be so similar and because each lacked the "penumbra" women and minorities in the law had seen, many suggested a gray area in which the law functioned in politically viable ways. Perhaps legal victories for civil rights had been symbolic, but symbolic victories were productive of further grassroots activities and of a psychological change that CLS failed to recognize. Leftist scholars who challenged the CLS position suggested that their own identities as non-white, non-elite, and not-necessarily male played a role in their different view of law. Because of their reliance upon different perspectives and experience, critical race and feminist legal theory have been collected under the label of identity politics. While CLS, critical race theory, and feminist legal theory each attempt to criticize the "myth" of formal law, identity-based legal theory is open to critique from both traditional jurisprudence *and* critical legal studies. What is identity politics and does identity-centered jurisprudence replace the myth of neutrality with a mythology of difference?

Political theorist Kathy Ferguson has some difficulty pinpointing the exact meaning of the often-used term, identity politics:

> Identity politics is itself a slippery term. . .it claims that women-of-color, or third-world women, or working-class women, or lesbians, because of the structure of circumstances and activities they are likely to share, gravitate toward a shared consciousness about themselves and their society. . .it posits some kernel of self-

> hood that adheres in those marked by color, class, passion, or world and can be elicited when the veil of colonization is lifted. (1993: 119)

Identity politics, whether tied to a biological or a socially constructed definition of identity, argues that one's experiences as a member of a disenfranchized group leads to certain political interests and goals. Law professor and narrative scholar Robin West relies upon the tenets of identity politics in her work. She writes:

> Women's subjective, hedonic lives are different from men's. The quality of our suffering is different from that of men's, as is the nature of our joy. Furthermore, and of more direct concern to feminist lawyers, the quantity of pain and pleasure enjoyed or suffered by the two genders is different: women suffer more than men. (1993: 179)

Taking this political and "natural" fact as given, personal legal narratives might be rendered a treatise on *how* identity creates a unique relationship with law. In her foreword to the *Michigan Law Review's* symposium on legal story-telling, Kim Lane Scheppele suggests that legal scholarship (all legal scholarship) posits an implicit "we" to which the law is responsible. She argues that whether the stories about the law are believed or not depends upon *who* tells them:

> All of these Articles attest to the very real presence of perceptual fault lines, different descriptions of events that grow from different experiences and different resonances. And most of these perceptual fault lines described in these Articles occur at the boundaries between social groups, between whites and people of color, between the privileged and the poor, between men and women, between lawyers and nonlawyers. . .(1989: 2083)

The value of legal storytelling has been placed by commentators and storytellers alike in the identity of the storyteller as a "member" of an "outgroup." Like James Boyd White's hopes for a more literary law, Richard Delgado suggests that storytelling enhances both the teller and the listener. Stories necessarily have an enlightening impact. Delgado writes,

> Oppressed groups have always known instinctively that stories are an essential tool to their own survival and liberation. Members of outgroups can use stories in two basic ways: first, as a means of psychic self-preservation; and second, as means of lessening their own subordination. . .The storyteller gains psychically, the listener morally and epistemologically. (1989: 2437)

Delgado also suggests that oppressed groups have an inherent motivation to share stories. For "slaves, Mexican-American, Native American," the oral tradition and the stories it spawned have had liberatory, psychological, and cultural import. Consequently, when members of these historically disenfranchised groups enter tradition-laden, white, male law, story-telling *naturally* becomes a method of self-expression and of self-preservation. The politics of identity lead to a humanist vision in which narratives--personal and fictional--introduce readers to new and often ignored participants in the legal game. According to Delgado, many narratives function as "counter-stories" correcting false notions about outsider groups fostered by a homogeneous (and eurocentric, male) insider scholarship. In essence, Delgado writes, "Stories humanize us" (1989: 2440).

Critical race theory originated in the early eighties not so much as a coherent set of theoretical propositions, but as a group of law students and teachers of color who sought greater representation and recognition of difference in legal education. When Derrick Bell, Harvard's first African American law professor, left Harvard University, the school was left with no one to teach his "Race, Racism, and American Law" course. Students, including Mari Matsuda and Kimberlè Williams Crenshaw, first organized to have the course taught by another African American scholar, but having Harvard fail to do that, committed to teach an alternative course themselves with visiting scholars like Professors Richard Delgado and Charles Lawrence. Summarizing the development of critical race theory as a movement, these scholars write:

> The group identity grew out of shared values and politics as well as the shared personal experience of our search for a place to do our work, for an intellectual and political community we could call home. Our identity as a group was also formed around shared themes, methodologies, and voices that were emerging in our work. (1993, 5)

Critical race theory emerged in opposition not only to the conservative and "Rule of Law" perspective of elite law schools and the Reagan-era judiciary, but to the racism and exclusion scholars of color faced within left movements--including critical legal studies.

Critical race theorists utilize contextualized analysis and the experience of disenfranchisement to inform their jurisprudence:

> Critical race theory insists on recognition of the experiential knowledge of people of color and our communities of origin in analyzing law and society. This knowledge is gained from critical reflection on the lived experience of racism and from critical reflection upon active political practice toward the elimination of racism. (Matsuda, *et al.*, 1993: 6)

The emphasis upon "raced" experience has been a source of controversy for critical race scholars both inside and outside the African American legal community. In the era of Constitutionally protected cross-burning (see *R.A.V. v. St. Paul*, 1992), the efforts to expose hate speech as more hatred-filled then speech-protected has focused critical race scholars upon issues surrounding the first amendment and racist speech. In her highly influential "Public Response to Racist Speech" (1987), Matsuda argues that the "stories of those who have experienced racism are of special value in defeating racism" (1987: 50). In determining what speech constitutes a violent act, people of color (who have experienced that violence first hand) should have legal standing greater than that of white judges or Supreme Court Justices. Matsuda resists the traditional civil libertarian rhetoric and argues that "free speech" is a misnomer disguising the prevalence and acceptance of racist hate speech in our society and in our legal system.

Nevertheless, critical race scholars could not presume to speak for the entire African American legal community. Harvard's conservative African American law professor Randall Kennedy criticized critical race scholars for their overly determined idea of racial consciousness and argued that it was both anti-intellectual and politically unproductive (1995: 175-177). Critical race scholars have been criticized for relying upon an "identity politics" that collapses under the weight of disparate opinions within a group identity. Nevertheless, critical race scholars remain emersed in contests over experience and the implications of a legal system that has the lacked and often ignored African American and Latino perspectives.

Women's achievement of voting and reproductive rights have occurred in the last seventy-five years and, like civil rights activism in certain ways, feminists found the allure of rights new and empowering. Modern legal gains have legitimated this century's women's movement and have "[come] to symbolize women's responsibility to a world beyond the home, and the possibility of their moving into the public realm" (Shanley, 1987: 9). Yet, this shift in responsibility still maintains the stark distinction between public and private. Critics argue that distinctions like public and private are produced and reproduced in even the most progressive legal causes. Social scientists and Critical Legal Scholars attempt to illustrate the inability of litigation to bring about broad change in the material conditions of women. With rights' utility *and* limits in mind, feminist legal scholars have all been influenced by either the law's implicit call to liberalism and sameness with men or critical legal studies' absolute rejection of that call.

Many feminist legal scholars move beyond Tushnet's treatment of rights by at once understanding the limits of rights for women *and* responding to the historical, symbolic power of rights as raisers of consciousness. Feminist legal scholars, like feminists in general, differ and disagree along philosophical lines. Carrie Menkel-Meadow (1989) describes a chronological development in feminist theories:

> In what could be called three stages of feminist theory we have moved from "sameness" or traditional equality arguments. . .to "difference" claims. . .to the current strain of poststructuralist, postmodern diversity theorists who resist essentialism and overgeneralizing that occur when two genders are opposed to each other. (Menkel-Meadow, 1989: 296)

Feminist legal theory, however, has maintained one over-riding principle. As Patricia Smith (1993) writes in her introduction to *Feminist Jurisprudence*, feminism informs critiques of law with one particular goal: "the one thing that unites all feminist theories and distinguishes them from all other theories is the rejection of patriarchy" (Smith, 1993: 9).

Feminist legal scholarship--also called resistant discourse (Smart, 1989); feminist jurisprudence (Smith, 1992), outsider jurisprudence (Williams, 1991), and jurisprudence unmodified (West, 1988)--struggles to create a legal system representative and appreciative of women's often disparate experiences. Like the Legal Realists before them, feminist theory points out the divergence between what society expects from its legal institutions and what it receives:

> [Feminist] theories see law as a tool of patriarchy. This body of work exposes not only how women are the victims of discrimination, but how notions of equality and discrimination contain within them a male norm or comparator. (Kenney, 1992: 2)

As a tool of patriarchy, the legal system follows the same sexist hierarchy premised upon asymmetrical, binary opposites of individual/community, rational/emotional, public/private, man/woman. As one might expect, the law does not address women's experience--experience that has been dismissed as private (extra-legal), as emotional (not lawyer-talk), as marginal (*silent*). As Catharine MacKinnon writes, these problems are systemic, i.e. a product of a system premised upon male dominance (see MacKinnon, 1989).

The "myth of law" clouds any conception of law and maintains its image as objective, universal, and totalizing. Legal scholar Carol Smart (1989) describes this phenomenon:

> It is important to acknowledge that the usage of the term 'law' operates as a claim to power in that it embodies a claim to a superior and unified field of knowledge which concedes little to other competing discourses which by comparison fail to promote such a unified appearance. (Smart, 1989: 4)

Smart suggests that the law affects how rape victims describe their experience. The law's definitions become more powerful than an experience that might contradict or complicate them. The outcomes of rape trials, therefore, follow patterns of "binary logic" in which experience must be set up in the opposing guilt *or* innocence model. Smart writes, "This may be entirely acceptable except that in rape cases guilt and innocence are dependent on the outcome of another pair of opposites--this is consent/non-consent" (Smart, 1989: 33).

Feminist legal theory has been prolific in its attention to the conceptual crisis related to what is often seen as identity politics. Postmodern feminism attempts to deconstruct gendered dualisms and to move beyond the sameness/difference debate. Judith Greenberg, in her introduction to Mary Joe Frug's *Postmodern Legal Feminism*, offers a description of postmodernism and its relationship to liberalism and feminism. She writes,

> Postmodern thought is a response to modern theories like liberalism, Marxism, and the feminist dominance model. These seek to rationalize the social world, often using all-encompassing pairs such as public and private, freedom and coercion, capital and labor, and male and female. While such theories. . .claim to "be about what *is*," and to describe reality, postmodern work is about interpretation. In a reversal of the "modern," postmodern theory focuses on the text instead of on the events that are signified. Interpretation requires a position from which the event is understood. . .The binary pairs of modern theory present particular and partial perspectives. (Greenberg, 1992: *xix*)

Postmodernism and feminist legal theory are linked as much by a common enemy (liberal humanism) as by common goals. The sibling rivalry between the two may be summed up by the different tones created in each. According to Linda Singer, these are for postmodernism, irony and for feminism, outrage. Singer explains:

> Not that feminist discourse can claim to be immune from the effects of this game playing, and its sociosymbolic imaginary. But because so much of that imaginary has produced discernible effects, of the kind that, on many occasions, merits outrage, judgment, indignation--just the kind of tone and frame that postmodern cool works so hard to avoid. (Singer, 1992: 469)

Though Singer does not cite outrage and irony as mutually exclusive strategies, she does argue that the "and" between a feminist *and* postmodern strategy maintains an understanding of differences--notwithstanding the intertextual relationship--between the two ventures. Joan C. Williams (1991) offers a postmodern, feminist reading of the sameness/difference debate within feminism and critical race scholarship. The idea of "sameness" so endearing to first wave and liberal feminism has given way to the concept of difference.

Cultural or radical feminism suggests that while men view the world from a linear, autonomous perspective, women view the world with a webbed, connected consciousness.

Robin West has been a central voice of "difference" in feminist legal theory's identity politics. According to West, women think relationally and non-hierarchically (West, 1989). Like Carol Gilligan, West calls upon women to create resistant discourses. In a patriarchal society, West argues, women's identities and experiences have been not only devalued but negated. West (1989) describes the negation of women's "selves" as a construction of and inherent limit to liberal rights ideology. The "separation thesis" that predates liberalism and law by separating individuals into singular, "unitary" beings with individual "natural rights" does not include women. Instead, women are and have always been connected to others through responsibility and biology. The potential to give birth and the care for a weaker life that results from birth are fundamental experiences for women. Unlike the un-gendered individuals of classical liberal thought, women do not strive for nor can we ever achieve complete separation from others--stronger, weaker, equal, or other-wise. From this philosophical *difference*, West claims liberalism--thus, law--to be gendered male. According to West, theories based wholly in this notion of separation and individuality,

> [are] essentially and irretrievably masculine. . .Women are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly "connected" to life and to other human beings. . . (West, 1989: 2)

West bases much of her "connected" thesis to women's potential for pregnancy--from heterosexual intercourse to breast feeding--an undeniably narrow conception of women's identity. Nevertheless, she writes,

> If, by "human beings" legal theorists mean women as well as men, then the "separation thesis" is clearly false. If, alternatively, by "human beings" they mean those for whom the separation thesis is true, then women are not human beings. It's not hard to guess which is meant. (West, 1989: 2)

Critical legal scholars have taken for granted the autonomous, liberal "I" as a separate masculine agent in search of community. Because of its centralization of male experience,

West remains skeptical of *any* jurisprudence, (liberal, feminist, or other-wise). West asserts that the law is unable to recognize women's "essential experience."

A critique of identity politics is implicit in the literature that celebrates it. Joan Williams argues that feminist essentialist theory serves only to reinforce the "status quo" by substantiating the oppositional relationship between men and women. Williams redefines the concepts of "sameness" and "difference" in a way that deconstructs, and thus supplements, the parameters of the current argument:

> A postmodern approach also offers a reformulation of difference that avoids essentialism by focusing on the multiple viewpoints available to any one individual. Postmodernism offers a description of difference in which the notion of a stable set of "essential" differences between men and women, European- and African-American--or, indeed, between any two groups--disappears. (J. Williams, 1991: 299)

Williams rejects the divisiveness of loyalty to "one" static, guiding, and overwhelming identity. In doing so, she seeks the catalysts that move certain identities to the foreground. Her argument connects power and knowledge and illustrates the way characteristics have been manipulated into "merit" because of their possessors' relative power. The sameness/difference debate have festered in critical race and feminist legal theories with obvious repercussions. Even if one values the ability of identity-based theory to enlighten narrow, often segregated, images of law and lawyering, counter-stories are hardly limited to the perceptions of whites vs. those of people of color. Rather, counter-stories exist just as strongly within "identity" groups as the perceptions of Stephen Carter in *Reflections of an Affirmative Action Baby*(1991) confirm. The writings of Randall Kennedy, Clarence Thomas, and Suzanna Sherry suggest that even within academic and professional circles, the "call to stories" has been heard differently different even among people with a raced or gendered identity. The impossibility of personal narrative's insuring not only truthful and accurate accounts of experience, but a singular representativeness of all African-American's, lesbians, women's, etc., experience leads to another quandary within the legal

academy. Personal legal narratives have not only been criticized according to the weaknesses of identity politics, but according to the demands of a formalist and neutral jurisprudence. Critics have demanded a provable and simplistic brand of personal narratives if they are to be "taken seriously" by the legal community. Farber and Sherry (1993) argue, "[A] valid exercise in storytelling must involve efforts to assure truthfulness and typicality of the story. Because these attributes are not self-documenting, the author must present some analysis to show that the story is credible and representative" (Farber and Sherry, 1993: 853). Such criticisms engender another more legalistic reading of personal narratives in the law: the normative or 'how-the-law-should-*respond*-to-my-experience' reading.

The readings of personal legal narratives have followed, as this chapter might have suggested, two perceptible paths with, oddly enough, similar results. Leftist scholars--even when committed to the authors' goals--question the efficacy of a genre based upon identity politics. While traditional scholars search for the normative value of legal story-telling and, having found none, relegate personal narratives to an non-legal field. The next section will review the reviews of personal legal narratives within the legal academy. As this paper hopes to argue, both the acceptances and rejections of legal narratives *as* legal theory has a lot to do with the temptations of jurisprudence--that is, with the expectations of the legal academy about what legal theory is or should be.

D. Temptations in Reading: Interpreting Narrative

According to law professor Richard Matasar, "The very purpose of legal scholarship is to take a position--one shaped by unique, personal concerns--and vigorously argue its merits" (1992: 353). In supporting the role personal narratives have begun to play in legal scholarship, Matasar is, if not alone, definitely in the minority when he suggests that narratives make legal scholarship "more interesting, relevant, and valuable to students

of the law" (1992: 35). The legal academy has offered less glorifying descriptions of outsider and narrative scholarship. Judge Harry T. Edwards has accused anti-formalist scholars of "use[ing] the law school as a bully pulpit from which to pour scorn upon the legal profession" (1992: 34). Not willing to go as far as Judge Edwards, Richard Posner has nevertheless written articles about narrative scholarship with telling titles like: "The Decline of Law as an Autonomous Discipline: 1962-1987" (1987) and "The Deprofessionalization of Legal Teaching and Scholarship" (1993). In the latter, Posner offers the a self-evident aside concerning postmodern legal scholarship :

> Then there is a wild literature that I have avoided mentioning in which law professors in immensely long articles subject legal texts to the hermeneutic techniques of postmodernist literary theory. No judge could get *anything* out of that literature, and this unbridgeable gap is not merely a generational one. (1991: 1928)

Despite these authors disdain for the narrative and other anti-formalist theory, the real indication of narrative scholarship's impact upon the academy might be, as Stanley Fish argues about feminist jurisprudence, the fact that so much has been written *about* it--both positive and negative. As Fish writes,

> It is not the force of feminist theory or even of supposedly theoretical slogans. . .that has made such an impression on everyone, but the impossibility of avoiding feminist ways of thinking even when you reject them. Indeed, rejecting them is in some sense what one cannot do: the man who refuses to substitute "he or she" for "he" and believes that in doing so he is remaining true to his prefeminist self, is self-deluding; for the fact that he feels obliged to refuse marks his act as different from the one he used to perform when he wrote "he" without any awareness that it was a choice. Feminism "has" him. . . (1989: 24)

If Fish is to be believed, articles like Edwards' and Posner's and the dedication of several issues of prominent law journals[11] to either the problem or the panacea of legal storytelling should attest to a theoretical shift in the legal community. To locate just what this shift has meant for readings of legal narrative, this section reviews several of the more influential

---

[11]See especially, *Texas Law Review*, Vol. 60, 1982 and *Michigan Law Review*, Vol. 87, August 1989.

articles surrounding the uses of legal narrative. The temptation toward either identity politics or a scientific jurisprudence define the parameters of that criticism.

Law professor Kathryn Abrams has written extensively on the topic of legal narrative, particularly feminist narratives. In her earlier work, "Hearing the Call of Stories" (1991), Abrams articulates and affirms a need for narratives to contain normative claims. While her more recent writing retreats from this position, her argument as well as that of Farber and Sherry help to define the normative critique of narratives. Abrams suggests that Marie Ashe's narrative about childbirth avoids easy generalization and categorization by speaking to the different ways women deal with life and death. From this unfurling of different experiences, however, Abrams is not sure what to do next. Her criticism follows from a critique of identity politics asserted above. In retreating from identity politics, Abrams turns toward more traditional questions:

> I find myself wondering, somewhat uncharacteristically, about the "typicality" of the views Ashe expresses. Ashe's narratives. . .ask the reader to credit the narrator(s)' rendition of a particularized experience. . .While I believe Ashe's narrative genuinely reflect her own experience of birth, I wonder whether she speaks for all women. I particularly doubt that she speaks for me. . .This concern, not atypically I suspect, crystallizes as a questions about "normative legal content." . . .How, for Ashe, do these physical narratives about birth and death translate into ideas for legal change? (1991: 1009)

Abrams is quick to clarify her critique of Ashe and other narratives by realizing that narratives emerge from a context of legal skepticism which attempts to invigorate the law with outsider's voices. She wants to avoid characterizing the experiences described in personal narratives as "unitary or uncontested" or as so specialized that "they can not be made intelligible to members of other groups" (1991: 1018). This said, Abrams argues that for narratives to be useful to the broader world of legal scholarship, a normative and explanatory level must be included in them:

> Drawing out of a story elements that are shared, general, or capable of repetition is a crucial part of relating, or understanding that story: it sketches the network of connections, obligations, and relationships from which the particular features of the story take their meaning. . .Normative elaboration not only facilitates connection of

> a narrative with an author's substantive legal arguments (a move that may make the narrative accessible to a wider variety of readers), it facilitates conversation with scholars from diverse methodological background. (1991: 1047)

Abrams argues that a normative component to narrative might strengthen its position within the legal community, but does not argue that this normative component is the *only* way in which narratives might be effective. More critical of the genre and more supportive of the normative role legal scholarship plays in the law, Daniel Farber and Suzanna Sherry use aspects of Abrams argument to assert the role narratives should play in legal theory.

Farber and Sherry attempt "to take legal storytelling seriously" (1993: 854). The authors find that narratives have an important role to play in the legal academy, but question the *legal* value of personal narratives that do not commit to an analysis and normative conclusion about their experiences. While Farber and Sherry repeat Abrams' concerns with narrative's ability to represent group experience, they are more concerned with verifying and making accountable the story-tellers. Farber and Sherry argue that narratives, like any other form of scholarship, must be subject to rigorous tests of objectivity, typicality, and *quality*:

> Although most of this debate concerns the distinctive nature and purposes of legal scholarship, our concern here is with the more basic question of what qualifies as good scholarship in general, in any academic discipline. Most academics would agree that traditional standards of merit do exist. And most would concede that the standards can often be applied unevenly or too leniently. We are not suggesting that all extant scholarship *does* meet the standards we propose, only that it aspires to. Different voice theorists argue, however, that those traditional standards operate unfairly. . .against storytelling. . . (1993: 840)

The authors suggest that an analytical component is and should be required by the standards of "good scholarship"--traditional or otherwise. By defining the terms of their "test for good scholarship," the authors make the point that such analytical work is not inherently white or male or anti-storytelling. Without equating their "identities" with the inability to do analytical work, the claims--according to Farber and Sherry--that traditional legal scholarship marginalizes the scholarship of women, minorities, and those who

attempt to alter traditional forms of legal theory are not valid. That done, Farber and Sherry argue for more responsible and more discipline-specific narratives: "Just because something is worthwhile does not mean that it should take place under a law school umbrella. Indeed, to the extent that fictional or fictionalized accounts purport to be scholarship, they jeopardize the credibility of legal scholarship" (1993: 845).

Legal scholarship, then, is a distinct and somewhat static vocation with several hard and fast rules. Farber and Sherry propose the following characteristics of legal scholarship:

> [O]ur aim is to identify the core goals of legal scholarship. Toward that end, we propose to divide the traditional standards of scholarship into three categories: (1) consensus standards. . .(2)reason and analysis. . .(3)methods of evaluating the importance of a work. . .Almost everyone would agree that a work of scholarship should be comprehensible to its audience, say something new, and demonstrate familiarity with the relevant literature. Despite their vagueness, these standards can still help expose some stories as not very good scholarship. (1993: 847)

Under these qualifications, Farber and Sherry deny Ashe's "Zig-Zag Stitching" the label of good scholarship. They argue that scholarship should be an "interactive" experience and should allow the reader "to enter the dialogue" (1993: 851). Anecdotal evidence and fictional hypothesizing may have a place in literature, but the rigors of academic scholarship demand that facts be open to verification and ideas be positioned to affect and even alter the landscape of the discipline. The "importance" of scholarship is measured by its ability to change that landscape (and, one imagines, change it for the better). Farber and Sherry celebrate the *analytical* component of quality scholarship. Scholarship without this requisite normative goal, the authors argue, "is much like a judicial opinion with 'Findings of Fact' but no 'Conclusions of Law'" (1993: 854). Law professor Toni Massaro repeats a similar criticism of narrative scholarship, or what she calls empathy literature. She argues that the law itself can not be inherently labelled un-empathetic, but that the law--by virtue of the breakdown in human communication that brings the law into our lives in the first place--has to choose one picture of reality over another: "Where consensus ends, lines are

drawn; and those outside the line--legal losers--always will feel unheard and wounded" (1989: 2122). Massaro, like Farber and Sherry, argues that legal narratives lack the normative quality that would make them useful to legal theory. She writes:

> The guideposts for assigning our priorities are missing in the empathy literature. Indeed, they are missing from much contemporary American legal scholarship, perhaps because of the influence of the deconstruction school of literary criticism or perhaps because guideposts of this sort are too difficult to establish or defend. The problem of priorities, however, has not disappeared. On the contrary, in our complex world of shrinking resources the problem of priorities will only grow more fierce. We therefore can not outrun the practical-moral task of distinguishing the possibilities of good from the possibilities of evil. (1989: 2126)

Massaro's desire for uncomplicated guideposts and priorities does not attend to the possibility that those guideposts and priorities may have also become complicated "in our complex world." The normative critique of narrative scholarship is itself criticized in a later article by Kathryn Abrams.

In "Unity, Narrative, and the Law" (1993), Abrams can be read to reject Massaro's and Farber and Sherry's appeals for a normative jurisprudence. Instead, Abrams argues that it is the unified, normative narratives that are the least effective and the least politically viable. Unified narratives, according to Abrams' definition, are an unambiguous attempt to "mak[e] women primary in accounts of social experience; at granting them the status of subject that they have so often been denied in more traditional historical accounts or social descriptions. . .[and] to reveal oppressive aspects of women's experience" (1993: 17). The key word in this description and in Abrams' argument is *unambiguous*. She argues that these unambiguous narratives--like the ones called for by Massaro and Farber and Sherry--lead to the question of representativeness. That is, they walk head first into the theoretical and practical issues surrounding identity politics, some of which were mentioned above. Abrams, again unlike Massaro and Farber and Sherry, is not willing to reject what she calls "experiential" narratives. Instead, she calls into question the possibility of objectivity and the insistence upon normative claims following from

representative, provable, and objective experience. Unitary narratives do not challenge these "standards" in legal theory as they claim to, but rather, "replace it with a form that is differently derived" (1993: 22). According to Abrams, "complex narratives" are more successful at disrupting and challenging the subtle presuppositions of legal theory. Complex narratives,

> contest the notion of a reality as an external, measurable state of affairs: what is "out there"--be it a group of people, a type of experience or a discriminatory attitude--is not seen as consistent or constant even by a single narrator. Moreover, the narrator's role in constructing the "reality" presented is made visible in many instances; the complications and choices implicit in this role are palpable and often central to the telling. . .complex narratives. . .necessarily challenge the notion of "truth" as correspondence to this state of affairs. . . (1993: 23)

Unlike narratives appealing to an identity politics, Abrams suggests that narrative theorists like Patricia Williams who expose themselves to multiple interpretations and think of themselves and their stories on multiple levels are examples of complex and more politically useful narratives. As for the suggestion that such complicated narratives can not contain normative value, Abrams argues that scholars looking for quick and wholly legal solutions to social problems like those contained in anti-discrimination law are often failing to solve the problem. That is, to date, legal doctrine has not ended race and gender discrimination. Possibly a different approach to the problem would allow law to deal more effectively with this complex social issue. Abrams writes:

> When scholars believe that the initiation of these more difficult inquiries will take them outside their accepted domains, and interfere with their ability to generate readily usable solutions, they may not take seriously the multifaceted explorations necessary to addressing gender discrimination. (1993: 25)

Abrams divides narratives into politically effective and ineffective categories according to their ability to accept a multiple and ambiguous world view. The texts then gain political and legal value according to their author's explicit (or perhaps implicit) admission that their's is not *the* woman's (or African American's, or Asian American's, etc.) perspective.

This approach reverses the useful/wasteful dichotomy established by legal scholars concerned with normative or "Conclusions of Law" value. The reversal makes the claim that a set of narratives is still legally (and politically) un-useful, but it is a different set of narratives for a different set of reasons. Abrams' argument centers upon a similar value distinction between politically useful and politically useless or potentially dangerous narratives. The ability to *divide* narratives into these two groups, however, as well as the ability to see an ambiguous and complex world view as something other than a chaotic pouring of scorn upon the legal profession suggests a shift in the reader as much as the text. Nevertheless, Abrams' *reading* of narratives results from a particular set of theoretical (and potentially political) practices not unlike in character (though opposite in form) those of Farber and Sherry. That is, Abrams' reading of personal narratives as political relies upon the same identity vs. difference and law as political vs. law temptations articulated throughout this chapter. In other words, Abrams reads personal narratives according to the constraints of jurisprudence--constraints which demand that legal writing replace one mythical or universal claim over another. In the next chapter, I attempt to read Williams' personal narratives as a genre of legal writing in which mythical temptations do not only go unheeded, they are deconstructed. In this theoretical space, a textual politics rather than a universal claim to truth is produced.

CHAPTER IV

PERSONAL NARRATIVES AS TEXTUAL POLITICS

The fact that law is deconstructible is not bad news.
Jacques Derrida[12]

A. Introduction

Whether centered upon legal distinctness, legal indifference, or the identity of legal actors, myths invite an air of skepticism and attempts to replace that skepticism with a truer, more powerful version of myth. The criticisms of personal legal narratives have emerged from and have reified the mythical standards upon which jurisprudence has stood. It is my argument that personal legal narratives can be read and written in a different way. The personal legal narratives of this chapter are not free from the temptations of legal myth-making. The context of justifying, critical, and identity-based jurisprudence is ever- present in the personal narratives of Patricia Williams. Nevertheless, Williams' choice of genre effects a struggle to avoid making mythic claims about the origins of law or the right way to change law. The irony of these narratives lies in the authors' use of mythic language and figures even as she confronts and ultimately deconstructs the mythology of law. This chapter connects deconstruction to the law and literature movement's emphasis on reading and the deconstructive writing in personal legal narratives, represented by Patricia Williams, in the hopes of articulating the textual and political space such writing fills.

---

[12]Derrida, 1992: 14.

B. Reading Politics

> For all their compelling brilliance, their deep affinity for the local and civil plight of queers, deconstructive and psychoanalytic approaches seem unsuccessful at connecting their crucial "reading" technique with the modes of constitution of, especially, civil-rights linked identity.
>
> Cindy Patton[13]

Discourses negotiate inclusion and exclusion by operating as what Donna Haraway calls "modes of power" (1989: 289). This paper argues that deconstruction has allowed modes of power, as they operate in texts, to be articulated. Unlike Fraser and Cornell's rejection or defense of deconstruction as a method for understanding women's subordination, the passage above questions the ability of deconstruction to explode that subordination and open a space for different cultural narratives. The shift is one in effect--from description to production, from an emphasis on why to an emphasis on *how*. With this shift, texts become locations of politics which create a different space for deconstructing identity/difference, law/politics. Cornell suggested that deconstruction contains an ethical prerogative--a double interest in knowing and being known by the Other. As such, deconstruction has, by definition, a methodological role in the discursive practices of marginalized groups. Nevertheless, the concept of identity is conspicuously absent from Cornell's discursive play of allegory and metaphor. This is perhaps to avoid a misreading of deconstructive politics as essentialist. Cindy Patton's criticism of deconstructive and psychoanalytic practices offers a more thoughtful and less polemic path toward an intersection between deconstructive method and identity (factional) politics. She suggests, "[D]econstructionists may believe in the imputed essentialist identities much more than those in the political sphere who are purported to have them" (1993: 166). That is, the deconstruction of identities (the release of identity from ontology) may have already

---

[13]1993: 166.

occurred in the movement politics of a postmodern world. That identities rely upon discursive practices and duties rather than some essentialist "being" underneath state-imposed categories is an effect of what Patton calls "postmodern governmentality." This lengthy but important passage compares the tasks and legitimacy of modern with that of postmodern governmentality:

> If the modern state's business was to legitimate its existence in the absence of theological justification, . . .then the postmodern state seems concerned to recede from visibility, to operate blindly as a purely administrative apparatus to an apparent market democracy. If the modern state had to describe its existence with reason, . . .the postmodern state has to pose itself as capable of administering an incoherent, incommensurable plurality of interests. The modern state integrates social factions to resolve conflict; the postmodern state holds pluralities apart. Instead of invoking organicist logic that links the nation to the individual. . .the postmodern state proposes lateral linkages, . . .If modernity conceived power in blocks that operate entropically, postmodern power circulates, disperses, intensifies. . . (1993: 172)

For deconstructive methods to be in line with the practices of resistance (textual and otherwise), this conception of postmodern governmentality is crucial. The state has changed, Patton seems to be arguing. Consequently, the way we read and write must change. Identity claims no longer connote a moral appeal to the state. Patton suggests that by claiming an identity, one is engaging in a performance--not choosing a costume, but *performing* the duties and desires that will discursively control that identity:

> The crucial battle now for "minorities" and resistant subalterns is not achieving democratic representation but wresting control over the discourses concerning identity construction. The opponent is not the state as much as it is the other collectivities attempting to set the rules for identity construction in something like a "civil society." . . .The discursive practices of identity and the actors who activate them produce the categories of governmentality that engender the administrative state apparatus, not vice versa. (1993: 173)

Politics, then, is taking place in the "readings" and "misreadings" of identity as it takes place in New Right pamphlets, in the writing of laws by legislative aids, in the "threshold" between "social and political institutions." Cornell's ethical deconstruction under-identifies (rather than over-identifies, as Fraser argued) the collectivities at struggle within discourses. Such abstractness errs in the "right" direction, but errs nonetheless. Cornell is

so concerned with correcting the misunderstandings of deconstruction, she tends to valorize the "otherness" inherent in a deconstructive reading while offering no method for combatting the ways marginalized groups, as Patton suggests, are "*being read off* in larger fields of power" (1993: 174). That is, deconstruction offers a method for reading the discursive field, a field through which power (and politics) operates, but Cornell's ethical deconstruction does not address the ways in which postmodern identities (at work in a discursive field) might *engage* in reading/writing/power struggles. This is not a simple "too much theory/not enough politics" criticism of deconstruction. Rather, I am suggesting, with, I think, Patton, that deconstruction has *already* re-defined political practices and presuppositions to the extent that politics can occur in different, sometimes discursive, locations. In a deconstructive discourse, both identity and the other mean something "new."

Chapter three detailed the temptations of jurisprudence in order to show the closed shop in which legal theorizing has occurred. Legal theory has toiled under disciplinary constraints that has led even anti-formalist jurisprudence to create a mythical center or claim to truth. In staging critical theory with these conventions of legal discourse, criticisms remained vulnerable to the interpretive conventions of the legal community. This is not to argue that critical theory in legal discourse has not altered the way law works and the ways law represents women and minorities. This is to say, only, that the modes of power at work within even the most critical or nihilistic legal theory has not challenged the "style" of jurisprudence. Jurisprudence has not heeded the call for, to paraphrase Derrida, a style of writing that can be many things at once, that uses the discourses available and attempts to step temporarily outside each of them at different times. This "monster theory" is the change in style that Derrida believes will create new interpretive communities--that is, will create new legal readers. And, new legal readers are both constituted by and constitutive of a different jurisprudence and a different conception of and contests over power. As Patton

suggests, postmodern governmentality places political importance in the discursive strategies chosen (or created as choices) by writers, speakers, actors. Identities are written or activated by words and genres. While arguing that texts activate identities may not be an especially cogent point, when deconstruction becomes a way of reading and writing these textualized identities, one is able to move away from the unsatisfying choices of either essentialist group politics or stark individualism. Deconstruction allows for a more interesting method of treating those identities. By placing the center in question, deconstruction allows these textualized identities to mean more than one thing, to alter over time, to perform momentarily as a politically useful idea without buying into staid and overly determined political identity. The politics of identity may be re-read (again and again).

How, then, do we *read* a genre of "monster theory" that combines auto-biography and fiction, dominant discourses and subaltern discourses, the master's tools with the de(con)struction of the master's house? --for instance, Patricia Williams' personal narratives.[14] An examination of the "house" from which personal legal narratives emerge and disrupt was the purpose of chapter three. Again, my focus on legal texts and legal theory as one context does not preclude other contexts, readings, or approaches. Further, every reading signifies a system of interpretation for which the reader must be responsible. Obviously, my reading of deconstruction as political engagement opposes Fraser's reading of deconstruction. However, my understanding of deconstruction carries a political mandate Fraser disregards and Cornell celebrates. Deconstruction as an ethical pursuit demands that I have more invested in my reading of Williams (or any text) than my position in what Fraser calls, a "transcendental safe house" (1989: 91). As Cornell rightly suggests: "Interpretation is not simply the individual or for that matter the community,

---

[14]Other texts in this "genre" might include Henry Louis Gates' *Colored People* (1994) and Dorothy Allison's *Skin* (1994).

playing with itself" (1992b: 81). The law and literature movement places these questions of reading and interpretation in fore.

C. Different Readings

> But the law can more properly be seen not as a set of rules or commands, even with a set of restatable principles or values behind them, but as the culture of argument and interpretation through the operations of which the rules acquire their life and ultimate meaning. James Boyd White[15]

The law and literature movement has importance for the reading of personal narratives, in part because of the involvement of narrative scholars like Patricia Williams and in part because of its focus upon reading and interpretation as contestable and constrained practices. Law has always relied upon narrative devices whether in its more pragmatic sense (the facts of the case tell a story about (il)legal activity) or in its more theoretical sense (the law tells a story that helps to narrate our society's vision of right and wrong). Law and literature scholars argue that legal documents and doctrine is never only about statutes and parties. The "law" always envelops and sits atop social values and historically contextualized "truths." *Brown v. Board of Education* is, of course, a narrative about slowly changing racial prejudice and the evolving role of federal government in the "local" realm of racist school systems and segregation. Nevertheless, law is not a closed narrative with one accepted interpretation and one ultimate "truth." In this sense, legal narratives function much like literary narratives--the interpretation of both types of texts are contested and altered by time, politics, and intellectual movement. The movement can be divided into two branches. The law-*in*-literature branch, might explore the law used as a

[15]White, 1983: 436.

plot device in classics such as Franz Kafka's *The Trial* or Harper Lee's *To Kill A Mockingbird.* The second, law-*as*-literature branch:

> uses a broader range of methods and theoretical practices of literary criticism as a medium for analyzing legal texts and exploring the nature of legal style and rhetoric. This strand of the movement developed from the idea that storytelling is relevant for legal studies because, . . .law is but another story to be interpreted. (Minda, 1993: 150)

The law as literature movement, represented best by scholars James Boyd White and Stanley Fish, explore the intersections between these two text-centered vocations. It is the law-as-literature work that this chapter will incorporate into the legal academy's more specific treatment of personal legal narrative. It is within the context of the law-as-literature movement and its impact upon traditional legal theory that personal legal narratives emerge and are both influential and controversial.

The interpretation of law *as* literature has been particularly important to constitutional scholars. *Criticism* as it is performed by literary critics and readers of literature more broadly has been adopted as a method of legal analysis. The focus is shifted from the crafter of legal doctrine (the judge or *author)* to the audience of that doctrine. The readers and *their* response and interpretation of a text becomes as (and sometimes, more) important than the "objective" words on the page or the author's intentions. Stanley Fish (1982) has argued that the interpretive community which surrounds a text actually and continually "makes" a text's meaning and text's "place" within a broader canon. This is not to say (as Fish has been accused of suggesting) that with every new reader, an entirely new text may be created. Fish writes:

> Interpreters are constrained by their tacit awareness of what is possible and not possible to do, what is and what is not a reasonable thing to say, what will and will not be shared as evidence, in a given enterprise; and it is within those same constraints that they see and bring others to see the shape of the documents to whose interpretation they are committed. (1982: 562)

Legal interpreters, like the interpreters of literary texts, are bound by the constraints of their "enterprise." This enterprise takes place within a context of history and personal and

political conflicts which influence the interpreter's very understanding of what it is he or she is doing. How is this different from Dworkin's use of literary criticism to describe judicial behavior? Dworkin suggests that judges are constrained by "the proposition of law" and must draw their interpretations from a body of knowledge. Fish argues that Dworkin's use of the "many authors/one text" metaphor to describe legal interpretation fails to comprehend the constraints met and mediated by the "original" author. That is, Dworkin argued that "every novelist but the first has the dual responsibilities of interpreting and creating, because each must read all that has gone before in order to establish, in the interpretivist sense, what the novel so far created is" (Dworkin, 1982: 541). On the contrary, Fish responds,

> . . .the first author has surrendered his freedom as soon as he commits himself to writing a novel, for he makes his decision under the same constraints that rule the decisions of his collaborators, He must decide, for example, how to begin the novel, but the decision is not "free" because the very notion of "beginning a novel" exists only in the context of a set of practices that at once enable and limit the act of beginning. (1982: 553)

Fish asserts that Dworkin's method relies upon a tension between the freedom of the interpreter and the restrictiveness of the text. This tension leaves Dworkin with the same theoretical problems he seeks to overcome--those of the legal realist vs. the legal positivist. Fish writes:

> [Dworkin] assumes that history in the form of a chain of decisions has, at some level, the status of a brute fact; and he assumes that wayward or arbitrary behavior in relation to that fact is an institutional possibility. Together these two assumptions give him his project, . . .As a result, these alternatives rule his argument, at once determining its form and emerging, again and again, as its content. (1982, 559)

Fish's critique of Dworkin's attempts at "literary/legal criticism" exposes the innovative character of the law as literature movement. Applying literary criticism's techniques are not as theoretically simple as "reading" law as a novel or applying a literary sensibility to the "scientific" practice of reading legal behavior. By taking Dworkin to task on his attempt to draw the literary into law, Fish implicitly characterizes his own method of analysis as

different from a positivist, realist, or--to be sure--any *purely* legal approach to the intersections between law and literature. I will return to Fish as an outspoken critic of transcendent or formal textual meaning later in this section. His approach to law and literature offers a method of reading and interpreting radically opposed to the predominant vision of the relationship between law and literature espoused by scholars such as Dworkin, Richard Posner (1988, 1993), or even James Boyd White (1982).

James Boyd White has, in fact, characterized law and literature as "an art form" (Minda, 1993: 164). A law professor and prolific contributor to law and literature scholarship, White argues that neither literary nor legal texts (and the narratives they contain) can be definitively "restated" or mined for ultimate meaning. This is not a simple claim of artistic beauty or a sentimental claim about the inability of criticism to "capture" the essence of a text. Rather, White argues that once something that is written is read, a structural transformation in language occurs. Language itself becomes something different, altered by the injection of this new form into a context that itself is constantly altered and transformed:

> This is what it means to hope that one's text will have a life of its own. As for the reader, he or she knows that over time words change their meaning and values shift; that expectations as to form evolve. All of this is bound to have an effect on the reading of the text. For example, in an age so atheistic, or at least so determinedly pluralistic as today's. . .we may have difficulty in responding to Burke's talk about religious toleration. . .As our language changes, we acquire the material for asking new kinds of questions. To these new questions, the text will yield new answers. . . (White, 1982: 427)

Whites's observations about the shifting of values and language are easily seen in the realm of literary criticism. Without these shifts, a feminist analysis of Chaucer's fourteenth-century work *The Canterbury Tales* would be impossible--not just theoretically or politically controversial, but absolutely impossible. The application of such analysis to law and literature, though plausible because both practices are *so* text-driven, is less obvious in readings of the law. How do the reader's cultural and linguistic settings alter and expose

texts to new readings? Is this argument akin to Fish's which suggested that interpretive communities determine texts' meanings?

White argues, no. Texts can no more be proven to hold *no* inherent meaning (or, to put it another way, just what a group of readers perceive its meaning to be) than they can be proven to hold one objective meaning.[16] White argues that the question inherent in this dichotomy (no meaning vs. one meaning) is a "false one":

> . . .the meaning of a text is not to be found in it like a stone and held up for display; nor do I think that texts as such are inherently unintelligible. One can neither disregard the independent force of the text, nor assume that all one's questions are unambiguously answered within it. . . .Despite their form, such questions do not really state a choice, for neither alternative is possible to the exclusion of the other. At best, they define a topic of inquiry and argument, a field of concern marked by a tension between extremes. (1982: 418)

White suggests that the reading of literary texts can parallel the reading of legal texts in the "experience it offers its reader" (1982: 420). The idealization of the reading experience suggests certain implications for White's reading of law as literature.

For White, readings by different readers can never achieve identity with one another--nor can they arrive at one unanimous, objective interpretation. This said, White furthers the point by arguing that the reader is changed by every reading of a text. In other words, the reader *and* the text emerge as something new with every reading experience:

> one is always learning to see more clearly what is there and to respond more fully--or at least differently--and in the process one is always changing in relation to text or to friend. It is in this process of learning and changing that much of the meaning of the text or of a friendship resides; the text is in fact partly about the ways in which its reader will change in reading it. (1982: 429)

White centers this reader/text relationship around the concept of an "ideal reader." The ideal reader is both the expectation of the author and the aspiration of the reader. White is literal about this aspiration. He argues that a text can impose itself upon the reader in both

---

[16]This is meant to contrast Fish's concept of interpretive communities and their control over texts' meaning and value to a positivist vision of objective meaning or Dworkin's implicit claim of an original (but interpretable) truth.

constructive and destructive ways. Some texts act in an "unfriendly" manner and allow the reader a "free reign" on his or her own "destructive impulses." Other texts, those that White would call "great," allow the ideal reader to reach his or her highest potential:

> This reading produces a sense of the text working on its reader, on oneself, that is different from any way it could actually work in the real world on any person. . .[Burke's] ideal reader is. . .one who recognizes the claims of others, in qualification of those very preferences, and can thus make a real claim to the virtues of toleration and justice. And the ideal reader of this passage will not only acquire this character in his reading of it, but will carry it into the rest of his life, as he speaks the language he has learned here. (1982: 432)

The experience of reading--in White's ideal lexicon--is an exceptional, extra-ordinary one and one which can not necessarily occur during one's first encounter with a text. There is a temporal and incremental dimension to White's idealism. It is from these dimensions that the enlightenment influence becomes clear in White's reader/text relationship. Texts teach their readers not only to be better readers, not only to incur a new relationship with language, but (in some cases) to become batter human beings. From Burke, readers learn toleration and justice--not simply Burke's treatment of the terms, but on an ontological level, readers become more tolerant and just:

> The reader's engagement with such a text is always tentative. While responding to the text he is always asking how he responds, who he is becoming, and checking that against his other wishes and aspects. Sometimes he is fooled: the racist joke may make him a momentary and chagrined racist. . . .Sometimes--and this is the central point--he is educated. (1982: 432)

Both White and his "ideal reader" are obviously reading (and writing) within a humanist framework. For White, the ideal reader is neither a passive receptor nor a neutral field upon which the text acts. White acknowledges and appears to celebrate the reader's debate between the text and the "different cultural contexts"(1982: 433) in which the reader sits. White is less clear on exactly what these contexts are and how they actually work on the reading of a text. Exactly how does the reader's cultural location in and of the antebellum American South for instance affect the ideal reading of a "racist" text. The "fooled/educated" dichotomy relies upon a vision of human enlightenment in which the

chagrined racist is fooled and has only to read the right texts to *learn* to be anti-racist. Moreover, White's dichotomy is predicated upon the text rather than reader because, for White, all readers are the same and have the same potential for edification. Even as he rejects the "Great Books" approach as superficial, White maintains the theoretical imperatives of that approach in his conception of an "ideal reader" and (the next logical assumption) the existence of an "ideal text."

The employment of the ideal reading, because of its ability to "defin[e] the possibilities. . .of our lives," is espoused by White. Because law is applied to and constitutive of its own political and cultural contexts, the "ideal [legal] reader" must not only immerse him or herself in the text of law, but must be immersed in a reading of culture and politics as well. This is not identical to, say, a realist claim that judges and other legal interpreters are subject to their social position, what they ate for breakfast, their own unique political goals and aspirations. White's claim is staked in the relationship between text and interpreter (and then culture), rather than culture and interpreter (and then text). That is, White argues, "the lawyer is engaged in a continuous argument the terms of which are always changing, in an interaction between the particular document and its larger world." Notice White's antecedent to the pronoun "its": The document and *its* larger world--the world of language. It is both language and legal texts that are irrevocably altered by each reading. They become the location of "a conversational process" that eventually creates the accepted interpretations of legal texts. White suggests: "The lawyer's work is thus analogous to that experienced by the single reader of the literary text" (1982: 435). Still, and always for White, the text is a separate and unified object--unified if not in meaning, at least in external existence, as an *object.* It is this external existence which allows White to make a claim, again as opposed to Fish, for textual meaning outside communities of readers. White writes: "Of course, our readings are in some sense communally

determined; but they are readings of texts that are themselves external to the community, not mere wish fulfillments" (1982: 438).

James Boyd White's reading, while critical of "found law," creates an interesting blend of identity/formalist practices. White argues that if the reader is ideal, his or her identity will be transformed by the (one) meaning of the text. White has opened the door to the possibility that social and political values are constructed and help to construct readings of a text. He has, unfortunately, only offered a vague notion of how these constructions work. The meaning of a text and the reasons for reading a legal text are placed within a "rhetorical community" that through a "culture of argument" create and perpetuate our understanding(s) of law. These arguments construct "a world and make it real" because these conversations function not in the abstract worlds of "social policy and political philosophy" but "from a defined position, to a defined audience, in a defined language" (1982, 441). According to White, what makes these conversations "real" and "defined" is their implicit mandate to the reader to answer the question: "who are you?" That is, law demands of its reader a conscious humanity, a unified subjectivity through which the text may act.

If White's literary theory relied upon the text to humanize its reader, White's legal-literary theory offers the text a perfect (*the* ideal) subject upon which to work its magic. Of course, the more each individual reader consciously begins to answer the question of who he or she is, the more likely a "we" will emerge and with it will develop "a sharpened sense of respect for the cultural inheritance which constitutes 'us,' and from which we learn" (1982: 443). While White's literary criticism offered the theory for an evolving human race, law appears to be the practice through which this evolved human race accepts its appropriate cultural inheritance. Though couched in the terms of a readerly (and contestable?) relationship with texts, White's "ideal reader" is, nevertheless, an overly

determined, unified subject whose convergence with others as a "community of readers" is more ephemeral and abstract than any literary creation.

Still, White's demonstration of a literary sensibility in determining the role of political and cultural values in legal interpretation opens the door for different kinds of literary readings. Stanley Fish offers a theory of text and meaning that recognizes deconstruction as a productive interpretive practice. Fish, like White, focuses upon a community of readers, but Fish argues that it is *readers* who determine textual meaning not the other way around. Fish draws upon the linguistic theory of Derrida to argue that readings are always contextualized:

> The issue here is between two notions of context: traditionally a context has been defined as a collection of features and therefore something that can be identified by any clear-eyed observer; but Derrida thinks of a context as a structure of assumptions, and it is only by those who hold those assumptions or are held by them that the features in question can first be picked out and then identified as belonging to context. . .contexts, while they are productive of interpretation, are also the products of interpretation. . .(1989: 53)

For Fish (and Derrida), there is no clear-eyed observer--no philosopher king--who stands free from context or interpretation. Therefore, no text can be written, read, understood, or analyzed outside of the constraints and assumptions of a context. This is just as true of the interpretation of a "baseball game, of a classroom situation, of a family reunion, of a trip to the grocery store, of a philosophical colloquium" (1989: 53), as it is of a text. These events are "the same" on the level of convention--each occurs according to the conventions of the system to which each activity belongs. This is not to say that these systems and their conventions are static and unchallenged. On the contrary, each is at constant battle with its own presence; its procedures and rules constantly affirm the present facts of its existence as family reunion, classroom, etc. In fact, discourses or textual practices contribute to the production of *and* the challenges to conventions. Fish offers this reading as an alternative to Derrida's image as a de-centered master of "free play." Fish argues instead that,

> [w]hile he is certainly not a believer in the determinate meaning in a way that would give comfort to, say, M.H. Abrams or Frederick Crews, he does believe that communications between two or more persons regularly occur and occur with a "relative" certainty that ensures the continuity of everyday life. Rather than a subvertor of common sense, this Derrida is very much a philosopher of common sense, that is, of the underlying assumptions and conventions within which the shape of common sense is specified and acquires powerful force. (1989: 57)

The powerful force with which common sense is taken for granted is what a deconstructive method attempts to locate. Fish later writes that force rests within the *interpretation* of law because it is the interpretation that is rendered external to human experience.

The interpretation of law has traditionally relied upon a singular meaning emerging from a common sensical reading--that is, legal interpretation comes "from an impersonal source that resists the encroaching desire of particular (interpretive) wills" (Fish, 1989: 505). Fish argues that Hart's distinction between penumbra and core cases relies upon a contextualized interpretive community that has constructed certain cases as penumbra and others as core. Core cases, of course, do exist--Fish writes--but their core-ness is a function of the interpretive community in which they exist. To put it more simply, what makes some cases "core" is not a transcendent or empirical truth of legal simplicity, but rather is the result of an interpretive community steeped in doctrine, common law, history, and precedent. Lawyers and judges did not discover that "A valid will must be signed by two persons" when they ventured outside the cave. The rule that makes some cases simple or core does not refer to the "form" of the simple case. Rather, in Derridean terms, the simple case refers back only to itself and to the interpretive community that renders it. Even (maybe especially) these simple cases risk the possibility of being mis-read or un-read. Every case, interpretation, reading, speech act must be "'read' into being" (Fish, 1989: 47) and because language carries with it "the quality of risk," the interpretation can never be absolutely justified. The reader never receives exactly the message "intended" by the writer. The speaker never conveys exactly the message he wants his listener to receive. Every time a simple case is named as such, it has survived "a 'mere temporary ascendancy'

of one vision or agenda over its rivals" (Fish, 1989: 523). But, as the epigraph to this chapter suggests, neither Derrida not Fish see this indeterminability as a slide into brutish or paralyzing state of nature. Fish writes,

> it appears to be disabling only if the alternative to neutrality is unprincipled force; but if the alternative to neutrality is principled force--and it is my argument that there is no other kind--then the unavailability of neutrality simply does not have and *could not have* the consequences Hart fears. The absence of external and independent constraints only means that the constraints inherent in the condition of belief--the condition of having been persuaded to some vision--are always and inescapably in *force*. (1989: 522)

Rather than a sphere of open and free play, Fish, I think rightly, uses Derrida's theory about language to suggest that while we must constantly live with and rely upon our beliefs with no hope for transcendental or objective truth, we must also just as constantly persuade and be persuaded to alter or maintain the systems which guide our beliefs. These acts of persuasion are politically--but not truth-fully--invested. Our inability to locate the origins of our knowledge, rather than a signal for unmitigated play (which would, if you follow Fish, be impossible anyway), is instead an argument about the force of persuasion and the persuasive force of reading. That there is no textual center could be read as a fervent appeal for contests over knowledge, theory, and common sense. Could this not also be a call to politics?

Personal narratives have challenged jurisprudence to a kind of reading contest. Personal narratives enter the context of jurisprudence--the interpretative terrain detailed in the last chapter--and disrupt law's discursive expectations. Further, personal narratives represent a discursive choice (in genre, diction, tone, narrative reliability) that unites a textual expression with a political mission. Personal legal narratives self-consciously attempt to undermine what can be considered politically invested interpretive choices inherent in legal discourse. Despite authors like Patricia Williams and Marie Ashe's attempts to thwart interpretations that place their work in either of the two critique-centered camp (one based on identity, the other on legal reform), some in the legal academy

continue to read personal narratives into the constraints of the two frameworks. If texts are identity-based, their value is represented as their difference from traditional, dominant voices. As such, they expose the politics of race and law, gender and law, etc. They are political or critical texts which interrogate the meanings of legal doctrine and of legal practices for raced and gendered people. If, on the other hand, these texts *do* call for a change in the law, their writings are expected to be representative, typical, neutral, to work inside the system. But, Williams' texts propose neither a structural or scientized argument for why the law has failed women and minorities, nor a universal solution to these problems. Her personal narratives read both the interpretative constraints and her own identity as un-centered--full of readers and texts producing meaning. Williams, therefore, moves jurisprudence to a plain unconcerned with mythologizing law and equally unconcerned with choosing between identity politics and legal neutrality.

D. Different Writing

> . . .I suppose I will never know my true fate. In the meantime, I read what text there is of me.
>
> Patricia Williams[17]

Patricia Williams incorporates a reading of herself into a legal theory, into alchemical notes, and into an exploration of prejudice. Morphing her middle class upbringing and her "identities" as affirmative action baby, law professor, literary scholar, African American woman, and single mother, Williams writes a disjointed and cacophonous experience. In a 1987 law review article, Williams takes on the themes of the Critical Legal Studies movement because of her "discomfort with that part of CLS which rejects rights-based theory, particularly that part of the debate. . .which applies to the black struggle for civil rights" (P. Williams, 1987: 404). It is within these criticisms of

[17]Williams, 1991: 233.

leftist politics that Williams began to negotiate the genre that has come to be associated with her. Through the writing of personal narrative, Williams explores and criticizes leftist politics, but does not opt for what has been constructed as its only alternative--the liberal legal model. Williams criticizes critical legal studies' suggestion that rights discourse be abandoned since it exemplifies the liberal model and the insidiousness of domination and hierarchy in law and society. While Williams understands rights to play a role in maintaining the terms of power, she continues to respect law's ability to produce grassroots politics:

> I by no means want to idealize the importance of rights in a legal system in which rights are so often selectively invoked to draw boundaries, to isolate, and to limit. At the same time, it is very hard to watch the idealistic or symbolic importance of rights being diminished with reference to the disenfranchised, who experience and express their disempowerment as nothing more or less than the denial of rights. (P. Williams, 1987: 405)

Williams rejects the "either/or" mandate of CLS and traditional legal scholarship by placing her own scholarship in a space where "either/or" distinctions simply cease to make sense. Thus, when Williams speaks of experience and identity formation and of how African Americans hear the words *individual* and *rights* in a differently contextualized way, she is theorizing a space between traditional and progressive jurisprudence.

By using the genre of personal legal narrative, Williams risks the use of the law *and* of personal experience without succumbing to overly determined readings of both these discourses. Williams writes, "[progressive] language of circumstantially-defined need--of informality, of solidarity, of overcoming distance--sounded dangerously like the language of oppression to someone like me who was looking through the establishment of identity, the *form*-ation of an autonomous self" (P. Williams, 1987: 409). That is, Williams' decision to place her scholarship in the realm of experience is a methodological and political choice. It is a choice, however, that does not demand an empowered judge or government to recognize or validate that experience. This is absolutely not to say that Williams is

disinterested in power. On the contrary, Williams genre has purposely located her text in one of the spheres through which she believes power to work, i.e. the textual sphere. Williams, like Patton, is concerned with how texts are seen to create and are then read off as identity politics. As Patton suggested, representative politics and static identities do not comprise the only--or even the most important--game in town. By addressing the alchemists who labor away to locate themselves (momentarily) within competing and disparate communities, Williams hopes to allow jurisprudence a hand at another game.

Subtitled "diary of a law professor," Williams' *Alchemy of Race and Rights* incorporated this 1987 article and others into what could be read as a modern gesture toward representation, toward representing her Self as an African American woman to the predominantly white, male power of law. Instead and akin to Patton's notion of identity, Williams explores the *performative* characteristics of her own identity--those imposed by a racist, sexist society and those adapted from the deconstruction of these racist, sexist discourses:

> I am trying to create a genre of legal scholarship to fill the gaps of traditional legal scholarship. I would like to write in a way that reveals the intersubjectivity of legal constructions, that forces the reader both to participate in the construction of meaning and to be conscious of that process. Thus, . . .I hope that the gaps in my own writing will be self-consciously filled by the reader, as an act of forced mirroring of meaning-invention. (1991: 7)

Williams' text is itself an attempt to deconstruct legal style, contract law, polar bears, generic categorization, race, and gender. Her discursive and de-centered identity is performed through her writing *and* through the readings of that writing by an audience both inside and outside the legal world.

Williams supplements the ideas associated with traditional legal theory by disclosing the politics of legal publishing. Williams is candid about how her *writing* about her evolving perceptions is greeted by her peers and editors. When Williams' offers for

publication an account of her experience of being barred from Benetton, her editor responds:

> 'It's nice and poetic,' but it doesn't 'advance the discussion of any principle. . .This is a law review, after all." Frustrated, I accused him of censorship; calmly he assured me it was not. 'This is just a matter of style,' he said with firmness and finality.' (1991: 48)

What makes Williams' writing unique is not simply her decision to incorporate the "I" pronoun into every aspect of her legal theorizing and critique; but her turning of the spotlight on the very mechanisms of contemporary jurisprudence. The mundane and banal aspects of law review publication decisions are advanced by Williams as an integral aspect of the law. Comparing her incorporation of doctrine and statute with personal experience and professional mechanisms to the work of Austin and Hart on judicial decision-making and legal authority, Williams' brand of legal theorizing is made all the more extraordinary. Williams deconstructs the notion of "discretion" by exposing the mechanisms, prejudices, and biases that function within the idea of discretion. Unlike Dworkin, Williams does not wish to linguistically eradicate the very concept of discretion. Rather, Williams wants to explore the ways discretion works within all facets of the legal profession--from academic publishing to affirmative action. By placing herself both inside and outside the boundaries of that discretionary space, Williams, too, offers a "double" (or multiple) consciousness from which to analyze legal practices. Nevertheless, to locate moments of deconstruction *in* Williams' text is not to locate the politics *of* her text. How is Williams' text *as text* politics?

Again, the addition of Patton's notion of postmodern governmentality to Cornell's method of ethical deconstruction is crucial. Williams is aware that within her own writing, the remains of the Other is always already "present." Further, and like Fish, Williams suggests that the reader will bring his or her own Self (with *its* remains of the Other) to the reading of her text. This method of writing is meant to interact with multiple readings to

produce a risky or contestable proposition. But, remember, the potential for deconstruction exists whether we want it to or not. As Cornell quotes Derrida:

> As we have seen, the very condition of a deconstruction may be at work, in the work, *within* the system to be deconstructed; it may already be located there, already at work, not at the center but in an excentric center, in a corner whose eccentricity assures solid concentration of the system, participating in the construction of what it at the same time threatens to deconstruct. One might then be inclined to reach this conclusion: deconstruction is not an operation that supervenes *afterwards*, from the outside, one fine day . . . (1992b: 81)

Unlike Fraser, Williams takes this "fact" not as a cause for paralysis, but as a cause for production, for a new writing, for a new readerly/writerly relationship.

In *The Rooster's Egg: On the Persistence of Prejudice* (1995), Williams shifts the focus of her writing to questions of intolerance and hate. In creating a personal narrative about prejudice, Williams entwines the discourses of law, jurisprudence, and culture. Law professors, judges, and lawyers are as often cited as media personalities, politicians, and televangelists. Each is called upon in an attempt to answer the question: How are we to talk about prejudice without either condoning it as natural or inevitable *or* masking it with enlightenment theories? The important words to remember in this question are, "how are we to talk..." because, for Williams, how we talk about ideas is pivotal in determining what, how, and whether we do anything about them. Again, Williams' *Rooster's Egg* does not develop a key to ending prejudice. It does not re-write the a kinder, gentler myth of justice and equality. Rather, Williams argues that prejudice is written into seemingly neutral discourses. First ladies, single motherhood, theater are each being written and read through the lens of a powerful race and gender mythology. Williams writes:

> If eliminating the stigma were truly as simple as erasing labels, then perhaps enough White-Out in our cases and codes would eliminate the problem once and for all. But it is the ferocious mythology of blackness (or otherness) as the embodiment of inferiority that persists whether blacks are inside or outside particular institutions and regardless of how they perform. (1995: 105)

Williams is again arguing that the mythology of embodied inequality, not just racist or sexist codes and statutes within a representative government, writes prejudice onto the

bodies and minds of its subjects. If she is to take the mythically charged prejudice seriously, then, it is necessary for Williams to write in a way that does not weave its way back into traditional, representational politics. Neither does Williams wish to create an alternative mythology through which a different embodiment of natural and true meaning is endowed--though such a writing endeavor, Williams admits, *is* tempting:

> While I am not a great fan of idealization of any sort, I have begun to long for just a touch of counter-mythology. Say, the mythic black single mother educates her young'uns against all the odds, wrassles urban coyotes, and all the while stretching that two-dollar welfare check over twenty-one meals 'til Sunday. (1995: 176)

Counter-mythology, however, is not viable. Instead and without begrudging the politics of representation their many hard-fought achievements, Williams offers readings of prejudice that place her (multiple) selves--rather than any mythic truth claim--in a tenuous and interpretable discourse.

The tenuous character of Williams' perspective is apparent when comparing *Alchemy* to *The Rooster's Egg*. This is a slightly different Williams. The tone of this text shifts to that of an increasingly alienated observer. Williams often chastises her own misreadings of the cultural landscape: "But as usual, I was wrong. And not just a little wrong, but a whole lot" (1995: 154). Like a writer of fiction producing an unreliable narrator, Williams ironically combines both reminders of her misreadings with forthright admonitions of the right thing to do. We must acknowledge the fruits of affirmative action's labor; we must not demonize women who are educated and outspoken; we must not quietly acquiesce to the Jewish Princess joke here and the poor white trash joke there if we expect the discourse of prejudice to disappear. By combining these contesting images of herself, Williams invites the reader to make his or her own "truth" from Williams' "facts." Nothing in Williams' narrative should be taken at face value--interpretation has produced this narrative just as an interpretive community will produce readings of this narrative. In this sense, personal narratives as political theory become ironic in the most

obvious sense. Williams has based this genre of so-called "identity politics" upon the *rejection* of an identical relationship between who the theorist is and what she writes and what readers read. Williams calls for a distinction between identity and interpretation. For example, Williams writes:

> The substitution of role models for complete understanding of the political implications of certain philosophical doctrines results in the privatization of the political, and shifts focus from the implications of philosophy to the personalities of its proponents. It also makes these proponents *very* authoritative. It cedes to them enormous and total power over the consequences of "their" theories, as if theory has no life beyond birth, no interpretive, generative property as taken up and reiterated by others. . .(1995: 128)

One might suspect that Fish would regard the reading of theory as an extension of identity as itself the product of an interpretive community--a community steeped in the cult of personality. Williams' irony lies in her attempt to shift interpretation away from personality with a text of and perfectly suited for this interpretive community. Through Williams reading of her own experience, she deconstructs identity and the "myth" that experience is the one valid truth claim left in this (post)modern world. As an admittedly unreliable reader of her own and others' experience, Williams deconstructs the genre itself and produces a different level of discourse where there can be *no* valid truth claims, no singular personality.

E. Conclusion

When Kirstie McClure argues that thinking about theory as an active, political endeavor might be "less content upon adjudicating or settling practices and more concerned with mobilizing meanings" (1992: 365), she could have a text like Williams' in mind. If such texts are to be viewed as political acts, however, an understanding of active political behavior as only the politics of representation or as appeals to authority or to the state must necessarily be expanded--not abandoned, but expanded. The politics of postmodern governmentality occur in the fast and floating contests over whose and how texts are read,

how texts are written, and whose bodies are being "read off." These battles do not necessarily shape legislation (although they might), do not necessarily become socially entrenched (although some have), and do not necessarily enter the halls of academia or law (although a few have). Rather, within these battles, words produce shifts and interruptions in the ways we talk about identity, prejudice, justice, motherhood. At the conclusion of *The Rooster's Egg*, Williams muses,

> From time to time I try to imagine this world of which he spoke--a culture in whose mythology words might be that precious, in which words were conceived as vessels for communications from the heart; a society in which words are holy, and the challenge of life is based upon a quest for gentle words, holy words, gentle truths, holy truths. I try to imagine for myself a world in which the words one gives one's children are the shell into which they shall grow, so one chooses one's words carefully, . . .like magnificent inheritances. . . (1995: 212)

In Williams' wishful thinking, there is, of course, a hint of reality--a reality that her own writing has helped to create and comprehend. The key to this reality, however, is that words carry no mythical endowment, no prerogative toward magnificent inheritances, gentle truths, or holy quests. Words are--intentions always aside--one of the modes through which power asserts itself in numerous and unaccountable ways. The text becomes the location of this political relationship between reader and writer, text and interpretation. By placing herself in the center of her text, Williams' genre challenges the overly-determined "perspectiv-ism" of both identity politics and liberal ideology to an utterly in-determinate space. Within her text and within its community of readers, this contest takes place as interpretations and readings contest the value and the meaning produced in such a textual decision.

CHAPTER V

CONCLUSION

> Rape exists because our experience and deployment of our bodies is the effect of interpretations, representations, and fantasies which often position us in ways amenable to the realization of the rape script: as paralyzed, as incapable of physical violence, as fearful. New cultural productions and reinscriptions of our bodies and our geographies can help us begin to revise the grammar of violence and to represent ourselves in militant new ways.
>
> Sharon Marcus[18]

Sharon Marcus reminds us again of the mutually re-enforcing relationship between texts and what we call real life or experience. Just as Marcus sees the politics of a scripted narrative in the *real* definitions of rape, I would argue that a politics of interpretation, experience, and reading exists in the space of *abstract* theoretical narratives. Neither position recognizes representative or institutional politics as the only battles and contests around. Applying Patton's understanding of postmodern identity as not what it once was, I would argue that texts (to those who write within this "intersubjective" manner) are not what they once were. Texts are one possible engagement in Patton's "crisis of duty" (1993: 172). Self-consciously "deconstructive writing" is engaged in politics, in a contest over which (whose) styles and readings should "produce the categories of governmentality that engender the administrative state apparatus" (1993: 173). Bodies, identities, meanings, and "truths" are the currency in both modern and postmodern governmentality, but how this currency is exchanged has changed. Personal legal narratives and the temptations from which they emerge stand as one possible example of this conflation of narrative or text and experience or politics. By reading texts like Williams the way this thesis has done, a politics might located on the page, within textual and discursive "modes of power."

---

[18]1993: 400.

With a new style of writing, Williams textualizes this battle between traditional legal thought, critical legal studies, contract law, student and teacher, and Williams own style. Within the infinite readings and temptations of the text, these factions clash and jostle for position (no matter how temporary that position might be). Does this lead to politics being everywhere and, thus, nowhere? Hardly. With an ethical conception of deconstruction or "the philosophy of the limit," blank signifiers become political choices. Limits multiply meanings rather than hide ideologies. Thus, generic choices become ethical constraints. Texts "play" the game of politics by disrupting and irrevocably altering discourses through writing and reading practices. Postmodern governmentality adds to deconstruction the self-consciousness of a political will. Textual politics confer agency upon both writings and readings, writer and reader. From these multiple possibilities for readings, contests over what texts say and whose meaning will matter take on the properties of a real, dirty political battle. With politics defined as the struggle to authorize discourses, *political* theory will produce neither blueprints nor maps, but rather, will stake out what McClure calls "breathing room for the articulation of new knowledges, new agencies, and new practices" (1992: 365). This thesis has argued that personal legal narratives exemplify the battles over textual authority being waged in the writings and readings of law every day. Narratives like Patricia Williams' and theories like deconstruction have shifted the questions implicit in these battles from, "Whose experience is real and true?" to "Whose reading or writing of 'experience' counts right now?" With this shift, jurisprudence is asked neither to justify its own existence nor to find the ultimate reform. Instead, jurisprudence might articulate *how* knowledges, agencies, and practices produce (and fail to produce) what we think about the law.

BIBLIOGRAPHY

Abrams, Kathryn. (1991) "Hearing the Call of Stories," California Law Review. 79: 972.

_____.(1993) "Unity, Narrative, and Law," Studies in Law, Politics, and Society. 13: 3-35.

_____. (1994) "The Narrative and the Normative in Legal Scholarship" in Representing Women: Law, Literature, and Feminism. Sage Heinzelman, Susan and Zipporah Batshaw Wiseman, eds. Durham: Duke UP.

Ashe, Marie. (1989) "Zig-Zag Stitching and the Seamless Web," Nova Law Review. 13: 355.

Austin, J.L. (1962) How To Do Things With Words. Cambridge: Harvard UP.

Baldick, Chris. (1990) The Concise Oxford Dictionary of Literary Terms. New York: Oxford UP.

Bartlett, Katharine and Rosanne Kennedy, eds. (1991) Feminist Legal Theory: Readings in Law and Gender. Boulder, CO: Westview Press.

Bell, Derrick. (1987) And We Are Not Saved. New York: Basic Books, Inc., Publishers.

_____. (1994) Confronting Authority: Reflections of an Ardent Protester. Boston: Beacon Press.

Bumiller, Kristin. (1987) "Rape As A Legal Symbol: An Essay on Sexual Violence and Racism," University of Miami Law Review. 42: n.p.

_____. (1988) The Civil Rights Society: The Social Construction of Victims. Baltimore, MD: Johns Hopkins University Press.

Butler, Judith. (1990) Gender Trouble. New York: Routledge.

Butler, Judith and Joan W. Scott. (1992) Feminists Theorize the Political. New York: Routledge.

Cornell, Drucilla, *et al*, eds. (1992a) Deconstruction and the Possibility of Justice. New York: Routledge.

_____. (1992b) "Gender, Sex, and Equivalent Rights" in Feminists Theorize the Political. Butler and Scott, eds. New York: Routledge.

_____. (1992c) The Philosophy of the Limit. New York: Routledge.

_____. (1995a) "What is Ethical Feminism?" Feminist Contentions. New York: Routledge.

_____. (1995b) "Rethinking the Time of Feminism" in Feminist Contentions. New York: Routledge.

Cotterrell, Roger. (1989) The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy. Philadelphia: University of Pennsylvania Press.

Delgado, Richard. (1995) The Rodrigo Chronicles: Conversations About America and Race. NewYork: New York University Press.

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

_____. (1987) "Structure, Sign, and Play in the Discourse of the Human Sciences," Literary Theories in Praxis. Shirley Stratton, ed. Philadelphia: University of Pennsylvania Press.

_____. (1982) "The Ends of Man," Margins of Philosophy. Chicago: University of Chicago Press.

_____. (1988a) "Limited Inc. abc. . .," Limited Inc. Gerald Graff, ed. Evanston: Northwestern UP.

_____. (1988b) "Signature, Event, Context," Limited Inc. Gerald Graff, ed. Evanston: Northwestern UP.

_____. (1988c) "The Purveyor of Truth" in The Purloined Poe: Lacan. Derrida, and Psychoanalytic Reading. John P. Muller and William J. Richardson, eds. Baltimore: The Johns Hopkins UP.

_____. (1989) "Force of Law: The 'Mystical Foundations of Authority,'" in Deconstruction and the Possibility of Justice. Drucilla Cornell, *et al.*, eds. New York: Routledge.

Dworkin, Ronald M. (1967) "Is Law a System of Rules?" in The Philosophy of Law. Ronald M. Dworkin, ed. New York: Oxford UP, 1977.

_____. (1977) The Philosophy of Law. New York: Oxford UP.

_____. (1982) "Law as Interpretation," Texas Law Review. 60: 527 - 550.

Edwards, Harry T. (1992) "The Growing Disjunction Between Legal Education and the Legal Profession," Michigan Law Review. 91: 34.

Ewick, Patricia and Susan Silbey. (1995) "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative," Law and Society Review. 29: 197-226.

Farber, Daniel and Suzanna Sherry. (1993) "Telling Stories Out of School: An Essay on Legal Narratives," Stanford Law Review. 45: 807.

Ferguson, Kathy E. (1993) The Man Question: Visions of Subjectivity in Feminist Theory. Berkeley: University of California Press.

Fineman, Martha Albertson and Nancy Sweet Thomadsen. At the Boundaries of Law: Feminism and Legal Theory. New York: Routledge, 1991.

Finley, Lucinda. (1989) "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning," Notre Dame Law Review. 65: 886.

Fish, Stanley. (1982) "Working on the Chain Gang: Interpretation in Law and Literature," Texas Law Review. 60: 551-567.

_____. (1983) "Wrong Again," Texas Law Review. 62: 299-316.

_____. (1989) Doing What Comes Naturally: CHange, Rhetoric, and the Practice of Theory in Literary and Legal Studies. Durham, NC: Duke UP.

Fisher, William W. III, *et al.* eds. (1993) American Legal Realism. New York: Oxford UP.

Foucault, Michel. (1979a) "Governmentality," *m/f* a feminist journal. 3: 5-21.

_____. (1979b) Discipline and Punish: The Birth of the Prison. New York: Vintage Books.

_____. (1988) Politics, Philosophy, and Culture. New York: Routledge.

Frank, Jerome. (1930) Law and the Modern Mind. Exerpted in American Legal Realism. Williams W. Fisher, III, *et al.*, eds. (1993) New York: Oxford UP.

Fraser, Nancy. (1989) "The French Derrideans" in Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory. Minneapolis: University of Minnesota Press.

_____. (1992) "The Uses and Abuses of French Discourse Theories for Feminist Politics," Theory, Culture, & Society. 9: 51-71.

_____. (1995a) "Pragmatism, Feminism, and the Linguistic Turn" in Feminist Contentions. New York: Routledge.

_____. (1995b) "False Antitheses" in Feminist Contentions. New York: Routledge.

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

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

Greenberg, Judith G. (1993) "Introduction," in Postmodern Legal Feminism. Mary Joe Frug. New York: Routledge.

Haraway, Donna. (1989) Primate Visions. New York: Routledge.

Hart, H.L.A. (1958) "Positivism and the Separation of Law and Morals," in The Philosophy of Law. Ronald M.Dworkin, ed. New York: Oxford UP, 1977.

_____. (1961) The Concept of Law. Oxford: Oxford University Press.

Honig, Bonnie. (1993) "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic," Rhetorical Republic: Governing Representations in American Politics. Frederick Dolan and Thomas Dumm, eds. Amherst: University of Massachusetts Press.

Hoy, David. (1985) "Jacques Derrida" in The Return of Grand Theory in the Human Sciences. Quentin Skinner, ed. Cambridge: Cambridge UP.

Johnson, Barbara. (1981) The Critical Difference. Baltimore: The Johns Hopkins UP.

Kairys, David, ed. (1982) The Politics of Law: A Progressive Critique. Vol. 1. New York: Pantheon Books.

_____, ed. (1990) The Politics of Law: A Progressive Critique. Vol. 2. New York: Pantheon Books.

Kenney, Sally J. (1992) "An Introduction to Feminism and Law, " Law and Courts Newsletter, Fall.

Llewellyn, Karl. (1931) "Some Realism About Realism," in American Legal Realism. (1993) William W. Fisher, III, *et al.* eds. New York: Oxford UP.

Lorde, Audre. (1984) Sister Outsider. Freedom, CA: The Crossing Press.

Marcus, Sharon. (1992) "Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention" in Feminists Theorize the Political. Butler and Scott, eds. New York: Routledge.

Massaro, Toni. (1989) "Empathy, Legal Storytelling, and The Rule of Law: New Words, Old Wounds," Michigan Law Review. 87: 2099.

Matasar, Richard A. (1992) "Legal Education II: Storytelling and Legal Scholarship," Chacago-Kent Law Review. 68: 353.

Matsuda, Mari, *et al.* (1993) Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment. Boulder, CO: Westview Press.

MacKinnon, Catharine A. (1989) Towards a Feminist Theory of the State. Cambridge: Harvard University Press.

_____. (1993) Only Words. Cambridge, MA: Harvard UP.

McClain, Linda C. (1992) "'Atomistic Man' Revisited: Liberalism, Connection, and Feminist Jurisprudence," Southern California Law Review. 65: 1071.

McClure, Kirstie. (1992) "The Issue of Foundations: Scientized Politics, Politicized Science, and Feminist Critical Practice" in Feminists Theorize the Political. Butler and Scott, eds. New York: Routledge.

Minda, Gary. (1995) Postmodern Legal Movements: Law and Jurisprudence at Centeury's End. New York: New York UP.

Minow, Martha. (1990) Making All the Difference: Inclusion, Exclusion, and American Law. Ithaca, NY: Cornell University Press.

Nietzsche, Friedrich. (1966) Beyond Good and Evil. New York: Vintage Books.

_____. (1967) On The Geneaology of Morals. New York: Vintage Books.

Olsen, Frances. (1984) "Statutory Rape: A Feminist Critique of Rights Analysis," Texas Law Review. 63: 387.

Patton, Cindy. (1993) "Tremble Hetero Swine!" Fear of a Queer Planet: Queer Politics and Social Theory. Michael Warner, ed. Minneapolis: University of Minnesota Press.

Posner, Richard A. Law and Literature: A Misunderstood Relation. Cambridge, MA: Harvard UP.

_____. (1993) "The Deprofessionalization of Legal Teaching and Scholarship," Michigan Law Review. 91: 1921.

"President's Page," (1987) Stanford Law Review. 36: i.

Rhode, Deborah. (1989) Justice and Gender. Cambridge, MA: Harvard University Press.

Rosenberg, Gerald N.(1991) The Hollow Hope: Can Courts Bring About Social Change? Chicago, IL: The University of Chicago Press.

Sage Heinzelman, Susan and Zipporah Batshaw Wiseman, eds. (1994) Representing Women: Law, Literature, and Feminism. Durham, NC: Duke UP.

Scheppelle, Kim Lane. (1989) "Foreword: Telling Stories," Michigan Law Review. 87: 2073.

Schneider, Elizabeth M. (1991) "The Dialectics of Rights and Politics: Perspectives from the Women's Movement," in At The Boundaries of Law. Editors Martha Albertson Fineman and Nancy Sweet Thomadsen. New York: Routledge.

Schneider, Elizabeth M. and Nadine Taub. (1990) "Women's Subordination and the Role of Law," in The Politics of Law: A Progressive Critique (2nd Ed.). Editor David Kairys. New York: Pantheon Books.

Searle, John R. (1977) "Reiterating the Differences: A Reply to Derrida" Gyph 2.

Shapiro, Michael J. (1992) Reading the Postmodern Polity: Political Theory as Textual Practice. Minneapolis: University of Minnesota Press.

Skinner, Quentin. (1985) The Return of Grand Theory in the Human Sciences. Cambridge: Cambridge UP.

Smart, Carol. (1989) Feminism and the Power of Law. New York: Routledge.

Smith, Patricia, ed. (1993) Feminist Jurisprudence. New York: Oxford University Press.

Soper, Philip. (1984) A Theory of Law. Cambridge, MA: Harvard UP.

Tong, Rosemarie. (1989) Feminist Thought: A Comprehensive Introduction. San Francisco, CA: Westview Press.

Torres, Gerald. (1988) "Local Knowledge, Local Color: Critical Legal Studies and The Law of Race Relations," San Diego Law Review 25: 1043.

Trubek, David M. and John Esser. "'Critical Empiricism' in American LegalStudies: Paradox, Program, or Pandora's Box?" Law and Social Inquiry *Review Symposium Essay.*

Tushnet, Mark. (1984) "An Essay on Rights," Texas Law Review. 62: 1363.

Villmoare, Adelaide. (1991) "Women, Differences, and Rights as Practices: An Interpretive Essay and A Proposal," Law and Society Review 25: 385.

West, Robin. (1988) "Jurisprudence and Gender," University of Chicago Law Review. 55: 1.

_____. (1989) "Feminism, Critical Social Theory, and Law," The University of Chicago Legal Forum. 59.

_____. (1993) Narrative, Authority, & Law. Ann Arbor: The University of Michigan Press.

White, Hayden. (1987) The Content of the Form. Baltimore: The Johns Hopkins UP.

White, James Boyd. (1982) "Law as Literature: Reading Law and Reading Literature," Texas Law Review. 60: 415-445.

Williams, Joan C. (1991) "Dissolving the Sameness/Difference Debate: A Postmodern Path Beyond Essentialism in Feminist and Critical Race Theory." Duke Law Journal 296.

Williams, Patricia. (1991) The Alchemy of Race and Rights. Cambridge: Harvard UP.

_____. (1995) The Rooster's Egg: On the Persistence of Prejudice. Cambridge, MA: Harvard UP.