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The Big Fear: Law Confronts Postmodernism

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Postmodernism has had a marked influence on cultural studies for well over two decades, yet its impact on legal studies has been felt only recently. Despite this, the engagement between law and postmodernism is shown by the author to be profound, and it is argued that the postmodernist perspective now pervades progressive legal thought in general and Critical Legal Studies in particular. The author first explores the impact of postmodernism through its critique of the Enlightenment. While remaining sceptical of the perceived novelty of this critique, he finds much that is valuable in the challenge it poses to the pretensions of rationalism and legal centralism that mark the discourse of the Enlightenment and its legacy in the major variants of liberal legal theory. Attention then shifts to the postmodernist critique of the epistemological presuppositions of both liberal theory and early CLS. This is a more problematic aspect of the postmodernist challenge, and the author shows how it has raised the spectre of nihilism within CLS, resulting in an unmediated opposition between those insisting on claims of certainty and those deriding such absolutist theory. The way out of the "big fear" of nihilism, according to the author, is the realization that both views are trapped in a false dichotomy which is characterized in academic debate by the invocation of the image of the "slippery slope". The effect of this false dichotomy on the politics of CLS is then explored with the author concluding that a pragmatic conception of truth, rooted in social practice, is needed to ground a project of progressive legal thought.

Au cours des deux dernières décennies, le postmodernisme a grandement influencé les sciences humaines. Par contre, son impact dans le domaine juridique est beaucoup plus récent. Néanmoins, l'auteur démontre que le lien entre le droit et le postmodernisme est profond. Il affirme que la perspective postmoderniste soutend la pensée juridique progressive en général, et les *Critical Legal Studies* en particulier. L'analyse de l'auteur commence par une exploration de l'impact de la critique postmoderniste de la pensée du siècle des Lumières. Tout en doutant de la nouveauté de cette critique, l'auteur apprécie le défi qu'elle pose au prétention de rationalisme et au centralisme juridique qui marquent le discours des Lumières ainsi que les principales variantes de la théorie libérale du droit issues de celui-ci. L'auteur examine ensuite la critique postmoderniste des prémisses épistémologiques des théories libérales et, à l'origine, les CLS. Le défi postmoderniste est ici plus problématique. Il soulève le spectre du nihilisme au sein des CLS et donne lieu à une opposition entre les absolutistes et les relativistes. Selon l'auteur, pour échapper à la crainte du nihilisme, il s'agit de reconnaitre que ces deux positions sont issues d'une fausse dichotomie. L'auteur conclut que tout fondement d'une pensée juridique progressive doit reposer sur une conception pragmatique de la vérité, ancrée dans la pratique sociale.

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Synopsis

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> The crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear.
> — Antonio Gramsci[1]

Introduction

The contemporary situation in legal studies exhibits an unprecedented confusion of intellectual trends and influences. This cacophony is especially pronounced amongst those who explicitly undertake committed and partisan scholarship which may be broadly, if not definitively, labelled 'progressive'. There are marked differences of opinion about what constitutes a progressive approach. The most pronounced differences revolve around the merits of the postmodernist influences which today have a substantial, if not predominant, impact within critical legal studies [hereafter CLS], the most influential progressive movement in legal studies.

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[1]A. Gramsci, *Selections from the Prison Notebooks*, ed. and trans. by Q. Hoare & G.N. Smith (London: Lawrence & Wishart, 1972) at 276.

What is this thing called postmodernism? Is postmodernism the same as poststructuralism? And what of deconstruction? I will generally employ the label postmodernism and treat it as subsuming poststructuralism and deconstruction: poststructuralism identifies the ground-clearing theoretical critique of both Marxist structuralism and linguistic structuralism while deconstruction names the method employed in opening up 'the text', whether legal judgment, news story or novel, to reveal both what it contains and what it blocks or excludes.[2] But the label postmodernism, even if it does not define the project, at least has the merit of projecting something of its flavour.

For present purposes I take postmodernism to be the embracing of a judgement that we have traversed a significant divide between the modernism of the early twentieth century and the postmodern reality of the late twentieth century. Without attempting to explore the various descriptors employed to map this transition, it is sufficient to stress that we now exist in a new epoch. The most significant step in forming the postmodernist perspective is the inference that if the old world is passing or is already past then its problems and questions have become redundant and so also have the intellectual theories and methods that were fashioned around those old problematics. It is not simply that a new set of questions can and should replace a prior set; the radical self-conception of postmodernism arises from its claim that we must break with the kind of 'big' questions which have traditionally motivated the intellectual projects of the previous epoch. It is not so much that modernism arrived at the wrong answers, but that its questions were unanswerable; they have been too broad, too abstract, riddled with a distinctive mix of naive humanism, an unwarranted faith in science and an over-optimistic view of the capacity of language to capture and share knowledge. Perhaps the most pervasive spirit of postmodernism is that it enjoins us all to the challenges and difficulties of trying to rethink the world and our place in it.[3]

The direct object of this paper is to explore the question which may be baldly stated as: "What is Left in legal studies?" This self-consciously polemical question requires explanation; it arises from a concern to identify which of the array of intellectual and political projects that have emerged from controver-

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[2]I am sensitive to the view, strongly pressed by Christopher Norris, that deconstruction should not be conflated with postmodernism; see C. Norris & A. Benjamin, *What Is Deconstruction?* (New York: St. Martin's Press, 1988). My justification for merging them in what follows is that the form in which postmodernism has impacted on legal studies is one in which its exponents and practitioners have themselves conflated these two related, but distinguishable positions.

[3]This sketch of postmodernism is given in lieu of a lengthy bibliographic essay. If the varieties and complexities of postmodernism are ignored my suggestion is that just two texts provide a sufficient introduction: J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge*, trans. G. Bennington & B. Massumi (Manchester: Manchester U.P., 1984); and Richard Rorty's set of essays in the London Review of Books: "The Contingency of Language" (17 April 1986), and "The Contingency of Selfhood" (8 May 1986).

sies around or touching on law can sustain the progressive claims made by their respective advocates. This situation is not just the oft-repeated sectarianism of progressive opinions preferring to argue with their own kind than to engage with their opponents. What is different are the radically dissimilar images, models and strategies which are on offer today. Confronted with this diversity of views and opinions, I am keen to insist that there is no intention to impose some authoritatively 'correct' or definitive line; rather, my concerns stem from a quest for self-clarification whose pursuit may contribute to the resolution of an important set of disagreements amongst progressives.

This article will argue that neither a simple espousal nor a rejection of postmodernism is adequate; instead it will contend that there are valuable elements of the postmodernist perspective which can contribute to progressive legal studies and which can be separated from its negative dimensions. Lest this sound too even-handed, it is as well to make clear that what is rejected is most of the general perspective that constitutes postmodernism. What is recommended for retention are some useful, yet partial, insights and techniques.

The quote from Gramsci with which I opened catches the flavour of a period of transition in which complex sets of intellectual and cultural manifestations contend. It is probably wise to strike a note of caution about whether the current conjuncture should be identified as a 'crisis', but there is no doubt that the end of the 80s marks a break or transition in both intellectual and political life. Perhaps Gramsci strikes a more negative tone than is necessary in that we are not simply confronted with "morbid symptoms"; rather I will argue that our present difficulties stem from the dilemma which confronts us when we seek to distinguish the morbid from the positive features present in postmodernist thought. What Gramsci succeeded in capturing is the sense of confusion, commotion and instability that permeates current exchanges. He focuses our attention on the distinctive characteristics of the present conjuncture in which many and varied positions contend and in which it is difficult to determine the political implications of the positions deployed. We find a vigorous debate on the Left in which radically incommensurate intellectual positions are offered as 'progressive', whilst the same ideas are denounced by others as 'reactionary'. For example, we find Jurgen Habermas arguing that postmodernism plays into the hands of conservatives, whilst Jean-François Lyotard retorts that it is Habermas who is the conservative.[4]

The closing years of the twentieth century are proving to be an epoch fraught with difficulties for progressive intellectuals. Contemporary Western societies seem further than ever away from the major structural transformations

[4]See J. Habermas, "Modernity Versus Postmodernity" (1981) 22 New German Critique 3 and, more generally, *The Philosophical Discourse of Modernity*, trans. F. Lawrence (Cambridge: Polity Press, 1987); for the postmodernist response see Lyotard, *supra*, note 3.

necessary for the dismantling of the hierarchies of class, gender and race and the achievement of social justice. It no longer seems relevant to repeat the old battlecries of the variant forms of the socialist movement. Despite the exciting chinks becoming visible in the monolith of the communist East, orthodox Marxism and the intellectual (if not political) renaissance ushered in by the Western Marxism of the 1960s, Marxist socialism is simply too encrusted with its history to provide contemporary inspiration. But neither has the social democratic tradition been able to transcend its own bureaucratic and paternalistic legacy. The oppositional Leftisms, whether Maoist, Trotskyist or anarchist, that have occasionally surfaced over recent decades, seem ever less relevant to the complexities of sustainable social change in the contemporary world. Despite the commitment of progressive intellectuals to the quest for links between theory and practice, meaningful engagement with 'where people are at' in relatively affluent, consumerist societies is more difficult than ever to achieve. The manifestations of resistance and the glimmers of possible alternatives appear as a bewildering plurality. Few would retain a hope that the working class (or any other unitary subject) has the capacity to bring the fragments together.

If progressive intellectuals confront these big and intractable quandaries a more specific set of dilemmas confront the progressive working in and around the law. The intellectual demography of the 60s and 70s resulted in a significant entry of radical intellectuals into both legal practice and law schools. There had, of course, been progressives working in the legal arena in previous periods. The difference today is that the loose alliance of progressives has achieved a certain critical mass which makes it possible to entertain the aspiration that they might displace the elite servants who have for so long and with such self-satisfaction served the aggrandizement of law's empire.[5]

These dilemmas take the form of a quest for a new intellectual paradigm, one that is demonstrably radical but at the same time avoids the deficiencies of the theories of the 'old Left'. In the field of legal scholarship the alternative which is currently having the greatest impact is the constellation of themes around postmodernism.

The intellectual and political issues associated with postmodernism are having a belated but nevertheless significant impact within legal scholarship. It is belated in the sense that in fields such as literary and cultural studies it was the 1970s which witnessed the impact of postmodernism. In this sense legal studies has, not unusually, lagged behind the main flow of intellectual development. But although the decade of postmodernism and deconstruction may be over in cultural studies, it is certainly not over in legal studies. Indeed it is an important dimension of my argument to insist that law's confrontation with

[5]"We are the subjects of law's empire, liegemen to its methods and ideals" in R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) at vii.

postmodernism is both a deep and a profound engagement. It is one that cannot be ignored nor will it go away. The belated encounter between law and postmodernism is serious and presents major challenges to most varieties of existing scholarship. While traditional scholarship has reacted dismissively or has ignored the challenge it is significant that the major location of both the rise of postmodernism and of critical reactions thereto has been within CLS; accordingly it will be this engagement that will provide the major focus of my discussion.

Postmodernism is an extremely variable phenomenon. It significantly changes both its form and its content as it moves between different cultural and intellectual fields. Postmodernism in architecture and in law are very different manifestations. It is not my concern to map the varieties of postmodernism.[6] There is a certain superficial sense in which postmodernism has travelled through the cultural and social studies and is currently visiting law. But to make this analogy more satisfactory it is necessary to insist that postmodernism has not simply been a travelling circus passing from one field to another repeating the same show in different locations. Rather, in the course of its migrations not only the debate itself but the ideas and concepts which it deploys change.

I. Law Encounters Postmodernism

There is now a burgeoning postmodernist literature in and around legal studies. It is diverse in nature and not yet sedimented into schools, groups or factions. I make no attempt to offer a bibliography or even a bibliographical survey; instead some of its more interesting manifestations are noted below.[7] In order to assess the impact of postmodernist thought on legal studies it is desir-

[6]On the mapping of postmodernism see A. Huyssen, "Mapping the Postmodern" (1984) 33 New German Critique 5 and F. Jameson, "Postmodernism, or the Cultural Logic of Capitalism" (1984) 146 New Left Rev. 53.

[7]J.M. Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 Yale L.J. 743; D. Cornell, "Toward a Modern/Postmodern Reconstruction of Ethics" (1985) 133 U. Pa. L. Rev. 291; C. Dalton, "An Essay in the Deconstruction of Contract Doctrine" (1985) 94 Yale L.J. 997; C. Douzinas & R. Warrington, "On the Deconstruction of Jurisprudence: Fin(n)is Philosophiae" in P. Fitzpatrick & A. Hunt, eds, *Critical Legal Studies* (Oxford: Basil Blackwell, 1987) 33; G. Frug, "The Ideology of Bureaucracy in American Law" (1984) 97 Harv. L. Rev. 1276; P. Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London: Macmillan, 1987); C.A. Desan Husson, "Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law" (1986) 95 Yale L.J. 969; A.C. Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Toronto: Carswell, 1988); C. Norris, "Suspended Sentences: Textual Theory and the Law" in *Contest of Faculties: Philosophy and Theory After Deconstruction* (New York: Methuen, 1985) 167; G. Peller, "The Metaphysics of American Law" (1985) 73 Calif. L. Rev. 1151 and "Reason and the Mob: The Politics of Representation" (1987) 2:3 Tikkun 28; G. Rose, *Dialectic of Nihilism: Post-Structuralism and Law* (Oxford: Basil Blackwell, 1984); and B. de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law" (1987) 14 J. L. & Soc. 279.

able to identify both what is general about postmodernism and, more importantly, what is specific to the issues and controversies to which it has given rise within legal studies.

Postmodernism has made its presence felt in legal studies at two different but related levels. The more immediate level, which manifests the direct connection with literary theory, is provided by the concern with textuality, whilst the more general level involves the postmodernist challenge to the philosophical and epistemological underpinnings of legal theory [see Part II below]. There is an immediate and common sense plausibility to the idea that what links literary criticism and legal studies is that both are significantly concerned with the interpretation of texts. Legal texts, in particular the privileged form of the appellate judgement, provide the raw material for legal interpretation. This focus on textuality has taken on a special significance in the interpretation debate within legal theory.[8] This is because the abandonment of the quest for authorial intention disrupts the deeply entrenched tradition within common law jurisdictions of grounding the validity of the legal order as a whole on the privileged authorship and authority of constitutional texts and appellate judgements.[9] In an important sense there is a great deal at stake in controversies over the 'correct' interpretation of constitutional or statutory documents. The question of interpretation is not new but rather the awareness of the debates in literary criticism, generating an explicit focus on the textuality of law, has served to sharpen the awareness of the important issues that underlie different interpretive strategies. Yet these debates remain, in Ronald Dworkin's sense "internal", in that they accept the interpretive project whilst arguing about how judges and legal academics should discharge this function.[10]

As deconstruction migrated from literary criticism to legal theory the context changed, as did the issues and their importance. The question is no longer how to interpret the text; rather it is about the legitimacy of legal discourse as a mechanism of power disguised as the pursuit of interpretive truth. Thus the project of deconstructivist critique is to mount a challenge to the legitimacy of

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[8]On the interpretation debate see R. Dworkin, "Law as Interpretation" (1982) 9 Critical Inquiry 179; D.C. Hoy, "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives" (1985) 58 S. Cal. L. Rev. 135; S. Fish, "Working on the Chain Gang: Interpretation in Law and Literature" (1982) 60 Tex. L. Rev. 551; O. Fiss, "Objectivity and Interpretation" (1982) 34 Stan. L. Rev. 739; and A. Hutchinson, "Doing Interpretive Numbers: A Jurisprudential Twosome in Three Parts" in *Dwelling on the Threshold*, *supra*, note 7, 125.

[9]The question of authorial intention has taken on special significance in the United States by virtue of the review role of the Supreme Court. This was dramatically underlined in the hearings on the Bork Supreme Court nomination played out before a national TV audience which revolved around the role of the founders' intentions as the source of legitimate constitutional interpretation.

[10]*Supra*, note 5 at 78-86.

the project of law as a means of generating distinctively legal truth.[11] This essay will focus on the wider postmodernist themes because I suggest that with respect to interpretation the postmodernist impulse, while radical in its project, is a variant of a position already well established within the interpretation debate in legal theory.[12] This position, in turn, is a species of social constructionism in which language is not conceived as reflecting some extra-discursive reality; but language, and the understandings and meanings which it generates, are the 'reality' of social being.[13] The radical inflection of the postmodernist intervention lies not, I suggest, in its interpretive strategy or deconstructive methods, but rather in the way in which the tensions, closures and contradictions in judicial texts are linked to the wider dynamics of power and dominant interests.[14]

There is a general sense in which we are all now social constructionists; where postmodernist interpretivism departs is that it denies that there is any possibility of comparing, contrasting, evaluating or interpreting that discourse by reference to some extra-discursive reality.[15] Since this characteristic is a manifestation of postmodernism's general epistemology I turn now to the impact of the wider themes of postmodernism.

To situate the postmodernist challenge it is important to recognize the complex interconnection between the intellectual and political strands which it incorporates, and which make its concrete manifestations so diverse. The suggestion to be explored is that postmodernism involves two distinguishable elements. At its most general level postmodernism is a critique of the rationalism of Enlightenment thought. Postmodernism's more specific features, which may

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[11]The relationship between the strands of postmodernist thought is complex. For present purposes I treat deconstruction as a specific technique of handling discourses which is commonly, but not necessarily, found in association with postmodernist theoretical themes which, as I suggest in Section III below, primarily involve epistemological (or perhaps anti-epistemological) claims. For an excellent account of the relationship between deconstruction and the interpretation debate in legal theory see Norris, *supra*, note 7 at 168-82.

[12]For overviews of the interpretation debate see D.C. Hoy, *supra*, note 8; D. Kennedy, "The Turn to Interpretation" (1985) 58 S. Calif. L. Rev. 251; and G. Peller, "The Metaphysics of American Law", *supra*, note 7.

[13]P.L. Berger and T. Luckmann provided the classical and elegant account of social constructionism in *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City: Doubleday, 1966). Another important strand is provided through the generalization and extension of Thomas Kuhn's study of scientific innovation in *The Structure of Scientific Revolutions*, 2d ed. (Chicago: University of Chicago Press, 1970).

[14]Christopher Norris makes a very similar point about the limitations of the radicalism of deconstruction in *supra*, note 7 at 191.

[15]Note that to posit an extra-discursive reality does not necessarily involve positing a realist ontology; it is sufficient to make use of some distinction between 'discourse' and 'practices' to establish the possibility of some position outside of the discourse under consideration without implying that such an external position is 'objective' or 'neutral'.

be grouped together under the label of poststructuralism, revolve around specific reactions to structuralist thought, Marxism in particular, and more generally to the European socialist tradition. As postmodernism migrated into English-speaking intellectual life the specificity of poststructuralism became latent and was fused with the more generalized anti-Enlightenment mood.

Postmodernism's critique of the Enlightenment is of a failed rationalist project which has run its course but which continues to encumber contemporary thought with illusions of a rational route to knowledge, a faith in science and in progress. The radical core of postmodernism lies in its mission of shedding the illusions of the Enlightenment. The political ambiguity of postmodernism lies in its insistence that our received and familiar dichotomy between Left and Right is itself a product of Enlightenment thought, and that contemporary Left theoretical and political positions, especially Marxism, are deeply inscribed with the illusions of the Enlightenment. This is how postmodernism comes to claim progressive credentials whilst devoting much of its energy to the critique of erstwhile Left positions.

Postmodernism has a pronounced tendency to be absolutist in its judgements. Most noticeably it adopts a decidedly one-dimensional and almost wholly negative view of the Enlightenment and the modern world which is its putative offspring. Postmodernist authors such as Lyotard and Michel Foucault present us with an unhelpful and, I suggest, avoidable dichotomy between the wholesale endorsement of some classical version of the Enlightenment project and its complete abandonment. We are presented with a stark and dramatic choice between the Enlightenment (with the strong implication that to make this choice would reveal one's unreconstructed mind in its most old-fashioned garb) and postmodernism (with the strong inference that this is the up-to-date and radical choice); significantly, no intermediate positions are considered. Any approach which leaves features or elements of the Enlightenment intact is perceived as an attempt to keep that played-out project alive. It is important to note, in passing, that the 'Enlightenment Project' is always presented in the singular and thus assumed to be a unitary and integrated project.

It seems preferable to start out from the contention that modernity and the Enlightenment are much more complex, ambiguous and nuanced than this one-dimensional view permits. Marshall Berman forcefully expresses this by capturing the persistent intellectual and political ambiguity of modernism:

> [F]rom Marx's and Dostoevsky's time to our own, it has been impossible to grasp and embrace the modern world's potentialities without loathing and fighting against some of its most palpable realities.[16]

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

Berman goes on to make the very important point that whereas the intellectual giants of the nineteenth century were simultaneously enthusiasts for and enemies of modernity having to wrestle with its ambiguities and contradictions, their twentieth century successors have lurched far more toward rigid polarities and flat totalizations. Modernity is either embraced with a blind and uncritical enthusiasm, or else condemned with neo-Olympian remoteness and contempt; in either case it is conceived as a closed monolith.[17]

I want to suggest that we can and should adopt a more dispassionate view of the substance of postmodernism, and in so doing retain many of its insights and techniques, if we first separate its content from its general intellectual outlook or mood. At root postmodernism is grounded in a profound disenchantment with modernity. There is a very specific reason why many progressive intellectuals have come to adopt this disenchantment as their own; as I argued in the opening section none of the available political strategies of the present period seem to offer much hope of foreseeable and radical social transformation. So whether in disillusionment with contemporary socialism since the events of 1968[18] or with the swing to the Right since the late 70s, it is not surprising that postmodernism has had its attractions for progressives.

I am anxious to underline Berman's stress on the ambiguity of modernity. I empathize with postmodernism's critique of instrumental reason, scientism, the cult of progress and much more associated with the Enlightenment; but I also want to affirm that significant projects, in particular, that of human emancipation involving appeal to the discourses of freedom, equality and knowledge remain incomplete. In very different ways both Edward Thompson and Habermas articulate the view that modern liberalism has lost the will and the inclination to pursue these goals and that their realization has fallen to contemporary socialism; this in turn underlines my view that socialism must engage with and draw significantly from liberalism in order to fulfil this objective. It is for these reasons that I am unhappy with the general intellectual and political mood of postmodernism.

In order to explore the impact of postmodernism on legal studies it is important to stress that its inspiration stems from a generalized intellectual empathy with the critique of modernity. There is little sense at all from writers most influenced by postmodernism that the phenomena of law have themselves been subject to any significant transformations or have made any transition from one form to another. In contrast the debates in architecture and in literary criticism have explicitly been concerned to identify historically specific shifts in

[17] *Ibid.* at 24.

[18] I select 1968 as the critical turning point because of the way in which it encapsulates the paradox of the rise and fall of insurrectionary militancy in the West (Paris) and of humanist socialism in the East (Prague).

buildings and books, prior to naming and then theorizing that shift. With respect to law there is no evidence that those most influenced by postmodernism contend that their views are a response to some shift in the phenomena of law which mark a passage or transition from the modern to the postmodern.

It is interesting to note that there exists an almost complete separation between those concerned to track the changes in form and substance of law and those concerned with the postmodernism debate. The debate on the nature and implications of the transformation of law during the twentieth century has been very much the preserve of sociologically oriented scholarship, most noticeably in German sociology, which in turn is part of a wider debate within German social theory, in particular, between Habermas and Niklas Luhmann.[19] Whilst recognizing that my acquiescence adds another brick to the intellectual wall between critical legal studies and theoretical sociology of law, I will not consider any aspects of the empirical transformation of legal systems. My only justification for this major limitation on the scope of this essay is that such issues have played no part in the debates and controversies within legal scholarship over postmodernism.[20] Put at its simplest, the postmodernist offensive has been directed at the theory (or explanation) of law offered by the predominant liberal tradition (and its variants) of a phenomenon which both sides presume to be, in all essentials, immutable.

II. The Double Challenge

The postmodernist challenge within legal studies is two-sided. It is this dual challenge which constitutes the specificity of the postmodernist debate within legal scholarship. The first challenge is to the privileged place that Enlightenment thought and modern liberalism accords to state law. The second challenge is to the organizing protocols of legal scholarship and, in particular, to its epistemological assumptions.

A. Law in the Discourse of the Enlightenment

In the discourse of the Enlightenment law is accorded a privileged position as the guardian of the boundary between the state and the citizen and of the boundaries between individuals, both sets of boundaries being marked by legal rights. Law is conceived as a unitary phenomenon, 'the Law', and that law is

[19]Gunther Teubner has both been an active participant in these debates and has done the most to make them available to English readers; see G. Teubner, ed., *Dilemmas of Law in the Welfare State* (Berlin: Walter de Gruyter, 1988) and G. Teubner, ed., *Autopoietic Law: A New Approach to Law and Society* (Berlin: Walter de Gruyter, 1988).

[20]One important exception has been the work of Boaventura de Sousa Santos who has explored a much more strongly sociologically oriented conception of postmodernism in exploring the contemporary transformations within legal orders; see Santos, *supra*, note 7 and "The Postmodern Transition: Law and Politics", forthcoming.

state law, the expression of the sovereignty of the nation-state. It is invested with the sanctity of rationality as the most advanced way of social ordering by means of a neutral decision procedure rising above the clash of conflicting interests. At the same time the Law is not only self-validating but validates the constitutional arrangement of the society's political institutions and offices. Law is thus conceived as a teleology endowed with its own purpose of self-referentially policing its boundaries in such a way as to provide an independent guarantee of its capacity to resist the transgressions of both political power (the state) and (potentially) of economic power.[21] Nowhere is this teleological conception of law clearer than in Dworkin's allegorical world of *Law's Empire*. In this scenario law is not only identified with a teleology (law as integrity) but it is a self-activating teleology in which law is personified in terms of "'law's ambition for itself" in which "law works itself pure".[22]

In the discourse of the Enlightenment law plays the role of what Foucault termed a "total history" in that it came to be conceived as constituting the overall form or principle of a civilization; indeed law becomes the very personification of civilization.[23] In this role law is endowed with a teleological self-conception combining four projects: that of totality (the rational organization and ordering of a whole society); unity (the sovereignty of the nation state); civilization (the supercession of a dangerous and unordered past — law versus self-help and feuding); and finally the project of 'the subject' (the constitution of the legal subject as citizen, and citizen as legal subject endowed with self-responsibility and legal liability).

In challenging the Enlightenment's conception of law, postmodernism joins with and supplements other strands of critical theory. Its general thrust is to displace and decentre the privileged position accorded to 'the Law'. In short, its challenge is to legal centralism. Postmodernism challenges the four interconnected projects assigned to law. It denies totality by focusing on the social construction of the plurality and the radical particularity of social life. It denies unity, emphasizing instead the diversity of the micro-constituents of social life and the inability of states to ever fully subordinate such plurality. Postmodernism dismembers civilization by denying the evolutionist illusions on which the conception rests and exposing its suppression and silencing of the expelled and excluded (whether they be the insane, women or colonial peoples).

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[21]Liberal legalism which has enunciated, worked and reworked these themes has been predominantly concerned, even preoccupied, with the danger of transgression by the state. It has generally been critics from the Left who have pointed to the significance of 'private' economic power. My insertion of 'potentially' indicates that there seems to be no intrinsic barrier to liberalism taking cognisance of this form of power which threatens the boundaries it seeks to police. Concretely it is liberalism's parallel commitment to private property that impedes such a recognition.

[22] Dworkin, *supra*, note 5 and "Law's Ambitions for Itself" (1985) 71 Va. L. Rev. 173.

[23]M. Foucault, *The Archaeology of Knowledge* [1969], trans. A.M. Sheridan Smith (London: Tavistock, 1972) at 9.

Finally, and most famously, postmodernism displaces and decentres the sovereign subject. Thus the postmodernist critique displaces law from its central role as the embodiment of rationality and civilization. The discourses of law are simply a prime example of one of Lyotard's *grands récits* or totalising narratives which tells history as the unified story of one universal subject with a single origin and a unitary telos.[24]

To those who read the postmodern challenge too hurriedly this critique reads as a veritable condemnation of law itself and can, by extrapolation, even be treated as heralding the end of law.[25] But it needs to be stressed that the challenge is capable of quite another and less apocalyptic reading. The alternative version is one which cuts down the aggrandisement of state-law's ambition for itself so that we are better able to address both the limits and the potentialities of law as a form of social ordering. In short, postmodernism can be read as enjoining a more modest framework in which we can debate the real world of law, with its strengths and its limitations. This critique can and should be embraced as a necessary corrective to the over-investment in law characteristic of the discourses of the Enlightenment and of the major variants of liberal legal theory. But while it is true that postmodernism offers a powerfully formulated critique of legal centralism, it cannot be considered to be original. Indeed it is one that is already strongly represented by a range of pre-existing critical traditions, most significantly by American legal realism, by sociological discourses on law, by Marxist theories of law and, perhaps most powerfully, in 'early' critical legal studies.

B. Postmodernism and Legal Scholarship

This second challenge is to the way in which the project of legal scholarship has heretofore been conceived; though linked to the first challenge, the second is distinct and separable. It consists in a wide-ranging challenge to the philosophical and, in particular, the epistemological presuppositions of both liberal legalism and of critical legal studies. In its most general form postmodernism is anti-foundational in the sense that it denies the possibility of philosophy providing any epistemological guarantees for legal discourse, in particular, by undermining claims to tests of legal validity, rules of interpretation and the general positivistic quest for certainty, and if not certainty, then predictability. There is a certain variety within the anti-foundational position. In its most measured form, epitomized by Rorty's pragmatism, the denial is of philosophy as a 'mas-

[24]Lyotard, *supra*, note 3.

[25]It is this apocalyptic fear of a threat to law itself, which in passing it may be noted imports a very distinctive personification of law, that underlies the most outspoken criticisms of the critical legal studies movement; see P.D. Carrington, "Of Law and the River" (1984) 34 J. Legal Ed. 222; O. Fiss, "The Death of the Law?" (1986) 72 Cornell L. Rev. 1; A.B. Rubin, "Does the Law Matter? A Judge's Response to the Critical Legal Studies Movement" (1987) 37 J. Legal Ed. 307.

ter discipline' able to provide external epistemological guarantees for other disciplines.[26] This rejection of the foundational role of philosophy leaves every other discipline free to decide upon its own epistemological conventions. More radical forms of anti-foundationalism, epitomized by Foucault's critique of the human sciences, insist that the epistemological postures of any discipline result from the play of relations of power and are subject to decisive and sometimes abrupt paradigm shifts.[27]

The most important implication of postmodernism's epistemological challenge to legal scholarship is that it confronts the central preoccupation of legal positivism, the dominant strand within liberal legalism, with the search for tests of legal validity.[28] The existence of some governing test of validity is conceived as a precondition for the justification of the imposition of law as a form of state coercion. It proceeds by drawing a distinction between legitimate and illegitimate applications of the coercive capacity of the state. In challenging the very possibility of grounding the validity of law, the epistemological critique mounted by postmodernism thus goes to the very heart of the project of liberal legalism.

Drawing a distinction between these two challenges, the first to legal centralism and the second to legal epistemology, is important to both the argument and the structure of this paper. Most immediately it allows me to approve the first challenge to legal centralism whilst identifying reservations and specific resistances to the epistemological challenge. It is upon this attempt to separate out positive and negative dimensions of the postmodernist challenge that my attention will be focused.

III. Postmodernism and Critical Legal Studies

Within legal scholarship it has been in critical legal studies that the challenges posed by postmodernism have been most influential. My contention is that the trajectory of CLS has involved two different strands, one which has accepted much of the mood and language of postmodernism whilst nevertheless

[26]It is precisely this insistence on the restricted nature of Rorty's critique of foundationalism that Joseph Singer emphasises in "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 Yale L.J. 1 in the course of his criticisms of one of the CLS texts which bears the heaviest stamp of postmodernism, namely, J. Stick, "Can Nihilism be Pragmatic?" (1986) 100 Harvard L. Rev. 332.

[27]M. Foucault, *The Order of Things: An Archaeology of the Human Sciences* [1966] (London: Tavistock, 1970) and *supra*, note 23.

[28]In using the designation 'epistemological challenge' it should be borne in mind that postmodernist positions are generally explicitly anti-epistemological in that they deny the pertinence of epistemological enquiries. For my present purposes it matters little whether this claim to occupy a positon outside epistemology is itself an epistemological position; since little hangs on this matter I persist with the convenient label 'epistemological challenge'. My contention, which I do not seek to develop, is that it is impossible to adopt a position outside epistemology.

maintaining a degree of critical distance and the other which has imported the whole of postmodernist thought.

In its earliest stage of development CLS authors generally saw one of their tasks as being to elaborate an alternative theorization of law; this project was most apparent in the central role played by the concept of 'fundamental contradiction'.[29] This concept is typical of classical theoretical strategy; it deploys a concept which seeks to impose a pattern, and possibly a structure, on wide and diverse elements of social reality. Certainly liberal theory, and possibly the social reality of liberal society, could be modelled on the systematic presence of dichotomies and their accumulation into a general or fundamental contradiction (for example, between self and others).

There was, I suggest, one key text which announced the abandonment of this conventional, albeit radical, theoretical strategy and that was Peter Gabel and Duncan Kennedy's conversational exchange "Roll Over Beethoven".[30] But this piece aside, the transition within CLS work involved an almost imperceptible shift of intellectual reference points; it was imperceptible in the sense that it did not seem to necessitate any explicit acknowledgment that a shift was occurring, nor did it generate any public debate within the CLS community about the merits or problems of the shifts or transitions which were occurring. But it was the Gabel-Kennedy text that marked the moment (if there ever is a single moment) of reception of postmodernism into the emergent tradition of critical legal studies. It was in this text that, Kennedy announced a rejection of the possibility of CLS's theoretical project and indeed about the very "possibility of theory".[31] In adopting this stance he was in step with a generalized reaction against theory which had been particularly sharply debated in the field of literary theory.[32] This rejection of theory has come to have the pervasive influence within CLS and is very close to Rorty's critique of the foundational aspirations of philosophy.[33]

In "Roll Over Beethoven" Kennedy sketched out his preferred project for CLS; his alternative to the project of 'grand theory' included some characteris-

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[29]The concept 'fundamental contradiction' was the cornerstone of Duncan Kennedy's "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo L. Rev. 205; the concept was taken up with changing emphasis by most other CLS writers in the late 70s and early 80s.

[30](1984) 36 Stan. L. Rev. 1.

[31]*Ibid.* at 47. Throughout the exchange Gabel generally assents to the thrust of Kennedy's argument, but also manifests a lingering predisposition to the general theoretical project that had marked the first stage of the CLS project.

[32]The major contributions to the 'against theory' debate are collected in W.J.T. Mitchell, ed., *Against Theory: Literary Studies and the New Pragmatism* (Chicago: University of Chicago Press, 1985).

[33]See, in particular, R. Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979) and *Consequences of Pragmatism* (Minneapolis: University of Minn. Press, 1982).

tically postmodernist motifs: the rejection of rationalist philosophy, the repudiation of 'privileged' concepts, a reaction against abstraction as being antithetical to 'the real', a valorization of experience, and a focus on the small scale (minimalism or what I prefer to call 'localism').[34]

What is striking about Kennedy's remarks is the assumption that the problems presumed to haunt 'theory' and 'abstraction' can be so readily escaped. He insists that to replace theoretical constructs such as 'fundamental contradiction' by the more homely 'making the kettle boil' abolishes privileged concepts and avoids abstraction. This is part of an unargued assumption that to engage with 'experience', or its close associate 'common sense', provides a direct and unmediated access to 'reality'. Of course, as the more philosophically reflective strands of postmodernism make clear, there can be no such direct connection between reality and knowledge. But of more immediate import is the fact that there is no obvious merit in a move from a theorized privileged concept to an under-theorized privileged concept; 'kettles boiling' is both abstract and privileging, it is simply more fuzzy than 'fundamental contradiction'; its only conceivable merit is that it panders to a populist anti-theoreticism.[35] In a similar vein the appeal to the importance of the small-scale or local reality as a site for political intervention is part of conventional wisdom, but does nothing to address the more complex and intractable problems about the processes of aggregation and over-determination that link the local with the national, the micro with the macro levels.[36]

There is a significant continuity between the more recent postmodernist strand within CLS and its longer lineage which reaches back to the themes of the pre-war Legal Realists. This continuity is provided by the central, even organizing, emphasis upon the indeterminacy of legal doctrine. In the work of the 'new wave' postmodernist CLS this thesis draws less on the pragmatic demonstration of the inconsistency of legal doctrine; instead this argument increasingly relies on the more general themes of postmodernist linguistic and literary theory which, in a more systematic way, have displaced authorial authority, interpretational validity and univocal meaning. In the main the postmodernist shift within CLS has taken place easily without any sign of tension or controversy; it is manifest perhaps most demonstrably in CLS's own distinctive style of authorial privileging in which declarations of intellectual approval and affil-

[34]See further discussion of localism below in Part VI.

[35]The characteristic 'against theory' stance of much postmodernism is taken by some to be a 'rightist' deviation. "The rhetoric of 'against theory' ... cannot help but bring comfort, energy, and ideas to the enemies of change. The rhetoric of 'against theory' is reactionary." F. Lentricchia, "The Return of William James" (1986) 4 Cultural Critique 5 at 29. On the other hand Terry Eagleton characterises the "hair-raising radicalism — the nerve and daring with which it knocks the stuffing out of every smug concept" as 'ultra-leftist'; *Walter Benjamin or Towards a Revolutionary Criticism* (London: Verso, 1981) at 134.

[36]See below in Part VI.

iation are given by means of footnotes referring to the oeuvre of some major thinker. Symbolically Marx, Gramsci, Habermas and Freud have been displaced by Nietzsche, Derrida and Foucault.[37]

Critical legal studies has moved into a second phase in some other senses. Today there is a much more explicit focus on postmodernist themes and issues.[38] This second wave of CLS authors has become increasingly concerned with the reaction of the wider community of legal scholarship to the critical enterprise. There is today a secondary literature of responses to critical legal studies which ranges from intemperate hostility[39] to "friendly critiques" from fellow radicals,[40] as well as critical reactions from major figures of modern legal theory.[41] The focus of current debates about critical legal studies, from friend and foe alike, revolves around the issue of 'nihilism' and its close associate 'relativism'. It is these issues that have become most closely associated with the mark of postmodernist thought. It is the anxieties generated around the issues of nihilism/relativism which is captured in the figure of "The Big Fear" used to title this paper.

IV. The Big Fear and the Slippery Slope

The emergence of postmodernist positions within legal scholarship has raised the temperature of the usually benign style of legal scholarship. One response to critical legal studies and postmodernism has been intemperate. For example, Paul Carrington argues that there is no place for CLS-types within the law school; he hedges the illiberality of his position by not calling for their dismissal but with the ultimately lame gesture of calling for their resig-

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[37]In the general field of social theory postmodernism has been engaged in a protracted debate with the Marxist tradition, but perhaps most intensively with contemporary critical theory, in particular, as represented by Habermas; see, for example, *The Philosophical Discourse of Modernity*, *supra*, note 4; Lyotard, *supra*, note 3. For a very helpful overview of the debate between postmodernism and critical theory see P. Dews, *Logics of Disintegration: Post-Structuralist Thought and the Claims of Critical Theory* (London: Verso, 1987). Not only does Habermas see modernity as a project as yet uncompleted but he also holds out the possibility for the grounding of truth and validity claims. It is as a result of the shift of CLS towards more explicitly postmodernist positions that Habermas, who had earlier been favourably regarded, has largely been dropped.

[38]For texts drawing on and espousing postmodernist themes see, for example, Balkin, *supra*, note 7; Cornell, *supra*, note 7; Douzinas & Warrington, *supra*, note 7; Hutchinson, *supra*, note 7; and Peller, *supra*, note 7.

[39]See, for example, Carrington, *supra*, note 25 and Rubin, *supra*, note 25.

[40]See, for example, E. Sparer, "Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement" (1984) 36 Stan. L. Rev. 509; F. Munger & C. Seron, "Critical Legal Studies Versus Critical Legal Theory: A Comment on Method" (1984) 6 Law & Policy 257; Symposium, "Minority Critiques of the Critical Legal Studies Movement" (1987) 22 Harv. C.R.-C.L. L. Rev. 297.

[41]See, for example, critical responses to CLS from Dworkin, *supra*, note 5 and J. Finnis, "On 'The Critical Legal Studies Movement'" (1985) 30 Am. J. Juris. 21.

nation.[42] Carrington's response is but the most extreme manifestation of the deep and passionate reactions engendered by the double challenge to law and legal scholarship posed by postmodernism.

What I have termed 'The Big Fear' is a reaction which adopts a catastrophic scenario in which any concession to contingency or any retreat from the objectivity of knowledge-claims necessarily leads, via the associated imagery of the "slippery slope", unwittingly, but unavoidably towards the abyss of relativism and its even more dangerous associate, nihilism. This nihilism is both a generalized loss of belief in the prevailing social order leading to the denials of claims to objectivity and an insistence on the contingency of all values. In respect to law, Peter Goodrich suggests that nihilism

> simply means loss of faith in the community of legal doctrine and refusal to succumb, acquiesce or otherwise believe in the foundational myths of legal doctrine and legal regulation.[43]

Nihilism is conceived as catastrophic because it seems to deny the possibility of cognitive, ethical or moral judgement as anything more than subjective preference or conventional consensus. If "one opinion is as good as another" the project of scholarship itself seems to be doomed if the opinion of the fool is as valuable as that resulting from painstaking study. If "anything goes" it becomes impossible to distinguish between a moral judgement and self-interest. If there is no means to construct an argument which makes it 'better' or 'stronger' than another then all judgements, whether legal, political or moral, are arbitrary, and arbitrariness is a step along the road to either anarchy or tyranny.

Participants on both sides of the debate are propelled towards what Habermas has aptly termed "unmediated confrontations" in which stark and irreconcilable oppositions are forced to do battle. The lines of division are broadly and sharply drawn. The debate gets out of hand. "The Big Fear" pictures people who are presented as claiming that any view is as good as any other; but such a view is a fabrication, there are no witnesses that can be subpoenaed who hold, let alone advocate, such a position. Thus, for example, Allan Hutchinson argues that the charges laid at the door of relativism/nihilism must be false because there simply are no relativists or nihilists to be found on the block:

> Nihilism is only threatening or comprehensible for those who maintain that objective truth and rational knowledge are required for moral action and authority. It is only troublesome to those who continue to believe in the worth of the Enlightenment Project. The nihilistic deep is a construct of that project. If the

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[42]Carrington, *supra*, note 25.

[43]P. Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Oxford: Basil Blackwell, 1986) at 217.

> Enlightenment Project is abandoned, the association of nihilism with moral despair will also be rejected.[44]

Yet this defence seems to exhibit the classic weakness of all sceptical epistemological positions, namely, that in denying the possibility of absolute truth they slide into the untenable and unsustainable position that all forms of truth-claims must be absolutist and, as such, are fictions. As Peter Dews observes, the avant-gardism of postmodernism

> has been marked by an astonishingly casual and unquestioning acceptance of certain extremely condensed — not to say sloganistic — characterizations of the history of Western thought, as if this history could be dismissed through its reduction to a set of perfunctory dualisms.[45]

The characteristic response of postmodernist thinkers is to deny the pertinence of 'the big fear' and to insist that they are really the 'good guys' who want to do no more than set aside unjustified illusions about truth, certainty and objectivity. Their claim is one which stresses modesty and humility;[46] if we only abandon grandiose and unsubstantiated faith in reason, they suggest, then we can get along fine, and judges (just like everyone else) must make, and justify, their choices without hiding behind the discourses of truth and objectivity which only serve to obscure our responsibility for the choices that we make. James Boyd White exemplifies this response:

> When we discover that we have in this world no earth or rock to stand or walk upon but only shifting sea and sky and wind, the mature response is not to lament the loss of fixity but to learn to sail.[47]

Appealing though this metaphor is, it tarnishes as soon as we press the question: What must the judge or legal scholar do to learn to sail? Sailing offers a recognizable alternative to standing on the rock; but in letting go of our philosophical aspirations to ground knowledge we are entitled to know what is the functional equivalent to sailing.

One answer which has had considerable appeal to contemporary critical thought in law has been suggested by Richard Rorty, whose philosophy may best be understood as offering a naturalization of the radical relativistic themes of European postmodernism through their articulation within a pragmatism that is much more palatable to the North American intellectual mood. He takes on the role of the modest intellectual, eschewing grandiose claims. The best that we

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[44]Hutchinson, *supra*, note 7 at 46.

[45]Dews, *supra*, note 37 at xv.

[46]"[T]he purport of post-structuralist texts seems extremely modest ... As to their own text, the post-structuralist is often coy and playful" in David Kennedy, "Critical Theory, Structuralism and Contemporary Legal Scholarship" (1985) 21 New Eng. L. Rev. 209 at 286.

[47]J.B. White, *When Words Lose Their Meaning* (Chicago: University of Chicago Press, 1984) at 278.

can do and all that he enjoins, upon philosopher and citizen alike, is to "keep the conversation going". Once the issue is posed in these terms "The Big Fear" can be safely put aside.[48]

Just as those who raise alarmist fears about nihilism grossly overdramatize the intellectual challenge of postmodernism, so likewise do the postmodernists offer an account of their opponents which is a caricature. Their ruse is to make absolute the ordinary knowledge claims of both traditionalists and unreconstructed modernists by attributing to them unproblematic and unitary conceptions that they do not hold; this ploy is practiced by the heavily used device of the capitalisation of Truth, Knowledge, Morality, etc.; those who have not embraced postmodernism are alleged to believe in absolute 'Truth', 'Objectivity', etc. Another favorite devise is to attribute to all claims of objectivity a commitment to deductive modes of proof and to ignore both the presence of and the claims for other methods of reasoning. Joseph Singer, for example, uses this form of argument against the possibility of objectivity or certainty in legal reasoning.[49]

Both the relativists and their opponents seem trapped in the imagery of the "slippery slope" which operates by extrapolation from the positions actually held to their most extreme *reductio ad absurdum*. The problem is to find a way of posing the important issues at stake in a manner that avoids unmediated confrontations. The issues between the postmodernists and their critics touch upon some of the most important and challenging intellectual and political problems of our times. Rather than attempt to address the full range of issues at stake I will take a more focused approach and explore the important exchange about nihilism between Singer and John Stick.[50]

Critical legal studies has, as Singer observes, raised the spectre of nihilism in the arena of legal studies. It has produced an array of argumentation which, with varying degrees of fervour, insists that law is contingent, indeterminant and non-neutral. This has led to the charge of nihilism being brought against critical scholars because their criticism of law seems to involve the denial of the possibility of law being objective and neutral and thus renders impossible the project of achieving a rational ordering of social relations or of law serving as a means of constraining governmental power.

Singer's strategy is to deny that there is a problem by refusing the relevance of the charge of nihilism. He sets out to show that the absence of determinacy, objectivity and neutrality in law does not condemn us to irrationality, indifference or arbitrariness.[51] The big fear aroused by nihilism rests on the con-

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[48]Rorty, *supra*, note 33.

[49]Singer, *supra*, note 26.

[50]The principal texts are: Singer, *ibid.*, and Stick, *supra*, note 26.

[51]This stance, it should be noted, is exactly the same as Hutchinson's quoted above.

tention that "if we do not believe in the possibility of using reason to adjudicate value conflicts, we have given up on morality and law entirely."[52] The fear which Singer seeks to allay is the apprehension that uncertainty necessarily leads to arbitrariness, a counterposing of reason to passion:[53]

> [If] we do not believe that reason can adjudicate value conflicts and determine the legitimacy of governmental actions, we are relegated to arbitrariness, insecurity, physical and emotional harm, and tyranny.[54]

Singer is concerned to reassure his readers that this fate is not in store for those who espouse the postmodernist cause. His case invokes a Rortian defence which, in brief, says that the critique of legal rationalism can be sustained without fear of contracting the nihilist disease. Immunization from the nihilist contagion is achieved by way of mild inoculation with a dose of pragmatism; this involves nothing more than eschewing Truth, Proof and Reason in favour of that which we all enjoy so much, conversation.

Stick's reply has two main components. The first is to show, and I think quite correctly, that Singer misappropriates Rorty by forgetting that Rorty's primary critique is directed against the foundationalist pretensions of the discipline of philosophy to ground the knowledge-claims of all other disciples. His critique of logocentrism is more limited than Singer recognizes in that Rorty concedes that each discipline (or as he terms it each "field of natural discourse") has its own canons of rationality. For Stick the difference between philosophy and law is that "law does not seek to impose standards of rationality outside its own sphere."[55]

His second line of criticism is that Singer overstates the case for the contingency and indeterminacy of law because he persistently attributes a deductive account of legal reasoning to liberal legalism. This, Stick insists, is a caricature of modern liberal legal theory; rather it is coherence theories, such as those associated with Dworkin, which are the most influential. Again, I suggest that Stick is correct, for although some traditionalists do seem to assume a deductive model of legal reasoning, nobody who addresses the issue explicitly advances such a position; I will not pursue this issue of the dominant modes of legal reasoning further because it lies outside my present concerns, except to comment that it does provide evidence of a tendency in postmodernist argumentation to throw the charge of logocentrism around in a rather cavalier fashion.

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[52]Singer, *supra*, note 26 at 48.

[53]On the dichotomy of reason and passion see Peller, *supra*, note 7.

[54]Singer, *supra*, note 26 at 51.

[55]Stick, *supra*, note 26 at 342. Whilst accepting Stick's corrective to Singer's overextension of Rorty's critique of philosophy it may be observed, in passing, that legal discourse is not as benign as Stick presumes. Law has, as I argue below, its own imperialistic attempts to impose its canons of rationality on politics and morality.

In winning the first two rounds against Singer, Stick is confident that he has won the contest.[56] But it is far from clear that he has repulsed the dragon of nihilism which is giving CLS such a bad press. To disallow Singer from invoking Rorty's critique of philosophy as if it were a critique of legal theory, as Stick succeeds in doing, does not dispense with the strength of both the Rortian and the postmodernist (in so far as these are different) critique of philosophy and of all epistemologies. Stick relies on the obvious point that law and philosophy are organizationally distinct disciplines. He fails however to grapple with the problem that legal discourse, and in particular orthodox jurisprudence, is a species of precisely that kind of philosophy which is the main target of Rorty's criticism in that it does seek to provide 'guarantees' (in particular, through the search for validity) for its truths.

Nor are legal discourses content to remain within the framework of law-as-a-discipline. Legal discourses and legal theory do persistently seek to prescribe the proper conduct for other fields of human inquiry. For example, legal discourses seek to convince us that law can provide viable criteria for the limits of state action, and to deny all but constitutionalist legitimations of political action. In so doing law shares with philosophy the same sort of intellectual imperialism against which the Rortian critique of foundationalism complains. So, despite Stick's valiant efforts, he fails to repulse the postmodernist challenge.

Stick's strategy fails to deal directly with the Rortian challenge. Whilst he succeeds in deflecting Singer's attempt to remove the relativist sting from postmodern critical legal thought, there remain in place important issues which need to be addressed. My contention is that the basic objection that has to be levelled against Rortian pragmatism is its denial that critique can call upon cultural and intellectual resources outside the discourse under examination. Not only can we legitimately seek to understand specific cultural or legal forms of life in terms not their own, but they must be so evaluated. Critique strives for transcendence, it refuses the passive acceptance of Rorty's "postmodern bourgeois liberalism",[57] which as Christopher Norris demonstrates amounts to an invitation to accept the "hegemonic values of present-day American society".[58]

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[56]I would also have Stick win a third round concerning the merits of their substantive political positions because I am sympathetic to his argument that the Left needs to take liberalism seriously rather than being content to trash it; whereas Singer's edifying legal theory of opposition to cruelty, misery, hierarchy and loneliness is just too mushy and indeterminant for my tastes.

[57]Rorty, "Postmodern Bourgeois Liberalism" (1983) 80 J. of Phil. 583.

[58]Norris, *supra*, note 7.

V. Relativism at the Heart of the Postmodern Challenge: The Search For Theories of the Third Way

The implications of my reservation as to whether Stick has done enough to dispense with the fear of nihilism that surrounds CLS, is that the core anxieties that lie at the heart of and provide a rational core for "The Big Fear" remain intact. This anxiety, which can take many forms, manifests itself in the debates within legal studies under the label of relativism. It generates anxiety because it seems to deny the existence of any firm ground in which knowledge can be rooted and seems to leave us, fully aware of our frailties, in an ever changing and variable existence in which access to reality, truth or objectivity is forever denied. It is, in particular, moral relativism which generates the greatest anxiety since its espousal seems forever to prohibit us from settling any argument about what's right or wrong. We seem incapable of getting beyond personal preference or culturally given consensus.

How did critical legal scholarship get into the problem of relativism?[59] For progressive legal scholars, and critical legal scholars in particular, the problem of relativism arose from the concern to escape the vice of determinism which itself was the central problem generated by the interrogation of the formative influence of Marxist theory on critical legal studies.[60] In short, the reaction against determinism swung the intellectual pendulum full circle and arrived at relativism.

The critique of determinism, however, does not necessarily lead to relativism. The issue of determinism came to be posed in terms of the dominance of external causation in which the problem seemed to be that Marxism, as the most influential version of determinism, posits a causality (whether with regard to law or other 'superstructural' phenomena) located outside the phenomena under consideration, and which is to be found in the causal primacy of 'the economic'. The recognition that an important aspect of the problem of determinism was its apparent dependence on an external account of causality is of special significance because it explains the association between the rejection of determinism and the anti-realist philosophical position associated with relativism. The retreat from a realist epistemology comes about because it is assumed that it posits reality as external in respect to which the knowing subject is conceived as internal. This is seen most vividly in Rorty's rejection of all reflection accounts of

[59]Other strands of legal scholarship have come to face issues revolving around relativism by different routes; for example, liberal legal theorists travelled to the relativist implications of the interpretation debate as a result of the breakdown of traditional legal positivism.

[60]For an account of CLS's engagement with determinism see R. Gordon, "Critical Legal Histories" (1984) 36 Stan. L. Rev. 57. More generally, on alternative responses within the Marxist tradition, see N. Mouzelis, "Marxism or Post-Marxism?" (1988) 167 New Left Rev. 107.

reality as "the mirror of nature" whose imagery invokes the mind as internal and the reality mirrored in it as external.[61]

Once the problem is posed in these terms the rejection of determinism, and of the closely related vices of economism and reductionism, then a radical relativism, which renounces all talk of an external causality or an external reality and also abandons the projects of objectivity and truth, comes to seem the best guarantee against these vices. Of the different varieties of relativism the one which is paramount in recent CLS work is a cultural relativism which emphasizes the social construction of reality without any structures outside of linguistic communities being able to impose limits or constraints. Hence culture, in its infinite diversity and irreducibility, ensures the plasticity and relativity of the social.

We should stop and enquire whether this move to cultural relativism was necessary in the first place. The critique of determinism from which it arose is flawed because it introduces its own reductionism in that it presumes that the root problem of our account of causality is that it involves positing causal factors as external to that which is caused. The effect of this reduction is to set up an opposing dualism between external and internal, with the implication that to reject externality necessarily implies the adoption of an internal or non-objectivist account of causality. The paradox is that a distinctive feature of the CLS critique of liberalism has been to draw attention to liberalism's reliance on precisely such irresolvable dichotomies.[62]

The move to cultural relativism, while apparently intellectually radical and fully 'sociological', gives rise to the unintended consequence of 'social subjectivism', in which the subject conceives sociality as expressing only her own social position and experience.[63] The real difficulty is to find a way of avoiding this false counter-opposition between subjectivity and objectivity. This problem is, of course, a variant of that most pervasive problem of contemporary social

[61]See Rorty, *supra*, note 33.

[62]On the critique of the role of dichotomies in liberal legalism see D. Kennedy, "Legal Formality" (1973) 2 J. Legal Stud. 351; F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497 and M. Tushnet, "Legal Scholarship: Its Causes and Cure" (1981) 90 Yale L.J. 1205.

[63]Karel Kosik describes social subjectivism in the following terms:

> Praxis is not man's being walled in the idol of socialness and of social subjectivity, but his openness toward reality and being. All manner of theories of social subjectivism (sociology of knowledge, anthropologism, [and, we may add, postmodernism]) have walled man in a subjectively conceived socialness and practicality: in their opinion, man expresses only himself and his social position in his creations.

K. Kosik, *The Dialectics of the Concrete: A Study on Problems of Man and World* (Dordrecht: D. Reidel, 1976) at 139.

thought, namely, how to embrace both agency and structure without prioritizing one side or the other.[64]

As legal studies comes to engage the implications of taking its place seriously within the social sciences it has to engage what is one of the most pervasive theoretical questions facing the social sciences. There are many and varied ways in which the problem can be stated: Is it possible to avoid the dualism which haunts the history of social theory? Is there any way to avoid the opposition of structure/agency, objectivism/subjectivism, external/internal, etc.? Is it possible to find a way to articulate the interpenetration of objectivity and subjectivity? Can we find a framework which allows us simultaneously to employ ideas of historical determination and of the relativity and particularity of social life?[65]

The quest is for 'theories of the middle way' which, while avoiding overtly dialectical modes of expression, do seek to offer social and philosophical theory that attempts to overcome or to avoid the counterposing of objectivity and subjectivity, of structure and agency. Although very different in the positions espoused and concepts employed Habermas and Anthony Giddens in social theory and Richard Bernstein in philosophy all seek to steer a path between objectivism and subjectivism.[66] Since so significant a background role in the postmodernist debates has been played by responses to Marxism it is significant to note that Marxism, because of the close proximity of determinist and dialectical traditions within its development, has a long history of attempts to reconcile these strands and has produced a number of significant examples of theories of the middle way.[67]

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[64]For interesting treatments of the structure/agency problem see A. Giddens, *Central Problems in Social Theory* (Berkeley: University of Calif. Press, 1979) and A. Callinicos, *Making History: Agency, Structure and Change in Social Theory* (Ithaca: Cornell University Press, 1988).

[65]The problem is not so much whether such an account exists, for one significant tradition has a long and distinguished history bearing the name of dialectics, and comes in many varieties of intellectual and political hue, most famously, those associated with the names of Hegel and Marx. The problem about following through with this line of thought is that any mention of dialectics produces an adverse reaction in almost all strands of Anglo-American thought. This suspicion and hostility is one which I share. This is not the occasion to explore the reasons for these resistances. For present purposes it is sufficient to note that dialectical theory offers one possible escape from the mechanical counter-opposition of dichotomies within social theory.

[66]R. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics and Praxis* (Philadelphia: University of Penn. Press, 1983); A. Giddens, *The Constitution of Society* (Berkeley: University of Calif. Press, 1984); J. Habermas, *The Theory of Communicative Action*, trans. T. McCarthy (Boston: Beacon Press, 1984).

[67]Among some of the more important Marxist works which are, to a greater or lesser extent, theories of the middle (or third) way; see L. Colletti, *Marxism and Hegel*, trans. L. Garner (London: NLB, 1973); M. Godelier, *The Mental and the Material: Thought, Economy and Society*, trans. Martin Thom (London: Verso, 1986); P. Bourdieu, *Outline of a Theory of Practice*, trans. R. Nice

For present purposes it is not necessary to adopt or defend any one of these alternative theorizations. It is sufficient to insist that we must reject the false promise of the dichotomized choices within which the debate has been constructed. Relativism can have its necessary place, but it must abandon its paradoxically absolutist pretension that "everything is relative". It can take its useful place as a grounded relativism. By this I mean a position which embraces contingency and social construction, but which insists on limits to the possible variation of social forms. This move is not concerned simply to reintroduce objective structures and conditions of existence, although, of course, it does this; but it seeks to make a more basic point that the varieties of social construction of meaning and signification have their limits in the kind of people who construct their social reality, whose language, ideology and consciousness take particular (not just any) historical forms and thus result in determinant limits to the variability of the social. This attempt to ground relativism is essential in order to recover history in so far as postmodernist thought, whilst appealing to historicism, ends by abolishing history. The postmodernist formula that people cannot step outside of history is taken to establish the impossibility of achieving objective truth. This, however, is an ambiguous formula, since it reduces history to historicity, temporality, transience and irreplicability; historicism breaks up history into transience and a temporality of conditions. Social life is not a prehistorical or a trans-historical and unvarying substance; rather it is formed in the course of history. Reality is more than conditions and historical facticity (although it does not ignore empirical reality). Historical reality exists in this duality of transience and the trans-historical. The only reality of the human world is the unity of empirical conditions, complete with the processes of their formation. Reality is not the chaos of events or of fixed conditions but rather the unity of events and their subjects, a unity of events and the processes of their formation, and thus involves a capacity to transcend conditions. The ability to transcend conditions allows for the possibility of a movement from opinion to knowledge. For it is only if knowledge, not an absolute Knowledge or Truth, is itself a grounded knowledge, that is one which is the best that can be realized under the existing conditions of its production, that history can itself be recovered and in turn made use of in our self-understanding and capacity to transform the social conditions that we encounter. Without some such conception of knowledge the progressive urge behind much postmodernist discourse yields, albeit unintentionally, to a passivity and helplessness which becomes most apparent in the politics of legal postmodernism, the subject of Part VI.

(Cambridge: Cambridge University Press, 1977); Kosik, *supra*, note 63; S. Resnick & R. Wolff, *Knowledge and Class: A Marxist Critique of Political Economy* (Chicago: University of Chicago Press, 1987).

The quest for theory cannot be reduced to attempts to impose rival metanarratives upon the flux of social life. Theory is here to stay, if only in the limited sense that it cannot be evaded or abolished; there can be no discourse outside theory. Theory has the simple but important advantage over common sense in that it specifies its concepts and their connections and thereby brings to the surface the assumptions around which the theory is constructed, and thus it makes their interrogation possible.

VI. The Politics of Postmodernism

Not only are there problems in finding appropriate ways of posing the issues in dispute, but there is just as big a difficulty in deciding what the political implications of these intellectual positions are. One dimension of the dilemma of the progressive intellectual is: How do we decide what is progressive?[68] There is nothing to be gained by bemoaning the loss of the old certainties when relatively simple tests revealed the true political colours of intellectual and political positions. These apparent certainties were themselves the result of an ossification of the political thought of both the Left and the Right. That postmodernism has challenged and disrupted the process of political evaluation is one of its significant contributions, although it should be conceded that this process was already well underway within the fundamental rethinking on the Left of both Marxist and social-democratic politics from the late 70s. Peter Dews expresses the inherent limitation of the politics of postmodernism as exhibiting a

> continuing lack of clarity about the political consequences of its characteristic positions . . . [and] little attempt to think through the ultimate compatibility of progressive political commitments with the dissolution of the subject, or a totalizing suspicion of the concept of the truth.[69]

The most distinctive feature of the politics of postmodernism is the suspicion and renunciation of any strategy of large scale political change since these tend to be premised upon privileged agents (e.g. 'the state', 'the working class') and to be posed in terms of totalities (e.g. capitalism). The alternative to macropolitics is the politics of localism. Localism in a number of different forms is present in much CLS writing; ideas of the fundamental reality of immediate experience, of the self-governing community, that small is beautiful interweave with the CLS tradition.[70]

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[68]I intentionally invoke the plural that "we" have to make decisions about what is progressive; the choice of intellectual orientation or political strategy needs to be more than a matter of individual preference.

[69]Dews, *supra*, note 37 at xv.

[70]The idea of 'community', standing in contrast to both individual alienation and the totalising state, has long been a motif within CLS and has particular significance in providing one of the linkages between Roberto Unger and the more traditional radicalism of mainstream CLS. The themes

The most extensive and developed argument for localism is advanced by Hutchinson and for this reason discussion will focus on his position which is taken to be representative of much within CLS.[71] Hutchinson derives his political stance directly from postmodernist theoretical premises: "By abandoning the search for foundational truths, we enhance the possibilities for the powerless to engage in the essential dialogue of world re-making."[72] Unfortunately he does not indicate just how the adoption of such an abstract philosophical (or non-philosophical) position helps the powerless. Indeed once it becomes clear that he conceives of politics as Rortian "conversation" it becomes even less clear how this helps the powerless, even though he writes of conversational politics with militant rhetoric: "As conversationalists, we are front-line combatants in the daily struggle to resist, reproduce or change the world."[73]

The hegemony of the discourses of power and knowledge is such that it is far from self-evident that this dialogic conception of politics opens spaces for the subordinated.[74] It is uncertain how the radical subjectivism he espouses can contribute to a change in the pattern of political relations. As Terry Eagleton presses: "the unending 'dialogue' of human history is as often as not a monologue by the powerful to the powerless."[75] But Hutchinson exudes a deep confidence in dialogue and inter-subjective communication: The focus of endeavour must be realigned. Each person must individually and collectively encourage him or herself and others to promote and experience new forms of inter-subjectivity.[76] It is difficult to understand just how such a view of politics can provide any challenge to the institutionalized structures of power and inequality which characterize modern society. Whilst he recognizes that in 'politics as conversation' the powerful have the cards stacked in their favour, he is optimistic that localized politics can provide the enpowerment to activate the pow-

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of localism and community make contact with a certain mutual attraction between CLS and the revived interest in 'civic republicanism'; this is most apparent in the work of Andrew Fraser and Frank Michelman. See A. Fraser, "Legal Amnesia: Modernism versus the Republican Tradition in Americal Legal Thought" (1984) 60 Telos 15; F. Michelman, "Traces of Self-Government" (1986) 100 Harv. L. Rev. 4.

[71]Hutchinson, *supra*, note 7. Hutchinson offers the most developed account of localism. As already noted it is a theme present in Gabel and Kennedy, *supra*, note 30, and is also a major strand of James Boyle's position in "The Politics of Reason: Critical Legal Theory and Local Social Thought" (1985) 133 U. Pa. L. Rev. 685.

[72]Hutchinson, *ibid.* at 289.

[73]*Ibid.*

[74]Joel Handler offers a significantly more elaborated model of participatory politics in what he calls the "dialogic community", but he recognises that "when power is seriously unequal, something more is required"; "Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community" (1988) 35 U.C.L.A. L. Rev. 999 at 1076.

[75]T. Eagleton, *Literary Theory: An Introduction* (Oxford: Basil Blackwell, 1983) at 73.

[76]Hutchinson, *supra*, note 7 at 291.

erless. He goes further by insisting that local politics requires the renunciation of politics at the level of the state:

> [W]e must refrain from the familiar attempt to think in total and global terms. The response must be much more local and domestic. By working at ground level, transformative activity becomes a real possibility for disaffected citizens.[77]

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

It is important to my case to stress that I do not seek to disapprove of or to denigrate local politics. Indeed the stress on local politics has been an important part of the rethinking of progressive and socialist politics during recent years. But I do challenge the simple substitution of micro- for macro-politics. Postmodernism has a tendency to adopt a wilful self-limitation and thus to disempower itself from undertaking more than the most fragmentary analysis. There are some important questions about the relationship between local and state politics; among the questions that need to be explored are: To what extent can specific politics (including local politics) succeed without at the same time engaging with the multifaceted forms of social oppression? If struggles are not reducible, under what conditions is it possible to go "beyond the fragments" to achieve concerted action, and even alliances, effective at the level of the state? Unless these questions are explored the powerless are doomed forever to engage in an endless series of single-issue struggles. It is not that such struggles are unimportant, indeed they are the starting point of action and enpowerment; but unless they find appropriate forms of articulation at the national or international level they may remain locked into a vicious circle of a reformism that can never achieve its most significant goals.

A second and linked strand within the politics of postmodernism which has had considerable impact on CLS is organized around a strong commitment to a model of an ideal political practice which is participatory, which links the participants in a "dialogic community" and is empowering for those constituencies which are marginalized, silenced or excluded by the dominant discourses.[78] The roots of this configuration involve a sharp reaction against the traditional categories of socialist politics; the working class, political parties and the struggle for state power have no place in postmodernist politics. What is sketched is an admixture of Foucault's conception of a politics which is directed to bringing

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[77]*Ibid.*

[78]For an extended commentary on the potentialities and limits of the quest for dialogic community through rights struggles see Handler, *supra*, note 74.

into play "an *insurrection of subjugated knowledges*"[79] and Roberto Unger's concern with the expansion of the capacity to revise the encountered contexts through an "empowered democracy".[80] Such influences do not constitute a political programme nor even an agenda; rather they serve to sketch out the parameters of a potential political space whose major characteristic is precisely its marked departures from traditional progressive politics, whether revolutionary or reformist, which have both been directed to the seizure or acquisition of state power. True to the project of redrawing the map of politics and culture embodied in postmodernism, this 'new politics' defies and seeks to break out of the old categories of Left and Right. It is clear that the present period is one of major transformations whose full characteristics and implications at this early stage we can only partially grasp. I prefer to avoid the label postmodernism and in its place invoke the more neutral designation "New Times".[81] It is unwise, if not impossible, to analyse the new political orientations of the postmodernist trend within CLS as if they formed a stable conception. But we can catch glimpses of the implications for the politics of law.

The politics of postmodernist approaches to law tends to take over from earlier CLS positions a strong reservation about the political role of litigation and of rights.[82] Thus, for example, Hutchinson is suspicious of, if not downright hostile to, institutional politics, and this goes for legal politics as well. His strategic position is: "Resort to the courts can only be a pragmatic and occasional strategy for change."[83] He is trenchant in his critique of the judicialization of politics and of creeping judicial review of legislation.

I started out posing the question: What is Left in legal studies? It is now time to return to this issue.

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[79]M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed. by C. Gordon (New York: Pantheon Books, 1980) at 81.

[80]R. Unger, *Politics: A Work in Constructive Theory*, 3 vols (New York: Cambridge University Press, 1987). By far the most interesting discussion of Unger's work is Perry Anderson's essay "Roberto Unger and the Politics of Empowerment" (1989) 173 New Left Rev. 93.

[81]See the October 1988 issue of Marxism Today; in particular, S. Hall, "Brave New World" (1988) 32:10 Marxism Today 24 and C. Leadbeater, "Power to the Person" (1988) 32:10 Marxism Today 14. 'New Times' in this context indicating an attempt at a less absolutist analysis than that provided by 'post-Fordism' and 'post-modernism'. See also D, Hebdige, "After the Masses" (1989) 33:1 Marxism Today 48 for a wide-ranging review of the many faces of postmodernism.

[82]For "early" CLS criticism of rights see, for example, A.D. Freeman, "Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine" (1978) 62 Minn. L. Rev. 1049; M. Tushnet, "An Essay on Rights" (1984) 62 Texas L. Rev. 1363. This hostility towards rights has already come in for some criticism; see Sparer, *supra*, note 40, and Symposium, "Minority Critiques of the Critical Legal Studies Movement", *supra*, note 40. For fuller discussion of the 'rights debate' within CLS see A. Bartholemew and A. Hunt, "What's Wrong With Rights" in *Law and Inequality* (forthcoming).

[83]Hutchinson, *supra*, note 7 at 291-92.

If there is any common core to progressive thought it is a position which stands astride Enlightenment thinking; it does retain some commitment to the idea of progress, but its sense of modernity is one which focuses on the possibility of change and the role of human agency. The Left's version of modernism is one in which all 'natural' social facts are open to challenge and change, there is no pre-given 'human nature'; rather both history, and most significantly those who make it, remake themselves in the process of making history. The projects, struggles and travails of individual women and men, groups and every kind of collectivity make history and in doing so make themselves, and in this process lift the blanket of superstition, ignorance, fear and oppression. We do not need to be over-optimistic and envisage some brave new world in which fear and ignorance are banished; but there is a positive sense of advance in which whatever reservations we may have about 'Truth' do not inhibit us from saying things are better today than they were yesterday. But, of course, the deep source of the attraction of postmodernism lies in all those aspects of the human condition in which we are no longer as certain as we used to be that things are better today than they were yesterday. The deep significance of the inexorable rise of environmentalism is precisely that what has been the key evidence of the universality of progress, namely, the species' ability to control and subordinate nature, is now the source of the greatest collective danger. There is another, and explicitly political, side to contemporary doubts about progress. The parallel political transformations of the twentieth century, socialism (in both its Communist and Social-Democratic forms) and anti-colonialism have failed to produce societies which offer much encouragement to the progressive commitment to remaking the world. When the cake comes out of the political oven it has persistently failed to live up to its promise.

If the Left is committed to change, but unhappy with its results, and less confident about progress, then it follows that progressives have no alternative but to take the postmodernist challenge seriously. If the engagement with postmodernism is to be fruitful (not simply oppositional) then it is necessary to concede that postmodernism does present a challenge to the normal progressivist embrace of science, rationality and progress. It perhaps reduces the shock of embracing postmodernism to recognize that much recent progressive thought has already taken on board many of the characteristic themes of postmodernism and, most importantly, has done so without embracing its more cataclysmic manifestations. Thus, for example, the commitment to any linear, let alone unilinear, conception of progress has long since been abandoned. But this does not imply that the rejection of progress has been replaced by a radical relativism. The possibility of sustaining the judgement that some situation, circumstance, idea, policy, etc. is an 'advance'/'better' or is a 'retreat'/'worse' can and should be retained. Such judgements are not to be measured against some absolute standard of Truth or Knowledge, but seen as a choice between alternatives in which the options are determinant and in which the ethical or other values

employed are made explicit. Similarly the faith in narrowly conceived positivistic methods of 'science' has long been left behind, but again this has not involved the abandonment of the idea that it is possible to compare competing knowledge claims and to make judgements as to which is 'better'. This sense of 'better' is not some covert version of 'the Truth'; absolutism need not creep in. It is sufficient that we specify the context in which the judgement is made and the standpoint which we occupy for our judgements to be grounded and thus avoid the slide to ethical relativism.

Progressive thought has similarly taken important strides towards connecting such grounded conceptions of knowledge with the source and mobilization of power. The most revealing measure of this shift is that it finds expression in the across-the-board influence of Foucault.[84] But, as I have suggested above, it is necessary to redress the over-reaction against orthodox Marxism which led Foucault to simply substitute a prioritization of local politics for state politics; it is important to note that he himself made an effort to distance himself from a simple reversal of priorities.[85] This corrective is not only of general importance but has a special pertinence to the field of legal studies. Much contemporary scholarship quite correctly emphasizes the plurality of legal forms and mechanisms,[86] but this should not lead to a neglect of the central importance of state law, not least because it is engaged in a constant project to bring all the other developing and fluid legal fields under its control. To avoid the lapse into either naive localism or simple legal pluralism a more developed account of the inter-penetration of the macro- and micro-levels is needed.

Postmodernism is also characterized by a general espousal of the tradition of discourse analysis and the general emphasis on the role of language in the construction of social reality. This involves adherence to the epistemological view, which is central to Foucault's position, that there are no objects of knowledge constituted outside discourse. This gives rise to a profound paradox in postmodernist thought. If everything is constituted in discourse, how can an alternative politics exist or any criticism take purchase which appeals to other

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[84]One of the reasons for Foucault's current intellectual influence lies in the fact that his work can be seen as a sort of half-way between radical postmodernism and neo-Marxism. If nothing else this gives rise to the great mass of scholarship seeking to push rival interpretations. His key texts in this debate are those brought together in Foucault, *supra*, note 79.

[85]For example, Foucault indicates that

> I do not mean in any way to minimise the importance and effectiveness of State power. I simply feel that excessive insistence on its playing an exclusive role leads to the risk of overlooking all the mechanisms and effects of power which don't pass directly via the State apparatus, yet often sustain the State more effectively than its own institutions, enlarging and maximizing its effectiveness.

Ibid. at 72-73.

[86]For a survey of the debate and literature on legal pluralism see S. Merry, "Legal Pluralism" (1988) 22 Law & Soc. Rev. 869.

meanings or knowledges?[87] The position to be sustained is one which welcomes the advances made possible by discourse analysis as overcoming some of the limitations of ideology theory.[88] But, as Stuart Hall argues, it does not follow that it is either necessary or desirable to treat all social phenomena as only discourses; it is important to retain a concept of 'social practices' which are not reducible to discourses.[89]

This aspiration to grasp both discourse and practice is what I take to underline current concerns from a variety of sources to elaborate a model of 'constitutive theory' whose concern is to hang on to the coexistence and mutual determination of practices and discourses, structure and agency. The quest is for ways of articulating the sense in which law (or better legal relations) are generated within non-legal social relations whose own formation incorporates legal relations; legal relations and social relations interpenetrate.[90] Perhaps this project has not been sufficiently developed to merit the slightly grand designation 'theory'; but it does serve to make a point about the extent to which another element of postmodernist thought has been ingested by wider strands of thought. This sense of 'theory' is not one of a complete or formal model as a condensation or concentration of reality; rather it is a sense of theory as a provisional metaphor, as a potentially useful way of thinking and saying something new. Such a view of theory makes no claims to Truth or truths, but is subject only to a rigorously pragmatic evaluation: does a shift or change in the theoretical metaphor help or hinder articulating something that is otherwise ignored, neglected, or otherwise unsayable? In short it involves a conception of theory without guarantees.

There is then much of value that has emerged during the engagement between law and postmodernism. But the deeper problem remains of the neg-

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[87]Foucault's own solution to this difficulty was his appeal to the resistances generated by power; "there are no relations of power without resistances". *Supra*, note 79 at 142. Whilst definitionally this strategy solved his immediate problem it lacks credibility since it remains unexplained how alternative discourses are generated or how their challenge could ever be more than oppositional.

[88]For an introduction to the relationship between ideology theory and discourse theory see D. Macdonell, *Theories of Discourse: An Introduction* (Oxford: Basil Blackwell, 1986).

[89]S. Hall, "The Toad in the Garden: Thatcherism Among the Theorists" in C. Nelson & L. Grossberg, eds, *Marxism & the Interpretation of Culture* (Urbana: University of Illinois Press, 1988) 35 at 51.

[90]The quest for constitutive theory has its most general roots in Anthony Giddens' search for integrative theory; see, in particular, Giddens, *supra*, note 64. In social-theoretical studies of law its traces can be found in P. Fitzpatrick, "Law and Societies" (1984) 22 Osgoode Hall L.J. 115; C. Harrington, "Moving From Integrative to Constitutive Theories of Law" (1988) 22 Law & Soc. Rev. 963; S. Henry, "The Construction and Deconstruction of Social Control: Thoughts on the Discurcive Production of State Law and Private Justice" in J. Lowman, R.J. Menzies & T.S. Palys, eds, *Transcarceration: Essays in the Sociology of Social Control* (Aldershot: Gower Press, 1987) 89; and A. Hunt, "The Critique of Law: What Is 'Critical' About Critical Legal Studies" in Fitzpatrick & Hunt, *supra*, note 7, 5.

ative face, and indeed it is the most visible face, of postmodernism. I have been concerned to emphasize the distinctive nature of the engagement between law and postmodernism; this is precisely because the core of the legal project, in Lon Fuller's famous phrase, of "subjecting human conduct to the governance of rules" is itself such a profound manifestation of the commitments and preoccupations of rationalist thought.[91] It is precisely because law seems to carry the whole burden of civilization on its shoulders that legal scholarship has been so deeply, almost passionately, affected by the general mood of self-doubt, failure and hopelessness that has been the most distinctive manifestation of postmodernism.

Yet it is possible to face our age and its problems without relapsing into the pessimism that is the final resting place of relativism and nihilism once their radical guise is stripped away. This future has a place for law, but it will be a place in which law can no longer pretend to guarantee civilization or to provide procedural cures for the real world of conflict. In this more modest role we will have to complete what I have called the 'sociological movement in law'.[92] Intellectually law, or legal studies, will have to be fully part of the social sciences if we are to better understand both its possibilities and its limitations. We will, hopefully, have fewer illusions and there will need to be fewer self-proclaimed spokespersons for the legal project who proselytize for such an inflated project of law that it has always been a myth, but is today a dangerous lie. If the engagement with postmodernism, and the big fear which it has engendered, has brought us nearer to this understanding, then it has played its part.

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[91]L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) at 96.

[92]A. Hunt, *The Sociological Movement in Law* (Philadelphia: Temple University Press, 1978).