INTERPRETING THE LAW:
A REASSESSMENT OF THE DICHOTOMY BETWEEN THE LAW AND ITS READINGS

Necati Polat

Thesis submitted to the University of Nottingham

for the degree of Doctor of Philosophy

October 1993

Contents

Acknowledgements

I would like to thank Hilaire McCoubrey who supervised this thesis with kindness and tolerance. Thanks are due also to Nigel White for clarifying my mind on various technical points, especially at the painful initial stage, by generous assistance and advice. Peter Goodrich and Stanley Fish commented on two early exploratory essays. Although neither piece commented on is incorporated in the present work, the kind notes, objections and warnings therefore received have helped greatly with the perspective and direction of what is the final work. Needless to say, I am the only one to answer for the shortcomings. Finally, I would like to acknowledge the absurdity of ever succeeding justly to thank Susanne for the immense help, encouragement and warmth I have been lucky to receive throughout the entire experience.

Abstract

The purpose of this thesis is to pursue a grammatical, common sense, reading of some of the contemporary accounts of the workings of law. In so doing it relies extensively on the critical work by Heidegger, Wittgenstein, Derrida, and Stanley Fish, writers assumed to present a somewhat unified perspective on such matters as understanding, language, meaning and reading.

The shorter of the two parts, 'Judgement, Criteria, Justice,' sets the stage. Looking at Jean-François Lyotard's discourse, in *Just Gaming*, of a semantic and moral apocalypse, and his subsequent search for a concept of the just, the first part introduces the principal themes of the essay. These themes at once form some of the major concerns of the contemporary legal theory; the text of the law, the authorial intention, the politics of interpretation, the interpreter, and the limits of interpretation. Chapter 1.1 probes the concept of authorship as formulated by Lyotard. According to him, the modern situation produces a concept of the author that is *detached*. The modern situation lacks the transparency that characterizes the classical situation, where the author and the reader could relate to one another, and where, therefore, interpretation was a possibility. The Lyotardian concept radically distinguishes between the realms of the author and of the audience, a distinction that suppresses the ineluctably fraternal, attached quality of authorship. Chapter 1.2 is a critique of the concept of judgement Lyotard advances. It explores the two distinct orders within which, according to Lyotard, judgement is practicable: those of faith ('the Jewish pole') and paganism. While both orders exclude the concept of an autonomous subject — a false order which defines the rhetoric of the mainstream Western thought — the homogenous formalism of one, faith, contrasts with the heterogenous localism of the other, the pagan attitude. Questioning the dichotomy, the discussion goes on to argue for a concept of the primordiality of the attached, situated, quality of both the issuing of the judgement and of its possible interpretations, irrespective of the distinct orders of rhetoric — autonomous,

heterogenous, religious — in which they are presented. Chapter 1.3 explores the Lyotardian reworking of Kant's categorical imperative and seeks to point out the problematic nature of the enterprise. The discussion questions the idea that a thematic, non-moral, non-political, concept of the just may necessarily function better than one which is of common opinion, and indicates the illusory character of the Lyotardian venture radically to contrast what would be a thematic concept of the just with that which is mere common opinion. Chapter 1.4 continues on the subject of the politics of interpretation — can what would be the unruly, fantastic dictates of morals be avoided on the basis of a universalistic, politics-free, criterion? — to test the opposition Lyotard draws between the Sophistic and the Kantian positions. While from the Sophistic viewpoint a genuine opposition of competing moralities is not a possibility, the Kantian morality makes conceivable the concept of a rational, as opposed to mere opinion-based and rhetorical, choice.

The longer part, 'The Law and Its Readings,' is a reading of some of the motifs of François Gény's *Method of Interpretation and Sources of Private Positive Law*. Each of the four chapters that make the second part aims to dissolve one of the four binary oppositions that characterize the contemporary scene — polarities that are strictly mere variations on the theme of the dichotomy between the law and its readings, the law and that which is made of it: the text and the extratext, intention and extension, the tame and the freakish, the real and the formal. In the four chapters that form the second part, the logic behind the oppositions is explored, and a grammatical *reassessment*, which indicates the terms of each one of the polarities ultimately metamorphic and elusive, though, naturally, of possible grammatical use, is suggested.

Chapter 2.1 examines some of the contemporary arguments relating to the text of the law. Extratextualist positions such as, famously, Gény's counter the mainstream textualist positions by arguing against the mechanistic conception of the law that is written, all inclusive, and once and for all. Curiously, however, the notion of the law therefore invoked presupposes a notion of the text which might best suit the

formalism of the mainstream positions — namely that the *text*, as opposed to what might tentatively be called history, is the locus of meaning. What follows this markedly positivistic notion of the text, a notion invoked in particular in the extratextualist positions on the interpretation of the American Constitution, is a fear of judgement that would be made on the basis of what is often (as in the segregation cases) an *obsolete* concept embodied in the text. This fear, in fact, is not different from the formalistic, mainstream-textualistic, fear of what would become of the law in the absence of formally circumscribed, textual, constraints. In exploring the theme, the discussion focuses on certain individual cases, such as the segregation cases of the U.S. Supreme Court, arguments over which have been an integral part of the theory.

Chapter 2.2 is devoted to the considerations of the legislative will. Counter-intentionalist positions regarding the interpretation of the law, it argues, may in fact suggest an inherent *intentionalism*, as epistemologically understood, which may in turn point in the direction of a reversal not dissimilar to that of the binary opposition of textualism and extratextualism. The traditional arguments against the mainstream intentionalism seem to gather on two points: first, that intention is a state of mind and therefore impossible to uncover for those who do not have a natural access inside others' heads; and secondly, that even if it were possible to uncover it, what one has with the legislative will is but a fiction, for it refers to, not one, but many minds who could not possibly intent one and the same thing. The discussion seeks to disclose the way counter-intentionalist arguments subscribe to traditional intentionalism by assuming intention as an *occult presence*, to use two concepts, one Wittgesteinean and one Derridean, together. And it argues how intention as a concept is a possibility precisely because it is in each case a collegiate, fraternal extension.

Chapter 2.3 explores the problems of judicial discretion, politics, and the politics of interpretation. It discusses some of the traditional criticisms of judicial review, in particular the countermajoritarian objection, and points out the metamorphic character of some of the positions in the debate. In that countermajoritarianism

refuted from a majoritarian viewpoint stands right behind the very idea of constitutionalism, a distinct refuge at once of the majoritarian positions. And the positions that resist the idea of a timid, majoritarian, judiciary appear to be equally paradoxical, for these positions *are* simply for being ill at ease with the constitutional principle that is countermajoritarianism *par excellence*. The discussion then focuses on the Dworkin-Fish debate on the politics of interpretation and at once attempts to pin down some of the veins in Dworkin's thinking on the subject of judicial licence.

An overall evaluation of the conceptual scheme, potentialities, and assumptions of legal realism is attempted in chapter 2.4. Realism appears to emphasize the part of the interpreter, as opposed to the text, in the event of adjudication, and question the traditional assumptions of formalism whose mechanistic concept of jurisprudence equates the law with its text. While some of the most crucial of the realist objections to the formalistic concept of adjudication have been genuine and insightful, the realist writers, however, have been for the most part unaware of some of the formalistic, and ultimately self-refuting, presuppositions of their own rhetoric. It is argued that realism betrays its very rationale and mimics the mainstream formalism as it effectively supplants the formalistic considerations of the law as a system of rules, a text-oriented enterpise, with its preoccupations of the law as the right methodology. What may be called a thematic correctionism has marked realism in its distinct patterns across diverse terrains of jurisprudence.

Finally, concluding, the essay questions the validity of its own discourse and, offering a reappraisal of the dichotomy that marks the concept of a critical enterprise, namely that of the same and the similar, that which *is* and its representation, indicates its own limits. The idea is then tested against some of the recent attempts to evade the limitations and consequences of one's own discourse as a rhetorical exercise. The concluding chapter, therefore, is intended to balance, as it were, the discourse and hint at its own conditions of validity as an exercise in rhetoric. Some more explicit — traditional — conclusions are nevertheless drawn.

The good, therefore, is not something common answering to one Idea.

But then in what way are things called good? They do not seem to be like the things that only chance to have the same name. Are goods one, then, by being derived from one good or by all contributing to one good, or are they rather one by analogy? Certainly as sight is in the body, so is reason in the soul, and so on in other cases.

Aristotle, *Nicomachean Ethics*, 1096b

What could justify the certainty better *than success?*

Wittgenstein, *Philosophical Investigations*, 324

[N]othing succeeds like success...

Fish, 'The Law Wishes to Have a Formal Existence,' 206

Introduction

In a note in *Lectures on Jurisprudence*, Austin refers to the clichéd statement that equates right with might as 'a great favourite with shallow scoffers and buffoons.'[1] Its formulation, according to him, 'is either a flat truism affectedly and darkly expressed or is thoroughly false and absurd.'[2] The present essay agrees with Austin entirely, even though its own argument articulated in broadest terms is not dissimilar to the trite equation of right and might — law is anything you can get away with. The meaning of the statement then is so obviously true and the limitations it, as it were, induces are so general, saying it is hardly saying much. And it is preposterous, conversely, the moment it ceases to designate a primordiality, that is to say a condition for human association, and becomes instead a parochial concept, a statement which either grossly underrates the complexity of power formations, or, more naïve still, anticipates a might-less, non-mediated, non-political association. What is almost unarguably true becomes then ludicrous. As we have known since at least Aristotle, 'justice belongs to the *polis*.'[3] Of those who consistently underrate the complexity of the nature of political association, of course, Austin himself is one, who identifies might with a typically parochial concept of power, the command of the sovereign. What appears to be a common sense, common place, notion expressed in the 'truism' of right and might, therefore, is in effect a disregard, on Austin's part, of the obvious truth of that truism. Ultimately he sees in the equation little more than mere cynicism and irreverence. Yet the reversal of the Austenean 'truism' is hardly a surprise considering the traditional pattern. Aristotle himself is compelled further to swerve and contrast government by men with government by laws,[4] thus practically giving his blessing to the formalism of the Austenean concept. The constitutive force of the association is supplanted with the duality of the detached, autonomous, categories of man and the law. While the latter signifies the continuity that is the association, the former becomes a term capable of evading the primordiality of it. One of the best known

formulations of the dichotomy between right and might is that of Hamilton in *The Federalist* where government by 'reflection and choice' is opposed to government founded upon 'accident and force.'[5] It is my contention in what follows that the suppression of the said equation, what I hold to be a common sense notion of the process, has been at the heart of much of what is problematic about the contemporary legal theory. The dichotomy between law and its readings, law and what is made of it, a concept I aim to show in this study to underlie virtually all of the contemporary accounts of the workings of law, has been a theme based on a suppression of the primordiality of might, of the *attached* quality of that which is right, of force, of the force of habits and appearances.

The view taken in this essay then is a common sense view of the workings of law. Its basic arguments, I claim, are part of common perception. One exceptional class of verbal exercise where, in order to obtain immediate response, only the most widely shared assumptions are invoked, teased, displaced, is jokes. In the Pedro Almodovar film *Women on the Verge of Nervous Breakdown*, a character with a past partly spent in a psychiatric hospital produces a gun, out of the blue. Calmly pointing it to another character who is absolutely bewildered, she explains herself: 'I'm not really cured, I only faked it to fool them.' The common sense notion to which the joke owes its comical effect entirely is the immediately striking absurdity of the presumed dichotomy between sanity and *faking* sanity. That is not to say that ordinary perception recognizes no difference between the two states. But the difference recognized is one merely of *mimetic refinement* rather than a difference between two states, one mimetic, grammatical, and one *inherent*, namely one that transcends the mimesis of habits, routines, models, appearances. We laugh at it, because we instinctively find the suggestion funny that the criterion of sanity should be something other than that of persuasion ('fooling'). Sanity is anything you can get away with. Sanity, in other words, is what *passes* for sanity. What possible sense would it make for someone to act sane but to be 'really' insane? The assumption to which the joke appeals forms the core of one of the arguments the present study

builds on — the argument by Wittgenstein against the idea of private language. What a language that is for private use only would be like is a question Wittgenstein raises to introduce a much discussed theme in *Philosophical Investigations*. 'The individual words of this language,' he explains, 'are to refer to what can only be known to the person speaking; to his immediate private sensations. So another person cannot understand the language.'[6] It may sound like a purely hypothetical inquiry. The argument questions, however, a certain attitude towards meaning effects in language that is very much established. *Investigations* opens with a paragraph from St. Augustine where the relationship between words and what they are about is designated as one of simple correspondence and labelling; 'the individual words in language name objects — sentences are combinations of such names.'[7] Considered in these terms, our language *is essentially* a private language. It could have been devised by one person for private use only and in turn learned and employed by others, even though we may know historically and for certain that this is not so. One obvious effect of the difference between the two views of language, one private and one not so, or transparent, is that with one of them authorship, intention, ceases to be the privileged term that it is with the other. A fine example is the privacy the Almodovar character posits when she appears altogether to disconnect her insanity from the realm of the common. To her, madness signifies the immediacy of an inner experience as regards which those on the 'outside' can only entertain conjectures. Subsequently, she is the only person who may know whether she is 'really' mad. There is, therefore, a certain affinity between the idea, not infrequently professed, that intention is a state of mind and the assumption conceived by the Almodovar character that her madness is a private occurrence without necessarily a material, 'outside,' extension. The mode of thinking that epitomizes the idea of privacy is, of course, Cartesianism, an epistemology that radically distinguishes between the 'inside' and the 'outside,' the mental and the bodily. Man as *res cogitans*, 'a substance whose whole essence or nature is simply to think,'[8] contrasts radically with his physical extension, *res extensa*, that which is

mere accident about him.[9] By 'thought,' Descartes understands all that 'which we are aware of happening within us, in so far as we have awareness of it.'[10] Thought, therefore, signifies sensory, as well as intellectual, awareness. But what exactly is *awareness*? How exactly are its individual modes known? Aristotle, for instance, designates a series of sensations in *Rhetoric*, anger, fear, shame, pity, indignation, envy, and emulation, by the single word *pain*.[11] Wittgenstein expresses a similar concern when he declares in *Zettel* that joy, enjoyment, delight, love, fear, are *not* sensations.[12] He could have said that they all meant one thing — pain. Or that they were all basically fear — or joy. If the sensation felt is that of the unusual throbbing of the heart, pulsating blood, odd perspiring, and so on, it could be *any* of the above. It is not uncommon, as everyone knows, that sometimes the sensation lingers on even though one is unable to recall the reason for it. To remember what it is about at all one may need to be taken back to the moment when it was first felt. Furthermore, sometimes one is never able to 'name' the thing in the first place, one nevertheless has it, the so-called immediate object, the *cogitatio*, the awareness — awareness of *what*? Fear, joy, love, envy, shame, idle insecurity, bad liver condition? It is not hard to see why as a private concept language would cease to be a possibility. Even if words standing for the so-called immediate states of awareness, and for those only, could be conceived, which one cannot see how; because each speaker of the language would have to 'know'[13] the meaning of the words from his own private experience, and from that experience only, it would not be a language *generalizable* — an effect of what is traditionally known as the problem of 'other minds' — and would be therefore ultimately unacquireable and irreproducible. Yet fear, joy, pain, madness, and so on, are all states that can be mimed, illustrated, verbally related — states with what Wittgenstein calls 'criteria,' the telltale signs.[14] It is those telltale signs, models, habits and following transparency, that constitute the unique frame of reference for the performances of language. 'Now someone tells me,' writes Wittgenstein, initiating one of the most vivid paragraphs in *Investigations,* 'that *he* knows what pain is only from his own

case! —'

> Suppose everyone had a box with something in it: we call it a 'beetle'. No one can look into anyone else's box, and everyone says he knows what a beetle is only by looking at *his* beetle. — Here it would be quite possible for every one to have something different in his box. One might even imagine such a thing constantly changing. — But suppose the word 'beetle' had a use in these people's language? — If so it would not be used as the name of a thing. The thing in the box has no place in the language-game at all; not even as a *something*: for the box might even be empty.[15]

The idea that the beetle should be more than just what *passes* for a beetle holds little common sense insofar as it presumes that what might not pass for a beetle could possible *be* a beetle. What would 'to be' mean in that case? What possible reason would one have to call that which does not pass for a beetle a beetle?

More significant still, the argument for privacy entertains the concept that what *does* pass for a beetle could be *excluded* for not being 'really' a beetle on a basis other than that of criteria. In legal theory, the absurdity of private passion, the beetle in the box, in the face of criteria, the 'fooling' as the Almodovar character puts it, has been eloquently argued by Stanley Fish. In an old Marx Brothers joke (in the film *Animal Crackers*), Groucho asks Zeppo to take down a letter to the lawyers *Hungadonga, Hungadonga, Hungadonga & McCormic*. Realizing Zeppo has missed one of the partners in the title, 'you left out a Hungadonga,' bellows Groucho. 'You left out the main one too!' The common sense notion to which the joke appeals for its comical effect is the absurdity of distinguishing between different orders on a basis other than that of criteria. To recognize the *private passion* behind what passes for a legal decision and thereby single it out, which is virtually what legal theories are all about, one seems to have only as much clue as Groucho Marx. That does not mean that common sense recognizes no real difference between individual decisions — a concept that would effectively preempt

criticism in the domain of the legal — but that differences are those merely of *criteria*. Commenting on Dworkin's distinction between personal preferences and principles in adjudication, 'the fear of personal preferences,' writes Fish, 'is an empty one.'[16]

> A judge hearing [a specific case] might be inclined to decide against the plaintiff because she reminds him of a hated stepmother or because she belongs to an ethnic group he reviles. But think of what he would have to do in order to 'work' such 'reasons' into his decision. He could not, of course, simply declare them, because they are not, at least in our culture, legal reasons and would be immediately stigmatized as inappropriate. Instead, he would be obliged to find recognizably legal reasons that could lead to an outcome in harmony with his prejudices; but if he did that he would not be ruled by those prejudices, but by the institutional requirement that only certain kinds of arguments — arguments drawn from the history of concerns and decisions — be employed.[17]

Yet even as states that are totally irrelevant to the meaning of the individual decision[18] — for the difference they will make in the face of criteria will be exactly that of Hungadonga to Hungadonga in the Marx Brothers joke — 'I would go so far as to say that there are no such things as 'personal preferences,'' adds Fish, if the *personal* on the part of the judge is to be understood as the private, the fantastic, the extraordinary, the freakish.[19] It is a mistake to assume that, even as *undisclosed* states (supposing that could be said), personal motives can justify a non-grammatical, absolute, dichotomy of the common and the personal, the ordinary and the extraordinary. 'A preference,' writes Fish, 'is something one cannot have independently of some institution or enterprise within which the preference could emerge as an option, and an institution or enterprise is itself inconceivable independent of some general purpose or value — some principle — its activities express. It follows, then, that it is a mistake to oppose preference to principle.'[20]

Dissolving the presumed dichotomy between preference and principle, Fish repudiates the concept of immediacy, presence, in whose terms preference is defined. It is paradoxical that theory should seek ways to repress preference, as opposed to principle, for traditionally preference is the privileged term precisely for its supposedly unbridled, freakish, unadulterated character. 'Mind is better known than the body,' pronounces the Cartesian dictum, indicating the unarguable primacy of the pure ego.[21] The traditional pattern, as Derrida shows it,[22] is the privileging of speech, of the immediacy that is thought to mark speech, of intention, of passion, over writing, that which is the apotheosis of mediation, mimesis, reproducibility, transparency, extension. At a parallel level, however, the *absence* which defines writing translates into the absence of passion, and therefore into detachment and evasion, and becomes in turn a symbol of impartiality, not as a mimetic refinement, a grammatical possibility, but, perversely, as an absolute, pure, category — as presence.

The argument by Wittgenstein against the idea of private language assumes a world described by Heidegger in the first half of *Being and Time*,[23] an account of man and the world the present essay greatly relies on. Dissolving the opposition between awareness and extension, the mental and the bodily, and displacing the traditional hierarchy by redrawing the distinction in terms of a generalized concept of what is customarily the 'marginal' of the two, that is to say extension, or criteria, the argument against private language at once anticipates the manner of reading termed by Derrida 'deconstruction'[24] — a word currently too trendy for its own good. A deconstructive reading is employed and the writings by Derrida are consulted throughout the extent of the present study. The refutation of the private is at once a repudiation of the fantastic, the extraordinary. Deconstructive reversals show that which is fantastic to be in each case, and already, the defining quality of the very tame, the ruly, thereby negating a non-mimetic, non-political, concept of the fantastic. The absurdity of the fantastic, the uncommon, the wayward, as the bogeyman of legal theory, is forcibly demonstrated by Fish in a series of essays

commenting on the work of some of the most eminent theorists of law. Fish's writings form the basis of the attempts throughout the present essay to test the vigour of some of the accounts of the extraordinary in contemporary theory. Fish is a common sense writer and writes in a fashion, not unlike that of the later Wittgenstein, which makes it not difficult to underestimate the freshness and novelty of some of his ideas.

In what follows, the shorter of the two parts, 'Judgement, Criteria, Justice,' sets the stage. Looking at Jean-François Lyotard's discourse, in *Just Gaming*,[25] of a semantic and moral apocalypse, and his subsequent search for a concept of the just without common criteria, I introduce the principal themes of the essay. These themes seem closely to relate to the motif that lies at the heart of much of what amounts to the Western perceptions of the legal, namely the binary opposition of principles and men. As it is put in *Nicomachean Ethics*, 'we do not allow a *man* to rule, but law.'[26] The typical testament to the continuity of the concept may appear to be the extent of interest some of the recent ventures to distinguish between public principles and private passions in the domain of the legal have achieved to stimulate.[27] A more revealing indication of its resilience, however, seems to be the fact that the traditional opposition of government by laws and government by men, the law and its readings, is the very motif behind Lyotard's search for a concept of the just. Lyotard reproduces the dichotomy in his concept of the just as opposed to mere *opinions* of it. A probing of the binary opposition of the just and the mere opinions of it not only introduces the principal themes of the essay as Lyotard reflects on the just as a mode of authorship, and the opinions of it as mere interpretations, but it also helps to set the stage in its extraordinary combination of some of the Kantian and the Sophistic, pagan, motifs: while such themes as the text, the authorial intention, the politics of interpretation, the interpreter, and the limits of interpretation, therefore receive an introductory audience, against the tension which raises out of the Lyotardian eclecticism, the very approach of the thesis is further

explicated and put in the context of the Western thought. The critique of Lyotard initiates all the central arguments on whose basis the investigation of the second part is pursued: Wittgenstein's argument against the idea of privacy, the Heideggerian concept of transparency, and circumspection, a practical sight which *engulfs*, rather than oppose, the thematic sight of the *theoria* (1.1); the attached, situated quality of the utterance, the problematic nature of binary oppositions such as the literal and the metaphorical, the prescriptive and the descriptive, preference and principle (Fish), and the fallacy of logical positivist verificationism as a theory of interpretation (1.2); a negation of the positivistic concept of the moral as the unruly, the Heideggerian concepts of man, the world, and the primordial condition (1.3); the Derridean reassessment of the concept of supplementarity, of *parerga*, Derrida and Wittgenstein on intention and extension (stage-setting: a condition for meaning and interpretation), a re-evaluation of the idea of the fictitious, persuasion as a criterion of truth, and the concept of rhetoric (1.4). The arguments seek to identify the dichotomy between the just and the opinions of it, the law and its readings, as a specific continuation of the traditional distinction between principles and men. The word *reading* refers to the evaluations of the law as well as its procedural interpretations. Legal interpretation, in its technical sense, has consistently bordered on mere appraisal and opinion on the part of the judge, not necessarily from the viewpoint suggested in what follows, but from the viewpoint of those who have opposed the position of the judge on the particular issue. Writers who have attempted to draw a distinction that is observable between principles and men have not, naturally, felt the need at once to differentiate those who are in charge of the procedure of the delivery of justice from those who would be mere critics: where interpretation comes to an end and where personal politics enter the game have been notoriously difficult to identify. Therefore, Rawls, for instance, imagines a 'veil of ignorance' to *de-personize* man ad reach the rational man, the man that finally puts and end to the binary opposition by himself becoming pure principle.[28] While its *readings* refer to its individual interpretations, discussions,

criticisms, and evaluations by what would be the 'men,' therefore, the law is distinguished as a concept that *essentially* transcends those individual appraisals, though some of the individual readings may overlap with the law as an objective concept. One of the observations of the present essay is that virtually all of the contemporary accounts of the workings of the law posit a concept of the law which simply reproduces this concept. Again, the typical instance my appear to be the Dworkinean idea of a right answer.[29] The dimensions of the concept may be better estimated, however, in the case of a writer, such as Peter Goodrich,[30] who would seem to oppose the idea of a right answer on all accounts, but who would nevertheless presuppose, in his criticisms of the state of the law, a concept of *presence*, an objective concept, against which the law as it is exercised or taught in a particular terrain can be tested. The affirmation on the part of this attitude of the traditional concept hardly comes with the fact that it raises objections to the state of the law. Rather, the traditional concept is posited in the silent assumption, by the writer, of a viewpoint which would be *present*, in the sense of non-moral, non-political, non-religious, and from which, therefore, the state of the law could be condemned for being *simply* political, or *simply* fictitious — for being, in other words, a term of *absence*. Absence, the present essay argues, comes first. The law as a presumed presence, therefore, can be shown to be defined in terms of what is in fact absence, namely as a concept of contingency, a quality which marks its individual interpretations and evaluations. In this respect, the dichotomy between the law and its readings cannot be said simply to restate any of the traditional binary oppositions such as law and fact (as has been targeted by legal realist critical thought), and rules and their interpretations (targeted by critical legal studies). But it seeks to indicate a contemporary pattern of the greater, traditional distinction between principles and men, presence and absence, one which has dominated the mainstream Western perceptions of the legal (and one which has engulfed both legal realism and critical legal studies).

As a fundamental distinction of the just and the mere opinions of it permeates

Lyotard's discourse on the meaning of justice, therefore, it becomes possible to explore the themes not only of transcendence and suprasensibility on whose bases the just is defined, but, more significant still, of meaning, language, and interpretation, against the background of an uneasy combination of the Kantian and the Sophistic motifs — those, in other words, of presence and absence, of essence and contingency. Chapter 1.1 of the thesis probes the concept of authorship as formulated by Lyotard. According to him, the modern situation produces a concept of the author that is *detached*. The modern situation lacks the transparency that characterizes the classical situation, where the author and the reader could relate to one another, and where, therefore, interpretation was a possibility. The Lyotardian concept radically distinguishes between the realms of the author and of the audience, a distinction that suppresses the ineluctably fraternal, attached quality of authorship. Chapter 1.2 is a critique of the concept of judgement Lyotard advances. It explores the two distinct orders within which, according to Lyotard, judgement is practicable: those of faith ('the Jewish pole') and paganism. While both orders exclude the concept of an autonomous subject — a false order which defines the rhetoric of the mainstream Western thought — the homogenous formalism of one, faith, contrasts with the heterogenous localism of the other, the pagan attitude. Questioning the dichotomy, the discussion goes on to argue for a concept of the primordiality of the attached, situated, quality of both the issuing of the judgement and of its possible interpretations, irrespective of the distinct orders of rhetoric — autonomous, heterogenous, religious — in which they are presented. Chapter 1.3 explores the Lyotardian reworking of Kant's categorical imperative and seeks to point out the problematic nature of the enterprise. The discussion questions the idea that a thematic, non-moral, non-political, concept of the just may necessarily function better than one which is of common opinion, and indicates the illusory character of the Lyotardian venture radically to contrast what would be a thematic concept of the just with that which is mere common opinion. The critique by no means suggests to refute the concept of universal applicability, namely that which

seems to surpass mere common opinion, altogether — since what would be the 'universe' *can* be localized: the universal applicability will be, then, only a mode of the local, primordial, applicability. This is argued on the basis of the Aristotelian duality of the *polis* and the law of nature, and the parallels with the Heideggerian concept of human condition and Wittgenstein's concept of forms of life are indicated. Chapter 1.4 continues on the subject of the politics of interpretation — can what would be the unruly, fantastic dictates of morals be avoided on the basis of a universalistic, politics-free, criterion? — to test the opposition Lyotard draws between the Sophistic and the Kantian positions. While from the Sophistic viewpoint a genuine opposition of competing moralities is not a possibility, the Kantian morality makes conceivable the concept of a rational, as opposed to mere opinion-based and rhetorical, choice. Just as the idea of universal applicability, the choices that are made on a moral basis (the only basis there is) are conceded in this chapter as part of human condition and indispensable. For a certain thing to be bad *morally* hardly signifies that that particular thing cannot, then, be claimed to be 'really' bad. The present thesis, in fact, is a clear negation of this view of so-called 'reality.' It seeks to illustrate the fallacy of an attitude well exemplified by Lyotard which takes pains to avoid (or put in inverted commas) concepts such as good, bad, just, and so on, on the grounds that these concepts have no morality-free basis. It criticizes Lyotard for trying hard to find an epistemological, as opposed to moral, basis in order to be able to condemn Nazism. Furthermore, it attempts to counter and reverse a myth that has persisted since the days of the Athenean philosophers, about the so-called Sophistic cynicism, and hold responsible for bad law such as that of the Nazi Germany the homogenous, totalizing suprasensibility suggested by Lyotard reworking the Kantian theme. The historical Sophist attitude and arguments on such issues as slavery, racism, xenophobia, sexism, zealotry, and so on, are a clear testament to this fact. That a heterogenous, Sophistic, approach may inspire *better* law, rather than diminish, as it were, the force of a grammatically reassessed dichotomy between good and bad law, the just and the unjust, is argued throughout

this thesis.[31]

That the law, as a concept of presence, is in each case to be defined in terms of its readings, its interpretations and evaluations, that is to say, what is absent or contingent about it, therefore, ought not to be taken to mean that there can be no difference between individual readings, or that the attributes of the good and the bad, the just and the unjust, about the law may refer merely to individual positions in a particular case which one does not possess a measure to test against. That is *not* so, because one *does* have a measure against which to test competing moralities, albeit not *always* with finality. One lives in a world that is materially, as well as morally, highly structured. And the moral and the material layers seem frequently to be interwoven, such as in the attitudes regarding homicide and theft.[32] This, however, is not to be confused with the concept of what is tentatively called the 'silly' rule, intention, or judgement in this thesis. This concept pertains to the procedural interpretations of the law. The argument regarding it contends that the legal mechanism is an attached, situated institution, and as such it is simply *incapable* of producing that which would be 'silly.' The concept is formulated with specific reference to the formal warnings, such as in the 'golden rule' of the English statutory law, against the application of the particular law when it is downright silly. And it is argued that the situation anticipated by such formal warnings is not a possibility. To become an official interpreter of the law in a particular terrain involves a process (not necessarily formal) as constitutive and uncompromising as that which one would presumably have to go through to become a monk in Tibet. This fact does not only relate to the legal institution, but it is the very nature of the life man has, and has always had, on earth. It is a life of habits, customs, and institutions — a life, in other words, of *faith*. Strict, uncompromising training does not only define the status of the judge, or that of the academic who comments on the judge's work, but it is also what characterizes such basic human institutions as manhood, womanhood, and childhood.[33] These are institutions learned, institutions to which one is trained. To be sure, a particular interpretation of the law can be

regarded as silly. In that case, however, the 'silly' is merely a word of *disparagement* for what is in fact a thread within the body of threads that is the institution. In other words, when the particular rule, or intention, or judgement, applied or reached, is considered by some to be 'silly,' at once there will be some who will disagree: institutions only set and sustain an indirect, primordial consensus; they are not structures that do away with opposition and criticism altogether.

The second part of the thesis, 'The Law and Its Readings,' is a reading of some of the motifs of François Gény's seminal work *Method of Interpretation and Sources of Private Positive Law.*[34] A set of polarities divides the second part into four chapters: the text and the extratext, intention and extension, the tame and the freakish, the real and the formal. As I explore the logic behind each one of the binary oppositions, I pursue a grammatical reassessment of the dichotomy between the law and its readings as the underlying assumption. The *reassessment* of a particular opposition does not signify a conceptual negation of the opposition, but it *redraws* the borders between the terms as grammatical, that is to say, habitual, institutional, or praxis-based, as opposed to thematic or transcendental. Consequently, the terms of each one of the distinctions are indicated, though, undoubtedly, of possible grammatical use, as ultimately metamorphic and elusive.

Chapter 2.1 examines some of the contemporary arguments relating to the text of the law. Extratextualist positions such as, famously, Gény's counter the mainstream textualist positions by arguing against the mechanistic conception of the law that is written, all inclusive, and once and for all. Curiously, however, the notion of the law therefore invoked presupposes a notion of the text which might best suit the formalism of the mainstream positions — namely that the *text*, as opposed to what might tentatively be called history, is the locus of meaning. What follows this markedly positivistic notion of the text, a notion invoked in particular in the extratextualist positions on the interpretation of the American Constitution, is a fear of judgement that would be made on the basis of what is often (as in the segregation

cases) an *obsolete* concept embodied in the text. This fear, in fact, is not different from the formalistic, mainstream-textualistic, fear of what would become of the law in the absence of formally circumscribed, textual, constraints. The discussion not only indicates the ultimately *textualistic* character of the extratextualist rhetoric, but it at once attempts to define the text, as posited by textualist positions, in terms of what would be beyond its edges, namely the *extratext*. In exploring the themes, the discussion focuses on certain individual cases, such as the segregation cases of the U.S. Supreme Court, arguments over which have been an integral part of the theory. The view of the text as the locus of meaning is refuted on the basis of arguments by both Wittgenstein and Heidegger on meaning formation. And the concept of *supplementarity* as formulated by Derrida is invoked to work out the dialectic that seems to be at work between the text and that which 'supplements' it.

Chapter 2.2 is devoted to the considerations of the legislative will. Counter-intentionalist positions regarding the interpretation of the law, it argues, may in fact suggest an inherent *intentionalism*, as epistemologically understood, which may in turn point in the direction of a reversal not dissimilar to that of the binary opposition of textualism and extratextualism. The traditional arguments against the mainstream intentionalism seem to gather on two points: first, that intention is a state of mind and therefore impossible to uncover for those who do not have a natural access inside others' heads; and secondly, that even if it were possible to uncover it, what one has with the legislative will is but a fiction, for it refers to, not one, but many minds who could not possibly intent one and the same thing. The discussion seeks to disclose the way counter-intentionalist arguments subscribe to traditional intentionalism by assuming intention as an *occult presence*, to use two concepts, one Wittgesteinean and one Derridean, together. And it argues how intention as a concept is a possibility precisely because it is in each case a collegiate, fraternal extension. The discussion invokes the Derridean argument on the traditional privileging of speech over writing, and probes the paradoxical position of the parol evidence rule of contract doctrine where writing ostensibly

becomes the privileged term. Traditionally, writing is thought to lack the moment of *presence* which defines speech. The much discussed parol evidence rule appears to be wayward in view of the traditional hierarchy. In both the traditional privileging of speech and the parol evidence rule, however, writing is defined in terms of *absence* — the absence of passion and privacy. Unlike speech, writing is depersonalized, detached. What is an exclusion of private passion and of therefore partiality in contract doctrine signifies in the traditional hierarchy the suppression of that which is the immediate, present, meaning — intention. The passion of the speaker is, likewise, the dreaded concept in the traditional distrust towards oratory, or rhetoric, a fear well reflected in the long-standing, and only recently relaxed, English doctrine that confines the search for the legislative will within the text of the statute. The concept of the lack of *genuine intention* (a concept whose fallacy Derrida brilliantly demonstrates in his critique of the Austenean intentionalism) in oratory has its most typical pattern in the classical dichotomy between dialectic and eristic. In eristic one is not supposed to be *concerned* about truth, all that one is *concerned* about is to persuade and win the argument, a difference that can hardly be sustained if intention is at once to remain an unmonitored, occult, concern.

Chapter 2.3 explores the problems of judicial discretion, politics, and the politics of interpretation. It discusses some of the traditional criticisms of judicial review, in particular the so-called countermajoritarian objection, and points out the metamorphic character of some of the positions in the debate. In that countermajoritarianism refuted from a majoritarian viewpoint stands right behind the very idea of constitutionalism, a distinct refuge at once of the majoritarian positions. And the positions that resist the idea of a timid, majoritarian, judiciary appear to be equally paradoxical, for these positions *are* simply for being ill at ease with the constitutional principle that is countermajoritarianism *par excellence*. The discussion then focuses on the Dworkin-Fish debate on the politics of interpretation and at once attempts to pin down some of the veins in Dworkin's thinking on the subject of judicial licence. A positivistic distinction between the moral and the legal

was argued in the post-war years to have been one of the elements responsible for the total submission on the part of the legal mechanism in Germany to the Nazi rule. In a curious reversal, a *violation* of the dichotomy between the moral and the legal has been indicated by some of the writers with positivistic views on the interpretation of the American Constitution to have been behind the decision of *Dred Scott v Sandford* whose opinion declared the Black Americans 'a subordinate and inferior class of beings'[35] — a significant precursor to the Nazi mentality. The positivistic principle is probably best reflected in the French delegation of powers where, until very recently, the notion of constitutional review, for instance, was totally abhorrent to the mainstream rhetoric. The *impersonality* the French system seeks and sustains in the decisions of its judiciary — that is to say, a 'nullified,' in the true Montesquieuean spirit, notion of it — seems effectively to have yielded, however, to a judiciary much less timid in its interpretations of the law than in common law systems where, by contrast, judiciary is conferred upon much greater discretionary powers. A similar paradox arises from Dworkin's critique of the Hartian concept of discretion. The impersonality Dworkin seeks in supplementing rules with principles, as opposed to (strong) discretion, results in a 'Herculean' notion of judiciary. Both the French and Dworkin appear to invest much in a radical dichotomy between the freakish, the silly, and the tame in the procedural interpretations of the law. Questioning the dichotomy, Fish, on the other hand, suggests what seems to be a *nullified* concept of judiciary, not, however, necessarily on a Montesquieuean basis, but on the basis of a primordial hermeneutic condition in which the procedural interpreter, the judge, is an attached, situated, reader, rather than the free-wheeling, autonomous, subject anticipated by the mainstream legal theory.

An overall evaluation of the conceptual scheme, potentialities, and assumptions of legal realism is attempted in chapter 2.4. Realism appears to emphasize the part of the interpreter, as opposed to the text, in the event of adjudication, and question the traditional assumptions of formalism whose mechanistic concept of

jurisprudence equates the law with its text. While some of the most crucial of the realist objections to the formalistic concept of adjudication have been genuine and insightful, the realist writers, however, have been for the most part unaware of some of the formalistic, and ultimately self-refuting, presuppositions of their own rhetoric. The discussion seeks to demonstrate how realism in fact betrays its very rationale in virtually all of its classical arguments against the formalism of the mainstream, mechanistic conception of jurisprudence, and how it in effect simply *mimics* all that which it otherwise attributes to formalism. And it does so, the discussion maintains, with a zeal arguably greater than that of the mainstream formalism. In probing some of its major patterns across diverse terrains of jurisprudence, the common motifs and presuppositions that seem to underlie much of what amounts to legal realist philosophizing are pointed out. (a) If realism, it is argued, is *ineluctable* in practical terms — which is held to be *the* realist principle, the rationale — then realism as a discourse is simply a formalistic permutation for being an essentially *record-oriented* enterprise. Realism, in other words, pertains to that which it would consider to be mere theory, as opposed to practice — a dichotomy that is practically the backbone of formalism. If a radical opposition of theory and practice is therefore eventually to be affirmed, it is hard to see, subsequently, how realism as a way of *doing* can go on asserting its ineluctability, the principle that would in turn render the mainstream formalism a project that is impracticable: if theory can be detached from practice in a *radical* way, that is to say, if a vantage-point that is *outside* practice can be reached, it is difficult to justify why, capable in principle of reaching an autonomous viewpoint from which to manipulate practice, formalism as theory should necessarily be devoid of practical effects. And, conversely, if a point autonomous from practice is *not* a possibility — the realist principle — it is not clear how realism itself as theory is to evade being simply superfluous and have *effects*. (b) If, on the other hand, the realist principle is to be abandoned altogether, as realist writers frequently do, and realism is therefore to be clearly *more* than a mere record-straightening enterprise and become instead

one that seeks to guide and manipulate that which it records; then, again, every single feature that has come to be the mark of formalism anywhere can be shown to lie at the heart of realism: a belief in formal guidelines in the form of theory, namely a concept of the *right* method; the presupposition of a state of anything-goes, that is to say, subjectivism and unpredictability, in the absence of formal guidelines either as rules or as theory; a positivistic distinction of the legal and the moral, is and ought, in the studies of law; and a formalistic (pictorial) notion of language underpinned by a formalistic (correspondence) theory of truth. The discussion ventures to indicate some of the realist associations which have consistently been neglected in the traditional assessments of the legal realist critical legacy. It attempts to pin down not only some of the significant connections between the earlier European and the later, better-known, American patterns of realism, an affinity on the part of the latter which accounts for some of its greatest intellectual obstacles, but it also draws attention to the extent of association, in both themes and, more important still, *aporias*, between realism and the more recent criticisms of the state of law in the American environment, such as those of critical legal studies, represented here in an argument (if somewhat more refined than the average within the movement proper, and therefore not strictly characteristic) by Paul de Man. What is also pursued is to try to contrast some of the so-called Scandinavian arguments of realism — central to which seems to be a verificationism not dissimilar to that reflected in Wittgenstein's early work — with the approach favoured by the later work by Wittgenstein to the phenomenon of rule-government, one which drastically opposes the earlier, verificationist, or pictorial, approach in its assumption of an intrinsic, immanent, relationship between the word and that which it is about, or between the rule and that which accords with it.

The concluding chapter seeks to differ from the conventional approach by proceeding to discuss the problems and limitations of a critical discourse as such, and reappraise the dichotomy that in each case marks the critical enterprise — that of the same and the similar. The significance of the *awareness* of some of the

problems inherent in one's own discourse is itself one major conclusion of this thesis. The essay inadvertently suggests a *mastery*, in its critique of a number of other projects, over the dynamics and the contradictions that are constitutive of its own rhetoric. The concluding chapter, therefore, is intended to balance, as it were, the discourse and hint at its own conditions of validity as an exercise in rhetoric. Some more explicit — traditional — conclusions are nevertheless drawn.

The idea that a rhetoric may in no instance escape its own consequences, however, does not amount to a so-called nihilism, a state of anything-goes. On the contrary, the present essay takes issue with what it calls a *Kirilov complex* in recent theory. 'If there is no god, then I am a god.'[36] In attempting to reverse the hierarchy traditionally assumed between principles and men, the Kirilovean condition operates on the basis of the concept of a possible oscillation between the presumed realms of the text and the interpreter, a mere *reproduction* of the traditional dichotomy between government by laws and government by men, the law and its readings. Its discussion in this chapter aims to trace and pin down the *pattern* that seems to mark the arguments regarding nihilism. Some of the references in the debate to the Nietzschean formulation of the concept are weighed, followed by a discussion of its critique by Heidegger, and the logic which forms the core of the pattern is pointed out — a logic of *betrayal*. The logic, it is argued, is responsible for the nihilistic conception as one essentially of *presence* and *evasion*. That which betrays violates. But it at once discloses, gives away. While the presuppositions of presence on the part of the nihilistic conception revive the notion of identity, of the *same*, evasion signifies a revival of the concept of autonomy and, as a presumed exception to the primordiality of the mimetic, the *similar*, becomes a *condition* for discursive validity. Two intertwined paradoxes to the pattern are therefore formed. As presencing, nihilism signifies re-presencing while de-presencing. And as evasion, nihilism signifies a mimetic uneasiness, even hostility, in the face of a discourse that is at once committed to the idea of the primordiality of the mimetic.

1 JUDGEMENT, CRITERIA, JUSTICE

In marking the contrast between a conventionalist notion of justice, namely that of the Sophists, and a Kantian one, Lyotard discloses that 'an extraordinarily dangerous position' arises when justice is regarded as 'common opinion.'[1] The words he decides on are curious. The *ordinary*, the common, the conventional, as the begetter of that which is *extraordinary*, a rather quaint perversity of logic, is the key to work out the impasse in the Lyotardian discourse. 'A rule by convention would require that one accept, let's get to the bottom of things right away, even Nazism. After all, since there was near unanimity upon it, from where could one judge that it was not just?'[2] Unless one subscribes to a conception of the general will which would exhaust all the traces of force within a given domain, what Lyotard seems to suggest may be hard to establish as an indisputable fact. Were all the traces of force clearly dissolved by the regime at the time in Germany? For a well-known example on the contrary, the post-war German case which fuelled in the late 1950s the debate between the proponents of naturalist legal theory and the positivists involved a Nazi soldier who had expressed his disapproval of the leadership and the regime to his wife and consequently been prosecuted.[3] It is reported that in some of the cases in the same era prison sentences were passed only to make sure the individuals involved did not get in the hands of the civil or military intelligence.[4] Furthermore, there seem to have existed German jurists, in the very heydays of the Nazi rule, who criticized openly, and published against, particular undue readings of the law by courts under political influence.[5] Obviously, in the face of such records, it is not easy to maintain what Lyotard seems to take for granted. The German Court of Appeal in the much discussed post-war case, mentioned above, ruled against the informing wife with a particular reference to the notion of 'unlawful action' which, the court thought, had been held by the German public when the wife had chosen to take the particular course of action to harm the husband.[6] In a similar case in 1952,

the same point was made and stressed by the Federal Supreme Court. The prevalent pattern of the just had been far from one commonly supported.[7] The Federal Constitutional Court which invoked and defended this view zealously in many of its decisions went as far as to pursue a historical survey, of the sources in the Nazi era, one which the Court found to confirm its opinion.[8]

To prove this, however, is not at all what is central to our concern here. Indeed, taking into account, on the opposite side of the argument, the anxiety which the post-war Germany naturally did have to restore the good name of the people, it will be equally hard to conclude, by the evaluations made in the aftermath of a war of losers and winners, that the support of the people for the regime was remarkably less than near unanimous. Lyotard, therefore, may well be right. Would that, nevertheless, give more credence to the point he makes on the possibly extraordinary hazards of an ordinary opinion of justice? Masses may go insane. Would their insanity, however, be necessarily different *in kind* from the sanity of the rest?

I will argue that the direction Lyotard's text takes on that issue is not simply accidental. That which underlies it underlies much of his discourse on justice. *Just Gaming*, a dialogue in the Platonic fashion between Lyotard and Thébaud, is a significant work. That is so, neither because its project on justice is among the most compelling nor because it forms one of the most persistent veins in the thinking of Lyotard himself.[9] Its significance is for two reasons, both strictly of economy. First, it is easily one of the most typically articulated amongst the projects with a distinctive reading of what might be called a non-transcendentalistic, non-foundationalist, order of themes that seems to have emerged in the present century in the writings primarily by Heidegger and the later Wittgenstein. Best exemplified in the English speaking world in literary and legal studies, of recent, the distinctive seal of that reading has been a consistent rhetoric of semantic and moral apocalypse.[10] Secondly, because the text in question is with an impressively wide horizon, or adventurous enough, to call at once upon such varying sources as the

Sophists, Aristotle, and Kant, reading it should enable us to call into consideration, if rudimentarily, the classical accounts of the subject as well as the challenges posed by the contemporary analyses.

In what follows I will try to read into the text of *Just Gaming* four interwoven statements, each under a separate heading: (1) Authorship is mere proliferation of that for which the author has been authorized by the audience. A distinction, therefore, between the realms of the author and of the audience can only be grammatical. (2) Different genres of judgement, of justice, may be so distinguishable only on a grammatical basis. (3) That which is just can be told apart from that which is not only grammatically. Out of that grammaticality, however, an 'anything goes' situation does not arise. (4) The extraordinary is merely a political category of the ordinary, and a distinction between the two is always a grammatical one.

1.1 Judgement, Authorship, Audience

The dichotomy Lyotard introduces at the very outset is that of 'classicism' and 'modernity.' These are not, however, words to designate *periods*. The latter is distinguished from the former on the basis of a series of negations which are notably atemporal. The classical situation, elucidates Lyotard, is

> a situation in which an author can write while putting himself at the same time in the position of a reader, being able to substitute himself for his own reader, and to judge and sort out what he has accomplished from the point of view of the reader that he also is.[1]

The modern situation, on the other hand, differs radically in that it lacks an

audience; 'in modernity there is no longer a people.'[2] Where there is no addressee, there cannot be 'a possible consensus.'[3] And where there is no consensus, there can be no criteria. '[A]nytime that we lack criteria,' writes Lyotard, 'we are in modernity.'[4] Where there are no criteria, in turn, there can be no law, no prescriptions, no judgement, and no taste. That which does get produced, no one knows what happens to; it is not 'received,' but simply trapped 'in networks of distribution. They are economic networks, sales networks.'[5] Although we are clearly assured that '[t]he date does not matter,'[6] one wonders in the face of such rhetoric whether some periodizing is not really in question. '*We* are without interlocutors,'[7] declares Lyotard, 'for *us* moderns, prescriptions are not received.'[8] All the same, we are reminded, again and again, that no temporal reference is intended, and 'that anytime we lack criteria, we are in modernity, wherever we may be, whether it be at the time of Augustine, Aristotle, or Pascal.'[9]

The classical author is in a position of which defining quality is transparency. The consensus it signifies contrasts with the state of closure that is modernity. Criteria are what modernity lacks in its closure. They are models, routines, and habits. For a comparison, Wittgenstein has in mind precisely the habituality that marks Lyotard's classicism when the former challenges the assumptions of an essential closure traditionally posited with regard to formation of meaning in language.[10] In the picture Wittgenstein draws signification is dependent entirely on what he calls 'criteria' — a curious coincidence with the Lyotardian notion. Criteria, naturally, are inconceivable without a participating audience. The transparency in whose specific terms Lyotard defines the classical situation, therefore, is a prerequisite of sign generally. The substitutability that defines classicism is the necessarily institutionalized character of the deed, whether it be phonetic or graphic. That which the author composes takes place in a language which is not private, but which is *substitutable*, or which, as Derrida puts it, 'iterable.'[11] Anything said, seen or thought is just so because it is reproducible; even in a 'private,' one-person language, signs that are employed will have to be iterable. The author will in no

instance be in a state of non-mimetic, absolute, closure. Every time he produces, he reproduces. The reproduction resists a radical dichotomy between the author and the reader. By this account, a state of closure is clearly out of the question. According to Lyotard, on the other hand, transparency is a feature which one could do without. As opposed to the classical author, the modern author, he notes,

> no longer knows for whom he writes, since there no longer is any taste; there no longer is any internalized system of rules that would permit a sorting out, the dropping of some things and the introduction of some others, all of this before the fact, in the act of writing. We are without interlocutors.[12]

The modern author has no audience whom to address, yet he somehow does write. What reason would one have to call him an 'author'? Authorship, after all, seems to be a word for the bond between the scribe and language. When language is involved, in turn, the bond that is authorship is one between the scribe and the *others*. Is it at all conceivable that one should become an 'author' before one is 'author'ized to be one? Does authorization by the audience not always come first? Is one not always trained through criteria to the *right thing*, long before one is capable at all of *writing*? Is the author not, therefore, one who merely proliferates (*aucto*) what he has *already* been introduced to? *Auction* without an audience, indeed, is a contradiction in terms. Lyotard knows well that writers such as Augustine, Aristotle, Pascal, and indeed himself, all had and have interlocutors before them. What he does, however, is to turn such rhetorical refinements of everyday practical life as performer and audience, taste and distaste, into transcendental dichotomies. They in effect become distinctions between good and bad audience, and taste and bad taste. When Lyotard declares that 'there no longer is any taste,' therefore, he is being apocalyptic simply about the kind of taste which Kant, for instance, refers to as 'taste proper' in contradistinction to 'sensory' taste.[13] As with 'taste,' in moral matters the Kantian project radically distinguishes the 'external' connections of

entities from what is 'intrinsic' to them. No formative relation is allowed between the two.[14] The free-for-all which follows Lyotard's conception of modernity seems therefore to be an effect of the Kantian dichotomizing Lyotard adopts. The audience is regarded as dispensable rather than constitutive of the process. Hence a free-wheeling concept of authorship — and the apocalypse. The words Lyotard employs to present his case — author, writing, the artefact, reception, rules, judgement, taste, the interlocutor — they all seem to refer to entities in a distinctively linear, unadorned, manner. They clearly presume a 'substratum,' an ontological haven, where things would 'be' pure and free of any accidental relations; a mode of presence based on a distinction between inside and outside. Substitution, a state of affairs Lyotard makes an attribute of classicism exclusively, can hardly be ruled out, unless one at once invokes a radical dichotomy of inside and outside, mind and matter; unless, that is to say, as Kant puts it, 'rational nature exists as an end in itself.'[15] Taking pains to clarify the *atemporal* character of the distinction between classicism and modernity Lyotard does indeed hint at a similar concern: one can do without the transparency of habits and patterns 'wherever [one] may be, whether it be at the time of Augustine, Aristotle, or Pascal.' The dichotomy between classicism and modernity, therefore, is ultimately the expression of a moral hierarchy after the Kantian fashion, one between substitution through criteria and judgement without substitution. 'I judge,' holds Lyotard,

> [b]ut if I am asked by what criteria do I judge, I will have no answer to give. Because if I did have criteria... it would mean that there is actually a possible consensus on these criteria between the readers and me; we would not be then in a situation of modernity, but in classicism.[16]

If one thing the concept of judgement without established standards signifies is the lack of audience consensus, another is a questioning of that which is set up and instituted — the establishment. Is it not a clear defiance in the face of the

establishment when Lyotard declares that 'for us moderns, prescriptions are not received'?[17] Criteria are transcended and the substitutability of classicism is dropped by means of a fine, and yet radical, distinction between inside and outside, one which ensures Kant the *autonomy* of the will uninfected by sensory experience. Lyotard's rhetoric on justice swings, by his admission, between two distinct positions, one non-transcendentalist (the 'pagan'), the other Kantian. The interesting thing is that we have been, and will have been for quite some time yet, through only the non-transcendentalist part where there has been so far not one single reference to Kant. The philosopher whom Lyotard does refer to is Aristotle. 'Yet we do make judgements,' intervenes Thébaud, 'there must be a *sensus communis*.' Lyotard replies: 'No, we judge without criteria. We are in the position of Aristotle's prudent individual, who makes judgements about the just and the unjust without the least criterion.'[18] In *Nicomachean Ethics* Aristotle describes *phronesis* (prudence) as neither knowledge nor art. It is not a 'making,' therefore not an art. It is not knowledge, because it can be reversed. Rather, as Aristotle sees it, *phronesis* is the capacity to issue well reasoned opinions regarding such matters as the good and the bad.[19] Lyotard goes on further to explicate that, for Aristotle,

> a judge worthy of the name has no true model to guide his judgements, and that the true nature of the judge is to pronounce judgements, and therefore prescriptions, just so, without criteria. This is, after all, what Aristotle calls prudence. *It consists in dispensing justice without models*. It is not possible to produce a learned discourse upon what justice is.[20]

One enigmatic point is the last sentence, one which is stated almost as a logical derivation of the sentence it follows, namely 'dispensing justice without models.' Issuing discourses on the *whatness* of justice and following criteria when judging are two different things. The latter has something to do, as Thébaud suggests, with a *sensus communis*, readily rejected by Lyotard: 'No, we judge without criteria.'

While the former is the kind of thing Socrates, for instance, does against the argument by Thrasymachus in the famous passage of *The Republic*.[21] Whatever *phronesis* is, it seems that it can defy only one of the two. What is defied, as far as Lyotard, if not Aristotle, is concerned becomes once more clear, when Thébaud comments that judgement without criteria is the case with Aristotle's judge, but only 'because he has been educated, because there is a habit, because there is a pedagogy of the soul.'[22] In fact, if Thébaud is right in his stress on the point of the 'pedagogy of the soul,' he cannot at once be right in recognizing this as judgement without criteria, for it can be what else but criteria to confer on the judge his habits and pedagogy. Nevertheless, the part of the pedagogy in the judgement of the Aristotelian judge, too, of one piece with the rejection of the *sensus communis*, is dismissed: 'I am not even sure that one can say that.'[23] As I have noted it, Aristotle distinguishes *phronesis* from both art and knowledge. Considering criteria as habits, models, and categories based on the consensus of an audience, does *phronesis* really mean the capacity to judge *without criteria*? In *Rhetoric*, Aristotle explains 'a general principle' of judgement in conjunction with *phronesis* as follows:

> that which would be judged, or which has been judged, a greater good, by all or most people of understanding [*phronesis*], or by the majority of men, or by the ablest, must be so; either without qualification, or in so far as they use their understanding [*phronesis*] to form their judgement. This is indeed a general principle applicable to all other judgements also; not only the goodness of things, but their essence, magnitude, and general nature are in fact just what knowledge and understanding will declare them to be.[24]

As invoked by Aristotle, *phronesis* seems rather a long way from a state of closure uninfected, as it were, by models. First of all, he makes it a general principle that that which is *believed* to be just is just. Believed so by whom? The circle is kept as large as it can be: 'by all or most people of understanding, *or by the majority of men*,

or by the ablest.'[25] Equally open-ended is the manner in which judgement is pursued: '*either without qualification*, or in so far as [the people] use their understanding to form their judgement.'[26] What Aristotle understands by *phronesis*, Heidegger calls circumspection (*Umsicht*), or prudence, a sight (*Sicht*) which contrasts with the traditionally privileged sight of the *theoria*.[27] Theory, the 'thematic' knowledge, according to Heidegger, is a category made possible by circumspection rather than an order that evades the primordiality of the practical, habitual knowledge that is circumspection.[28] While the essence, the Being, of man is care (*Sorge*),[29] explains Heidegger, he is primordially, and in each case, guided by his sight.[30] Care marks the nature of man's relation to the world and emphasizes his existence as fundamentally 'practical.' And sight stands for all that which is conventionally thought to differentiate between man and the beings with which man co-habits the world. 'Equipment' signifies the class of entities which are of the specific mode of care that is concern (*Besorgen*).[31] And the 'others,' the fellow humans, are of the mode of care that is solicitude (*Fürsorge*).[32] While men are subject to the instances of sight Heidegger terms considerateness (*Rücksicht*), forbearance (*Nachsicht*), and inconsiderateness (*Rücksichtslosigkeit*); equipment, whose sole Being is their use, the *pragmata*, the objects of man's concernful dealings, the *praxis*, is subject to the mode of sight that is circumspection (*Umsicht*).[33] The sight which therefore in its various modes defines man's existence and houses what Heidegger calls man's 'capability-for-Being' is transparency (*Durchsichtigkeit*), a knowledge of the self as 'disclosedness,' as opposed to being 'closed off.'[34] Circumspection, the sight on whose basis man's dealings with equipment are pursued and which is at once the frame of reference for the *theoria*, the thematic sight, is in turn a possibility of the transparent quality of existence. Hence, Aristotle's definition of *phronesis*, prudence, as 'a general principle applicable to all other judgements also.'[35] Judgement, as a human capacity, free of models on the basis of consensus is a notion that seems to be alien to Aristotle. And in what I above quote from *Rhetoric* the reason for this is clearly put: 'not only the

goodness of things, but their essence, magnitude, and general nature *are* in fact *what knowledge and understanding will declare them to be.*'[36] That is an insight, I will argue, which is rather in the fashion of the pre-Socratic thinking and which stands squarely against the form of the metaphysics of presence, as Derrida terms it,[37] posited by both Kant and Lyotard. It is most remarkably preempted in Aristotle's statement by the terms in which he understands 'Being.' To capture that position more clearly and work out how a certain form of the metaphysics of presence underlies the ongoing discourse, however, there is still some length to go.

One point left unclarified is what I indicated above as a peculiarity of logic that seemed to be reflected in two successive sentences by Lyotard. Aristotle's prudence, he notes, 'consists in dispensing justice without models. It is not possible to produce a learned discourse upon what justice is.'[38] I recorded that it is mystifying for the second sentence to appear as a simple derivative of the first sentence as the two implied two mutually uneasy positions. The question arises when *both* of the positions that can possibly be held on the issue are negated. While it seems unlikely that Lyotard had in mind a *third* position into which his particular reading of Aristotle would fit. It looks beyond doubt, for one thing, that he regards the Aristotelian prudence as distinct from judgement on the basis of models, or criteria — the first position. Does, then, prudence, as he reads it, oppose also judgement based on a single, all-comprehensive discourse, the second position, and becomes, therefore, a *third* one? That, however, is not easy to infer as they both invoke justice, whatever the discrepancies, independently of criteria, and transcending criteria is simply what the distinction between the positions is about. Or is it possible that what is considered so far to be Lyotard's notion of 'judgement without criteria' is *not* quite an accurate depiction of what he actually means, and that what is rejected above is not two opposing positions after all? If this is the case, then only *one* of the two positions is rejected: judgement with, or without, criteria. Which one? The answer depends on what a criterion, for Lyotard, is. If we take a quick look back, we will see that in 'modernity' rules, prescriptions, taste, and so on, are

not extant.[39] That is because the 'classical' substitutability, as one's capability to see through (*Durchsichtigkeit*) others[40] has disappeared, and that is, in turn, because one has no criteria in the modern situation. One lacks criteria because one lacks those who produce and sustain criteria — the audience.[41] Criteria are none other than 'models' and 'habits'[42] established on the basis of community 'consensus.'[43] To state, accordingly, that Aristotle's judge judges without criteria,[44] and that is what modernity is all about, is to mean modernity to transcend one's models, beliefs, habits, common sense, in short, much of what is effectively one's native world. One question is whether that seems to be Aristotle's stance, for whom, famously, justice is inconceivable outside the *polis*, the world of praxis.[45] Even if that were so, however, the problem would be only reiterated rather than clarified, for Lyotard proceeds to classify his particular reading of the Aristotelian justice within the same order as the Sophists — the 'order of opinion.'[46] Given his reading of prudence as judgement without criteria and the Sophist emphasis on the criteria of worldly habits and standards, one is once again puzzled whether one understands by 'criterion' the same thing as Lyotard.

The puzzle is prompted, in fact, by an almost elusive trace of force in his rhetoric, of which Lyotard is neither convinced nor not convinced. He is not convinced, yet he feels the force of that trace. He is convinced, because it is out of the question for one to feel its force unless one is already convinced of it. In a passage where he strives to defy and reverse the institutional character of judgement, things happen out of the sheer political force of a certain institution, namely that of the non-transcendentalist rhetoric in contemporary theory. How? According to Lyotard, the Aristotelian prudence 'consists in dispensing justice without models. It is not possible to produce a learned discourse upon what justice is.'[47] Here it is not a simple confusion, on his part, that he dismisses the two opposing positions at once. Judgement based on criteria is equated with judgement based on an omnipotent theory only to oppose both by a *third* position. He does presume a third position after all, even if it is expressed only by confusions and

aporias. In addition to the passage above he reveals another mark for that position when Thébaud raises the ineluctable question whether Lyotard has not been developing, all along, a 'new critique of judgement' himself.[48] He states in reply that the kind of judgement he suggests is no more than a 'feeling.' Unlike the ready-made prescriptions of a theory of judgement, what happens in transcending criteria through prudence is that 'in each instance, I have a feeling, that is all.'[49] What seems to be at stake, Lyotard is quick to explicate. 'It is a matter of feelings, in the sense that one can judge *without concepts*'.[50] In other words, judgement without criteria is judgement based merely on a 'hunch' and, therefore, *without* institutional ties. Being 'without concepts,' it is thematically uncircumscribeable.

Judgement as mere feeling opposes both (a) judgement with criteria, and (b) judgement without criteria but with concepts. It is that delicate border-line between judgement without criteria but with concepts and judgement without criteria, with no concepts, but with mere feeling in which Lyotard invests all the plausibility of his reading of prudence. The unworldly 'feeling' of Aristotle's prudent judge is named 'opinion,' too moral a word (*opinor*) for an amoral elevation. It is, in turn, situated 'within the order of opinion, and *not in the order of truth*. I think this is quite close to some of the themes that one finds among the Sophists.'[51] It is important to notice that it is solely his eleventh hour rhetorical twist for the word 'opinion,' and against the word 'truth,' which places his particular reading of Aristotle in safe proximity to Sophism. The terms in which he defines 'opinion' are simply hidden away. The order of opinion disregards criteria exactly the way the order of truth does, only with the difference, by a last moment choice of words, that the former is no more than 'a matter of feelings' in contradistinction to what would be the bold prescriptions of the latter. Is he not endeavouring to get away with his *daring,* as it were, notion of transcending criteria by simply dropping the truth claims from that transcending? In the face of what is that endeavour? A certain trace of force, a political bully?

'Truth,' just as a host of similar words in language, has become a cursed word. It

is a word never to be used outside the safety of quotation marks. Lyotard's timid and sometimes downright hostile uses of the word derive from a non-transcendentalism which is at odds with the basic commitments of that rhetoric.[52] Avoiding words on the ground that they do not deliver what they promise is precisely the same breach of grammar as philosophy has so often done from Plato onwards. Words do not make abstract promises. They *are* what they actually deliver. 'We are always within opinion,' declares Lyotard, 'and there is no possible discourse of truth on the situation. And there is no such discourse because one is caught up in a story, and one cannot get out of this story to take up a metalinguistic position from which the whole could be dominated.'[53] Is distinguishing language from metalanguage not a metalinguistic venture itself? Will there not always and unavoidably be an irreducible element of *truth* constitutive of a discourse? Rather than to try and avoid this or that particular word in language, the point seems to be being alert, in the face of metaphysical abuse, not to let the grammar of the particular word somehow elude its use. Once the models and habits which make up the entire being of the word are dropped, the violation of grammar is but a matter of course. Lyotard's discourse attests to that only too well. In a parade of words with an abused grammar, the very word 'justice' takes the lead.

1.2 Judgement and Blind Faith

The prevailing conceptions of justice, Lyotard classifies within three 'orderings.' The first one is the ordering of 'autonomy,' a category which, as the name implies, derives from the principle of the autonomy of the subject and which belongs to the mainstream of Western thinking.[1] According to the autonomous conception of justice, that which is just is so determined by man the subject whose definition of it is through the law, a mere reflection of his free will. And once the just has been

determined, the obedience it requires means less a restriction on man's autonomy than a sole consummation of it. The subject 'remains autonomous even when he obeys it since he is its author.'[2] The second ordering is what Lyotard calls 'the Jewish pole.' It signifies justice in the mode of 'obligation' — of obligation without ever the requirement of either understanding that obligation or being able to rationalize it.[3] The third ordering is that of 'heteronomy,' or the 'pagan' ordering, a category Lyotard does not consider distinct from the prudence of the Aristotelian judge; that is, as he reads it, judgement without criteria. Regarding the autonomy of the will, Kant also distinguishes between what he calls 'autonomy' and 'heteronomy.' The latter he takes to refer to man as part of the sensible world and, thus, under the reign of nature, while the former designates man's independence, within the world of intellect, from the impositions of the world of senses.[4] The subject assumed as essentially autonomous, Kant simply reproduces what, for Lyotard, is the *Leitmotif* of the Western philosophy. The heteronomous justice of paganism, on the other hand, appears not to rely on a prior distinction between the sensible and the intelligible. On the contrary, in what Kant would consider to be the world of intellect, paganism recognizes no autonomous region; at least no more than that of a *feeling*, of, namely, the 'third' position.[5] Because the subject cannot be autonomous, he can, in no instance, be the author of that which prevails as just; '[t]he will is never free, and freedom does not come first.'[6] To illustrate the pagan case, Lyotard cites the narrative tradition of a particular group of Amazon Indians. Within that tradition, he notes,

> whenever a story is told... the teller always begins by saying: 'I am going to tell you the story of X (here he inserts the name of the hero) as I have *always* heard it.' ...In other words, he presents himself without giving his own name; he only *relays* the story. He presents himself as *having first been the addressee* of a story of which he is now the teller.[7]

Hence, the 'heteronomy,' or effective disappearance, of the subject. What the

narrator does is no more than to 're-lay' that which is *already* in place and which he 'ha[s] *always* heard.'[8] But then, is that not exactly the point which we tried, above, to lay against *his* argument of modernity? That one could not be conceivable as an author before one had been *authorized* to be one? The Lyotardian modernity is distinguished by its lack of criteria for judgement. And the lack of criteria arises from the lack of audience. It was, again, emphasized above, against the presumed vanishing of the audience and the lack of criteria, that authorship, whether in the delivery of justice or in literary exercise, could achieve to be no more than mere proliferation (*aucto*) of that which one, the author, has *already* been introduced to, and that *auction* without an audience would be inconceivable.

Does that signify, then, a sharp turn in the ongoing discourse from the presuppositions of its *modernity*? For Lyotard, however, that which distinguishes modernity defines also heteronomy. 'These [pagan] stories,' notes Lyotard, 'have no origin. They treat origins in terms of stories that presuppose other stories that in turn presuppose the first ones.'[9] In this texture of interwoven narratives, no one can stabilize what proper name refers to what body. That which would otherwise be known as the subject becomes a non-identifiable relation in a whirl of shifting bodies. In that perpetual shifting, the relationship between humans and gods, the just and the unjust, turns into a transfigurational one. In the event of a confrontation between any two figures, writes Lyotard, 'there is no reference by which to judge the opponent's strength; one does not know if s/he is a god or a human. It is a beggar, but it may be a god, since the other is metamorphic, and one will have to judge therefore by opinion alone, that is, without criteria.'[10] Ending up, once more, with the lack of criteria and making it the definitive mark of heteronomy, Lyotard does only little more than repeat what he had to say concerning modernity. How the lack of 'reference by which to judge the opponent's strength' occurs in a tradition in which the narrator, the judge, owns no 'room of her own' but keeps referring to others is something which needs working out. Clearly, she tells the story just as she 'ha[s] always heard.'[11] In each case she 'ha[s] first been the addressee'[12] of what she

tells. Is not what would naturally be expected of her to judge between gods and humans, or between the just and the unjust, the way she has *always* seen, heard, and been told? Yet, surprisingly, she ends up with no criteria, that is to say with no models, no habits, no *stories*. How does that come about? Characteristically, the enigma is prompted by a curious reading of the tradition that is cited. As Lyotard describes it, when a story is told, it is impossible to trace it back to any kind of origin. 'They treat origins in terms of stories that presuppose other stories that in turn presuppose the first ones.'[13] The same can be said to be equally true for the judgement made at any given moment; for obvious reasons, it cannot be traced back to sources which would exhaust its origins. What characteristically intercepts Lyotard's account, however, is the presumption of a *presence* which comes in, once more, to activate what is already there. It is true that the criteria which originate the story, or the judgement, are not circumscribeable. That they are not fixed and present, however, does not necessarily mean that the specific judgement, or story, is made without criteria. Indeed, the criteria involved will be as untraceable as that curious 'trace' in Lyotard's own rhetoric, a theme that compels him so often to offer costly sacrifices to the gods of non-transcendentalistic politics. Likewise, although on no basis other than that of untraceable criteria, no pagan should ever be at loss to tell her gods apart from the ungodly. She will be at no loss, because, to lead Lyotard's own insight into its consequences, she does not *exist*. What exists is the vague and slippery totality of references into which she is born and which she keeps re-counting.

The confusion between the untraceability of criteria and the *lack* of them is the same in kind as one greater confusion which is almost destined to evade attention. It is reflected in Lyotard's formulation of the three distinct orders of justice. Is that by which heteronomy is exemplified an account of the *sole* prevailing process, the Nazi idea of it included, or is it simply a possible, and yet more favourable, pattern of it among others? As with the distinction between classicism and modernity, the three orders — autonomy, the Judaic order, heteronomy — are conceived more as

radically distinct processes of judgement than as mimetically discrepant *representations of one and the same process*. A hierarchy, in turn, is established amongst the three, and 'heteronomy' is singled out. Autonomy, for one thing, derives from a distorted picture of man as the subject. It is his autonomous will which is reflected in the law and which determines that which is just. By Lyotard's own line of thinking, since autonomy is based on a false notion of the subject, it can be no more than a figurative, tactical, account of what is decided, again, heteronomously, that is, 'without criteria.' Autonomy, therefore, cannot be a statement of what might tentatively be called the *actual process,* but simply a political discourse on it. The distinction then between autonomy and heteronomy is political. That which is autonomous is, in each case, already heteronomous. The Judaic order, on the other hand, stands out as a distinct pole, namely that of faith, and issues justice neither with criteria nor without them. Heteronomy and the *blind faith* represented in the Jewish pole, therefore, must form the only genuine opposition. But how exactly does Judaism evade the primordiality of heteronomy? Or how exactly is heteronomy understood to be faith-free?

Thébaud asks the question: 'If I hear a rabbi tell me 'throw this flower pot out of the window!' a debate begins to take place then. Am I just if I obey? Or, on the contrary, am I perhaps unjust if I hurl the flower pot out of the window?'[14] We all know who a rabbi is. But who is it that receives the command from the rabbi? Is it Thébaud himself? Is it necessary that we have this piece of information? What is Thébaud's aim? Does he intend to get an answer from Lyotard as to how one decides the just in an everyday situation? What is an everyday situation? Perhaps he intends to force Lyotard into a corner: 'Now, would you not consider *that* outright silly?' The 'that' in my question is stressed because that is how it is echoed in the answer. In response, Lyotard states: 'One can suppose that because the rabbi is honest, because he is just, because he is as just as one can hope to be, one can suppose that if he tells you *that*...'[15] What exactly does the rabbi tell? 'Throw this flower pot out of the window!' The *that* which comes in Lyotard's answer after the

buffer of a chain of adjectives indicates how rather tricky he thinks the question is. It is something one needs to be very careful about. He is so alert in fact that, before he proceeds to make any comments at all, he suggests that we consider the positive qualities of the rabbi; 'because the rabbi is honest, because he is just...' In the face of *what* are these positive qualities? The *negativeness* of what the rabbi commands? But Lyotard does not say that yet. In fact, he does not say at all that he finds what the rabbi commands negative or silly. What he does find, instead, is that the command by the rabbi is an utterance simply ***hanging in the air***. He is, therefore, compelled to call in the *down-to-earth* — and not necessarily positive or negative — qualities of the utterer to help to make some sense of the statement. '[O]ne can suppose that if he tells you that,' he then concludes, 'it is not in order to deceive you.'[16] And yet he adds: 'But one cannot be sure.'[17] In saying so Lyotard not only thinks that the command is hanging in the air, but that the whole thing, the audience included, takes place in a vacuum-like environment. It is not *situated*, hence not even a situation.

Of course we do not need to know *who* exactly receives the command from the rabbi. Who would a rabbi give a command to but only someone who would take it? The rabbi will hardly ever mistake his audience. By the same token, the receiver of the command will in each case have an equally operational view of what is taking place. 'But you cannot be sure,' warns Lyotard. 'Even if he [the rabbi] is not seeking to deceive you, he himself may be deceived.'[18] That is how the whole thing is hanging in the air. In the face of some such command, 'you cannot be sure' whether either of you, or both, are not deceived. How very much like the Cartesian meditation it all is, which, in the absence of criteria, develops, not surprisingly, an all-inclusive doubt. Imagine, a person makes a holiday booking in a travel shop, pays the fee, gets her documents, and leaves. Then she pauses and thinks to herself, 'I wonder, if I have been deceived?' Or she goes into a shop with the intention of purchasing a shirt and has a look at the price tags, decides on one, then contemplates, 'Suppose I bought that shirt, would it be my money's worth?' Of

course there is nothing Cartesian with the contemplation of that sort. It happens all the time, and it happens quite justifiably. When it happens, however, *there always is in place some way of satisfying one's curiosity*. In other words, the situation enables one, in each case, to be *able* to ascertain whether one has been deceived. If one is not *already* capable of doing so, it cannot be a *situation*, much less what is known as the game of 'deception'.[19] Deception is a word in one's language. It is governed by the criteria which reflect the patterns, habits and conventions spinning around that word. If she thinks she may have been deceived by her travel agent or by the local shop, her ways of checking on that which bothers her, as well as the ways in which she is bothered, are common, established, and in each case already in place. And there is no reason why the same should not be the case with the rabbi. No matter how different the nature of the rabbi's relation is to the world at large or to his audience — different especially from that of the purchaser in the local shop to everyday taste and economics — to be in a *situation* requires that the rabbi's audience should be in each case and already in a position to notice, play, or reverse, the rabbi's game of deception, or, for that matter, any other game suggested by him. This is *more* so perhaps — because it obviously narrows its field of criteria by clearly rejecting the criteria of a more familiar, more widely known, terrain, and thereby employing for its frame of reference a *special* mode of transparency — in the face of a command such as the one in the example, 'throw this flower pot out of the window!' Conversely, if the certainty sought with respect to the rightness of the rabbi's command demands for its satisfaction a rigorous discourse, a colour chart, against which the statement can be tested — then the game is altered. In purchasing a shirt, if the purchaser believes that he has not paid for it more than other shops demand and the shirt is not of poorer quality, etc., and yet if he still thinks that he may have been deceived because of the way things get value, for instance, or of the imbalance between his income and the costs of living, again, the game has changed. If that person remarked to a friend of his whom he encountered immediately after purchasing the shirt that he may have been ripped off, though he did not think that it

was of poor quality or cost more than in other shops, his friend would think either that the purchaser did not know the meaning in English of 'being ripped off,' or that he was simply playing an altogether different game, one which is definitely *not* that of deception.

The command of the rabbi is hanging in the air, because, as an effect of the distinction between heteronomy and faith, the rabbi himself is hanging in the air. Unlike the Amazonian Indians, the rabbi is *more* than a mere proliferator of that which is already in place. 'Throw this flower pot out of the window!' Lyotard remarks that the example is an excellent one. It is excellent because it shows the *hazards* of taking utterances always at their letter.

> It is an excellent example because the refinement that Judaism brings to the notion of obligation is precisely that one has to watch out for prescriptions that appear to be just or authorized; they are not always to be taken *literally*, and they may result in the most extreme injustice.[20]

The immediate alarm in commenting on the rabbi's utterance is now accounted for by a distinction between literal and otherwise reading. 'One can suppose that because the rabbi is honest, because he is just, because he is as just as one can hope to be...'[21] In other words, if it were a command such as 'Water the flowers over there!' then Lyotard would not have to remind himself of the character traits of the rabbi. Why not? Because there would be no hazard and no injustice in taking it literally. But, is really the dichotomy between the literal and otherwise so alarming an element in the actual game? What is it that is signified when the metaphorical is posited in contradistinction to the literal? Undoubtedly, we all make plenty of uses of that dichotomy in many operational ways. It is important to notice, however, that one seems to refer to it as a practical device in certain situations, *often* in order to justify an action which has already been taken, and *always* to justify the action on the basis of that which is already out in the open, and *never* as an element getting in

the way of the very practicality. '[O]ne has to watch out...'[22] '[One] cannot be sure.'[23] The *watching out* is a well-given piece of advice only when the utterance, the rabbi, and the audience, all are thought to be hanging in the air. It entertains the notion that the command could possibly be one that evades the system of narratives which is already in place and which frames the understanding (*phronesis*) of those who are with him. Could one really invoke a moment of hesitation, of assessment, an instant which would freeze the whole event in the air, rather like Zeno's arrow, and in turn mediate between what the rabbi says and what is made of it by the audience, whether what is said is literal or otherwise? If, on the other hand, that which is inside *is* simply for the sake of its having already been outside,[24] in that case both the rabbi and his audience are all along down-to-earth and ineluctably tied with the traces of a system of narratives, of force, rather than hanging in the air.

On the part of the rabbi, there seems to be hardly much of a choice, but to pronounce, or proliferate (*aucto*), that which is already out in the open as just. 'No one can say,' notes Lyotard, 'what the being of justice is. That, at least, seems certain. The rabbi cannot tell either.'[25] A call to silence, as most characteristically pursued in the Kantian project regarding things-in-themselves, is *not* an avenue to preempt the claims of metaphysics, but, on the contrary, a curious reaffirmation of its most basic trait, namely the idea of a deeper layer, a substratum, which eludes the language and the sight of man. The assumption of a fixed 'being' for justice makes out of justice, a word in language, an abstract promise whose eternal content may or may not overlap with what is its letter. The actual performances of the word are brazenly ignored. If justice is a word in language, surely there must be relatively clear indicators as to where the word is supposed to be cited at all, and when cited, what it can be, that is to say, what can be suggested, by the criteria already in place, as just. A speaker of the language, the rabbi, therefore, should be perfectly capable, in each instance, of telling what is just. He may be the representative of a distinctive, even peripheral, narrative tradition, a quality that may consequently narrow, or rarefy, the realm of criteria in the specific case. Yet even so, it is a

mistake to assume that the exceptional just of the rabbi could possibly evade the realm of the common and the categorized. One's status as a rabbi is hardly less established or institutionalized than the everyday performances of the word justice. It is difficult, therefore, to imagine the rabbi capable of suggesting what would be clearly, by common criteria, unjust. Consider the following passage in a story by Martin Buber:

> Once Rabbi Elimelekh was eating the sabbath meal with his disciples. The servant set the soup bowl down before him. Rabbi Elimelekh raised it and upset it, so that the soup poured over the table.[26]

Now, is that just? It would be missing the point to think that some sort of self-control on Rabbi Elimelekh's part would have to ensure that what is attempted is just — he could not possibly take the risk of doing or stating that which could not be read, by the prevailing criteria, as just. But, being part of the *situation*, what would contradict the criteria, the models, habits and patterns, of justice that are in place would simply not be *available* to him to begin with. As Fish puts it, 'all preferences are principled,' even though principles do not form a category that can be hierarchically opposed to preferences.[27] As that which is common and established does not refer to a narrative, a genealogy, that would transcend that which is individual, the individual is in each case what is already common. How the rabbi's action is received in the end, therefore, is anything but a surprise.

> All at once young Mendel, later the rabbi of Rymanov, cried out: 'Rabbi, what are you doing? They will put us all in jail!' The other disciples smiled at these foolish words. They would have laughed out loud, had not the presence of their teacher restrained them.[28]

Choice is hardly the word that defines either the rabbi's action or the reaction from the audience. Supposing for a moment what the rabbi did did not turn out to be in

harmony with the prevailing criteria, the *dramatism* that would then be the case would have *already* altered the game; no one would describe then what the rabbi would have done as the effect of a *choice*. Nor does seem to be much choice, in the face of the rabbi's action, on the part of his audience. In the story, the young Mendel who ventures to make an — anti-institutional — *choice* (supposing that can be said) is *not* already a drop-out. He is not excluded from the game; there is not much that is dramatic other than he being called a fool. The adjective 'young,' however, which Buber is quick to put before Mendel's name, accounts for it all. Training, a time-related enterprise, stands behind the whole event. We do not drop out children for the strictly anti-institutional 'choice' of communicating with their shoes, yet we would be likely to do it with grown-ups.

In the end, what *takes place* appears to be truly situated (hence, a *situation*), and the rabbi as tamed and trained 'as one can hope to be'[29] (as opposed to being a free-wheeling, evasive, distant subject). Unlike what Lyotard implies, not a single element in the rabbinical situation turns out to be hanging in the air. The hanging in the air, however, is not only implied, but is clearly formulated by means of yet another dichotomy by Lyotard — that of prescriptives and descriptives. The Lyotardian line unfolds as follows:

> One can suppose that because the rabbi is honest, because he is just, because he is as just as one can hope to be, one can suppose that if he tells you that, it is not in order to deceive you. But one cannot be sure. Even if he is not seeking to deceive you, he himself may be deceived. Here we are in a relation that is proper to *prescriptives*, because there is no test for the just whereas there is for the true. One cannot compare what the rabbi says with a state of affairs (a *Sachverhalt*).[30]

There is evident continuity between the apocalyptic account of morals in modernity, the initial argument in the Lyotardian text,[31] and the contention here. Statements of justice, rabbinical or otherwise, are defined here as prescriptives, and contrasted

with the class of propositions which simply *mirror* things rather than assign directions to them. The latter can be tested in the face of things which they describe, while the former lack the content to be factually verified. Consequently, moral judgements appear, once more, on the loose. 'The sense of a proposition,' declares *Tractatus*, the early work by Wittgenstein, 'is its agreement and disagreement with possibilities of existence and non-existence of states of affairs [*der Sachverhalte*].'[32] The utterances which do not stand for facts, as states of affairs, are transcendent of the factual world. And that which transcends the world transcends language. We are not capable of talking about the unworldly and, at once, of making sense. That is because our language is no more than a totality of pictures which reflect the most basic worldly facts, a medium therefore not suitable to convey sensibly that which corresponds to no such factual being. That which is transcendental is the mystical, inexpressible and incommensurable (*Unaussprechliches*).[33] Crudely, such is the call to silence in the discourse of *Tractatus*, a work which bears little in common with the later work of its author. Very much reminiscent of that rhetoric, Lyotard notes:

> One cannot compare what the rabbi says with a state of affairs (a *Sachverhalt*). There is no state of affairs that corresponds to what the rabbi says, and it is proper to prescriptives *not to make commensurate* their discourse with a reality, since the 'reality' they speak of is still to be.[34]

To elucidate the latter day adherence here to what has come to be known as the logical positivist reading of *Tractatus*,[35] we could imagine the rabbi stating, before he goes on to pronounce his command, that 'there is a pot of flowers by the window.' The components of a statement such as this, accordingly, are analyzeable, through a logical reduction, into their most elementary parts. In turn, the elementary utterances can be checked against the elementary *facts* (states of affairs), of independent phenomena, in order to judge the accuracy, the truth, of the correspondence between the two. Roughly, that is how the true utterances are

distinguished from the false utterances, and, in the event, indeed, of an utterance with no factual content, meaningful utterances from the ones which are not so. We can readily multiply the kind of utterances which, however possibly false, as well as true, would nevertheless radically oppose the *incommensurability* of the justice, the truth, of the command by the rabbi to 'throw the flower pot out of the window.' 'We are four people here in this room.' 'The Rabbi wears a black gown.' 'He is older than I.' In each of these utterances, the truth the proposition bears can be tested in the face of facts it depicts in a pictorial fashion. The picture theory of *Tractatus* aims at hard truth, and is resolved to avoid many of the classical subject matters of philosophy by rendering them in advance as senseless. At best, for that which transcends the world, such as religion and aesthetics, *silence* is invoked. I have argued that invitations to silence following the claims of incompetence, of man's either language or sight, anticipate a sphere which exists beyond language and sight — one of the most persistent themes of modern metaphysics. The idea of banishing pieces of speech from speech in general does presuppose, however, a *pattern* to those pieces, one which has to be recognizable before banishing is possible. Does the inevitability of a pattern not indicate a basic and uninterrupted circulation of signs and subsequent meaning effects on the part of the banished pieces? How exactly do the *concepts,* of incommensurable nature, are distinguished from what are mere graphic or phonetic marks? Does one get to know the words *just* and *beautiful* in a way radically different from the words *room* and *gown*?

Just as the dichotomy between the literal and the metaphorical,[36] a distinction between prescriptives and descriptives is, no doubt, a legitimate tool with considerable efficacy. The legitimacy, of which one can speak, however, is one ensured by the *grammar* of the dichotomy, that is to say the models and habits, by which the tool is in each case employed. Are the words description and prescription, on the basis of criteria, labels attached to radically distinct states? On the contrary, in each and every instance, much of that which is considered to be descriptive seems to be already taken for granted. 'The Rabbi wears a black gown.' That colour

distinctions are cultural formations is a commonplace piece of anthropology. A *gown* is perhaps even more obviously prescriptive in its referential content. Again, probed, *wearing* will prove to be a concept with an equally controversial subject matter; let alone cultural diversities, it will be hard to pinpoint just what exactly is common in the uses of the word in various examples such as wearing perfume, a gown, a particular expression, a situation.

Similarly, the declaration that 'there is no test for the just'[37] turns a practical tool of everyday discourse into an element getting in the way of that very practicality. The 'just,' a much used word in language, must be testable by definition. That convention does not seem to point to one fixed way of employing it is hardly a deficiency on the part of the word. Why on earth should there be only *one*? What really counts, of course, is the fact that *all* the ways of employing the word is determined by some consensus which is in each case prior to what might be called *secondary* disagreements of it — discords that are as *fair* as agreements. If, on the other hand, the game pursued is one of attempting to see through that which is conventionally just (supposing this is a feasible concept); in that case, not only the words descriptive and prescriptive, but also the very notion of testability will cease to make any sense. Testability will become a notion with no conceivable use. It will have no use, because where there is no test for the prescriptive, nor will there be one for the descriptive. Alluding to the age-old tradition of all-inclusive scepticism in philosophy, '[d]oubt,' notes Wittgenstein, 'comes *after* belief.'[38] 'Throw this flower pot out of the window.' 'The Rabbi wears a black gown.' Does one employ, in judging the truth, the justice, of either of the statements, a frame of reference that is different in kind from what one would employ with the other? Perhaps not surprisingly, scepticism (the kind whose paradigmatic instance is the Cartesian sceptic in *Meditations*) goes hand in hand with the hard realism of logical positivism where in effect the incommensurable is regarded as taking place *outside* history, *outside* the realm of the commensurable. The incommensurable, as Lyotard posits it, is more than just that which one habitually takes seriously without at once

demanding the sort of justification that is categorized to be *inappropriate* for it. The incommensurable refers, instead, to a failure that is characteristic in the face of some no-nonsense test of reality. Hence an opposition of paganism and Judaic faith, a dichotomy that is more than mere mimetic distillation — a *genuine* dichotomy. Considering, however, the generalized faith that is the primordiality of criteria, judgement seems to be a project that takes place *only* in faith. Paganism, therefore, appears to be none other than a sub-category of what one might call Judaism — or, alternatively, if the former is chiefly marked by its locality, *vice versa*: Judaism has to be a grammatical category of what is paganism: that which is local is also the primordial.[39] 'Let's be pagans,' calls out Lyotard. The answer then is: we *are* pagans. Defined as the *local*, paganism is the sole conceivable way to be.

1.3 The Just, the Unjust, and the Ugly

I have noted that the 'just,' a word commonly performed, must be testable by definition. That is not to say, however, that those who are the sole authority to judge the uses of it in particular cases, namely the speakers of the language, must necessarily come up with a definition of the just, or, for that matter, of the unjust, which would apply to *all* cases. Even in *one* specific case, the part played by the audience appears to have already *consented*, in one way or another, what may be brought up in the specific case as just, rather than to reach a unanimous agreement on it. The idea that, if not a universally valid definition, there should be one right answer at least in the individual case is, for various reasons, not a practical one; nor does it bear any sufficient reason that it should necessarily be so. The idea presupposes an evasive force in man, one that is to form a common intellectual sphere for the participation of all and from which the contingencies of history are to be left out.[1] History, or, as Kant puts it, the 'sensible,'[2] is to be suppressed, for it is

none other than the world of senses that prompts the undesirable diversity of beliefs, prejudices and habits. That is, of course, if what is evasive, detached, about man is not, in each case, what is already out in the open, in which case the particular idea of the just which claims *more* validity, whether universally or for a local, specific, instance, will be merely attesting to a policy which tends to hold some beliefs dearer than others.[3] As for the practicalities of the concept, decisions of the just are amongst those which one has to pursue in one's daily life in greatest multitude. Yet often one does not appear to have an overwhelming difficulty in assessing exactly how to go about it. At least, in each case, one seems to be in a position to be able reasonably to weigh the available suggestions of the just and the unjust. 'Let us take a look at it differently,' Thébaud invites Lyotard, immediately after the propositions of the just are certified untestable by the latter. 'What do we do with a thesis like 'it is unjust; I rebel'? How is one to say this if one does not know what is just and what is unjust?'[4] If they do not correspond to circumscribeable states of affairs, have no factual content, and are therefore neither true nor false, what will one make of such everyday declarations of the good and the bad, of the just and the unjust, distinctions that are obviously indispensable for the continuity of life? In a *blind* struggle of competing moralities, is it not strictly the case that *anything goes*?

The conclusion that anything goes does not stem merely from the Lyotardian project. It is deeply rooted in a tradition, from Plato to Descartes and Kant, in its principal stepping stones, one which appears to conceive of man within the framework of an inflexible dichotomy of the sensible and the intelligible.[5] The human condition, in turn, becomes doubly apocalyptic; for not only the world of senses is cut loose, but, deprived of the criteria of senses to bridge the presumed gap between the private and the common, the world of *reason* is rendered devoid of unifying standards, a *common* language. Lyotard therefore ventures, for the sake of everyday continuity, to draw a definitive, unifying, line, if not for the just, for at least the unjust. He suggests:

> *Absolute* injustice would occur if the pragmatics of obligation, that is, the possibility of continuing to play the game of the just, were excluded. That is what is unjust. Not the opposite of the just, but that which prohibits that the question of the just and the unjust be, and remain, raised.[6]

In the passage the *game* perspective comes to the foreground not quite accidentally. *Just Gaming* introduces itself as an enterprise to 'use Wittgenstein's theory of language games to examine the problem of justice.'[7] As he posits the notion of games, however, Lyotard does so only to induce further confusion. Because he has already excluded from the game the criteria of habits, models and patterns, the concept of a grammar which is absolutely central to the Wittgensteinean formulation, the notion has been already neutralized. Subsequently, that which is game-like becomes simply another way of referring to that which is shallow and unruly, that which has no *firm* ground to stand on. 'It is unjust; I rebel.' This game is played throughout one's everyday life, when shopping, when encountering things in the street, when watching television. In each instance, however, one's is a judgement with no 'solid' foundation. It is in each case a statement that goes, by its nature, untested and unverified. But since these judgements are indispensable, one must try and learn to live with them. And that is exactly where the criterion of *injustice* comes in. Although there is not much one can do about it, one can try and soothe, as it were, the pain of having to live with one's unbridled, unadulterated, and therefore incommensurable, instincts. This soothing is done by means of a universal line, one which is to mark out injustice in its *absolute* form. Absolute injustice, accordingly, becomes the case in one's ineluctable tackling of rival players when it is in order to drive the rival players out of the game. Considering the anything-goes situation naturally anticipated on the basis of the dichotomy between the sensible and the intelligible, the line Lyotard has to draw is tantamount to declaring amidst a free-for-all, 'No hitting below the belt!'

One characteristic instance, according to Lyotard, where transgression is absolute

is terrorism.[8] Terrorism, he elucidates, marks itself by what distinguishes it from war. Unlike the latter, terrorism is set to deny others even the mere chance of taking part in the game. The case that well illustrates this point, he indicates, is the much publicized kidnapping, in 1977, of a German industrialist, Schleyer, by the gang Baader-Meinhoff in order to pressurize the German Government. The terrorists threatened to kill Schleyer (they eventually did kill him) unless the Government freed their friends in prison. This, comments Lyotard, 'excludes the game of the just.'

> It excludes the game of the just because the Schleyer in question is obviously taken as a *means* here. He is threatened with death, but this threat is addressed to a *third party*, not to *him*.[9]

An act of war, on the other hand, where rival players are fully engaged in the game with the essential untestability of the objectives that the sides have in the game intact, bears 'no relation' to the act of terrorism.[10] For instance, in the case of the less publicized raid by the same gang on the American installation in Heidelberg and the subsequent destruction of the equipment there, we have a radically different picture, 'the group considers itself at war; it is waging war and it is actually destroying a *part of the forces of the adversary*.'[11] In this picture, first of all, there are *two* sides involved which is what 'the rather exact game' of a war[12] is all about. The sides have their freedom 'complete,' because they are fully in the game. They both think just and do accordingly, considering, at once, the adversary to be thinking unjust and acting unjustly.[13] In the kidnapping case, on the other hand, the 'complete' freedom of the others involved is precisely what does not happen. The hostage is not 'treated like an *adversary*,'[14] because the kidnappers themselves do not consider him to be part of the game. In a war, the same Schleyer would be 'at [the] risk of being killed in an attack, but that is not the same thing at all. Then he would have been treated like an adversary,'[15] and therefore already a party in the

game. In the dichotomy of war and terrorism, much seems to be invested in the distinction between the 'means' and the 'adversary.' What states of affairs exactly do these conceptions correspond to? Do the *means*, as opposed to the target, and the *third party*, as opposed to the adversary, continue to remain serviceable once they become part of an ambitious formulation?[16] What exactly is it that constitutes the side against which the terrorist gang is waging a war? In attacking the American defence interests in Germany, is it the American Government the gang is fighting? Is it an American-German alliance that is regarded as adversary by the terrorists? What side does the gang itself represent? Is Lyotard himself on a side when reading the Schleyer affair? Why is it that the gang chooses Schleyer to kidnap and not an academic in Paris? How many sides is it against which the gang is pursuing its war? Is it a multitude of wars taking place simultaneously yet clearly cut from each other, as in each case the game played must be the 'rather exact game' of a war with 'two' clear sides?

The kidnapped man, Schleyer, was the person in charge of Germany's employers' federation. As Lyotard does record himself, Schleyer 'considered himself as being indeed at war; he had himself surrounded by armed bodyguards.'[17] And who were the terrorists? The Baader-Meinhoff gang set themselves the aim 'to hit the Establishment in the face.'[18] On Lyotard's part, the kidnapping of Schleyer, the head of the employers' federation, by a gang seeking to fight the establishment does not seem to be a particularly apt example. He could have pointed out, instead, to the hijacking of an aeroplane, with unsuspecting German tourists, an event that took place at about the same time and in solidarity with the kidnapping of Schleyer. Would that make Lyotard's point more credible? The argument Lyotard pursues, however, is far from being clear altogether. He thinks of Schleyer not as 'part of the forces of the adversary,' while the American computer destroyed in Heidelberg *is*. The kidnapped man is simply a 'means,' as distinct from the 'adversary.' Then, however, Lyotard appears somehow to revise the case. Schleyer did think of himself as fighting a war. Does that mean, then, that the kidnapping could be an act of war

after all? It does not, answers Lyotard. Because, if it were really an act of war, Schleyer 'would [have] be[en] taken as an adversary and *destroyed as such*.'[19] It was not a war, because the kidnapped was not treated as an adversary. And he was not treated as an adversary, because he was treated as a hostage. Schleyer and the Government are pictured by Lyotard as two radically distinct entities, the latter being almost a transcendental one. What the picture would be from the viewpoint of the gang, or of Schleyer, or of the Government, he is not particularly concerned about. What adds to that is the curious logic that, in an act of war the enemy force must simply and necessarily be destroyed, just as the equipment in Heidelberg. Once got hold of 'part of the forces of the adversary' one is not allowed to try and make the most of it. How do the confusions arise? The terrorism in question, notes Lyotard,

> is a politics that is absolutely 'immoral.' You understand what I mean. One is working in a tripatriate fashion, and the blow one delivers to the other is not a blow that weakens him. Whether Schleyer is alive or dead changes nothing to the economic direction of Germany...[20]

One clue to how things get tangled up is the *immoral* in the paragraph in quotation marks. What he expects from his addressee is to understand (and of course we all do), that the absolute immorality he speaks of is but a figure of speech. Terrorism exemplifies the absolute unjust, yet this judgement is not generated by a morality outside inverted commas. A chain of confusions arise by the odd attempt on Lyotard's part to reach a point from which he could condemn terrorism without at once being moralistic. He could not condemn terrorism from a moral stance; if he did, that would have lost his argument its entire point. To avoid morality in its *infirmness*, incommensurability, he is forced, once more, to rearrange the grounds for his comment on the Schleyer affair. 'Whether Schleyer is alive or dead changes nothing to the economic direction of Germany...' One confusion delivers itself to

another. Here Lyotard gives the impression that he might be inclined to ignore the crucial distinction between the means and the adversary, and consider the kidnapping to be *not absolutely unjust* after all, had it been a 'weakening blow' to the German economy, the real adversary. Did the destruction of the equipment in Heidelberg — what was clearly an act of war — *cost* the adversary more than what it did in the kidnapping case, an act of terrorism? According to many, incidentally, the Schleyer affair was the 'greatest publicity triumph' of the gang;[21] a gang which aimed 'to hit the Establishment in the face, to mobilize the masses, and to maintain international solidarity.'[22] And even if the kidnapping were not a 'blow' to the adversary, would that not be strictly *all* to it? Why would the instance have to be no less than one of *absolute* injustice?

'It is unjust; I rebel.' Is that bound to be a *moral* objection in each case? Lyotard is bothered in the first place for he consistently reads the moral as that which is shallow and unruly (hence, his misled preference for the word 'game').[23] The solution he comes up with is that absolute injustice is at issue when the game of the just is no more. This, for him, stretches safely beyond moral contingencies. What it also does, most remarkably, is to refuse staking *freedom* in the game: 'my opponent thinks that what I think and do is unjust, and I think that what he does and thinks is unjust. Well, his freedom is complete and so is mine.'[24] We were told earlier that 'freedom does not come first,'[25] that it is always defined in terms of the prevalent narrative and that it can be anything but complete. But then, was ever the pagan rhetoric delivered earlier more than mere *sacrifice* to the gods of non-transcendentalist politics, a *trace* in the texture eventually overcome by that which underlay Lyotard's entire discourse? It now spins around the glittering word of freedom, rather in the fashion of the Enlightenment philosophers. It is a nice piece of oratory, if one does not mistake the time and the occasion. One who certainly did not mistake the time was Kant, the most influential of the Enlightenment philosophers. To Kant, it seems, the 'freedom of the will' meant precisely what 'complete freedom' means to Lyotard. 'What else, then can the freedom of the will

be,' declares the former, 'but autonomy, i.e., the property of the will to be a law to itself?'

> The proposition that the will is a law to itself in all its actions, however, only expresses the principle [of the categorical imperative] that we should act according to no other maxim than that which can also have itself as a universal law for its object.[26]

How is the will to be 'a law to itself,' if it has to be administered in the first place by a maxim, the categorical imperative? Injustice occurs if you do other than that which you wish to be a universal law. What is it that makes that particular maxim *more equal* among equal maxims of morality? Note the uncanny resemblance between the categorical imperative and the Lyotardian *sine qua non* in the form of the continuity of the game of the just. Where the imperative leads, the will becomes a law to itself and freedom complete. To disobey the categorical imperative is to disregard others' right to participate in the game. Is not the notion of fair play, which seems essential to Lyotard's conception of absolute injustice, merely another moral declaration among many, just as the categorical imperative of Kant is one among a multitude of moral maxims, though somehow 'more equal' than others? Does it have a basis that is firmer (supposing that can be said) than that of the terrorist (im)morality whose characteristic is to deny others their complete freedom? What is more, *not* letting others raise competing questions may well be part of the game (of the just). Indeed, is that not precisely the case in waging a war? Even in the case of the hijacked aeroplane with unsuspecting civilians, mentioned above,[27] one may have to think twice before one reasons that the abhorrence one has of the entire thing is beyond moralities, and that the dichotomy between the means and the adversary may in that case be employed as an absolute measure. Hijacking and what is associated with it seem to be as much established as robbery and ordinary homicide. It is not an act *unsuspected*, to force the grammatical possibilities of that

word. On the contrary, hijacking is clearly suspected in the taking of such *pre*-cautions as guarding, policing, security systems, and so on. There is a game in place the rules of which are *fairly* known. If we are to take the notion of fair play as something *more than a rhetorical figure*, that is to say as an *absolute* line, then fair play must be considered to be achieved so long as the mutually known rules, patterns, of the game are not broken. And how can one break a rule unless breaking it has already become a rule itself?[28] In other words, the grammar of the adjective *unsuspecting* resists to justify the *absolution* required of it. The difference, therefore, between the situation of the civilians of a town under enemy shelling and that of the tourists under terrorist threat is not a difference *in kind*. The border line between the two cannot be drawn without the much dreaded moralities, criteria, in place. Terrorism does not *simply* exclude the just. In the absence of political traces, namely the moralities based on an incessantly shifting ground, terrorism cannot be told apart from war. That is, indeed, where Lyotard perceives the pain of a supposed paralysis, and hence his quest for the holy grail of, if not the just, at least the absolute *unjust*.[29] Disregarding, of course, that what he *may* come up with, as well as his very pain, is already grounded in, and simply a mouthpiece of, the trails of force, the criteria, which are already in place. They are in place, yet in a state of flux — read by Lyotard as *unreliable*. What makes terrorism foul play and war otherwise, however, seems to be precisely this slippery ground as opposed to a pinpointable line which would apply universally. A perpetually shifting frame of reference is what one bases one's judgements on in numerous everyday uses of 'it is unjust; I rebel.' The grammar of the very word *reliability*, appears to be a *possibility* of this so-called slipperiness rather than an exception to it. Attempting to stretch, as it were, beyond that grammar, and qualify its ordinary, everyday game as unreliable, is a characteristic abuse of that very word.

Lyotard, however, is easily past the point of no-return in his abuse of language. And justice and judgement take the lead amongst the words to be characteristically misused. In terrorism, the game of the just is excluded. Whereas in the 'rather exact

game' of a war, the sides have their freedom 'complete.' Thébaud asks: 'And you are saying that, at this point, one is just and the other unjust?' Lyotard's reply is enlightening:

> JFL: No, I am saying that they are incompatible. I am not judging.
> JLT: *You are not judging.*
> JFL: *No, I am describing.*[30]

The word is solemnly avoided on account that it lacks for its content a firm, morality-free foundation. In so doing he simply reproduces the distinction that marks the entire mainstream of Western philosophy: what one sees and one's ways of seeing, description and judgement. It equally marks the established legal rhetoric in the form of a dichotomy between what is read, the law, and the ways of reading it, interpretation, adjudication. It is the old formulation by Parmenides ('seeing and being are the same,' to follow Heidegger's reading of it[31]) *in reverse*. A radical separation of seeing and being has probably its best known expression in the Kantian project — appearances and things-in-themselves.[32] Lyotard avoids the word judgement in exactly the same fashion as Kant avoids elaborating on the category he establishes as things-in-themselves, beings that *are* independently of how they are seen. Heidegger points out the centrality of Parmenides' formulation to Western philosophy.[33] Philosophers who can be put squarely against Kant have nevertheless reread the same formulation from exactly the same angel. Unlike Kant, for instance, the fundamental idea in both Hegel and Marx is a *unity* between rational and actual,[34] and ideology and economy,[35] respectively. What puts Kant, Hegel, and Marx together, however, is their consistent reading of seeing and being as two *essentially distinct* orders.[36]

What is remarkable regarding the traditional dichotomy is the position of the Aristotelian *phronesis*, of which departure from the post-Socratic tradition I have already noted. I quoted from Aristotle and argued briefly that judgement as a human

capacity independent of criteria is a notion alien to him. Having reached a point of comparison, we can now clearly establish why that is so. Aristotle states:

> that which would be judged, or which has been judged, a greater good, by all or most people of understanding or by the majority of men, or by the ablest, must be so; either without qualification, or in so far as they use their understanding to form their judgement. This is indeed a general principle applicable to all other judgements also; *not only the goodness of things, but their essence, magnitude, and general nature are in fact just what knowledge and understanding will declare them to be.*[37]

What Aristotle indicates as a 'general principle' seems very much to be the *sameness*, in its Parmenidean-Heideggerian sense, of being and seeing, a concept whose mimetic distillations generate the everyday operational distinctions between essence and knowledge, nature and understanding. They are neither logically unrelated elements, nor two distinct yet significantly related articles. The confusion of the mainstream post-Socratic philosophy may be explained by its disregard of the attached, criteria-imbued, character of the dichotomy between seeing and being. 'The Rabbi wears a black gown.'[38] When a person expresses her misgivings about the truth of a particular statement, is what she does to oppose the statement to what is considered to be its content, that is to say what transcends the talks, citations, designations of it? According to Aristotle, it seems, what that person does in objecting to the statement is merely to put against a piece of knowledge that which is simply another piece of knowledge, a possible 'hierarchy' between the two being an effect of the judgement 'by all or most people of understanding of by the majority of men, or by the ablest.' The repudiation of seeing and being as transcendentally distinct elements brings *man*, that who sees, to the forefront. 'It is the peculiarity of man,' states Aristotle, 'in comparison with the rest of the animal world, that he alone possesses a perception of good and evil, of the just and the

unjust, and of other similar qualities...'[39] That which distinguishes man from the rest of animal world is that which makes Heidegger choose man as the subject matter of his work on 'to be' (Being). Man stands out from other entities in that he *sees*. 'Being is that which is an *issue* for every such entity.'[40] The emphasis in the Heideggerian statement on the word 'issue' indicates what to Aristotle is 'the peculiarity of man.' Man, in his very Being, has Being as an issue. Consequently, he is the only being among beings with what Heidegger calls a 'potentiality-for-Being.' He sets models and patterns, and establishes criteria. Most important of it all he is capable of *choosing*, though not in a criteria-free, free-floating (a favourite expression with Heidegger), manner. He is always *his own* possibility. Remarkably, in *Nicomachean Ethics*, Aristotle lays great emphasis on man and defines justice in terms of the *just man*: 'justice is that in virtue of which the just man is said to be a doer, by *choice*, of that which is just... '[41] The distinctness of the Aristotelian justice from that of Socrates in *The Republic* is striking.[42] What is the nature of man's choice? '*Being* is that which is an issue for every such entity.' The accentuation on *Being* in the statement by Heidegger situates man's essence (*Wesen*) in his existence.[43] That which is called by Aristotle the 'peculiarity of man,' namely his perception, is not a free-wheeling possibility, but a very much confined one. Man's potentiality-for-Being is *defined* by his relation to Being. Aristotle himself is quick to make that very clear:

> It is the peculiarity of man, in comparison with the rest of the animal world, that he alone possesses a perception of good and evil, of the just and the unjust, and of other similar qualities; *and it is association in these things which makes a family and a polis*.[44]

Choice, in other words, is *not* the capacity which Kant, for instance, would rationalize within the framework of a distinction between the intelligible and the sensible, seeing and being. For Aristotle, on the contrary, the potentiality of man for

choice bears the constitutive mark of the attachments within the association of which he is part. Association in the just and the unjust is a *prerequisite* of judgement. This is stated by Aristotle in a celebrated passage in *Politics*: 'Justice belongs to the polis; for justice, which is the determination of what is just, is an ordering of the political association.'[45] He does not, of course, identify the just with what might be called the positive law of the political association. He clearly thinks justice (*dike*) greater than the law.[46] And yet nor does he seem to understand by justice a transcendental, natural, order. It is true that in both *Ethics* and *Rhetoric* Aristotle distinguishes between the just of the particular association and a notion of the just which transcends locality.[47] How is that duality to be understood? If 'man is by nature an animal intended to live in a polis,'[48] and if the *polis*, the political association, is in turn a condition for judgement, the capability to distinguish between the right and the wrong, how exactly is man to conceive of a non-local, non-political, notion of justice?

One possible way of looking at the Aristotelian position is to take into account his pre-dominantly rhetorical objectives. That is to say, it may be more than simple discontinuity in the work attributed to him that Aristotle continually transposes himself between the terms of such oppositions as associational and natural justice, written and unwritten law,[49] rule by judge and by law.[50] The consistent transposition, on the contrary, may refer to a subtle *denial* of those very dichotomies. Law *is*, as he makes no secret of it in *Rhetoric*, a domain precisely of such subtleties.[51] The fears which Barker, for instance, expresses in his Introduction to Aristotle's *Politics* would hardly have made sense to Aristotle himself. Where he describes the character of the Athenean popular courts with hundreds of members assigned to determine *to dikaion*, Barker notes: 'from any strict legal point of view this system is of course defective: it remits what ought to be strict and impartial justice to the emotional pleadings of litigants and the fluid popular sense of justice.'[52] Where Aristotle speaks of legislation we must remember that the *nomos* is invoked, a genre of juristic literature which no formalist would really call the law.

The *nomoi*, in other words, were not exactly the Benthamite guidelines. And where the law courts are at issue we have the *dikasterion* in which rhetorical skills ('partial... emotional pleadings') are performed to an audience of hundreds of judges who are to decide the just. What thus took place at the Athenean courts, according to Barker, was a 'subjective' justice as opposed to a 'legal' one.[53] Note the affinity between Barker's fear and that of Lyotard: the fear of the ordinary and popular opinion of justice as distinct from the just transcending criteria. Aristotle, on the other hand, would probably be mystified to be told that what is *not* of the popular and ordinary could possibly foster a court outcome; that what is expected of the litigant is other than to play, by any means in stock, to the prejudices already in place in order to illuminate and bring forth the desired pattern.

While another way of looking at the Aristotelian duality is to *re-read* what it considers to be the *universal*, that is to say that 'which is everywhere by nature the best,'[54] as opposed to the parochialism the law of the *polis* could threaten to turn into.

> Universal law is the law of nature. For there really is, as every one to some extent divines, a natural justice and injustice that is common to all, even to those who have no association or covenant with each other.[55]

That which contrasts with universal law, according to Aristotle, is particular law, the law of specific community. 'Particular law is that which each community lays down and applies to its own members: this is partly written and partly unwritten.'[56] In the same book of *Rhetoric*, the *written* principles of particular law are referred to as 'special law.'[57] The term 'general law,' on the other hand, signifies the unwritten principles, 'principles which are supposed to be acknowledged everywhere.'[58] In *Ethics*, the just 'by nature' is distinguished from the just 'by human enactment.'[59] The two are specified also as 'one unwritten and the other legal.'[60] Things that are just by nature are everywhere the same and the best. While those that are just 'by

human enactment are not everywhere the same, since constitutions also are not the same...'[61] Although clearly inclined to think of the universally just as an *unwritten*, non-legal, kind of justice, Aristotle associates it curiously with the *politeia* (constitution). Things that are just 'are not everywhere the same, since *constitutions* also are not the same, *though there is but one which is everywhere by nature the best.*'[62] In a different translation Barker renders the last phrase as a separate sentence: 'And yet there is but one constitution which is naturally the best everywhere.'[63] Since natural justice is supposed to be distinct from the written, formal, patterns of the just and yet that 'which is everywhere by nature the best' is at once designated as *politeia*, the signification of the 'constitution' therefore posited must not go unnoticed. Does the *politeia* refer simply to the constitution of a political association, whether on the basis of written principles or of a formal tradition — a reference which would constitute an immediate paradox in the Aristotelian formulation? Or is what is intended by the *politeia* the elusive assemblage of attachments that are at work at any given moment within the association?[64] What must not escape attention is the primeval *associationality* Aristotle seems to allot to the concept, a primordiality which in turn resists a non-associational, non-grammatical, dichotomy of the political and the universal. He may seem to disagree with the ineluctable associationality suggested by the *politeia*. In the passage quoted above he describes 'a natural justice and injustice that is common to all, *even to those who have no association or covenant with each other.*'[65] Associations and covenants between different communities, however, need not necessarily be in the form of technical contacts. Man's ineluctable fraternity in what Wittgenstein calls 'the natural history of human beings'[66] — what the term 'forms of life' also stands for when it means, beside social conventions, the 'extremely general facts of nature,'[67] facts that are taken for granted too great a degree to be conspicuous[68] — at once signifies a bond, a natural association, in things political. Although Alexander the Great, the barbarian (hence, cosmopolitically spirited?) pupil of Aristotle's, crossed half the world at the time

and made it much smaller than it used to be, that was by no means necessary for someone in India to associate in forms of life which also Aristotle in Greece did. Man is born to a world with definite resources. It all takes place under one and the same moon. Most probably, for someone in Manchuria to fish in the sea there was no need for a technical contact with a community in Carthage from whom to acquire the practice.[69] People get hungry in whatever part of the world they may find themselves. There appears to be the game of making a living and the unavoidability of it. If you slap someone in the face, the reaction to it, of the flesh, will not be drastic in different parts of the world. Men seem to have bodily functions not dissimilar no matter how distant the communities in which they live are to one another.[70] The equally compelling fact that men have for the most part differed in their opinions of the good and the bad, the just and the unjust, proves only that the forms of life which are therefore universally shared constitute a relatively small number among other life-forms. Eating is safely *just* in all parts of the world and has always been, but exterminating people on racial grounds is not. The differences of opinion may start as soon as it comes to *what* to eat, *how* to eat, and *how much* to it. An yet differences of opinion are at once subject to the 'universal' relations of force, the attachments which exert themselves more and more as the global association of the world becomes smaller. The need for associations and covenants which Aristotle dismisses for the universally just, therefore, may be more properly understood as the need for *technical* contacts and covenants between different communities. The universal justice he makes 'common to all' is as much an associational, grammatical, political, justice as the locally defined justice that is inconceivable without the *polis*. A *cosmo*-political one, perhaps.

Man, according to Aristotle, owes his Being to the *polis*. The *polis*, he contends, is 'a species of association.' In view of associations such as household and village, it is the 'most sovereign and inclusive.'[71] All other associations or 'forms of community are like parts of the political community;'[72] they become what they are only in and through it. Where Aristotle mentions the *polis* as a narrowly defined

political organization, this we must not perhaps confuse with what his formulation as a whole suggests by it. The political *organization* of the association seems to be a contingency with a prehistory.[73] As a primordiality, on the other hand, as history of attachment, the *polis* is less a technically organized association, such as the State, than an elementary association of force.[74] The *polis* then is mere assemblage of men with forceful habits. Man achieves himself in his primordial association with *others*, a fraternity that is 'prior to the individual.'[75] Being born into the *polis*, one in each case finds before oneself an already established world. Even to defy the criteria, the models and patterns already in place, one will have to have recourse simply to what is another set of criteria, habits, again made available by those with whom one primordially associates — the impersonal 'they' suggested by Heidegger, *das Man* (the French *on*).

> 'The Others' whom one thus designates in order to cover up the fact of one's belonging to them essentially oneself, are those who proximally and for the most part '*are there*' in everyday Being-with-one-another. The 'who' is not this one, not that one, not oneself [man selbst], not some people [einige], and not the sum of them all, the 'who' is the neuter, *the 'they'* [*das Man*].[76]

To be, accordingly, is to be already in the house of the *polis*, a fundamental human condition in which '[e]veryone is the other, and no one is himself.'[77] Such states as authenticity, a complication in the Heideggerian work,[78] and intellectual privacy,[79] are to be understood as mimetic cultivations, that is to say as moods acquired through partisanship within the *polis* rather than independently of it. Aristotle calls those who are detached from the *polis* as beasts and gods.

> The man who is isolated — who is unable to share in the benefits of political association, or has no need to share because he is already self-sufficient — is no part of the polis, and must therefore be either a beast or a god.[80]

To dissociate from the *polis* is to dissociate, among other intellectual formations, from law and justice. That is because 'justice, which is the determination of what is just, is an ordering of the political association.'[81] In detachment, man, the perfect animal, becomes 'the worst of all.'[82] What Aristotle states, of course, is less an ethical bluff than sheer irony on his part. One who dissociates can hardly go so far as to be the worst of animals; the naming of the isolated as 'either a beast or a god' refers to the absurdity of the concept. Detachment is a refined mode of attachment, a possibility of the *polis*, rather than an evasion despite and in the face of it.

1.4 The Ordinary and the Extraordinary

Paradoxically, that which corresponds to *seeing* in the presumed dichotomy between the prescriptive and the descriptive is not the latter, but the former, the prescriptive. As the assault on senses pursued famously by Descartes in the Second Meditation makes it clear, *to see is to prescribe*.[1] While *describing*, the mere surfacing of that which *is*, is left to the intellect. Yet how does one locate the demarcation line between the two realms? In the absence of criteria how does one avoid the apparent arbitrariness that characterizes the class of propositions deemed prescriptive? 'Oh, one can always avoid it,' writes Lyotard.

> For my part, I prefer the thesis of pure and simple transcendence, that is, there is a willing. When I say this, I am answering like a pure Kantian. There is a willing. What this will wants we do not know. We feel it in the form of an obligation, but this obligation is empty, in a way. So if it can be given a content in the specific occasion, this content can be only circumscribed by an Idea. The Idea is... 'the whole of reasonable beings' or the preservation of the possibility of the

> prescriptive game.[2]

What is surpassed by 'pure and simple transcendence' is the association of habits, models and patterns. The 'Idea' which thus secures the detachment of the judgement from the parochialism of the *polis*, the community, is that which we have already seen to distinguish war from terrorism, namely the idea of the continuity of the game of the just.[3] What is new is the delayed acknowledgement to Kant. It comes in a project which has been anxious to employ for itself the refreshing seal of 'paganism.' I have tried to draw attention to the markedly Kantian presuppositions of that most peculiar paganism. Here Kant comes in, surprisingly, as a *novelty* to supplant what has been said so far. 'I hesitate between two positions,' notes Lyotard, 'while still hoping that these are not two positions. To put it quickly, between a pagan position, in the sense of the Sophists, and a position that is, let us say, Kantian.'[4] One of the two points Lyotard finds the Sophists and Kant have in common is the sense of history, the *inescapability* of history, or, to put it in Aristotle's language, the priority of the *polis* to the individual, the ineluctability of the pagan localism.[5] The second point is the notion of *time* implicit in the Sophist thinking, a concept which does, according to Lyotard, a sorting out job similar to that achieved by the Kantian Idea.[6] It is true that the Kantian opposition between things-in-themselves and appearances has *history* as its frame of reference; the latter term signifies phenomena in the mediation of history. In this account, however, the role of history is clearly reduced to the realm of senses which, for man, signifies only 'the side of his lower powers.'[7] By exercising his ethical agent, namely his reason, on the other hand, 'he distinguishes himself from all other things, even from himself so far as he is affected by objects.'[8] Man, therefore,

> has two standpoints from which he can consider himself and recognize the laws of the employment of his powers and consequently of all his actions: first, as belonging to the world of sense under laws of nature (heteronomy), and, second, as belonging to the intelligible world under laws which,

> independent of nature, are not empirical but founded only on reason [autonomy].[9]

The incommensurability which Kant assigns to things-in-themselves — and which he believed marked his departure from traditional metaphysics — serves in fact only to *reproduce* the idea of presence which is the defining characteristic of the tradition.[10] The idea of presence, as with the Cartesian conception of mind, is an *assault* on history rather than a submission to it. The Kantian historicism perceives the mediation of history only to emphasize man's ***disability*** to see beyond history. Furthermore, the disability seems to vanish in the matters of morals. Man as the force of the intellect, a notion — needless to say — that would hardly find room in the Sophist thinking, detaches himself from the contingencies of history; 'we transport ourselves into the intelligible world as members of it and know the autonomy of the will together with its consequence, morality.'[11] Morality, the idea of a moral order, in other words, is conceivable because the intellect as 'a law to itself'[12] is a possibility. *Securing* morality, indeed, is the objective behind all the conceptual trouble Kant puts himself into in the first place. From the Sophist viewpoint, on the other hand, it is precisely the anxiety (for moral order) on the part of Kant's project that is absolutely uncalled for. The universal imperative Kant comes up with in the end is a line which he simply picks up in an all-engulfing association of criteria, an association which he makes the mistake of taking as a repressible arrangement of loose ends. The Kantian misconception is typically reflected in Lyotard's approach. He compares the Sophist assumption of time as a regulator of morals to the Kantian Idea, to start with. As soon as he comes to think of the discrepancies between the two positions, however, Sophism becomes mere justification of what is in effect a condition of non-morality, a state in which 'one looses all capacity to make the slightest judgement about what ought to be done.'[13] The anxiety is ill-grounded not because a fetishized notion of time serves in the Sophist case as a substitute suprasensibility. The anxiety that characterizes the

Kantian-Lyotardian position, however, follows from a typical underestimation of the significance of what Derrida terms, in a reading of the Kantian notion of beauty, the *frame*.[14] In Kant's *Critique of Judgement*, the judgements of 'taste proper' based on the *form* of the object of art transcend the sensible qualities of the object exactly the way the Kantian-Lyotardian judgements of morality proper based on the *Idea* transcend criteria. 'A judgement of taste, therefore,' notes Kant, 'is only pure so far as its determining ground is tainted with no merely empirical delight.'[15] In fact, according to him, no such thing as 'merely empirical delight' exists. That which is empirical about the object of art cannot be said to be delightful *by itself*, but it must owe its charm to the form.

> Even what is called *ornamentation* (*parerga*), i.e., what is only an adjunct, and not an intrinsic constituent in the complete representation of the object, in augmenting the delight of taste does so only by means of its form. Thus it is with the frames of pictures or the drapery on statues, or the colonnades of palaces.[16]

In his reading, Derrida puts into question the hierarchy between the form of the aesthetic work (*ergon*) and its frame (*parergon*); the former as the pure aesthetic object of the work, and the latter as that which is purely accidental and supplementary about it.[17] His reading focuses on the frame as 'the limit between the inside and outside of the art object,' between what is intrinsic to it and what is external.[18] Since the purity Kant is after is what is left of the object of art after all the accidents, all the *parerga*, are stripped away from it, Derrida concludes that this stripping away in order to reach the pure beauty will in the end leave nothing of the object but its mere *frame*.[19] What is a frame? '*There is* frame [framing],' states Derrida, 'but the frame *does not exist*.'[20] Framing is the negation of a possible border between inside and outside, the sensible and the pure. As an association, however, of prevailing habits, models and patterns, a totality of attachments that is ultimately and uniquely responsible for the beauty or lack thereof of the object, the frame does

not refer to an exhaustible, pinpointable, circumscribeable sort of a (con)text; it '*does not exist*.' Framing is an event that cannot be fetishized or reified. The centre holds not only for the sake of the frame, as opposed to what would be the work-itself, but also *because* the frame resists framing, a state of affairs that while affirming the transparency that defines the process at once yields to the energy of the very process and becomes elusive.

The Kantian project of 'pure and simple transcendence'[21] and the Sophist politics of *involvement*, of the *parerga*, the *politeia*,[22] do not exactly indicate a strikingly common origin. Lyotard himself seems to forget all about the peculiar syncretism he attempts as he proceeds to state the basic disparity between the two. While the Sophist position clearly suggests a medley of equally authoritative opinions, and therefore confusion, the Kantian Idea makes genuine opposition possible. That, with Kant, one is subsequently enabled to *judge* between different maxims of the will, according to Lyotard, is particularly significant in view of the obviously hazardous instances of ethical and political choice. Contrary to the undecided character of the Sophist position, some such mechanism of an Idea can mark with required finality that which will never morally hold:

> in matters of ethics and politics, one can see quite readily that there is... a regulating Idea, that allows us, if not to decide in every specific instance, at least to eliminate in all cases (and independently of the convention of positive law), decisions, or, to put it in Kant's language, maxims of the will, that cannot be moral.[23]

The Sophist politics of persuasion, of 'opinion,' on the other hand, Lyotard designates as 'rule by convention.' According to that position, 'what is just in a collectivity of human beings at a given moment, is that which has been convened as just.'[24] He adds, however, that the representation here, of the Sophistic account of morals, follows Sophism 'in [its] most banal, and probably most falsified, aspect.'[25] Why he does not try to reproduce a less banal picture of the Sophistic standpoint is

something of an enigma, unless, of course, one remembers that he considers the first part of his own discourse (where he dispenses with criteria in the exact fashion the Kantian Idea transcends the sensible) to be Sophistic, and less banal an account at that.[26] That which makes Lyotard's better is, no doubt, that which also makes it virtually indistinguishable from the plain Kantian position. The banality he attributes, in turn, is not to Sophism in its corrupt and oversimplified representations. On the contrary, he conceives of *no* politics of *opinion* that would not at once be banal. And what does that mean? It means that Lyotard does not for a moment entertain the idea that his is partly 'a pagan position, in the sense of the Sophists,'[27] that his discourse is one of *two* distinct themes. He does not intend to give Sophism a chance in the first place. And why a politics of opinion is banal when defined as rule by convention, he states: 'A rule by convention would require that one accept, let's get to the bottom of things right away, even Nazism. After all, since there was near unanimity upon it, from where could one judge that it was not just?[28] The argument here I cited at the very outset of the present reading and pointed out the complications it involves in more than one way.[29] It takes for granted considerably more than it can actually account for. And that is so not only in terms of facts but also, and notably so, of logical evidence. In fact Lyotard cuts off the very branch on which he stands. The evidence of logic clearly betrays him as he, first, refuses to assess the Sophist position in its own terms, namely that a possible reversing of the dictate of convention will in each case be simply *more* convention rather than an exception to it. Secondly, 'since,' as he puts it, 'there was near unanimity upon [Nazism]' at the time in Germany, the fact that the concept of a suprasensible Idea, the 'pure and simple transcendence,' the exercise of what Kant calls the higher power of man, may therefore become so obviously *locally* defunct suggests in turn that what is suprasensible may require the right soil and the right method of cultivation — that is to say the right set of *conventions* — in order to survive. And finally, Lyotard misjudges the very logic of the Sophist rhetoric in its opposition to a suprasensible concept of the just. When Thrasymachus famously

declares to an outraged Socrates that justice is 'that which is advantageous to the stronger,'[30] his statement may be taken to mean a good many things beside its obvious disbelief in the so-called higher potentiality of man, in suprasensibility, but it may hardly be construed as a celebration and justification of power. And this is so for a good reason. One thing the statement doubtless does is to refuse to *glorify* that which is just — easily the perfect attitude to resist, rather than support, a regime such as that of the Nazi Germany and especially the force of *the masses* mobilized behind the regime. That it can offer a better stance in resisting painful prejudice is palpable by the mere fact that historical Sophist arguments to counter slavery, xenophobia, sexual discrimination, zealotry, and so on, have not only proved effective in time but are now part of the human rights literature taken for granted.[31] The irony of all this, of course, is that, despite the spectacular failure on the part of the political choices of the later Athenean philosophers who shared on almost every issue the opposite camp, their original views of the Sophists, as smooth-talkers with questionable ethics, have survived. Consequently, it has been the Sophists, and not the others, to be customarily charged with siding, or being philosophically open to side, with the *status quo*. Hence 'the extraordinary danger' Lyotard senses,[32] once the Sophist rhetoric is led to its consequences as politics of opinion. So did Locke, perhaps not surprisingly, in *An Essay Concerning Human Understanding*, who not only displays an almost identical perspective to draw attention to the 'danger' in 'opinion,' but whose sad bigotry is also significantly underpinned by his *distrust* in opinion:

> There is another [ground of probability], I confess, which though by it self it be not true ground of *Probability*, yet is often made use for one, by which Men most commonly regulate their Assent, and upon which they pin their Faith more than any thing else, and, that is, *the Opinion of others*; though there cannot be a more dangerous thing to rely on, nor more likely to mislead one; since there is much more Falshood and Errour amongst Men, than Truth and

> Knowledge. And if the Opinions and Perswasions of others, whom we know and think well of, be a ground of Assent, Men have Reason to be Heathens in *Japan*, Mahumetans in *Turkey*, Papists in *Spain*, Protestants in *England*, and Lutherans in *Sueden*.[33]

It can be stated with more sense, therefore, that the Nazis had better inspiration and support in the totalistic suprasensibility suggested by both Locke and Kant than in the unstationary, life and difference affirming, views of the Sophists. This seems to elude Lyotard, who subsequently holds on to a mood of anthropological pride and insists not to see that against the horrors of humanity the only security one has is that of the continuity of criteria. There is no conceptual security and one will find no use for the misguided optimism of a suprasensible Idea. That is probably how the Sophists would have responded to the Nazi case. Yet this is no *pessimism*, for the kind of optimism which defines Lyotard's search lacks grammatical connections. If that which follows from the concept of judgement that is in each case at the mercy, as it were, of habits, models and patterns is to be labelled pessimism, then pessimism is primordial. Optimism exists merely as a political refinement of this primordiality, of that which in each case criteria, and only criteria, have already taken care of.

As he draws his conclusion, Lyotard opts, not surprisingly, for the proud concept of man, as one made in God's image. His is a choice for the extra-ordinary, as opposed to the *phronesis*, the circumspection, of the ordinary, the common. A non-mimetic, absolute, dichotomy of the extraordinary and the ordinary, almost as the distinctive seal of the very logic of dichotomizing, is therefore affirmed. He sums up:

> My question then is: Can we have a politics without the Idea of justice? and if so, can we do so on the basis of opinion? If we remain with opinion, what will be just ultimately is that upon which people agree that it is just. It is common opinion. This is an extraordinarily dangerous position. If, on the

> contrary, we take a Kantian position, we have a regulator, that is a safekeeper of the pragmatics of obligation.[34]

The position here may seem as something of a shift, on Lyotard's part, from an anxiety radically to distinguish between the categories of descriptives and prescriptives to a prescriptionism that is not shy to preach: 'Can we have a politics without the Idea of justice?' As the common patterns of the just are consistently held in suspicion and contempt, it does not become a matter of concern whether the just one has by virtue of simply being in a position to discuss it, the discussion by Lyotard included, is based on a regulating, suprasensible Idea. Yet the omission in fact preempts the inquiry as a whole: no talk of justice will succeed to evade the ranks of the ordinary if it is to aim at once to convey sense and be understood. What would it be like to have a judgement which is not based on a prevailing pattern of the just? How would one recognize a judgement based on a *suprasensible* Idea when one did see one? That the rhetoric turns into an overtly moralizing one hardly indicates a shift in the ongoing discourse as a whole for it is of one piece with, and an effect of, its main and most persistent objective: dispensing with the audience.[35] That upon which people do not agree can, and should, if so required, become that which is just. What would it be like to have, for the just, that which is *not sensible* — meaning both non-judicious and suprasensible? Even unreasonableness, however, seems to be a state very much established and sensible, one can tell it when one sees it, a fact that compels a reassessment of the presumed polarity between the ordinary and the extraordinary. The dichotomy is assumed by Lyotard throughout his discourse on justice to provide a frame of reference for the binary oppositions it lays great emphasis on; the author and the audience, the *krites* and the *kriteria*. Here for the first time Lyotard produces his example of how the ordinary could be avoided. A departure from common opinion could be achieved, he states, by attending not only to 'all of society as a sensible nature, as an ensemble that already has its laws, its customs, and its regularities,' but also considering what he

terms one's *capability to decide*,

> the capability to decide by means of what is adjudged as to be done, by taking society as a suprasensible nature, as something that is not there that is not given. Then the direction of opinion will be reversed: it is not taken anymore as a sediment of facts of judgement and behaviour; it is weighed from a capability that exceeds it and that can be in a wholly paradoxical position with respect to the data of custom.[36]

Hardly anything about the 'capability to decide' indicates that it is not simply another tag for what to Kant is the higher power of man. The point is how some such capability goes unaffected by the laws, customs and regularities one encounters primordially.[37] To illustrate how a reversal of the ordinary could be achieved, how that which is *not already there and given* could be reached, Lyotard gives an example from Corax, the Sicilian rhetorician whose work Aristotle criticizes in *Rhetoric*. According to Corax, as Aristotle relates it from the former's *Art of Rhetoric*,[38] a man accused of violent assault on someone stronger is best defended on the basis of common probability: it is not likely that the weaker should beat the stronger. In the case of the stronger accused of the same charge, however, Corax' strategy for defence is, once more, one of probability. It is unlikely also for the *stronger* to have committed it, simply because he must have been aware all the time of the current thinking that, being the stronger, he is likely to be suspected of it. And that is precisely what would refrain him from committing it. The *anticipation* the defendant has in the latter case, comments Lyotard, of the current thinking, enables him to reverse that which is the ordinary, common likelihood.[39] The route Corax offers in the specific case exemplifies one effective way out from the standards of the audience. The criteria of society as a sensible nature are transcended. According to Aristotle, on the other hand, the argument by Corax is a good example only of a 'spurious enthymeme.'[40] He finds it enough evidence on

whose basis to condemn an entire school: 'This sort of argument illustrates what is meant by making the worse argument seem the better. Hence people were right in objecting to the training Protagoras undertook to give them. It was a fraud...'[41] Lyotard and Aristotle seem to oppose one another on the argument by Corax. As will be recalled, the former refers to the latter's idea of prudence, the *phronesis*, to mark the moment of judgement without criteria;[42] the example Lyotard provides of that moment, however, is what, to Aristotle, is the cardinal instance of the very imprudent. In the confrontation, Aristotle stands alone. Opposite to him are Kant and Corax brought together by Lyotard.

> In the idea that Corax attributes to his client... there is already all of Kant, at least all of the Kant of the Idea: I am likely to be found guilty if opinion remains what it is, but if I maximize and if I use my imagination, if I anticipate what the judge will decide on the basis of common opinion, then I may be able to reverse the likelihood, the verisimilitude.[43]

I have argued that Lyotard's partnership with Aristotle in a project which entertains the idea of judgement without criteria is ill-grounded. So is, paradoxically, the *parting* of the two on the significance of the argument by Corax. That is because both Lyotard and Aristotle read Corax' defence in terms significantly underlay by a dichotomy of the ordinary and the extraordinary. For Lyotard, Corax' client reverses the common and arrives at that which does not ordinarily exist. And a similar mode of the extraordinary, the uncommon, is detected by Aristotle. He points out that the argument is mere fraud, for it makes a *particular* probability look like *absolute* probability. The immediate appeal of the argument, according to him, is

> based on the confusion of some particular probability with absolute probability. Now no particular probability is universally probable... for what is improbable [such as the claim of Corax's client] does happen and therefore it is probable that improbable things will happen. Granted this,

> one might argue that what is improbable is probable. But this is not true *absolutely*.[44]

Aristotle sees rhetoric as an art 'to produce conviction.'[45] It addresses the beliefs and prejudices of an audience and skilfully *rearranges* them. As such, rhetoric consists in modes of persuasion. 'The modes of persuasion are the only true constituents of the art: everything else is merely accessory.'[46] Given this, it is enigmatic that he should go on and issue classes of good and bad arguments, ones that are so recognized by a sudden and mysterious *omission* of persuasion as the sole criterion of the art. By his original line of thinking, one reasons, Corax' argument should be considered at worst to be of *poor persuasive quality*. To Aristotle, however, it is definitely more than that — it is a fraud. Relevant to that mystery are two points, one he particularly emphasizes in the First Book of *Rhetoric*, and one less noticeably stressed yet with even further-reaching implications. 'A man,' notes Aristotle immediately after indicating persuasion as that which rhetoric is all about, 'can confer the greatest of benefits by a right use of these [modes of persuasion], and inflict the greatest of injuries by using them wrongly.'[47] He himself offers in *Rhetoric* contradicting arguments in both making and defending cases, arguments whose examples I provide in the present study.[48] This, however, he does not regard as duplicity because the morality involved is already secured by the prerequisite that the case defended be right: 'for we must not make people believe what is wrong.'[49] The paradox is that it will be, once more, but *persuasion*, as the sole criterion, to establish whether one is making in the specific instance the right or wrong uses of the modes of persuasion. How does one tell the wrong uses of persuasion from the ones that are right? If an argument is persuasive enough to win 'all or most people of understanding or... the majority of men, or... the ablest'[50] on its side, what possible sense will it make to consider the argument as essentially wrong? What would 'wrong' possibly mean in that case? If it is of persuasive quality, one will find nothing wrong with it; and if one does find something wrong, then it is of poor

persuasive quality. If Corax' argument were persuasive enough, on what possible basis could one relinquish it as the worst made to seem the better? If *any* argument, indeed, can be made to seem better *vis-à-vis* its audience, on whatever else can one plausibly rely to dismiss it as essentially-worse-turned-better? A *refined* concept of audience perhaps? To see what to Aristotle is *essentially worse*, we will have to quote him in full: 'A man can confer the greatest of benefits by a right use of these, and inflict the greatest of injuries by using them wrongly... *What makes a man sophist is not his abilities but his choices*.'[51] The dislike Aristotle has for the cynical, irreverent image of the Sophist rhetorician serves in his judgement rather like the dreaded end in a bad dream which occurs first but which nevertheless appears as a consequence of that which comes after it. The end gives rise to the story of which it wishes to be the culmination. He would not have made that very clear if he simply dismissed Corax' defence as bad rhetoricianship and of poor persuasive quality. He makes of it, however, an example of that which is fake and fraud. His anxiety is almost tangible when he makes a virtual *leap* from Corax' example to Protagoras, one which is quite unfit for his otherwise rigorous style.

> This sort of argument illustrates what is meant by making the worse argument seem the better. Hence people were right in objecting to the training Protagoras undertook to give them. It was a fraud; the probability it handled was not genuine but spurious, and has a place in no art except Rhetoric and Eristic.[52]

The vision of rhetoric as an art littered with articles that are not all genuine leads us to our second point, one which unless we take as a practical demonstration of the art Aristotle teaches, has tragic implications. He resists a radical separation of seeing and being, and the *phronesis*, as the mood of praxis, of the *politeia*, well testifies to it. It never quite puts out, however, a spark which stands in total contradiction with all that and which is almost an apology for the all-inclusive and infiltratable forestructure of the *polis* — of its illusory bleakness. Rhetoric becomes a term of

depreciation, and to serve as a basis for this a dichotomy of the genuine and the spurious is invoked. Aristotle notes:

> the whole business of rhetoric being concerned with *appearances*, we must pay attention to the subject of *delivery*, unworthy though it is, because we cannot do without it... All such arts are fanciful and meant to charm the hearer. *Nobody uses fine language when teaching geometry.*[53]

The metaphysics of presence, a view of the world whose repudiation is implicit in the concept of *phronesis*,[54] filtrates back into Aristotle's formulation exactly the way it will later haunt the work of J.L. Austin, a philosopher who is as much, if not more, determined to avoid the specific mode of metaphysics and who, as demonstrated in Derrida's brilliant reading of his work,[55] ends up effectively yielding to it. In his investigation of language, Austin distinguishes between ordinary and what might be called *fine* instances of language, and the latter he points out as being 'parasitic' upon the former and in turn life-less, 'etiolated.'[56] The etiolated performances of language, according to him, can be excluded from the investigation. They can be dispensed with, because a statement of a doing 'will, for example, be *in a peculiar way* hollow or void if said by an actor on the stage.'[57] That which marks the actor's statement on the stage is the lack of genuine *intention* on his part. The calling in of intention as an indispensable element in making sense of the language disregards the primordially grammatical, mimetic, quality of it. As Wittgenstein puts it, 'a great deal of stage-setting in the language is presupposed,' even when one has the least complicated relationship with it (such as naming).[58] And what one grammatically considers to be the intention of the speaker is an effect merely of that very *mise en scène*, rather than a state that transcends the specific performance. As Derrida formulates the Austenean paradox, if the staging is that which marks the parasitic side of the binary opposition, then the parasitic, the etiolated, the non-ordinary, the fictitious, must be prior to the non-parasitic, a

transposition that subsequently renders it impossible to tell which one of the two is parasitic, or supplementary, after all.[59] It is not simply accidental that one should encounter also in Aristotle the *staging* quality of rhetorical delivery: 'when the principles of delivery have been worked out, they will produce the same affect as on the stage,'[60] the staged standing for the etiolated. What Aristotle belittles as *unworthy appearances* are none other than the stage-setting, the criteria, or, as Derrida calls it in his reading of Austin, the *iterability* which is absolutely prior — exactly the way the *polis* is to law and justice — to the event of signification.[61] The simulated character of that which is performed on the stage is not only a quality of language generally, but it is also what makes signification, the *exchange* of senses, conceivable in the first place. The difference between the ordinary and fine instances of language, therefore, is one of simulation, of mimesis, of mimetic distillation, rather than an element that is independent of the actual pattern, the criteria, namely intention. 'Nobody uses fine language when teaching geometry,' writes Aristotle.[62] The opposition between geometry and rhetoric is equally precarious.[63] If a person did not use *fine* language in geometry, it is dubious that anyone would understand or listen to that person (supposing a *geometrician* speaking a language other than that of his discipline is a possibility), even though that which is *fine* will be defined differently in different settings. The seminal work by Kuhn, *The Structure of Scientific Revolutions*, for instance, is devoted entirely to capture the logic of the *fine* in different settings in science.[64] Again: if it is the fancifulness that makes rhetoric marginal, that is to say, of mere appearances, then charm, fancy and fine language seem to lie at the very heart of all arts and sciences. Science then will have to be understood none other than a mimetically refined branch of the greater and primordial art of rhetoric.

Turning back to Corax' defence, for Aristotle it is spurious *because* it is based on a particular probability rather than the absolute probability of the strong beating the weakling. It is fake *because* it spins around that which is pale and etiolated — that which is the extraordinary. The likeliest, the least likely. One wonders, were the

great detective stories of the early and mid-twentieth century entirely lifeless because they often took into the centre that which was a *particular* mode of probability? Yet they did always start the investigation from the likeliest. Do plots have minds of their own, as literary critics once suggested, which may lead themselves in directions that may *radically* challenge the reader's expectations, interests and prejudices? The likeliest, the least likely. Apparently the classical line of logic is quite hackneyed now and abandoned in crime stories. The stories need further twists to go on surprising. No particular probability seems to be an *absolutely particular* probability; nor is an absolute probability an *absolutely absolute* probability. That may be because probabilities are dependent on forms of life in which they are situated.[65] What seems to keep things in an order of predictability in a mimetically redefined sense is the very fundamentality of these forms of life which are for the greatest part commonly practised, forms which are, in turn, the ultimate limits of the persuasive capability of Corax' rhetoric — and that of Aristotle's against him, for that matter. The latter's fears, consequently, of the dangerous and bogus charm of the Sophist argument seem to be groundless. Those fears are probably there to tell us an entirely different story of suspense.

Although both based on the logic of the ordinary and the extraordinary, Aristotle is aware, unlike Lyotard, that Corax' lawyer will in no case be telling his audience that which they do not already know. As he puts it, 'what is improbable is probable.'[66] Indeed, that which is improbable could not possibly be improbable if it were not already probable, that is to say if it were not already within the realm of the transparent, the iterable. The grammar of improbability is as much established as that of probability. According to Lyotard, on the other hand, the anticipation by Corax of that which is probable on the basis of prevailing standards enables him to reverse it in a way that is radical enough to lead him to that which is *not already there.*

> Corax anticipates a judge who... relies upon the *already*

> *judged* [i.e., the pattern of the likely criminality of the stronger] in order to establish and judge the fact. Whereas Corax relies upon *not yet judged* to establish precisely that an act did not take place. This law [the pattern]... is nothing but a custom. It can be turned. It suffices to anticipate it.[67]

The rhetorician does, for Lyotard, more than simply to attempt to *rearrange* the attachments already in place. On the contrary, he goes 'beyond the boundaries of sensible experience.'[68] And he does so by means of a suprasensible extension, an Idea, which 'rests upon something like the future of further inquiry: there is a free field left open to the reflective judgement's capability to go beyond the boundaries of sensible experience.'[69] The future of further inquiry lies in what is 'not yet judged.' In the *unreal* field of this non-historicity, 'the reverse of what is believed'[70] is achieved. That is so, however, only if 'what is believed' can be reduced to what Aristotle calls an absolute probability, namely the likely criminality of the stronger. Does the reasoning Corax seems to pursue evade the domain of habits, beliefs and prejudices? It is bound to be defined by some common attachment, because the argument needs, after all, to be *read* by those to whom it is directed. Could the audience possibly grasp, or pay attention to, that which is a *private* experience of the rhetorician, even if it were possible for the rhetorician to have the experience? And what exactly is it that is *not yet judged* about Corax' argument? Is it the client's mere *awareness* of the current thinking that the stronger is the likely criminal? As in our day, in the ancient Greece people did not offend because they were not aware of what would follow. But they did so in spite of the consequences. Is the suprasensible, then, the client's *anxiety*[71] of what would happen if he committed the crime? Is it his subsequent forbearance? And if the elements that add up to the argument Corax suggests are already out in the open, namely well established pieces of habit, custom, convention, then it is perhaps imprudent to reduce *what is believed* solely to Aristotle's absolute probability. That is not to say, of course, that there is no difference between Corax' argument, the likeliest the least likely, and what

Aristotle considers to be a case of absolute probability, the likely criminality of the stronger. Nor is it to say that since the difference is one merely of mimesis, of criteria, Aristotle is necessarily wrong to be disturbed by it. To conclude, on the basis of mimetic primordiality, that the difference between the two arguments, or what by common sense would be good and bad law, is no difference at all would either indicate a political parochialism of a rather senseless kind or commit the very mistake Lyotard seems consistently to make, namely to look for a basis that would be *firmer* than that of morals. What follows from the primordiality of that which is ordinary, habitual, common, sensible, or mimetic, on the contrary, is that the rhetorician makes use of what is simply another trail of the common, another arrangement of habits, rather than surpassing, as Lyotard would have us believe, the laws, customs and regularities of society as a sensible nature. The logic of the likeliest the least likely is as much *real*, or, alternatively, *fictitious*, as that of the likely criminality of the stronger. It offers no exit from the standards of the audience. Privacy, authenticity — the extraordinary — are states to be understood only grammatically.

In the following part I discuss some of the questions in *theorizing* how to read the law, an enterprise marked by a distinction between that which is read, namely the law, and the ways of reading it: the problem of interpretative strategies.

2 THE LAW AND ITS READINGS

The formal sources of private positive law, according to Gény, are statute and custom. What is sometimes referred to as decisional law, on the other hand, is to be confined, as regards the problem of the sources, to the sole function by courts of initiating in law the customary rule, and thereby upgrading the unrecognized custom to one of the formal sources of law.[1] As individual holdings are thought to be 'subject,' by definition, 'to variation and contradictions,' a clear dichotomy between court decisions and the law is established. Individual decisions in the application of law lack 'the necessary guarantee of all law making.'[2] Law requires the kind of steadiness ensured by the precipitates notably of generality and cohesion to be found either in the pronouncements of one single authority, the legislator, or in the anonymous and, thus, again, single, or perhaps non-, authority of the common practice, the custom. As he makes note of it, one principle which designates unequivocally 'the necessary guarantee of all law making' is the principle of the separation of powers. It marks not only the political constitution of France whose private positive law concerns Gény primarily, but it is also very much concomitant with such common sense ideas as constitutionalism and the rule of law. And because it makes court outcomes as part of the formal law inconceivable, the 'quasi-legislative authority' of the English judge signifies an obvious departure from, or, as he puts it in a more telltale phraseology, makes 'a well-known fiction' of, that particular principle.[3] Edouard Lambert, a countryman of Gény's, likewise, draws a not especially flattering picture of the English law. He notes that it is truly a 'vicious circle' the way the English go about it. The judge is supposed to rely upon the established law and avoid being arbitrary, there is however no law to rely upon before he himself establishes it.[4]

In the principal point of his criticism of American legal realism, Kantorowicz invokes the dichotomy between the law and its readings in very much the same way

as Gény. The realists receive a stern rebuke for not respecting the distinction between law and fact and 'teach[ing] that law consists of judicial decisions alone, and therefore of facts.'[5] Gény does not have a particularly high opinion of the turn-of-the-century German legal movement *freies Recht*, the free law, of which Kantorowicz is probably the best known representative. Paradoxically, he brings against the Free School almost the same charge as that which Kantorowicz brings against the realists: that the Free School recognizes no *formal* authority of law.[6] What in fact the project of the Free School involves, as Kantorowicz elucidates it, is to try and re-establish the relationship between the formal law and that which the formal law cannot, and does not, do without, namely the free law. The free law consists in mere *construction*, if stylish, and application of the formal law, statutory and case law. For the proper functioning of the latter, its 'free' interpretation supported by the non-formal data of experience is needed.[7]

Gény himself is a champion of 'free search,' *libre recherche scientifique*.[8] The *unique* point, in fact, which distinguishes *his* position from that of the Free School is simply the exegetical attitude, of a peculiarly fleeting kind, which he favours before the statute, namely interpretation of the written law solely by the legislative will.[9] Arguably no less subversive, however, is the obvious mechanism behind Gény's stance which is that the more strictly one reads the statute the less problematic it is to abandon the law altogether and be 'compelled' to go on to do one's own free searching. Free objective search for a rule, according to Gény, follows as a necessity from the simple fact that no text is conclusive or particular enough, by the very nature of writing, to cover for all the requirements of an elusive life.[10] Statute and custom are sources only of the *formal* law. Likewise, Kantorowicz distinguishes between the formal and the free law. What seems to differ one position from another, therefore, is neither a free-floating flair by the Free School nor a water tight formalism on the part of Gény. The dichotomy between the law and its readings remains unchallenged.

It is hardly questioned either by the realists, even though they are criticized by

Kantorowicz for doing so. That is because the realist disregard of the dichotomy appears less to be a dissolution of it than a mere displacement of the *hierarchy* that it traditionally establishes. Realism does not intend a challenge to the logic that operates the formalist view of law, even though it jeopardizes the entire point of its project in that. It intends instead to establish simply an 'anti-formalism' content with the terms put before it.[11] The dictum by Llewellyn (and Frank) is a good illustration of the realist duality: 'Before rules, were facts; in the beginning was not a Word but a Doing.'[12] The dichotomy thus affirmed is as old as the history of metaphysics. A possible dissolution of it would entail the designation of the *word* as a doing also, the realm of the latter in turn redrawn. And that would amount to considerable attenuation of the practical consequences of the realist criticism. The theoretical practice, therefore, appears to have tangible interests in a radical distinction of the formal and realist views of law.

Why a decisional law based system should look a 'vicious circle' obviously relates to what looks like a 'short-circuit effect' that is thought to occur when one of the terms of the duality the law and its readings is somehow defunct. Gény makes the *full* functioning of it a requirement of the principle of the separation of powers. Far from being simply a remnant of the orthodox theory, the distinction between fact and law, concepts that mark the respective spheres of reality and validity, is central to the French rhetoric.[13] Law transcends the accidents of its individual applications. That which is immediately paradoxical, however, is the much greater significance of the dichotomy in the very decisional law based systems despite, on the one hand, the lack of a canonistic formulation of it as in France and, on the other, the 'short circuit' image which the system seems to inspire by definition.[14] The bulk of Anglo-Saxon legal philosophy from the divergent views of Blackstone and Bentham[15] down to the Hart-Fuller[16] and the Hart-Dworkin[17] debates seems to have centred consistently around the opposition of the reality and validity of law. Traditionally, mechanistic jurisprudence takes for granted the distinction between the law and its readings by its very epiphenomenal conception of adjudication. The

views, therefore, that the language is essentially marked by an 'open texture,'[18] or that law is essentially an 'interpretive concept,'[19] reflect the discontent with the law understood in mechanistic terms. The very idea of interpretation, however, is at once inconceivable without the involvement of the dichotomy between the law and its readings. It is the difference between *meaning* (the letter, intention, principles, and so on) and *extension*, the former term being transcendent of, and thereby unaffected by, the latter.[20] It is a postulate, in each case, of the absolute autonomy of the former term, that which is read, *vis-à-vis* the ways of reading it.

In the preceding part of the present study I noted that the mainstream legal philosophy simply reproduces the metaphysics of presence dictated by the traditional distinction of seeing and being.[21] Gény clearly attempts to draw borderlines for law exclusive of individual 'seeings,' or readings, of it. For seeing is understood as mere emulation, a private and biased vision ('subject to variation and contradictions'), of that which *is*, that which is present and selfsame. In the decisional law based systems the distinction is lay even greater weight upon because of law almost canonically being defined as an *interpretative* enterprise. Reading and the law (uncovering and the meaning) are posited as two distinct states. Interpretation, in turn, becomes pure presencing. Fierce debates over it are often not a threat directed to its purity, but simply to particular *strategies* of pursuing it.

That the dichotomy between the law and its readings is not likely to hold against a critical probing is what I aim to demonstrate in this part. Does its dissolution, however, necessarily suggest the destruction of its apparent value, grammatically understood? A conception of law that is irrespective of its individual readings has been so very persistent in legal thought. I have already noted, regarding the Aristotelian distinction between natural law and the law of a particular association,[22] the possibly political undercurrents of such enterprise. '[T]he law of Nature... plain and intelligible to all rational creatures' is put consistently in the tradition in contradistinction to 'the application of it to... particular Cases.'[23] Natural law as distinct from incidents and conventions that surround the particular pattern

seems to be the purest expression of the traditional notion of validity. 'What is well and in conformity with order is so by the nature of things and independently of human conventions.'[24] True it may be that the modern conception of law has been a poor substitute for a long lost divinity to whose disappearance man is yet to readjust. Will he, however, have to give up at once the comforting notion of a safe and securely organized life? The idea that prevails seems to encourage a misled faith in the workings of the law. But it may also be capable to function as a weighty political support for that which particular readings of the law have chosen to suppress and exclude. Is that, perhaps, an explanation for the appeal of the theories of rights, of recent? What exactly is the nature of the help, by way of rhetorical support, to counter discriminatory readings against minorities racial, religious, ethical, sexual, readings (and counter-readings) which after all seem to form almost the entire body of the material around which the interpretative controversy centres?

That it is basically around such material may be revealing about the nature of the very interpretative controversy. What the actual material may inspire regarding the nature of controversy will contrast with the mainstream notion of interpretation as presencing where, because interpretation is thought to consist of such distinct, pinpointable, sequential elements as the law, the process of interpretation, and the strategies of interpretation, the issue is one merely of pursuing the right strategy. As it is characteristically stated in the First Programme of the 1969 report on interpretation by the Law Commission of Britain, the body that reviews and investigates the law with the aim of suggesting ways to improve and reform it,

> [t]he rules of statutory interpretation, although individually reasonably clear, are often difficult to apply, particularly where they appear to conflict with one another and when their hierarchy of importance is not clearly established.[25]

The general idea with respect to the individual reading, therefore, may manifest itself as one of dealing with a conundrum, one whose answer is safely kept

somewhere. The thing to do, accordingly, is, as it were, to keep calm and search for the right way to go about it. The particular strategies to which the Law Commission refers are those of literal, ordinary-sensible (unless absurd, ordinary meaning to be followed), and purposive (mischief remedied to be considered) meaning.[26] The interpretative views of law which seek to challenge the much criticized mechanistic jurisprudence do not seem to offer challenge to its very defining idea of adjudication in clear-cut, well-drawn, numbered sequences. Hence, the ever resilient concept of interpretative *strategies.*

It is reported that '[t]he antinomy between strict, logical interpretation and more consciously policy oriented approaches to law is to be found represented in the continuum of judicial attitudes in all major legal systems.'[27] Fascinated by the analogy, lawyers have been quick to point out the confirming interpretative pattern '[a]cross all of the great Western religions.'[28] One way of looking at the thus emerging pattern is to try to uncover the 'rational order' that seems to underlie it in diverse legal systems. It entails, subsequently, the possibility of constructing a discourse to clarify and guide the practice.[29] Another way of looking at the recurrent themes of letter and spirit, penumbra and core, meaning and intention, rule and principle, and so on, may be to treat the terms of the binary oppositions which therefore emerge as good and useful figures of shorthand; shorthand, not for strategies to obtain the answer, as it were, to the conundrum, but for positions racial, religious, ethical, sexual, recognizable solely on the basis of the individual reading. Is the foetus a person? Is a pushchair a vehicle? Is a pushchair a *chair*? In what may stenographically be called the literal and metaphorical readings of each one of the words categorized as problematic, entirely different games may be involved. A totalizing search for a common rational core, therefore, is likely to be deceptive.

Furthermore, the procedural interpretations of the law ought not to be considered distinct from what would be the *evaluations* of it on a more recognizably critical or political basis. In what follows, the third chapter is devoted to a discussion of the

politics of interpretation. The present essay is intended to be an argument throughout, however, against the concept of a *detached* reader. It seeks to make clear the fallacy of the assumption that interpretation is pursued in a mechanic sequence of distinct processes. According to this positivistic concept, reading brings together the mutually exclusive domains of the text and the reader, whose eventual interaction may or may not involve that which is political, moral, or religious. Because this concept is fallacious, the idea of *reading* that permeates the present essay refers to the critical evaluations of the law as well as its procedural interpretations. That is not to say that a distinction between interpretation and evaluation cannot be maintained as a mimetic distillation on an individual basis. The distinction itself, however, will in each case be an *evaluative* one. What is more, for the purposes of the present study, a *thematic* distinction will obscure a reassessment of the very concept of evaluation, as well as that of procedural interpretation. For the present study seeks to negate, beside a concept of free-wheeling interpretation, a detached notion of evaluation, or criticism.

This second part is a reading of some of the motifs of Gény's *Method of Interpretation and Sources of Private Positive Law*.[30] Although the interpretative concerns of Gény's book are confined primarily to the specific problems encountered in the application of the Code Napoléon, it has been one of the most discussed and debated works of jurisprudence this century across diverse terrains of legal thought. It is often said to have almost single-handedly formed a paradigm in its criticism of mechanistic jurisprudence. Gény's *Method* is a book produced at the cross-roads of the Continental European legal thought and thus the culmination, in a sense, of an intellectually busy period. But it has also had considerable transformative effect in shaping the rhetoric of the Anglo-American legal thought.[31] In what follows, I would like to read the major themes of the *Method* in order to try out a set of propositions I formulate, each under a separate heading, propositions which strictly constitute mere variations on the theme of the dichotomy between the law and its readings: (1) A text has no edges. The distinction, therefore, customarily

assumed between textualist and extratextualist positions is one of grammar. (2) Intention is not a state of mind. Every time a distinction is made and a hierarchy established between intention and extension, it is made grammatically. (3) The principle of the separation of powers is a principle of grammar. Distinguishing between law and politics, subsequently, is possible only on a political basis. (4) Realism is formalism. The difference between the two orders of legal methodology is one merely of grammar.

2.1 The Text and Its Edges

Perhaps the most compact statement of the themes of Gény's work is the battle cry by Raymond Saleilles in his celebrated 'Preface' to the *Method*: 'It is time to return to reality.'[1] I lay special emphasis above at the very start on the phraseology chosen by Gény to designate the authority of the English judge *vis-à-vis* the principle of the separation of powers: fiction. Not by pure accident, Saleilles' call builds on the assumed tension between fiction and reality. As he proceeds to elucidate it, fiction appears to characterize the mechanical jurisprudence of the exegetical school, of which two main pillars are the principles of the authorial will in reading the law and of adjudication on the basis of rigorous logical deduction confined strictly to the text.[2] Reality, on the other hand, suggests two alternative insights which sum up the entire message of the *Method*: the judge is urged to go 'through but beyond' the text of the law in its application (here Saleilles paraphrases Jhering on the Roman law), and she is to acknowledge, in so doing, the part that has to be played by science in her aid and guidance.[3] Hence, the (a) free (b) scientific (or objective) search, *libre recherche scientifique*.[4]

As I have already indicated it, however, the notion of a free search does not necessarily mean the end of Gény's commitments to a formal idea of law. He makes

it clear that he 'ha[s] no design to contest the recognized authority of written law.'[5] On the contrary,

> the interpreter's first rule of conduct is to submit himself completely to the statute which rises before him as a high wall, excluding... any personal judgement and any evaluation which would tend to prejudice the application in practice of the norm enacted from above for everyone. I would never think of questioning either the importance of written law as a source of positive law, nor the need for its supremacy.[6]

It is not, therefore, the so-called 'strict' reading of the law for which his project is critical of the exegetical school. What distances him from the traditional stance is what Gény calls the 'fetish of the written law' on the part of the latter. The fetishist attitude is marked by the notion that 'every decision has to be based on written law.'[7] As such, the notion is the distinctive mark of the mechanistic view of law.[8] While a conception of life grounded on shifting relations of interest, according to Gény, resist the idea of the written law that is all-inclusive and once and for all. That which is written is always, necessarily, 'incomplete.'[9] The written law is, therefore, conceivable as the sole legitimate basis only when one attributes to it a 'divine origin.'[10] So long as the authorship of an omniscient divinity is not the case, the written law needs 'supplementing or complementing.'[11] And this is where free objective search comes in. It is, first, characterized by an unstationary notion of life as opposed to the stagnancy suggested by faith in a 'divine origin' that accompanies an omniscient idea of the text, the scripture. Free objective search as 'supplementing,' secondly, stands in a curious dichotomy to the text of the law that is strictly the privileged term of the binary opposition.

Insofar as its notion of the written law is anxious to contrast with personal prejudices, politics, and principles of the judge, Gény's project appears to confirm the traditional opposition in the controversy, in the United States of America, concerning the reading of the Constitution. Amongst the contenders for the naming

of the opposing leagues in the constitutional controversy are the titles originalism v nonoriginalism[12] and interpretivism v noninterpretivism.[13] I choose to employ in this study the working titles of textualism and extratextualism, as a great deal of confusion seems to obscure especially what is usually understood to be the mainstream league of the opposition. Originalism (or interpretivism) is customarily thought to entail the idea of the priority of the (legislative) intention as well as of the text.[14] It at once appears in its certain significant patterns, however, radically to oppose the text to the intention that is extrinsic to it, such as in the parol evidence rule of the contract law and in the long-standing, and only recently relaxed, rule of the inadmissibility, in the reading of the English statutory law, of the Hansard, the Parliamentary proceedings in the making of an Act. A further complication arises if originalism has to incorporate also a position which, as with Gény, combines an uncompromising notion of the text, 'originally' understood, with a supplementary requirement of free objective search when the text is absolutely silent. What may initially seem to be an odd eclecticism of two unblending positions (originalism and nonoriginalism) may be described, more accurately, as an *ultra-originalism*, one which is deeply rooted in the tradition. The Benthamite idea of interpretation, for instance, bears striking similarity to Gény's. Bentham distinguishes rather sharply between 'strict' and 'liberal' readings of the law.[15] Liberal reading is stated also to be of two varieties, extensive and restrictive. 'In either case thus to interpret a law,' notes Bentham, 'is to alter it...'[16] He at once combines, however, the position that the very idea of a law precludes its liberal reading with an acknowledgement of the *supplementary* (and that is the key notion) need for a liberal reading of the law. In that it would be 'ruinous' not to 'alter' the law in certain cases by a liberal reading of it so long as the 'alteration' is immediately reported by the judge to the legislature and a 'formal' alteration or a remedy thereof is requested. Not vetoed within an allowed period of time, the informally made rule of the judge is to gain the effect of the formal law.[17] Gény simply reiterates the threat of 'ruin' formulated by Bentham. If the strict reading of the law is not *supplemented* by a free objective search, the

result will be either immobilization, impotency and defeatism, or, worse, under the sole possible cloak of a strict, mechanistic reading of the law, necessarily a 'most disorderly subjectivism.'[18] Originalism in the American sense will choose to avoid the sort of originalism (ultra-originalism) favoured by Bentham and Gény for fear of lacunae in the law. And when the lacunae do get acknowledged, a position that gives the courts the go-ahead to fill in the gaps for themselves is likely to be regarded, not as originalism, but as the exact opposite of the originalist stance.

2.1.1 Reading the Constitution

Charles Fried, the Solicitor General of the United States, distinguishes between the authority of the law and that of the judge in very much the same way as Gény. 'My indictment runs against adjudication that seeks to escape the discipline of texts and doctrine, and substitutes the judge's own authority for the authority of the law...'[19] An absolute division of the realms of authority is a requirement of the rule of law. And for that division to make sense, reading on a textual basis is a clear presumption. 'At the very core of the rule of law is the conviction... that legal texts have meaning.'[20] Do the views that reject a textualist reading of the law claim an *indeterminacy* of legal meaning?

The bulk of the positions that are not textualist would not appear to consider the reason for their dissent to be one of textual scepticism.[21] A concept of the *ambiguity* of the text is naturally invoked. But it is professed also by the textualists. A textualist strategy by Edwin Meese, the former Attorney General, prescribes the reading of the Constitution in three hierarchically available phases. (1) It is the specific meaning of the text that is to be followed. (2) When the text is not specific but yet specifiable through a notion that is demonstrably part of the text, signification thus unveiled is to be the meaning. And finally (3) when there is neither clear, specific meaning attributable to the text nor is there an obvious notion

to guide it, the reading is to be pursued in accordance with the text of the Constitution *as a whole*.[22]

If a scepticism of great Cartesian scale is not at once invoked, therefore, an extratextualist view of the Constitution will have to be simply a contradiction in terms. The very holders of the extratextualist positions could not agree more. Extratextualism, accordingly, is a stance that is merely marked by its *opposition* to textualism. John Hart Ely describes the latter as the view that 'judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written constitution.'[23] The distinction between the two positions, therefore, is one simply of whether or not the text in itself is complete as the sole authority on which to base the decision. In that respect extratextualism is clearly reminiscent of the Génian idea of *supplementing* and absolutely far from denying the authority of the text. According to Ely, textualism is basically the right approach, yet it has to be supplemented. Supplementing it ought to be done by way of not extratextual value enforcement, but by a 'process-oriented' construction of the text.[24] Paul Brest finds textual reading not wholly adequate, as a stagnant notion of the text falls short to tend to all the 'ends' which ought to be observed in a constitutional government and which are basically motivated by changing needs and values.[25] According to Thomas Grey, though they may not be part of the text it is the 'basic national ideals' that the text will have to be supplemented with.[26] Likewise, for Michael Perry, the 'aspirations of American political community' will guide the text.[27] That which will guide the text, according to Justice Brennan of the Supreme Court, is its very own 'transformative purpose.'[28]

Brennan opposes an *ex nunc*, contemporary, reading of the Constitution to its 'original' meaning as suggested by the standard textualist strategy. The relevant question, accordingly, is: 'what do the words of the text mean in *our time*?'[29] Perry designates the text of the Constitution as 'polysemic.'[30] Of one piece with Brennan, he makes the guiding 'aspirations,' the concept he introduces, as the meaning '*in addition* to the original meaning.'[31] The problem that arises immediately is that of

distinguishing between meanings when there is more than one. And secondly, there is the question, supposing a distinction is at all possible, of installing a *hierarchy*, an order of priority, between the different meanings of one and the same text. Brennan and Perry will venture, obviously, to determine the privileged meaning on the bases of 'our time' and 'our aspirations,' respectively. Whatever justification will there be, however, for abandoning an 'original' meaning for meaning that is not original? In both cases, complications arise when Brennan and Perry acknowledge the existence of a textual *core*, as it were, that has been preserved over time, however very much dated now. It is a meaning, in other words, that is *not* determined by our time and our aspirations. The writers will be able to produce no good reason for their choice, not for the original meaning, but for what they call the 'transformative' or 'aspirational' meaning. And the moment they start tracing their steps back and deny that original meaning is *really* original meaning, but it is, likewise, meaning in 'our time' and based on 'our aspirations' (not necessarily those of Brennan and Perry), they will be even less able to produce a good reason for what is their privileged term.

Extratextualist positions have always made good use of one textualist predicament. In that many of the principles that are now taken for granted in the reading of the Constitution could not be justified on a textual basis. Amongst the principles of the said nature are the principle of equal protection, one that is technically related to the fourteenth amendment, and the very principle of the judicial review of legislation.[32] The latter is justified in *Marbury v Madison*[33] as a requirement that comes with the very notion of a written constitution.[34] The former is employed in what is arguably the second most significant Supreme Court decision, after that of *Marbury*, to start a new social and political era in the history of that particular judicial domain. *Brown v Board of Education*[35] bases its anti-segregationist decision on the equal protection clause of the fourteenth amendment. Alexander Bickel, who was a clerk to Justice Frankfurter when the segregation cases were first seen in 1952, relates the available evidence for a textualist

construction of the fourteenth amendment, and reaches the following conclusion.

> The obvious conclusion to which the evidence... easily leads is that section 1 of the Fourteenth Amendment [where the equal protection clause is included], like section 1 of the Civil Rights Act of 1866, carried out the relatively narrow objectives of the Moderates, and hence, as originally understood, was meant to apply neither to jury service, nor to suffrage, nor to antimiscegenation statutes nor to segregation.[36]

The textualist responses to the textuality of the decision in *Brown* are diverse. Herbert Wechsler symphatizes with the decision 'morally.' Legally, however, it is insupportable for its disregard for the 'neutral principles' that ought to govern adjudication. From a neutral point of view segregation should concern not the principle of equal protection but that of freedom of association. Accordingly, Wechsler finds the segregationist decision of *Plessy v Ferguson,*[37] the decision *Brown* is thought to have reversed in effect,[38] as legal.[39] Meese, on the other hand, charts the decision of *Plessy* as a defiance to the very textual idea, and *Brown*, in contradistinction, perfectly justifiable on textual basis. The decision of *Brown*, according to Meese, is of one piece with 'the clear intent of the framers of the Civil Law amendments to eliminate the legal degradation of blacks.'[40] Raoul Berger, however, is inclined to make an exception of *Brown* on textual basis. It is not justifiable textually, but it has to be accepted.[41] He criticizes the extratextual views for making an excuse of this exception to justify ideologically oriented readings of the Constitution. Those views, he maintains, confuse 'lawyering' with 'philosophizing.'[42] Robert Bork, on the other hand, finds the outcome in the anti-segregationist decision of *Brown* not only in compliance with the text (the equal protection clause), but also a clear requirement of it.[43] He objects, however, to what he thinks is the mood of the *opinion*. 'The disastrous fact,' he notes, 'was that the Supreme Court [itself] did not think [that it was the text of the Constitution that

dictated the decision]. The Court, judging by its opinion, thought that it had departed from the original understanding in order to do the socially desirable thing.'[44]

That each textualist writer should ascribe to the text of the fourteenth amendment a meaning that is at once rejected by other textualist writers makes the textualist predicament no easier. The extratextualist positions, however, are equally strained by a similar difficulty. If the text is even *partly* to be allowed to 'dictate' the decision, as it presumably would if, to cite but one hackneyed example, the age requirements for the president were the case, it is hard to justify why the text should not dictate *all* the decisions where, as in the equal protection clause, it seems to have an opinion. As I have already pointed it out in the views of Brennan and Perry, the difficulty follows from a problematic notion of the text. It underlies not only the bulk of the extratextualist views, but it is also the very logic behind textualism: the text as the locus of meaning.

Extratextualism is characterized by its opposition to textualism and *not* to the text. The legitimacy of textual reading to a certain extent has never been contested by extratextualist writers. As Perry states it, on the contrary,

> [t]here is a sense in which we are all originalists: We all believe that constitutional adjudication should be grounded in the origin — the text that is *at* our origin and, indeed, *is* our origin. But there is a sense too, in which none of us is an originalist: As Gadamer, for one, has taught us, we cannot travel back to the origin, no matter how hard we try...[45]

Redefined, extratextualism redefines also the pivotal dichotomy. The difference, accordingly, is that of the text as the *sole* legitimate basis to the idea of the *insufficiency* of the text. As I have already noted it, Ely's 'objection to [textualism] is that it is incomplete, that there are clauses it cannot rationalize.'[46] As such, extratextualism follows Gény's classic formulation in two ways. First, it posits a supplementarity which is at once a unequivocal *affirmation* of a formal notion of

the law. In what I quoted above Perry expresses absolutely no qualms either about the 'origin,' that which is supplemented or complemented, or about a concept of adjudication which is 'originated' rather than 'original,' i.e. principled as opposed to free-wheeling (inventive, original). Then Perry makes the move which I anticipated above[47] and expresses doubt that original meaning is *really* original meaning. On the contrary, it is original (inventive) as much as the extratextualist views that are not original (inventive). And it is not only a problem of the lost origin (as Perry thinks Gadamer suggests). But there is no origin to be traced further back than the *connections* in which the meaning is suggested.[48] Original meaning, therefore, will have to be equally a meaning in both 'our time' and on the bases of our prevailing 'aspirations.' Meaning as the moment of framing, to use the word Derrida favours, is non-extant. That is because framing does not operate on pinpointable borders.[49]

Extratextualism, then, not only leaves unaccounted for the fact that the text goes simply uncontested in the majority of the cases and it therefore perfectly well 'dictates' the decision, but extratextualism also leaves room for an apocalypse, an anything-goes, a Benthamite-Génian 'ruin.' There is nothing for extratextualism to hold on to, when the origin, a formal notion of the text is no more. A discourse of apocalypse, paradoxically, is the characteristic of the rhetoric of *textualism*. I quoted above Fried distinguishing between the authority of the law and that of the judge.[50] Alongside him Wechsler, Berger, and Bork consistently invoke the binary opposition of the law 'or else,' of namely neutral principles and morals, lawyering and philosophizing, the text of the law and the 'socially desirable thing,' respectively.[51] Meese appears not to have any immediate objections to the much criticized political overtones of the decision of *Brown*. He, too, however, does not refrain from making it the very point of his message to distinguish between a jurisprudence of 'constitutional fidelity' and one of 'political results.'[52] What extratextualism does, in response, is not to take into question the very dichotomy but simply *reverse* it. Whereby the apocalyptic choice in the extratextual case becomes one of indispensable principles not justifiable on the basis of the text or, as

with textualism, the much dreaded *else*.

The second way in which extratextualism follows Gény's model is its Benthamite-Génian ultra-textualism which is inseparably linked to its concern with indispensable principles not justifiable on the basis of the text. The textualist predicament, accordingly, is that many of the principles that are now taken for granted in the reading of the Constitution cannot be justified on a textual basis. Now that we have redefined origins, following the very suggestion by Perry, as non-extant, we are compelled to restate the predicament. The principles that are now taken for granted in the reading of the Constitution cannot be justified only on an *ultra-textual* basis. Restated, the predicament becomes a difficulty of *extratextualism* in almost more subversive a manner than it is as one, traditionally formulated, of textualism. Extratextualism is ultra-textualism in the sense that it is essentially underlay by an ultra-formal notion of the text. I have already noted that textualism in the American sense will choose to avoid the textualism of the kind favoured by Bentham and Gény for fear of gaps in the law. Hence, Bork's keen embracing of the outcome in *Brown*. The free search of the sort which is pursued by the *textualist* judge will have to be *regardless of the text* as a formal source of constraints. With extratextualism, however, as well as with Gény, the free search (principles, aspirations, ends, transformative aims, refereeing, and so on) is strictly dependent on the very condition of an ultra-formal notion of the text. Gény posits a formalism which is clearly stricter than that of the exegetical school so that he can open the way for free objective search. So does extratextualism. Its one of the earliest and most remarkable examples in the constitutional controversy is Frederick Douglass', an ex-slave and abolitionist writer, reading of the Constitution, to the dismay of his fellow abolitionists, as a document of vice, 'a most cunningly-devised and wicked compact.'[53] Gény opposes the text with a 'divine origin' to the secular text of the law.[54] The dichotomy supplies him with a passage to the idea of the incompleteness of the written text and thus need for supplementing. In striking similarity, Douglass distinguishes between the man-made document and the

document that is 'from heaven.' The constitution which he designates as a clear instrument of slavery and suffering is of the former character.[55] William Goodell, on the other hand, writing in an abolitionist pamphlet at about the same time, finds, in stark contrast, the Declaration of Independence and the Constitution 'amply sufficient in their provisions, for either the legislative or judicial abolition of slavery.'[56] According to Goodell, the legislator and the judge who refuse to legislate or decide against slavery perjure themselves in the face of their oaths of profession.[57]

The Génian problematic that is reiterated in extratextualist positions manifests itself characteristically in the dichotomy between the divine and the secular. That is not because the divine, that which relates to faith, forms any of Gény's concerns in the *Method*, as it seemed, in the first part of the present study, to dominate Lyotard's discourse almost throughout.[58] As a matter of fact, my entire exposition of it is based merely on a brief and obscure footnote in Gény's voluminous work, one which occurs where he elucidates why 'the statute will always be incomplete.' The footnote which comes right after is as follows:

> Only those nations where the law has been considered of directly divine origin and therefore perfect and immutable, could admit the opposite idea...[59]

Gény's is a duality of *rhetoric*. He does not appear to invoke a radical opposition of the workings of the divine and the secular law. The opposition is wholly and radically confirmed, however, as soon as he returns from the footnote to the text (from the supplement to that which is supplemented) and takes up the incompleteness argument in order to establish his notion of authorship. Authorship is defined in terms of the subject ('the human mind'). And because the subject is characterized by privacy and authenticity, the text the subject produces is marked by a formal and autonomous existence. The text, accordingly, becomes a private affair of its author. A private affair is a secluded affair with sharp edges. And finally,

because its edges mean that the text has a life of its own, a segregated life, independently of anything that is extrinsic to it, the text is essentially defined by an irremediable *deficiency* in its fight of durability against time. To define the text as essentially 'deficient,' Gény will have to affirm the *efficiency* of the divine. Hence, the dichotomy between the divine and the secular.

> No matter how subtle *the human mind* may be, it is incapable of a complete synthesis of our world. This *deficiency* which cannot be remedied, is especially noticeable in law, where the total appreciation would suppose the previous knowledge of all the possible relations human conflicts of interests can create.[60]

Quite apart from the peculiar notion of 'intention' displayed in the paragraph (intention as 'previous knowledge'),[61] Gény notably contrasts an unstationary notion of life to the stagnancy suggested by faith in a divine origin. Ironically, however, his very choice for life, as opposed to faith, is made possible by a distinctively *stationary* notion of life which mummifies, as it were, the text within its edges and for all times. Hence, the analogies, in the interpretative controversy surrounding the American Constitution, from scripture.[62] The edges of the text are the edges of its manufacture. Its formal and autonomous existence thereby taken for granted, to make sense of the text in the face of its longevity will require that the metaphorical, symbolic, and ultimately faith-based methodology of the sacred texts be adopted; 'through but beyond' the text.[63]

Two other significant patterns of a formal idea of the text are to be found in the distinctions traditionally drawn between literal and metaphorical, and statutory and constitutional reading. Because constitutions are assumed to be marked not only by their longevity as positive law but also by the longevity of what they signify within their closed edges, it has been the established practice to distinguish between constitutional and statutory interpretation. In his comparative work, *Constitutional Construction*, Chester James Antieau lists the dichotomy as a universally professed

principle of constitutional reading.[64] Lord Diplock lays special emphasis in *Hinds v The Queen* on the distinction to be observed between the strategies of reading applied customarily to 'ordinary legislation' and the interpretative methods suitable for 'constitutional instruments.'[65] That he has in mind especially criminal and taxing legislation by ordinary legislation may seem to make his division almost self-evident, 'express words are needed to impose a charge on the subject.'[66] The division does, however, disregard the precision required in constitutional provisions to address such obvious matters as the requisites to become legislative representatives, terms of office for the president or the cabinet, or the respective authorities and responsibilities of state powers which are responsible for ordinary legislation such as criminal and taxing statutes and their enforcement and reading in the first place. In *United States v Classic*, the dichotomy is given its classic formulation: constitutional provisions, intended for long standing and comprehensiveness, are to be read differently from the ordinary laws which are expressed in precise and short-term language and 'which are subject to continuous revision with the changing course of events.'[67] Intertwined with its formalism, the distinction clearly invokes the absurd notion of adjudication that requires the judge to switch, as it were, between different pairs of spectacles as different brands of texts come and go before him. What would one possibly mean by pointing out a constitutional provision cited in a decision of the Supreme Court and stating at once that the provision appears to have been read by a strategy that is rightly for *statutory* interpretation? What exactly would a *confusion* of the two distinct sets mean? Apart from the two basic facts that for the majority of judicial domains statutes usually *outlive* constitutions, and that a newly adopted text can create just as much interpretative controversy, the actual debates on statutory interpretation, pursued separately from constitutional exchanges, also show, as indeed does Gény's project, that it is very much the same set of arguments raised by a diversity of positions in statutory interpretation.[68]

2.1.2 The Silly Rule

The characteristic distinction which bears the seal of a formal notion of the text, however, is the distinction between the literal and the metaphorical. In what is probably the best known use of the dichotomy, St. Paul contrasts rabbinical textualism, literalism, to the extratextualism of the spirit whose history commences at the cross.[69] In order to bring textualism to a closure, on the other hand, he at once has to assume a textualism on an equally, if not more, grand scale which presupposes a notion of the text with an absolutely *still* life. Paul's represents the pole of life against the sterility suggested by faith in the divine text. Can the letter kill, however, without at all certain traces of *life* behind it?

Marks phonetic or graphic, from which all life has been sucked out, seem to lie at the heart of the traditional concepts of the literal. Introducing the subtleties of the French law to an Anglo-American audience, René David contrasts the letter of the law to its spirit, a division, he elucidates, habitually made by the French lawyer. 'The French lawyer does not just consider texts literally. He seeks from their spirit, grouping, and combination the very principles of French law...'[70] As he defines the literal, it becomes obvious that the literal is present only by its absence, absence of life. Literal meaning, accordingly, is signification 'in an objective sense, apart from any consideration of social utility or moral justification.'[71] Considering that intention, purpose and moral orientation are denied to it, it is enigmatic that the literal should get charted as signification in the first place. In *Marbury v Madison*[72] John Marshall is thought to have established not only judicial review but also *literal* judicial review as he clearly points in the opinion towards the 'letter' of the Constitution. According to Thomas Grey, who relies on this fact about *Marbury*, the analogies in reading the Constitution from literary or religious texts cannot be accepted also because of the 'presumption of literality' that any legal text has as its part by its inherent logic.[73] He is quick to add, however, that the literality required

in reading the law by no means leaves out purposive or contextual references. It merely opposes the concept of 'the text as primarily figurative or symbolic.'[74] Grey follows, like David, the Pauline path absolutely to etiolate the letter, even though, unlike the latter, he chooses to side with the letter and allow also a purpose and a sense of direction to it. He does take the same path simply by the uncompromising dichotomy of the literal and the figurative. The concept of literal reading is excelled to its limits, however, in the words of Jervis C.J. in *Abley v Dale*.[75] Accordingly, the literal meaning of the text is to be adhered to 'even [if] it does lead to an absurdity or manifest injustice.' For abandoning the literal meaning for whatever reason is but to 'assume the functions of legislators.'[76] The question that springs to mind, one skipped ordinarily owing probably to the fashion in which dictums tend to suppress the real dynamics behind them, is how the case so designated arises in the first place. How do you apply a law that is outright silly?

In an often cited case the French Court of Cassation decided to ignore the law which sought to punish anyone who would get on or off a train while it was *not* in motion.[77] It is not particularly hard to imagine a situation in which the law would not be completely absurd. It might concern the squatters taking cover in a train carriage that is temporarily out of use. How is one supposed to understand, however, the zeal in the prosecution of a passenger who intended either to get on or off the train when it was *still*, presumably at a stop on the platform? How did the case come before the court in the first place? An equally interesting case involves a British-Canadian bye-law which dictates that 'all drug shops shall be closed at 10 pm on each and every day of the week.' In the case *R. v Liggetts-Finlay Drug Stores Ltd.*[78] the lawyer bases his defence on the point of the literal compliance of his client to the word of the law, who shut his shop at the specified time and reopened it a few minutes later. In *Whitely v Chappel*[79] the argument is whether or not a law that makes it an offence to personate 'any person entitled to vote' can relate to the personation of a *dead man*. Is the tricky point in the case whether someone who is dead is a 'person'? Or is it whether a dead person can be considered to be a 'person

entitled to vote'? Another case, *Adler v George*,[80] concerns an Official Secrets Act provision which states that 'no person shall in the vicinity of any prohibited place obstruct any member of Her Majesty's forces.' The person involved in the case, however, is accused of obstructing, not 'in the vicinity,' but in the very prohibited place. Does the law cover the case? Might another case entail the rightful dumping, before the judge, of the 'corpse' of a person by his detainer at the lawful command of *habeas corpus*?

Rupert Cross, who recounts the lawyer's defence, in *R. v Liggetts* above, of the literal compliance of his client to the bye-law to close the shop at 10 pm, notes: 'This contention was dismissed with the contempt it deserved and with the observation that no-one but a lawyer would ever have thought of imputing such a meaning to the bye-law.'[81] Wittgenstein is known often to make the same point regarding philosophical reasoning as displayed in mainstream philosophy. In *Zettel* he notes, implying Moore's well-known common sense argument to prove the existence of an external world: 'No one but a philosopher would say 'I know that I have two hands' ...'[82] A more vivid illustration of the point is made in *On Certainty*:

> I am sitting with a philosopher in the garden; he says again and again 'I know that that's a tree', pointing to a tree that is near us. Someone else arrives and hears this, and I tell him: 'This fellow isn't insane. We are only doing philosophy.'[83]

Wittgenstein is inclined, not necessarily by the logical consequences of his argument, to dismiss that type of reasoning altogether for being pale. It is somehow de-practised, as it were, or estranged. Another way of looking at it might be to treat it as an entirely different genre of practice. What the lawyer does in invoking the literality argument, therefore, might be considered to be a *switching* of the game rather than non-grammatical nonsense and therefore not, as Wittgenstein would have us believe, no practice at all. By sheer fraternity of the world, hardly anyone that is involved in the bye-law case would really seem to be unaware of the

connections that are at work in that particular instance as well as of the moves and motives of one another. A lawyer who would still be thinking to be in the same game as the enforcers and interpreters of the bye-law when suggesting the literality argument could hardly have been a lawyer in the first place because he would have been fighting the teaching of a fraternity that is absolutely vital for his survival. His argument does clearly bear the marks of some such fighting because of its bad rhetoricianship. That anyone would fall for its persuasive charm is hardly at all conceivable. His rhetoricianship is so *very* bad, in fact, that it might well be justifiable in the foreground of the specific qualities of the case which we seem to be no longer in a position to take into consideration. What appears to be beyond doubt, on the other hand, is that at no point does the lawyer's argument suggest a meaning from which life has been sucked out and which can somehow or other be *related* to the bye-law it purports to be part of. Neither is it a non-meaning, a grammatical abuse. It is a different game altogether.

There seems to be only one possible answer, therefore, to the question 'how do you apply a rule that is outright silly?' Silly rules do not exist. The concept that makes silliness a quality of the text is fundamentally misconceived in that it presupposes a radically drawn opposition of the literal and the metaphorical, a formalism which refuses life to the former term. That which is literal, however, is somehow still counted as meaning. What is it that makes a sign literal, strict, *narrow*? By a curious coincidence both Heidegger and Wittgenstein reflect upon the sign of an *arrow*. Wittgenstein asks: 'How does it come about that this arrow ⇨ *points*?'[84] In the same vein, Heidegger also makes an issue of the 'indicating' quality of it which has become almost the very paradigm of that which is narrow. His example is the small arrow sign sometimes displayed in a motor car to illuminate at turns and indicate the direction that is taken.[85] 'What do we mean when we say that a sign 'indicates'?'[86] What is the connection of the sign to that which it indicates? Is the narrow that which carries with it an *essential* quality of itself as distinct from the attributions of intentions, purposes, and moral orientations that are associated with

it? 'Doesn't [the arrow] seem to carry in it something beside itself?'[87] That which a sign has with it 'beside itself,' or, what Wittgenstein sometimes calls a 'shadowy being'[88] that accompanies the sign and is what might be called its *ostensive predicate,* is what seems to underlie the entire notion that allots silliness to the text.[89] Wittgenstein's answer to his own question is: yes, the narrow exists; and, no, that which is narrow is hardly the being that simply shadows, as it were, the sign. The meaning of an arrow, on the contrary, is an artefact of the *connections* in which the arrow gets to have a use.

> How does it come about that this arrow ⇨ *points*? Doesn't it seem to carry in it something beside itself? — 'No, not the dead line on paper; only the physical thing, the meaning, can do that.' — That is both true and false. The arrow points only in the application that a living being makes of it.
>
> This pointing is *not* a hocus-pocus which can be performed only by the soul.[90]

Similarly, Heidegger designates the sign as *made* in a network of associations rather than something that is as such. He contends that, like the arrow sign in a car, which requires for its proper functioning as an indicator a totality of connections, any of the entities that are encountered in the world are meaningful only on the basis of a system of relations. This system he calls 'the worldhood of the world.'[91] Just as Wittgenstein invokes 'the application' of it as that on the basis of which the arrow indicates, Heidegger notes that the content of the relations that make up the worldhood is determined by such modes as 'in-order-to,' 'for-the-sake-of,' and 'with-which.' It is essentially through such *pragmatic* modes that entities get 'involved' in the worldhood and become the subject of man's 'concern.' The narrow, accordingly, is not that which somehow evades that worldhood and has a transcendental rapport, a relation of 'baptism,' as Wittgenstein calls it elsewhere,[92] with what it signifies. The difference which the narrow suggests to that which is liberal is not one of immediacy. The narrow, on the contrary, is grounded in such deeply rooted

everyday connections of worldhood that are simply too obvious to be felt.[93]

That which 'kills' in the Pauline opposition of the letter and the spirit[94] kills because it is very much *alive* and kicking. It is by no means devoid, as it were, of purpose and moral orientation. The interests to which it gives life, however, may not necessarily meet the demands of the mimetically distilled category of 'life' maintained by the interests of the opposing pole. The difference between the narrow and the metaphorical, therefore, is one merely of mimesis, of grammar,[95] for what makes an arrow narrow is the 'n' that comes before it and that stands for the indefinite quantity of relations of which it is part in the fraternity of the world. A solemn consideration of the lawyer's argument, in the bye-law case,[96] to be part of the rule (its 'literal' meaning) is in turn a defiance to this fraternity, the world of the *polis*, the *politeia*. Wittgenstein notes with particular emphasis in the above paragraph that 'pointing is *not* a hocus-pocus... [of] the soul.' Likewise, Heidegger points out the Cartesian idea of worldhood as 'a case at the opposite extreme' of the worldhood that he describes.[97] As with the mechanistic concept of adjudication which a formal notion of the text presupposes on the basis of the stern duality of the subject and the object, the idea of meaning transcendent of its worldly attachments (intention, purpose, moral orientation) shows obvious Cartesian origins. The stagnancy Gény quite ironically equates with the divine as opposed to the secular is the stagnancy that is in fact postulated by the Cartesian notion of signification to which he subscribes, a notion characterized by its denial of the world fraternity, the *politeia*, a world of *faith* and *training*, for its incessant mobility is hardly one of free-wheeling privacy. It is through such fraternity that the case comes before the judge in each case already *read* and determined.

The literality of reading is often invoked in the reading of the United States Constitution with reference to the decision of *Marbury*.[98] Grey formulates his dichotomy of the literal and the figurative on the basis of this very decision.[99] In *McCulloch v Maryland*,[100] on the other hand, Justice Marshall unequivocally introduces the primacy of *figurative* meaning:

> Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense.[101]

To make figurativeness the distinctive 'character of human language,' of every word in it, is to deny the text its physical edges. Where does the law, that is primarily 'written,'[102] commence, and where does it terminate, horizontally and vertically? Is the judge herself within the boundaries of it? Do the ratifiers also form part of the text? Is the law consisted of 'itself' *and* its interpretations, or is the law only its interpretations, exclusive of *itself*? Just as these are the wrong, unhelpful questions to elucidate what actually takes place, so is to draw the conclusion, from the two opinions by Marshall, of an *incoherence*. A conclusion of incoherence would have to postulate the odd idea of adjudication that would occur in an interaction of the mutually unindebted[103] elements of the subject and the object. Did Marshall decide under the contradicting spells, or visions (*theoria*), of the literal and figurative presumptions in two different cases? That the both cases came before him *prejudiced* on the basis of a specific mode of world fraternity seems to be more likely. Justice Cardozo designates the forestructured quality of decision-making which thus becomes the issue as follows:

> Nine-tenths, perhaps more, of the cases that come before a court are predetermined — predetermined in the sense that they are predestined — their fate preestablished by inevitable laws that follow them from birth to death.[104]

The two decisions by Marshall do not indicate in the direction of a fundamental inconsistency because, first, it hardly seems to have occurred to Marshall in the first place that he at once excluded the figurative character of the language when he pointed towards its letter. In fact, does anyone ever do when invoking the letter? For the letter is in each case conceivable, *narrow*, only on a figurative basis. An

apparent duality of *Marbury* and *McCulloch* also takes place in Gény's account. According to him, the reading of the law is never to be pursued by such considerations as the transformation of society and changing circumstances, 'unless [the text] expresses a dynamic concept, such as for instance the concept of public policy.'[105] As soon as the *dynamic* is allowed for, however, the terms of the binary opposition of the static and the dynamic will have to be understood as the sub-categories of some generalized notion of the dynamic. That which is static will be in each case conceivable only on a dynamic basis. Further still, opinion-writing might have to be regarded as a distinct game. A clear difference of rhetoric in two different cases decided by Marshall is confined not only to the pair of *Marbury* and *McCulloch*. For instance, in his decision in *The Antelope*,[106] Marshall distinguishes between the legal text and moral principles and upholds the former.[107] In *Fletcher v Peck*,[108] the earliest case in which a state law is invalidated for conflicting with the Constitution, on the other hand, he invokes the same dichotomy only to sustain the latter term against the statute which apparently has no regard for 'the reason and nature of things.'[109]

Another significant dichotomy of rhetoric occurs in two opinions by Justice Warren. I discussed above the anti-segregationist decision of *Brown v Board of Education*[110] as an apparent predicament on the part of the textualist views of the Constitution. For despite its virtually uncontested ruling today, from the viewpoint of the bulk of the extratextualist positions the outcome of *Brown* is not justifiable on a textual basis.[111] Some textualists appear not to disagree with that.[112] Some are prepared, however, to defend the decision on a textual basis, even though they may not approve of the style of the Warren Court.[113] That the decision of *Brown* was *not* dictated by the text, on the other hand, goes on to pose even greater an impasse for the *extratextualist* positions, as it seems to postulate the constraining capabilities of the text as a rule. Once those capabilities postulated, in turn, extratextualism would appear to have no good reason sometimes to bow to those constraints and sometimes simply eschew them.[114] *Bolling v Sharpe*,[115] the segregation case of the

district of Columbia, decided on the same day as *Brown*, gives a clue as to how the textualist and extratextualist positions may be eternally trapped in their disregard for the prejudiced character of the case. It also gives compelling evidence how opinion-writing may, in fact, have to be considered as a wholly distinct game.

In *Brown*, the four state cases of segregation were put together. The Columbian case of *Bolling*, however, was decided separately. That was because the fourteenth amendment whose equal protection clause is the basis of the decision in *Brown* is applicable solely in the *States* and therefore not in the district of Columbia. The manner in which the Court overcomes the discrepancy is at once curious and exemplary. The opinion refers to the difficulty, and yet it proceeds to indicate, very succinctly, that where the notion of equal protection comes from, namely 'our American ideal of fairness,' comes also the notion of due process.[116] Unlike the equal protection clause, the clause that expresses the principle of due process is contained in the *generally applicable* fifth amendment. It is enigmatic why, for the sake of rhetorical simplicity, the generally applicable due process clause was not made the basis of *both* decisions made on the same issue and on the same day. It is only enigmatic, however, if adjudication, just as noted before, is imagined in the mutually unindebted duality of the text and the interpreter, the object and the subject. Obviously the choice for the equal protection clause did have to do with the fact that the due process clause did not have at the time quite the substantive content which it seems to enjoy presently, in particular since *Roe v Wade*.[117] Considering that politically the case could be decided either way, it was probably less problematic to decide the state cases on the 'weightier' basis of the equal protection clause (some considerable 'weight' being invested in the very fact that challenge to segregation was pursued on what was practically its homeground[118]). The emerging discrepancy with *Bolling*, in turn, would become one of 'procedure,' an instance of technical insubordination, as it were, in view of the Constitution as a whole. Indeed, as the opinion itself points it out, it stands less than comfortably that segregation terminated on the basis of the Federal Constitution should be maintained in the

Federal Government domain.[119]

That a difficulty of the sort had to be overcome, however, is ample evidence of the distinct games that had to be played. Charles Black contrasts the difficulty of rhetoric the Court had in the segregation cases with the 'awkwardly simple' logic which was behind the decisions and which no one did really mistake. Segregation was simply a remnant of the belief in the white supremacy and had to be eliminated. 'Simplicity,' however, writes Black, 'is out of fashion.'[120] That Gény and Llewellyn, for instance, would ally their free objective search and the Grand Style,[121] respectively, with the 'simplicity' Black invokes, as opposed to the rhetorical difficulty the judge sometimes has to go through under the reign of formalism, is almost without doubt. What is really entailed in the Court's difficulty may be rather a tricky question, however, as one can readily misidentify that which the Court had to address and overcome in its rhetoric for the *textual* constraints of the Constitution. It is, therefore, absolutely crucial to notice whether the Court's obvious difficulty of rhetoric was in regard to the *text,* the text of the Constitution, or in regard to the prevailing *mood* marked notably by a local and undecided instant of the world fraternity.

The complicity of rhetoric, as opposed to the 'simplicity' of the drive that animates it, is always there. Its game seems to have to be played in each and every case. Once won, however, the complicity tends to get less and less conspicuous. That the difficulty of the Warren Court was not a difficulty of the *text* is well attested by the mere fact that in a series of decisions that followed *Brown* the Court declared segregation unconstitutional by simply referring to its decision in *Brown*,[122] even though the decision in *Brown* had made a careful note of it that its decision was strictly confined to the field of public education.[123] The Court, therefore, *got it right* both in *Brown* and in the following decisions of anti-segregation not because it gave a long neglected text its due reading. There is no such thing as due reading. But it simply followed the *mood*, which is in itself sufficient criterion for 'getting it right.' Neither did the Court have to devise certain

rhetorical strategies in order to evade or supplement the *text*, as the text as such could hardly be in the way. But it had to evade the constraints of the prevalent traces of what may tentatively be termed the mood. *Brown* could be decided *either way*. So could be the English case which seeks to answer the question whether the consumption by fire of the mortal remains of a human being is an 'industrial' activity. It could be decided either way even though the court's eventual answer is 'no,' and the owner of the crematorium at issue is thereby decided not to benefit from a tax allowance.[124] The bye-law case discussed above,[125] on the other hand, could be decided *only one way* so long as the players of the game would persist not to drift away and not to become participants of different games altogether. The text to which the individual case is 'technically attached,' however, hardly plays a part in securing the outcome for the case. On the contrary, the case seems to be prejudiced on the basis of a world fraternity where its particulars acquire a dictating significance — one of mood, nevertheless, not of the vision (*theoria*). Just as the literal and the figurative arguments attributed to *Marbury* and *McCulloch*, the arguments of equal protection and due process in *Brown* and *Bolling* indicate in the direction of a wholly distinct *involvement*. It had been an involvement of exactly the same kind when the decision of *Plessy v Ferguson*[126] had found no conflict in segregation with the equal protection clause of the fourteenth amendment.

2.1.3 The Logic of Supplementarity

What Gény casts in a marginal part, namely as that which is extrinsic to the text, therefore, appears eventually to occupy the centre stage. Given that he designates it as the very mission of his work to make the case for free objective search,[127] he hardly equates with obscure significance the extratextual affairs of the judge. A 'logic of supplementarity,' as Derrida names it, characterizes the project, however, as free search is made possible on the *originary* basis of the text. The text of the

law, as distinct from the free search of the court, is the privileged term of the binary opposition he thereby establishes. As the dichotomy of the divine and the secular places the text of the law over the shifting and elusive ground of changing circumstances, a free search is in turn required for 'supplementing or complementing' it.[128]

Just as the Kantian beauty is defined in terms of the form of the object of art as opposed to the *parerga*,[129] the idea of an origin, a presence, as opposed to its supplement, defines both textualist and extratextualist approaches in reading the law. Derrida traces the workings of the logic of supplementarity in his reading of Rousseau, a philosopher whose work is marked throughout by oppositions such as speech and writing, and nature and education.[130] In each of the Rousseauean dichotomies *the thing itself* is contrasted with the secondary or marginal term that purports to substitute it or that complements or makes an addition to it. The logic of supplementarity, on the other hand, operates as an indicator of the mimetic nature, the grammaticality, of such borders. That which is in the centre in each one of the oppositions can be shown to be defined by the term which borders on or over the edge of the thing itself. That is because 'the thing itself' is in each instance a grammatical approximation.[131] The terms inside and outside presuppose an immediacy that is not obtainable except through a 'sequence of supplements,' that is to say, a sequence of that which is present only by a countless multitude of non-originary references.[132] Textualism of the American constitutional theory seems to be the sole champion of the idea of an origin. An immediacy of presence on the part of the origin postulated, interpretation is understood as pure presencing. One important argument of extratextualism, on the other hand, has been to point out that the binary opposition of the original and the inventive which textualism invokes ought to be considered only grammatically, and that original meaning *is* inventive meaning in each case. Paradoxically, however, extratextualism has had to appeal to the idea of an origin with even greater zeal, for a sharper dichotomy of inside and outside-text has been more of a defining character of *extratextualism*. Just as

original meaning *is* inventive meaning in each case, it can be traced, in the logic of supplementarity of extratextualist positions, that that which dictates the decision *is* a 'free' decision (or a decision based on principles, aspirations, constitutional ends, transformative aims, and so on) not only in 'hard' or marginal readings, but in *all* readings of the law including the provisions that contain age requirements for the representatives of parliament.

A supplement either complements or makes an addition; the logic of supplementarity, on the other hand, is at once a denial of a clear-cut dichotomy of complementing and supplementing. As a questioning of the post-war literary criticism which sought to distinguish between the text and that which is extrinsic to it, notably the authorial intention,[133] came to be a building ground for the newly emerging literary theories, literary critics who thereby had to concentrate on the various predicaments of textualism have noticed more readily the workings of the logic of supplementarity in reading the law. In the parol evidence rule of contract law, for instance, evidence that is extrinsic to the textual capturing of the agreement between the parties is refused, for its admission is thought to be running the risk of perverting the evidence of the text itself.[134] Fish and Walter Benn Michaels, both literary critics primarily, have put into question the very idea of *the text itself*, as suggested by contract doctrine, and whether a clear dichotomy of supplementing the text of the contract, as opposed to complementing it, can be maintained. Pointing out the similarity of arguments between literary formalism and that of the parol evidence rule, Michaels designates the anxiety behind both enterprises to be one of making interpretation as 'objective' as possible.[135] What he goes on to argue is that the granting of such autonomy to the text, whether legal or literary, is problematic through and through. Its project is neither feasible nor really necessary for the purposes of securing impartiality or obtaining reliable knowledge. One significant exception to the parol evidence rule is when there is ambiguity or incompleteness in the text. Michaels puts into question the peripheral and supplementary position of the *ambiguous* along the lines of the parol evidence rule and inquires whether

ambiguity, as well as impartiality, are qualities of the *text*.[136] In one curious case he cites, the ambiguity seems to have arisen over the word 'chicken' in an overseas trade contract.[137] Chicken, obviously, is not exactly one of the first few words that would spring to mind to exemplify ambiguity. Nevertheless, the case attests to a genuine disagreement between the parties involved over the word.[138] Is ambiguity a property of the text? Will getting down as many details as possible help to keep the lid on the text? But even when no ambiguity is invoked in regard to the text of the contract, establishing *this very fact* seems to have to invite a notion of the text with no edges.[139]

The basic mechanics behind the parol evidence rule, according to Fish, is very much paradigmatic of formalism in general. The choice it offers is either the binding authority of the text, or *else*.[140] Insofar as its argument contrasts the authority of the text with that of force, Fish finds in the parol evidence rule a succinct expression of Hart's notion of law.[141] Hart formulates his idea of law as a formal source of constraints against the Austinean view of legal obligation, a concept Hart equates with the brutal authority of a gunman.[142] Law's authority opposes that of brute force for its authority is essentially vested in the text. Fish points out that for both the parol evidence rule and the Hartian notion of law, 'the foundations of law are linguistic.'[143] Having postulated an awkwardly formal basis for the law, Hart introduces his notion of 'open texture' so as to mark his departure from the ultra-formal, as it were, concept of the mechanistic jurisprudence. Open texture as a general characteristic of human language leads him to the idea of reading on the dual bases of core and penumbra of meaning. Because the 'uncertainty' of legal language is thereby allowed for and because a formal notion of the law will in turn have to cope with its 'staticness' and 'inefficiency,' the rules of the law will have to be 'supplemented.'[144] 'But if the rules are uncertain and require supplementation, how can they be rules?'[145] As soon as it has to allow for that which is supplementary, namely the ambiguous, the parol evidence rule is forced to betray, in very much the same fashion as Hart's project does, its linguistic foundations. 'The

document' of the contract, notes Fish, 'is neither ambiguous nor unambiguous in and of itself.'

> The document isn't *anything* in and of itself, but acquires a shape and a significance only within the assumed background circumstances of its possible use, and it is those circumstances — which cannot be *in* the document, but are the light in which 'it' appears and becomes what 'it,' for a time at least, is — that determine whether or not it is ambiguous and determine too the kind of straightforwardness it is (again for a time) taken to possess.[146]

What distinguishes textualism from extratextualism, therefore, is hardly that one of them limits itself for all times to the text, while the latter sometimes goes 'beyond' it. As I have already recorded it, in his preface to Gény's *Method*, Saleilles paraphrases Jhering to mark the new methodology in the face of the mechanistic jurisprudence of the exegetical school: 'Through the Civil code; but beyond the Civil code [*Par le code civil, au-delà du code civil*].'[147] The text, however, does not appear to be confined within its formal edges. In that respect, *cipher* would seem to be about the right word to designate the interpretative existence of the text, namely as a non-entity.[148] Yet the text as a non-entity may at once hold immense weight. But that is when the text is in the company of particular positions racial, religious, ethical, sexual, recognizable solely on the basis of the individual reading. Reading in that sense is not a presencing, but a *negation* of the text as a non-entity. Through reading, the text becomes an entity, and the reading, *de-ciphering*.

The *constructed* quality of meaning denies the text its presence as the unique shrine of signification. And a diversity of positions take the centre stage as that which distinguishes between positions turns out to be *not* a matter of whether or not to go beyond the text, but *whither* to go.[149] That a generalized category of faith (in the form of the primordiality of positions of prejudice) appears eventually to be the very adjudicator of the divine and the secular, the dichotomy Gény invokes

fundamentally, hints simultaneously at the *limits*, however uncircumscribeable, of the original as the inventive, and of the free as not only the quality of decisions in marginal cases but generally. The inventive and the free isolated from what they can signify grammatically will only reinstate what Fish finds admirably economically expressed in the parol evidence rule and what he considers to be the characteristic dilemma of formalism: it is either the authority of the text or else.[150] Clare Dalton, for instance, demonstrates ably in her reading of contract doctrine how its rhetoric is entangled throughout in a sequence of aporias created by binary oppositions such as private and public, objective and subjective, form and substance, and manifestation and intention.[151] In the parol evidence rule, that which is marginalized and secondary, namely extrinsic evidence, comes to determine that which is in the centre and primary not only in the cases of recognized ambiguity and incompleteness, but generally and necessarily. Because supplementary evidence is required, first, to determine the 'finality' and 'scope' of the text, secondly for its general 'interpretation,' and finally for ascertaining its 'legitimacy.'[152] Further, because the text as a formal source of constraints is no more, on all of those accounts the court will have effectively to intervene and cross between the domains of the private and the public, the objective and the subjective, and so on. The image the contract law has of itself as 'one of a neutral facilitator of private volition,'[153] therefore, hardly emerges from its analysis. A brilliant reading of the dynamics behind the formalism of contract doctrine comes paradoxically to confirm its most basic trait, however, when, in the absence of the authority of the text, the event of decision-making has to be accounted for. Content with the terms put before it, of formalism, as either the authority of the text or else, Dalton's analysis does no better than that of Hart and goes on to designate as one of its conclusions the 'indeterminacy' of judicial decision-making.[154] As a certain predictability of judicial outcomes, by the evidence of experience, has to be acknowledged, however, she ventures to recover her position by introducing the ironical dichotomy of 'doctrine-as-rule-system' and 'doctrine-in-application,' a duality whose latter term being 'after

all determinate.'[155] The very binary opposition that marks the parol evidence rule, namely the text and that which is extrinsic to it, comes to be reiterated in a reading that otherwise aims to dissolve it, as the supplementarity of application in the face of the text of the law is called forth. Because the text of the law is defined in terms of a presence,[156] in the absence of such pure immediacy the text, as it were, undergoes a loss of memory. It drifts away from what is made of it, namely its applications, and yet still seems to retain a being somehow to be conceded. What could possibly be the being of a restaurant bill other than that which one makes of it? The parol evidence rule grants the text exactly the sort of being which Dalton herself ends up bestowing on the text of contract doctrine. The former warns against the perversion of the text, yet allows extrinsic evidence supplementarily. Dalton's reading establishes the indeterminacy of the text and allows the extrinsic counter-evidence of its applications, again, supplementarily. It is crucial to notice that, despite its commitments to the contrary,[157] Dalton's discourse, just as Lyotard's before,[158] shares, in some elusive, yet significant, level, the typical objectives of formalism both in law and in literature, namely those of disinterested purity and scientific maturity.[159] Indeterminacy is invoked when the picture theory of truth that underlies those objectives fails to make out of the text a gallery of signification. Hence, the characteristic dilemma, suggested by formalism, of the text as a formal source of constraints or a state of anything goes. Just as the extratextualist views of the Constitution will always find it hard to rationalize why the text should sometimes dictate the decision and sometimes not, having affirmed a dichotomy of the law and its readings, Dalton will be at loss to explain why the reading of the contractual text by the court should be any more indeterminate than the reading of a restaurant bill, or, better, her very essay. As that which makes possible in the first place the free and the original, that is to say, the primordiality of positions of prejudice, is construed into a state of indeterminacy, what Dalton also does is to reverse her own dissolution of the dichotomy between the public and the private in contract doctrine. For so long as both the private and the public are defined in terms

of a greater category of that which is public, namely the *politeia*, a world of mimesis and fraternity, the free and the original as free-floating — indeterminate — modes of reading will not be conceivable.

2.2 Intention and Extension

The history of philosophy, according to Derrida, is that of 'the determination of Being as *presence*.'[1] The idea of presence is characterized by a 'presumed suppression'[2] of the connections in whose fraternity anything at all *is*. I attempted above to shorthand the multitude of connections thereby at work as that which makes an arrow narrow.[3] The logic of supplementarity serves the 'subversive' task of a grammatical reminder in the text of philosophy, of the connections in place, as philosophy traditionally defines supplementarity in terms of (either a lack or perversion of) presence. *The* binary opposition which attests to supplementarity and which marks the particular brand of Western metaphysics, for Derrida, is the opposition of speech and writing. Writing, he notes, is 'the supplement *par excellence* since it marks the point where the supplement proposes itself as supplement of supplement, sign of sign, *taking the place* of a speech already significant.'[4] That 'taking place,' or substituting,[5] on the part of writing, indicates the mode of being that defines it, namely *absence*. Writing, accordingly, *is* merely for the links that it has to speech. While the latter is the very paradigm of the moment of presence where voicing, hearing, and comprehending,[6] all take place without the kind of rupture that characterizes writing. Just as with the supplementarity of the instances of incompleteness and ambiguity in the parol evidence rule, on the other hand, Derrida points out that the frowned upon supplementarity of rupture and repetition defines not only the marginal instances of writing, but also those of speech. Iterability, as opposed to privacy, and derived immediacy, as opposed to the

concept of pure presence, are the qualities not only of the graphic sign, but of sign generally.[7]

In the face of the traditional privileging of speech over writing, another supplementarity, the parol evidence rule of contract doctrine, a rule that establishes the supremacy of writing over the evidence of 'parol,' is paradoxical. The logic of supplementarity which displaces the priority of speech, however, does no such thing as simply to *reverse* the hierarchy traditionally installed between the two.[8] What it does, instead, is to make both speech and writing derivative of a worldhood, a grand narrative, that is a play of the workings of 'secondary' terms such as supplement, ambiguity, incompleteness, rupture, repetition, substitution, and so on. Because writing is the term customarily defined by all these marginal qualities that are characteristically indicative of absence, as opposed to presence, Derrida names the worldhood that makes both speech and writing conceivable in the first place a generalized notion of writing, namely archi-writing. Archi-writing is 'writing as the disappearance of natural presence.'[9] In a hierarchy established in reverse, that is to say, when *writing* is given precedence over speech, as in textualism, the concept of pure presence, as opposed to derived immediacy, is as much in place as in the traditional pattern.[10]

Derrida traces the distrust towards writing as far back as Plato.[11] It may be possible to trace distrust towards *speech* just as far back. What Hobbes considers to be 'another Errour of Aristotles Politiques,'[12] for instance, is the latter's concept of 'well-drawn laws' so as to leave no room for passion and personal interests to have an obscuring impact on the judgement.[13] I have already recorded Barker's dichotomy, in commenting on Aristotle, of judgement that is properly legal and judgement that is obscured by the rhetorical skills and not 'impartial' but 'emotional pleadings of the litigants' in the Athenean *dikasterion*.[14] The 'well-drawn laws,' therefore, are in a sense a guarantee of impartiality. As with the parol evidence rule, however, Aristotle is inclined to supplement the 'well-drawn laws' that are passion-free and embody impartiality with the handy flexibility of 'the lead rule used in

making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid.'[15] The binary opposition which thus emerges is clearly vulnerable to the workings of the logic of supplementarity. The curious point, however, is that it points in the direction of a dichotomy of writing and speech where *speech* is the category defined in terms of the *rupture* of passion and personal interests, the *mediated* quality that characterizes in the traditional opposition not speech but *writing*.

What in fact occurs is truly revealing. When Hart places the text in the centre in defining legal obligation against the Austinean concept of it on the basis of power[16] (or in the Aristotelean concept of government by 'well-drawn laws,' as opposed to the Hobbesean notion of it on the basis of force[17]), that is because his thinking ascribes to speech, in the first place, a *privacy* of personal passion[18] and immediacy, as opposed to the common, monitored iterability. In view of the desired impartiality, in turn, privacy turns out to be a liability. While in the traditional opposition of speech and writing it is that very privacy, that very immediacy, that makes speech the *privileged* term of the opposition. What is seemingly paradoxical in the supremacy of the text, therefore, is but a consequence of the privacy speech is conferred upon customarily. The liability in the Hartian view of law regarding law's impartiality is *intention*. The evidence contract doctrine ignores is that of *personal passion* behind the 'parol.' And the guidance English law excludes in reading an Act of Parliament is that of *private motives and interests* behind parliamentary speeches.

That there should be qualms about intention is mystifying, given that the concept has often seemed to be synonymous with *meaning*. Gény designates the intention behind the law as 'its essence and reason.'[19] Considering the unhappy involvements of the private doctrine of contract law, as indicated in the preceding chapter, in a slightly uneasy analogy from the reading of a private will, Gény notes:

> the interpretation of a legislative text strongly resembles the interpretation of a private legal document... As the private will is the soul of the legal document it created, so the

> legislative intent alone should animate the statutory formula in which it is expressed. This intention can be the only essential target of any statutory interpretation in the proper sense.[20]

It clearly defies common sense that intentionalist arguments have to be made and defended in the first place. It is hard to conceive contrary positions which would ditch, as it were, the *intention* of the law, without simultaneously abandoning the law altogether. Charles Fried, the Solicitor General of the United States, points out the inseparability of the concepts of the intention and the rule of law.[21] It is, again, perplexing that one should *have* to state that. In the debates of statutory interpretation, likewise, Earl Maltz criticizes those who hold counter-intentionalist positions, such as Dworkin, but who would not at once give up the principle of legislative supremacy.[22] Samuel Thorne, who provides a panoramic view of the development of the idea of interpretation in the Anglo-Saxon law, draws attention to the manner in which the intention of the legislator came to supplant the previously reigning arguments of equity, surmised purpose, and reason.[23] 'It is... significant that only during the middle years of the sixteenth century did the intention of the makers begin to form the justification for extending a statute beyond its words.'[24] As he indicates the parallels between the growing significance of the Acts of Parliament and the advent of intentional arguments, Thorne also notes that, although having been used earlier, it is for the first time in Plowden's *Commentaries* (circa 1571) that the word 'interpretation' is taken to mean 'extensions of the words of statutes.'[25] It would be extraordinary, indeed, if interpretation and intention did not suggest a natural bond historically.

In addition to authorial intention, Umberto Eco points out two other notions of intention that emerge in the act of reading. They are the reader's intention and the 'intention of the text' (*intentio operis*).[26] Because he designates reading essentially as an uncovering of the intention, however not necessarily the *right* intention in each instance, Eco appears to confirm the common sense view that it is simply

paradoxical to oppose meaning to intention. However, just as Aristotle and Hart who vest the authority in the text as opposed to men, and just as the logic that operates both parol evidence rule and the rule of the inadmissibility of Hansard, Eco is at once motivated in his formulation by fear of the passion, personal interests and fancies of the interpreter. What man's privacy may most undesirably precipitate in reading, he terms 'overinterpretation.'[27] The intention of the *text*, on the other hand, suggests 'that there are somewhere criteria for limiting interpretation.'[28] That there are criteria *somewhere*, no one would seem to disagree. As he excludes the authorial intention for not being either available or relevant,[29] and as behind overinterpretation is but private passion, Eco appears to include where the interpreter stands, whether she is after the *authorial* will or simply her own, *not* within the confines of that which holds 'criteria for limiting interpretation.' In other words, according to Eco, the limiting criteria have a definite and formal residence. And where they reside, the criteria exist independently and irrespective of the perverting prejudices of what would be the outside connections. The criteria *are* an artefact of a prior limiting of the spheres of outside and inside. They reside within the text.

I have argued that extratextualism as advocated by Gény and the American extratextualists of the Constitution presupposes a notion of the text which has more *formal* a basis than textualism. What is usually categorised as extratextualism, therefore, is very much an ultra-textualism in disguise.[30] It should come as no surprise, in a similar reversal, that counter-intentionalism typically exemplified here by Eco's position suggests intentionalism on a more *private* basis than the straight intentionalism represented by Gény's argument. In a remark which curiously reminds of Wittgenstein's above contention that it is '*not* a hocus-pocus... [of] the soul' that makes a sign signify,[31] Gény makes intention the 'essence' of the written law just as a 'private will is the soul of the legal document.'[32] The 'hocus-pocus' is no casual phrasing on Wittgenstein's part as he often draws attention to 'the occult character of the mental process.'[33] The idea of the 'intention of the text' which Eco's

counter-intentionalist argument invokes, however, leaves Gény's intentionalism pale by comparison in that, quite apart from the textual presence it presupposes, it suggests an intentional occultism of twofold. It holds the typical view of the authorial intention as an elusive draught in the corridors, as it were, of the author's brain, and therefore 'very difficult to find out and frequently irrelevant for the interpretation of a text.'[34] And secondly comes the notion of overinterpretation, an act of interpretation induced basically by the *wrong* kind of intentions of either the author's or the reader's own. Because of the evasive quality of the former, there is not really a difference between the two. In both cases the reader pursues interpretation on the basis of that which is *his* and private and which therefore escapes the criteria that essentially limit interpretation.

In fact, in his tripartite formulation of intention, Eco only confirms the trilogy which has manifested itself in the present study in Lyotard's grouping of the three orderings of justice: those of autonomy, heteronomy, and faith.[35] Just as Lyotard dispenses with autonomy, Eco dismisses authorial intention. Faith will not do, nor will the intention of the interpreter: incommensurability comes in one of them with blind faith and with privacy in the other, a state of affairs that covers and blinds in very much the same way. And finally, Lyotard declares the incommensurability argument on a prescription-shy, subjectivity-fearing logical positivist basis, and the intention of the text which Eco advocates is but a textual positivism with strikingly similar anxieties. Because in each instance it is merely a political representation of that which is acquired through one of the two other categories, neither writer finds in the first one (autonomy or the authorial intention) a distinct category. The distinction, therefore, is one that is, once more, between the secular and the divine, or between textual intention and the intention of the interpreter. Considering, however, that in order to judge whether the intention put before one in a particular instance is the *right* kind of intention one will have absolutely no criteria other than, again, those of habits, a category of the *divine,* the prejudiced, the terms of the binary opposition will have to be redefined.

I discussed in the first part the argument suggested by the rhetorician Corax in defence of a person who is accused of violent assault on someone physically less capable.[36] It seeks to establish the less likely criminality of the stronger for his simply being the *likelier* on the basis of common probability. According to Aristotle who cites it, on the other hand, Corax' argument is 'not genuine' but designed to deceive, and fit, therefore, for 'no art except Rhetoric and Eristic.'[37] But how does one distinguish between eristic and dialectic? In eristic one is not supposed to be concerned about truth. All that one is concerned about is to win the argument. Suppose I think to myself of an argument someone has just put to me: it is a *good* argument, but *not genuine*. One can admire and appreciate a piece of furniture which is not 'genuine.' In an *argument* that seeks to make a point, however, it seems to be a contradiction in terms to be at once good but *not genuine*. If one may *think* it is not genuine, it has failed to make the point, and that alone will be the end of it: it is *not* a good argument. And where does *intention*, which is supposedly the *sole* difference between dialectic and eristic, enter into it? That which distinguishes between dialectic and eristic, namely the persuasive efficacy of the argument, distinguishes also between textual intention and the intention of the interpreter. The right intention is the intention that will *pass* for the right intention. And if one seems to have no criteria other than that which is common and habitual, the binary opposition both Lyotard and Eco suggest will have to be defined in terms of the primordiality of positions of prejudice, that is to say, of faith.

The anxiety typically exemplified by Eco is therefore to do primarily with the disregard of his discourse for the primordiality of the positions of prejudice in the face of persuasion. The narrative which is maintained on the one hand by a dissolution of the dichotomy between the secular and the divine, and on the other by persuasion as the sole distinguishing criterion, does not suggest a *sterile* circularity: the very 'overinterpretive' readings which receive the rebuke from Eco attest to that. Less does it suggest a free-floating privacy of passion to justify a dichotomy of the intention of the text and the intention of the interpreter.

2.2.1 Parliamentary Evidence

The idea of constraining criteria within the secure edges of the text is the panicked answer to the anxiety over the unrestricted passion of the interpreter. Hence, the long-standing, recently relaxed, English doctrine that confines the search for intention in interpreting an Act of Parliament '*within the four corners of the Act.*'[38] *Heydon's Case*[39] prescribes 'for the sure and true interpretation of all statutes in general' the duty of uncovering '[w]hat remedy the Parliament hath resolved' with the particular instrument. Tindal CJ designates as the 'only rule' of statutory interpretation, in *Sussex Peerage Case*,[40] interpretation 'according to the intent of the Parliament which passed the Act.' The parliamentary proceedings, however, are historically left out from the material to guide the interpretation where intention is not clear for exactly the same reason Eco emphasizes the priority of the text: where she stands, the interpreter essentially evades criteria.[41] The criteria come with the text. According to Lord Watson in *Saloman v Saloman*,[42] the 'legitimate' intention is merely that which is derived either from the 'express words' of the statute directly, 'or by reasonable and necessary implication.' The *Sussex* opinion, however, finds it safe for the interpreter to make use of the pre-Parliamentary evidence to establish the mischief the statute sought to remedy.[43] In his well-known and widely-supported opinion in *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg AG*,[44] Lord Reid, likewise, confirms the use of pre-Parliamentary evidence to find out the *ratio legis*. Pursued in the pre- and past-Parliamentary phases of the law, therefore, in an obvious paradox, Parliament turns out to be the only place where the uncovering of the Parliamentary intention is *not* pursued.[45] Just as the passion, personal interests and fancies of the interpreter, the judge, are held in suspicion for their elusive immediacy, the words of the members of Parliament are distrusted for leaving open the possibility of not being straight, unruptured, renderings of the speakers' immediate passion.

Anxiety over the lack of genuine intention in oratory has been ever-present

irrespective of the attitude to the use of parliamentary evidence in a particular legal domain.[46] In two separate opinions composed by John Marshall, the 'words' of the Constitution are described as the sole location where 'the spirit is to be collected,'[47] and the 'language' of the Constitution as the sole bearer of that which was or 'was not in the mind of the convention when the article was framed.'[48] Gény harshly criticizes the German Free School for setting loose the 'personal feeling' of the interpreter in the face of the 'formal authority' of the text.[49] The strict reading of the written law which he favours suggests at once a notion of intention framed within the physical confines of the text.[50]

I have already referred to J.L. Austin's anxiety over the lack of genuine intention in *fine* language.[51] It is in his reading of Austin's work that Derrida introduces his notion of *iterability* as the prerequisite of sign generally.[52] The former excludes the fictitious and the theatrical from that which is ordinary in the performances of language for their lack of genuine intention. While the very project of his work is an understanding of language as manifested in its *uses*. It opposes the mainstream, metaphysical notion according to which language essentially *transcends* its performances. In pointing out a reversal of basic commitments on Austin's part when he invokes intention, Derrida, needless to say, does no such thing as to challenge the difference of grammar that prevails between the theatrical and that which is not. Just as Wittgenstein says nothing of the inner sensation that occurs in one's state of pain when he advances his argument against the assumed privacy of it, and designates the meaning of 'pain' on the bases merely of its *iterable* signs as opposed to its so-called mental state.[53] As far as the performances of the word pain go, what is considered to be the inner sensation of it is 'irrelevant.'[54] In his vivid words, 'a wheel that can be turned though nothing else moves with it, is not part of the mechanism.'[55] What Derrida demonstrates in his reading of Austin, therefore, is that it is the very secondary, the very 'parasitic,'[56] left out by the latter from the investigation of language, that is essentially behind what Wittgenstein calls the mechanism. Intention plays no part in it. And, as I have already pointed it out,[57]

Aristotle only anticipates Austin in the latter's predicament when he marks rhetoric with its qualities of 'delivery' and 'staging,' and opposes its 'fine language' to the straight, unruptured medium of geometry.[58] The 'appearances' which constitute 'the whole business of rhetoric' and which are essentially 'unworthy,' however indispensable,[59] therefore, not only turn out to be *central* in the event of signification, but they also form the *sole* criterion that distinguishes between rhetoric and dialectic. A parliamentary piece of oratory deemed to have saved the *appearances* has saved it *all*. It has saved it all, because there is no other criteria available for validity, not only of parliamentary rhetoric, but generally.

That the appearances are the *sole* conceivable bases of validity, however, seems to have escaped even those who have often argued *against* the inadmissibility of Hansard in the interpretation of Acts of Parliament. In his opinion in *Hadmor Productions v Hamilton*,[60] Lord Denning ventures to discover 'what Parliament meant when it passed s.178 of the Employment Act 1980' because the case suggests *unusual* difficulty. 'In most of the cases in the court, it is undesirable for the Bar to cite Hansard or for the judges to read it.'[61] The recent decision of *Pepper v Hart*[62] formally relaxes the exclusionary rule.[63] Where ambiguity or absurdity are at issue, references to Hansard are to be permitted in order to discover the true mischief resolved. The parliamentary material to be admitted is pointed out in this milestone decision, however, as merely 'the statement of the minister or other promoter of the Bill.'[64] On what possible basis can one exclude the material that can sell itself as relevant? On what possible basis can one exclude an interpretation that can sell itself as convincing? And if the specific interpretation cannot do it, what difference does it make whether the interpretation originates in Hansard or elsewhere? Or whether it relies, within Hansard, on the speech of the promoter of the Act? Ironically enough, both sides in the controversy over Hansard do believe that it does make a difference either way. 'I always look at Hansard,' says Lord Hailsham. 'The idea that we do not read these things is quite rubbish.'[65] What is it he gets out of Hansard he could not otherwise have had? Will reference to Hansard be more than

merely *supportive* of that which has *already* been interpreted? Vera Sacks pursues in an essay the admirably operational objective of finding out whether recourse to Hansard (alongside other preparatory material) would have made a difference in a variety of cases with interpretative difficulty.[66] That she finds herself further enlightened in virtually no instance with regard to the problematic readings[67] is hardly a surprise. She finds, however, that consulting Hansard still gives the 'valuable insights not available elsewhere' of discovering that sometimes no intended meaning is involved in the first place, that the ambiguity is at the very source, and that as far as the interpretation of an Act is concerned often everyone is meant to be for himself.[68] And yet, from another angle, the inadmissibility rule is pointless, as only few seem to feel constrained by it.[69] Then, is the final word that references to Hansard could not possibly make a difference? The references would make a difference, according to Sacks, especially if they had a 'selective' quality about them. 'What must be strongly condemned is *selective* reading from Hansard.'[70] Lord Browne-Wilkinson's opinion in *Pepper* which formally commences a post-exclusionary era, does so only to retain a private notion of parliamentary intention insofar as the opinion allows references only to the material by those who stood behind the Act.[71] The prevalent anxiety at once underlies Sacks' warning against selective reading. It brings out intentionality, namely the private passion on the part of the interpreter, exactly the way it emerges in J.L. Austin's exclusion of the pretending performances of language. Justice Frankfurter, likewise, expresses caution against the '[s]purious use of legislative history' at the cost of the words of the actual legislation.[72] It is enigmatic, however, how the anxiety over passionate reading is justified, for that which will be decided eventually is *but* that which *can* be decided. Obviously, parliamentary references can have considerable political weight. That is so in particular in a case where either way the result will come as no great surprise. The political support of the reading, selective or otherwise, however, will only be for that which is *decidable*. And the specific reading will hardly have had a part in determining the decidable in the first place.

The notion of *dramatic* outcomes, with or without Hansard, and in any order or selection of it, follows from the occult idea of intention that is at the bottom of the anxiety over oratory and passionate interpretation: intention as a private state. The underlying opposition is that of intention and extension where a covering up of its constitutive connections makes the former term one of *presence* which at once transcends its epiphenomena or that which merely *extends* from it. The dichotomy of intention and extension, therefore, is simply another variation of the binary opposition of the law and its readings which appears to characterize the entire project of the mainstream legal thinking.

2.2.2 The Silly Intention

How is it that what sounds like simple common sense, namely the absurdity of a distinction between meaning and intention, becomes problematic in reading the law? William Goodell makes it the duty of the legislator and the judge, in an era before the thirteenth amendment, to legislate or decide against slavery.[73] And he does so on a *constitutional* basis. Does he invoke, in so doing, the *meaning* of the Constitution against the *intention* behind it? 'We the People of the United States,' opens the Constitution. Does 'the People' refer also to the *blacks*? What would it mean to respond, 'it does not, *intentionally*, but it does by meaning'? Or that *both* by meaning and intention the blacks are also included in 'the People'? Whose intention? That of the 'founding fathers,' who wrote it, or that of the adopters of the thirteenth amendment, who took steps to include the blacks in it? Or, perhaps, that of the Warren Court, who is thought to have brought the black people more in line with the rest? What does it mean for an expression to *change* its meaning? What does it mean for it to change its *intention*? Did the expression of the Preamble *change* its intention? Did the intention of the founding fathers go away, as it were, and did a new one take its place? And where is the *place*?

One example of the distinction between the intention of the law and its meaning is the reading by the *Conseil d'Etat* of a Vichy statute.[74] The law which declared administrative decisions of a particular type to be absolutely without remedy was interpreted not to leave out ultra vires because its exclusion had not been made in specific terms. 'Although the true intention of the law-giver was known to all, an argument drawn from an omission in the text enabled the court to find the 'objective' meaning of the statute.'[75] If an original meaning, as opposed to the 'objective' meaning, does not uniquely, necessarily and at all times accompany the law (which appears it does not, as the court was able to supplant it with a *new* meaning), why suppose the *intention* of it, namely that which was ignored by the court, accompanies it uniquely, necessarily and at all times? Could an objective *intention* not be obtained from the law? Could the court not change the *intention* of the law the way it changed its meaning? A variety of odd questions arise because the so-called objective meaning is considered to be somehow *of* that which it in effect settles scores with, namely the Vichy law. And a dichotomy of meaning and intention is introduced to cover up the fact that it is *two distinct intentions*, and not one meaning and one intention, that confront on the particular issue. It is a confrontation in which the third party of a *formal statute* hardly takes part.

The suggested opposition dissolves itself in its clumsy suppression of that which is *decidable*. I discussed it above regarding the literality argument which is characterized by the same impasse:[76] how do you follow an intention that is outright silly? The occultism postulated by counter-intentionalist positions enables not only an opposition of meaning and intention, but it also makes possible an opposition of intention and intention. In what I quoted above from *Sussex Peerage Case* 'the Parliament which passed the Act' is indicated as the sole holder of the intention.[77] A certain reading of the Act may also be rationalized, however, on the basis of the intention of 'the present law-maker,'[78] a holder of intention that can be present in parliamentary form or as a purely ideal supposition which intends no silly things. An 'objective' intention in contradistinction to the original intention, therefore, may

well be conceivable. And yet another counter-intentionalist dichotomy is one of intention and purpose,[79] a distinction whereby the silliness of the former over time can be compensated for by the unstationary aptitude of the latter.

That the intention of the law can be silly as such, and that a silly intention can somehow find its way into that which is decidable, are concepts entertained characteristically by counter-intentionalist views. When the Napoléonic codes were created, writes René David, 'it was at first thought that they should incorporate the very principles of reason.'[80] That which pervades the idea of legislation in France, he notes, is that it 'embodies reason.'[81] In his celebrated speech at the centenary of the Civil Code, Ballot-Beaupré, the first president of the *Cour de Cassation*, invokes the dictates of 'justice and reason' in the face of the possible silly consequences of the historical intention.[82] The question gone unasked, however, is how one could possibly conceive what legislation that did not 'embody reason' would be like. The law that does not 'embody reason' does not exist, except that the *reasonable* entails a variety of trails which more often than not may cross over one another. The decision of *Grey v Pearson*[83] concerns the interpretation of a will, the legal document in whose interpretation Gény finds the inspiration for the construction of the legislative text.[84] The well-known opinion in *Grey* cautions against the *silly* meaning that may emerge in the interpretation, for the silly could not have been intended.[85] In *River War Commissioners v Adamson*,[86] Lord Blackburn confirms the 'golden rule' of the former, and rules out 'inconsistent,' 'absurd,' or 'inconvenient' intention: the 'ordinary' meaning that suggests a silly intention on the part of the legislator is to be avoided. In his opinion where Justice Marshall designates the text of the Constitution as the locus of intention,[87] he also states that the 'plain meaning,' when manifestly 'monstrous,' is to be abandoned as the intention, 'because we believe that the framers... could not intent what they [appear to] say.'[88]

That the silly intention does not exist is expressed most remarkably by Hobbes in the *Leviathan*.[89] The dichotomy of the literal ('the Letter') and otherwise ('the

Sentence') is to be understood only grammatically ('*men* use to make a difference between [the two]'), for neither will be functionally extant ('the significations of almost all words, are... ambiguous') without the greater category (of reasonableness, the 'Equity') that houses them.[90] Arguments in its interpretation, subsequently, can be made on the basis of that which is categorized as literal, or otherwise, whichever best suits the occasion, '*but there is only one sense of the law*,' namely its *intention*.[91] Establishing the intention of the law involves making sense of it in a way that is equitable.[92] For if what emerges is not equitable it cannot be the intention of the legislator.

> Now the Intention of the Legislator is always supposed to be Equity: For it were a great contumely for a Judge to think otherwise of the Soveraigne.[93]

The terms in which Hobbes conceives the inequitable intention are akin to the terms in which Aristotle leaves room for those who are *free* of the association of the *polis*:[94] the isolated, namely gods and beasts, give a good idea of the sort of interpreter who would come up with a *silly* intention of the law, namely none. A silly intention does not exist. The silly, on the contrary, seems to be the concept that the intention of the law needs the cautions, protections, and assurances of rules such as that of *Grey v Pearson*[95] against that which is unreasonable, to start with. What also follows from the Hobbesean notion of intention as a concept of reason *in each case*, albeit within a fairly wide range of conflicting traces, is that in no instance intention signifies a private state. The decidable has never been a stationary concept.

I have pointed out the paradoxical character of the intentional controversy in that counter-intentionalist positions such as that of Eco suggest a somewhat greater commitment to intention as an essentially private occurrence in whose terms they would otherwise like to describe the opposing views of intentionalism.[96] The reason Eco dismisses authorial intention is the reason he condemns the intention of the interpreter, namely the elusive and unbridled quality of intention in the face of the

common awareness of the text. Ironically, however, the holders of intentionalist views have hardly ever invoked as the locus of intention anything other than the *text*.

In his defense of intention against Max Radin's famous counter-intentionalist argument, James Landis suggests the preparatory material of the law beside its text as the place where the intention is to be sought.[97] According to Henry Monaghan and Robert Bork, who advocate an intentionalist reading of the Constitution of the United States, intention is to be collected in the text of the Constitution.[98] The text, Monaghan designates as 'the best evidence of original intention.'[99] The decisional interpretations of it 'by courts nearer in time to the origin' should also throw considerable light on the intention borne by the text.[100] Against the counter-intentionalist arguments which posit the elusiveness of intention especially over a time gap of centuries as in the case of the Constitution, Bork draws attention to the fairly uncontroversial element of original intention in interpreting on a textual basis the views of ancient authors such as Plato and Aristotle.[101] In this respect, an elaborate view of authorial intention on the basis of the text has been maintained by E.D. Hirsch in literary criticism,[102] whose project has inspired work also in law.[103] An yet another intentionalist position, held by Gerald MacCallum in his essay where he discusses the Radin-Landis dispute, is based on a notion of common awareness which is textual, but which does not appear to subscribe to a crude formalism that would confine intention within the four edges of the text.[104] The legislator is able to convey sense in the first place, he writes, as he deliberates through the common medium of language, whereby 'he can anticipate how others... will understand [his] words. The words would be useless to him if he could not anticipate how they would be understood by these other persons.'[105]

Intentionalist positions certainly do confirm a dichotomy of intention and extension. Landis, for instance, distinguishes between 'intent' and 'purpose.'[106] Unlike the *private* experience of the latter, the former can be looked for in the legislative records. MacCallum agrees with Landis on the distinction. As he is

resolved to perceive intention as mere extension, in each instance, of the transparency that characterizes language, he at once feels compelled to entertain a concept of legislative 'purposes' where the *immediate experience* of intention is to be deposited.[107] Bork, likewise, distinguishes between the intention of the Framers and 'the principles they intended,' that which manifests itself in the text being merely and amply the latter.[108] In short, a dichotomy of *intention as extension* in contradistinction to *intention as presence* is implied by intentionalism as well as counter-intentionalism. Intentionalist positions, however, would appear to emphasize the *extensional* character of the idea postulated in intentionalist arguments, and *disown* a notion of intention based on the immediate, occult experience of the legislator.

The concepts of silly intention and of its possible threat to infiltrate, as it were, that which is decidable have been characteristically harboured by counter-intentionalist views, on the other hand, as they have consistently presupposed intention to be a private, closed experience. Because it is designated as a term of *presence* in the first place, claims to intention on an *extensional* basis have been criticised either for their delusions of it or for their use of the concept as a façade for an interest-ridden, political interior.

2.2.3 Intention as a State of Mind

In his classic essay on statutory interpretation Radin introduces the standard counter-intentionalist arguments to disclose the *false* project of intentionalism.[109] To start with, intentionalism is a venture 'to enter into the mind' of the legislator and is therefore utterly unrealistic.[110] Secondly, even if it were possible to turn inside out the legislative mind, intentionalism would still have no case, for the legislator is but a fiction, it 'does not exist.'[111] The legislator is an abstraction to signify a collegiate body of *many* minds. 'The chances that of several hundred men each will have

exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.'[112] In an equally memorable essay, John Willis distinguishes between the 'actual intent' of the legislator and 'the social policy behind the Act,' and warns, in similar vein, against the delusions of the former, for 'a composite body can hardly have a single intent.'[113] The point is confirmed in yet another essay of note by Douglas Payne insofar as 'the legislature being a composite body, cannot have a single state of mind and so cannot have a single intention.'[114] The idea of the elusiveness of intention on a collegiate basis has not ceased in more recent literature of statutory interpretation to be the principal argument against intentionalism.[115] And in constitutional interpretation, its point has been made with equal vigour. I quoted in the preceding section from Alexander Bickel on the original understanding of the equal protection clause, the textual evidence that was made the basis of the anti-segregationist decisions of the Supreme Court.[116] In another inquiry into the same subject before the anti-segregationist decisions, the writers express confusion over the *point* of searching for a unitary intention amongst 218 Congressmen with a variety of distinct interests.[117] The equal protection clause of the fourteenth amendment was adopted at a truly tempestuous time. But '[e]ven if the times had been calm and conditions static, the general phrases of the Amendment could not have meant even approximately the same thing to all who voted upon them...'[118] Justice Brennan, one of the fiercest opponents of intentionalism on the bench, likewise, questions the idea of an historical intention also for the dubious nature of the enterprise that seeks a single, original intention behind 'a jointly drafted document.'[119]

True to the intellectual spirit which characterized legal thinking in the first half of the century,[120] but which permeated primarily the studies to evaluate propositions in science,[121] Radin refuses to take into account the existence of the legislator, for its existence is merely a *figurative* existence. The legislator does not exist, for it has no *presence* as such. His argument does not make it clear, however, why one should suppose that *intention*, in contrast, is marked by a moment of *presence*. The

legislature does not correspond to a definite, unitary entity, actions taken in its name and references to which, therefore, are bound to be lacking the definite and verifiable content in order to be the basis of a judgement. As he points out a complex, multi-minded organisation, and at once a confusing blend of affirmations and negations, for which the word 'legislator' stands and without which it would have no existence, one could readily indicate too the numerous instances of *intention* in each one of which the word signifies an entirely different meaning and without which it would hardly be present. What Radin seems to disregard in the first place, therefore, is the primordiality of that which makes intention, as well as the legislature, *concepts of extension*, of namely a world fraternity. The concepts *extend* not from what would represent some selfsame, immediate being on the part of what they signify, but from the *attachments* that constitute a fraternity. Collegiate intention is inconceivable only when intention is perceived in terms of pure immediacy, pure presence. Intention *is* collegiate intention, not only in the case of the legislature or in a contract where the participants of conflicting interests could intend the execution of one definite thing, but *generally*, insofar as intention will make sense *only as much as it relates to a world fraternity*. An initial paradox of many-minds-and-one-intention manifests itself because intending is considered to be an artefact, not of those attachments always already in place, but of what Heidegger calls the 'cabinet' of mind.[122] The supposed paradox of collegiate intention, with whose sole weight Radin launches 'the most famous anti-intentionalist argument,'[123] is put with admirable precision and then duly dismissed in what is ironically the earliest treatise known in English on the interpretation of statutes.

> The seconde case whereby the statute shall be taken is *ex mente legislatorum* for that is chiefe to be considered, which, althoughe it varie in so muche that in maner *so manie heades as there were, so many wittes; so manie statute makers, so many myndes; yet, notwithstadinge, certen notes there are by*

which a man maie knowe what it was.[124]

The paradox would arise not only over the question of *many minds*. Postulated as a concept of *presence*, it would seem to be equally mystifying to entertain the idea of intention, even on an individual basis, to aim *ambiguity* or *silence*. Sacks finds in her investigation into the preparatory material of certain statutes that ambiguity is sometimes *intended* by the Parliament.[125] *Intentional* vagueness or imprecision is often said to be a major source of interpretative issues in different legal domains.[126] How does one intend ambiguity? How does one *imagine* it, in the sense of having a mental image of it? And what is the mental image of *silence*, a state of affairs which can be *intentional* and which, in certain legal systems, can have significant consequences?[127] In stark contrast to the Cartesian epistemology which makes *knowing something* 'a process of returning with one's booty to the cabinet of consciousness after one has gone out and grasped it,'[128] Heidegger points out that '[e]ven the *forgetting* of something'[129] is in each instance an *extension*. It is an extension of one's attachments to a primordial world which defies a dichotomy of one's pure immediacy on the inside and a mediated common awareness on the outside. Does the immediate mental image of silence occur as the mind goes *blank*? Neither intending silence nor going blank in the mind, however, would seem to acquire sense, even for the very immediate actor of the experience, in reference to a state of mind. 'I didn't mean *that* when I said it!' exclaims one. 'I know *well* what you meant!' responds the other. Is the argument possibly about the content of the mind that produced the disputed statement? Sir Thomas Egerton of the afore quoted treatise, for one, would not regard either of the two disputants as the necessarily privileged party to have exclusive hold of the meaning intended in the statement. The argument is possibly over a confusion, between the two, of what he calls the 'notes' regarding the statement, namely its *fraternal attachments*. Or perhaps it is an altogether different game.

As the attachments of the statement to an association already established

constitute its *sole* bond to that which is intelligible, or that which can *be*, and that is so not only for the listener but more significantly for the utterer also, fraternal meaning *is* the actual meaning of the statement. When Willis distinguishes between the 'actual intent' of the legislator and the policy borne in the Act,[130] what his distinction disregards in the first place is that actual intention in each instance *is* but act—ual intention, in the sense that it is in each case essentially enveloped in what Egerton calls *certen notes* about it. It is none other than, and correctly, those *notes* that are invoked when a writer states at the outset of his book on a concept by Wittgenstein that his 'main aim in this book is to give a clear and accurate account of *what Wittgenstein actually thought*...'[131] Wittgenstein himself would be first to oppose that he had a necessarily privileged hold over his *actual* thinking.[132] In *Philosophical Investigations* he relates the example, provided by William James, of a man who reportedly had thoughts before he was able to speak. The latter aims to show by the example the essentially separate functioning of one's thought from language, the forestructuring house of one's attachments to a world already established. The man who had the thoughts later put into writing what his thoughts had been about. 'Are you sure — one would like to ask —,' comments Wittgenstein, 'that this is the correct translation of your wordless thought into words?'[133] The witticism by Wittgenstein indicates the enigma that suddenly appears as that which is intelligible is claimed to be so without fraternal attachments. What the claim in fact does is simply to invoke *another fraternity* which would be alternative to that reflected in the language, rather than exemplify thought *without* fraternal attachments. Hence, the 'translation' Wittgenstein points out.

The primordial forestructuring of those attachments is well attested in the decision, by the Queen's Bench Divisional Court, of *R v Registrar General, ex parte Charlie Smith*.[134] The statute in question[135] makes it possible for the adopted children of 18 years of age and over to obtain on application a copy of their original birth certificate. In the present case, however, the Court chose to refuse the applicant the information about the identity of his natural parents. The High Court

reading of the law is at once striking and exemplary. The particular applicant had been sentenced to life imprisonment for a murder which had been virtually without motive. He had committed another murder while serving the sentence, this time having taken the victim for his adoptive mother. The Court held in perspective what it considered to be disturbing facts about the applicant[136] and decided that a positive response to the application in the specific case could note have been the intention of the legislator.

> It is, we think, *beyond belief that Parliament contemplated that* an adopted child's right to obtain a birth certificate should be absolute come what may. The public at large, knowing the essentials of the facts, we consider would, we have no doubt, *be outraged if that were so.*[137]

The opinion is remarkable on more than one account. First, it defies a dichotomy of meaning ('plain meaning') and intention, and confirms that the *silly* could not have been intended. Secondly, it refers in so doing to a legislative intention which at least in the present case could not be taken for a state of mind. Thirdly, a *continuity*, a common awareness, is hinted at insofar as what the Court refers to is also that in which the statute must have been conceived in the first place. And finally, unlike many over-zealous High Court opinions, it discloses in unequivocal terms the element of *persuasion* that underlies the decidable. That which is *not* decidable, in other words, is that which the court could *not* get away with. As the Court outrules the concept of silly intention, it at once suggests the actual intention of the statute as that which is constituted by the fraternal attachments of the statute. It invokes the very *experience* of intention on the part of the Parliament as an *extension* of a common awareness. 'It is, we think, beyond belief that Parliament *contemplated* that...' The firm conviction of the Court is an effect of that with which Egerton dismisses an initial paradox of intention, namely *certen notes*[138] about it. And what could provide a *firmer* conviction? What is particularly crucial to notice in what

occurs is the *constitutive* part played by those notes even for the immediate actor of the experience. Radin's argument makes the project of intention impossible because legislative intention is a *collegiate* intention.[139] The paradoxical conclusion that emerges from a critical probing of his argument, therefore, is that intention is possible *because* it is in each case a collegiate, fraternal intention. And that is so not only for the intention of the legislature, but *generally*.

The German jurists who advocated at the turn of the century a *free* search for the right remedy when required, as opposed to a mechanistic notion of jurisprudence, also pointed out, not infrequently, the *extensional* character of meaning. The work of the German school is sometimes associated with that of Gény. The latter, however, as I have noted it,[140] fiercely opposed the extensionally inclined views of the former. Paradoxically, the idea of intention postulated by Gény as the sole basis on which to interpret the statutory law[141] is virtually defenceless in the face of arguments such as those of Eco and Radin, because basically it clings itself to a dichotomy of intention and extension[142] even though the traditional intentionalism of Gény and of many others presupposes considerably less occultism, to borrow once more the word from Wittgenstein,[143] than the counter-intentionalist views of intention.

According to Kohler, on the other hand, interpretation seems to be conceivable only on an extensional basis. Thought as 'a complete slave of our will,' and thus as a radically distinct category from that which is extensional, 'is a common error' of conviction.[144] He refuses the privacy suggested by an occult notion of thought insofar as 'our thinking is not merely individual but also social; what we think is not our own product.'[145] That which is expressed in language is, first and foremost, part of a common, all-encompassing awareness. As such it 'has a life of its own independent of the person who thinks or expresses it.'[146] His concept of the text, therefore, clearly excludes the idea of a private and privileged hold on the part of the scribe. It emphasizes the fraternal attachments that define authorship as well as interpretative thought. '[T]he author of the statute... is not more the master of the

thought than thought in other instances is the mere slave of the will...'[147] One would like to think from Kohler's analysis that the thinking which Gény condemns for its unrestrained liberalism and which the former's approach crudely falls into not really implies a free-floating journey, but that, on the contrary, it almost *compensates* for the vulnerability that characterizes Gény's idea of intention. A dichotomy of meaning and intention, as suggested by virtually all the counter-intentionalist positions, will not hold, in that both categories of signification originate through the transparency of an underlying fraternity. As his enigmatic distinction between *thought* and *will* immediately gives it away, however, a dichotomy of intention and extension equally defines Kohler's project.

> Hence we may say, statutes are not to be interpreted according to the ideas and intentions of the legislator, but should be interpreted sociologically, as if they were the products of the entire people of which the legislator was but the organ.[148]

As his notion of thought precludes an occult privacy, the *will* remarkably evades the connections that forestructure thought. To hold, naturally, that a sociological reading must take precedence over intentional reading is to presuppose at once that what is intentional would somehow escape the fraternal attachments whose primordiality inspires a sociological idea of reading in the first place. The sociological idea of interpretation loses its point, therefore, at the very moment a *non-sociological* notion of interpretation is conceived.

I noted above that the figurative quality Radin allots to the legislature is a general quality that signifies the relationship between language and its other, namely what is taken to be its content.[149] A variety of distinct instances equally characterizes *intention*. It appears to have in common in all its uses merely what Wittgenstein calls a 'family resemblance.' One single feature could not be found to underlie *all* its instances, even though there will be strong, individual resemblances between

them.[150] For different instances of the word intention to convey sense, therefore, different criteria, or what Egerton would call different 'notes,'[151] are required,[152] although the *difference* goes often unnoticed, for the fraternal attachments in place have already eliminated all but its present instance. The confusing range of the instances of intention is pointed out by Austin. He points out to its varying uses such as in the intention of contractual intention alongside the intention of the legislator. He nevertheless concludes that

> [i]n each of these cases, the notion signified by the term 'Intention' may be reduced to one of [two] notions... namely, *a present volition* and act, with the expectation of a consequence; or *a present belief*, on the part of the person in question, that he will do an act in future.[153]

Both notions sketched out by Austin essentially reflect an accompanying state of mind. In either case, however, the *criteria* which come after the concept of *presence* and which are clearly secondary to the immediacy of the concept would appear to be perfectly capable in their supplementary position, and alone, to perform the game to the effect as would be desired. Does really the presence of a volition, or an expectation, or a belief, on the part of the intention-holder, make a *defining* contribution to the term?

In the vein in which Kohler draws attention to the extentional character of interpretative thought, Kantorowicz questions the notion of will as suggested by what he calls the 'accepted doctrine.'[154] Accordingly, what essentially defines a transaction, for instance, is but an overlapping of states of mind on the part of the transactors. In a commonest example of 'willed transaction' which he provides, however, the *will* appears to be produced by criteria, and *not*, as the traditional theory would have us believe, *vice versa*.

> If I board an omnibus the law requires me to conclude a contract of carriage with the company running the omnibuses,

> and this, according to the accepted doctrine, requires *two internal acts constituting a consensus of minds*; but if I pay my usual fare absent-mindedly because I am reading a novel I have nevertheless done all that the law requires me to do and the conductor cannot turn me out on the ground that I have not made a payment in the legal sense of a willed transaction, but *merely made external movements of my fingers*.[155]

A transaction, in short, is a *performance*. It is an exchange of actions and *not* minds. Through a *figurative* notion of will, criteria, and criteria alone, execute the entire game. That which prompts Kohler's dichotomy of sociological and intentional reading, namely an underlying opposition of inside and outside, however, comes to mark Kantorowicz's argument too as he proceeds to confine the primordiality of criteria within the sphere of *law*. Citing Kant on a distinction of legality and morality, he defines the former in the modest terms of 'mere conformity of external conduct.'[156] Justice also, he adds, is situated in the realm of extension. The conformity which therefore characterizes both law and justice, he makes part of what he calls 'quasi-morality.'

> By this word we mean *a purely external conduct* which as to its content complies with moral rules and which therefore would be moral if it were dictated by *a good motive*.[157]

It is mystifying that if the notion of a right *motive* is eventually to be retained why it should be eliminated in the realm of law and justice. What is more puzzling, however, is what *extra* part intention is supposed to play in morality as opposed to the quasi-morality of law. As with Radin, that which is figurative gets charted unfit by Kantorowicz to be the basis of what is *genuine*. A figurative notion of intention underlies transaction. Intention as presence alone, however, makes genuine morality. Will not the very notion of 'a good motive' convey sense only through the criteria of 'a purely external conduct'? As Wittgenstein would put it, how on earth is one supposed to have *learned* what 'a good motive' is in the first place? What can

possibly rationalize the notion that genuine morality is *more* than that which will pass for genuine morality?

It can be rationalized only in one way. What the argument by Kantorowicz suggests is neither simply nonsense nor a transference, as it were, from a *figurative* notion of intention in law to intention as *presence* in the realm of morals, but a shift from one figurative notion of it to another. He switches the game.

2.3 The Tame and the Freakish

That which is primarily anticipated in the conceptions of silly rule and silly intention is the silly *judgement*. The post-war years saw the advancement of arguments by the holders of natural law views drawing attention to the hazardous implications of a mechanistic application of the law without considerations of a moral content.[1] I discuss in the present study the concept of the just which defined the Nazi law to point out the primordially *opinionated* — in the sense of opinion-based and at once dogmatic — character of judgement.[2] In a curious reversal, writers with a positivistic stance over the reading of the United States Constitution have argued *against* moral considerations in the application of the law by issuing a similar warning. According to the judges Rehnquist and Bork, the notion that dictated the calamitous decision of *Dred Scott v Sandford*[3] followed simply from a confusion on the part of the Court between the categories of the moral and the legal.[4] That which is immediately paradoxical in view of the naturalist warnings of the earlier era against a positivistic notion of the law is the *positivistic* uses, in counter-warning, of what was a significant precursor to the Nazi pattern of the just. The decision of *Dred Scott*, for Bork, is an expression of the judge's private ethics as opposed to a dictate of the law. In it 'the politics and morality of the Justices combined to produce the worst constitutional decision of the nineteenth century.'[5]

Amongst the decisions that are equally bad this century, he cites those of *Lochner v New York*[6] and *Roe v Wade*.[7] It is self-deleting, according to him, to give support to one of the decisions with a core of infiltrated politics and condemn the rest. 'Who says *Roe* must say *Lochner* and *Scott*.'[8] Bork's contention bears unwittingly the insight that it is for the most part a war of fleeting positions of rhetoric, rather than a confrontation of elaborate and coherent generalizations, that characterizes competing arguments of constitutional review. That which is a 'progressive' argument in *Roe* may not necessarily be so in *Lochner*. 'There is no reasonable ground for interfering with the liberty of person... by determining the hours of labor...'[9] That could well be from a decision to recognize the woman's right to choose and determine her own 'hours of labor.' Only it happens to be from a decision that finds non-emancipatory the state regulation of maximum working hours to protect the interests of New York bakery workers. That an interchange of the arguments in two different decisions, one absolutely discredited the other not very much so, is conceivable at all hints at the elusive quality of that which is a bad decision. A transposition of similar kind defines the terms in which the majority, pro-choice, opinion of *Roe* refuses the *originalist* argument for the foetus as a person: 'that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.'[10] Unlike that of *Roe*, however, the decisions of *Dred Scott* and *Lochner* are more than simply controversial. They are disgraced decisions. Justice Taney's majority opinion in *Dred Scott* reads:

> The question is simply this: Can a negro, whose ancestors were imported into this country and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen... We think... that [the Negro] are not included, and were not

> intended to be included under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.[11]

I referred above to a certain reading of the Constitution by Frederick Douglass, an ex-slave.[12] His views of the Constitution and of its framers — which ironically, and strikingly, match Taney's — were already in publication when Taney's opinion was composed. What the opinion considers to be the standpoint of the Constitution and of its authors and supporters must have found agreement, therefore, amongst the very *abolitionists* as well as those who saw the Negros fit for no inalienable rights.[13] And that alone seems to place the decision of *Dred Scott* safely within the range of the *decidable*. What Bork does in denying its decision even historical decidability is not simply to glorify that which is decidable. His sole point of criticism in the opinion of *Brown v Board of Education*[14] is that it reflects the subversive view that the Court may legitimately part with 'the original understanding in order to do the socially desirable thing.'[15] Therefore, the resistance by Bork to recognizing in the decision of *Dred Scott* the very epitome of his dichotomy between the original understanding and the socially desirable thing indicates sheer brazenness on his part, beside mediocre rhetoricianship. 'There is something wrong,' notes Bork, '...with a judicial power that can produce a decision it takes a civil war to overturn.'[16] That the decision of *Dred Scott* was not decidable, however, hardly necessarily follows from the fact that it had to be reversed at the cost of a civil war. Without the privacy with which the passion behind the decision would have to be defined one would be at loss to account for its freakish conception by Taney and

others in the first place. But what exactly was *freakish* about it? Was the decision freakish in its *consequences*, as opposed to its report, its opinion, supported by the very testimony of none other than the opposite camp of Douglass, of the original understanding? Obviously, the Court could *reverse* the effects, for the present case, of the sentiments that had been behind the choices of the authors and immediate supporters of the Constitution. A reversal of those effects would have been equally part of the attachments in place. The sentiments for the *consequences* of the original sentiments, however, seem to have been as much part of the attachments in place as the Court opinion in its report of the original sentiments. That the effects that denied the rights and privileges of citizens to the blacks were very much part of the consensus is well attested by, of all people, Justice Harlan's support, at the time, of the outcome in *Dred Scott*,[17] who, by a stark contrast, would later go in his 1896 opinion of dissent in *Plessy v Ferguson*[18] further than the 1954 decision of *Brown* for an uncompromising condemnation of racism and the segregation. The civil war hardly took place to eradicate the sentiments so *widely* shared in the society. An altogether different set of motives, ones which a reversal of the decision in *Dred Scott* stood for, meant probably in the fraternity of the prevailing attachments considerably more than a mere overturn of the judicial endorsement of white supremacy. On the contrary, and despite the ensuing civil war amendments, the decidable at those particular connections would entail the endorsements, in one way or another, of white supremacy for at least another century. When Bork observes 'something wrong' with the 'judicial power' that produced the decision of *Dred Scott*, therefore, a dichotomy of the law and its readings thereby postulated is only intended to spare one the embarrassments and pessimism of a primordially *opinionated* concept of that which is decidable.

2.3.1 The Countermajoritarian Objection

A concept of *freakish* judgement underlies characteristically what is sometimes known as the 'countermajoritarian objection' to judicial review. Antidemocratic implications may suggest themselves, accordingly, in the judicial review of legislative acts[19] or in the judicial substitution of the legislature where the law is non-extant or unclear.[20] Is 'majority' represented by *the majority of the present legislature*, the majority that passed the statute, or in the *Constitution*, a document often defined by a supreme order? Where exactly does the *court* stand? In response to Justice Peckham's question in *Lochner,* where a state statute is declared invalid, 'are we all... at the mercy of legislative majorities?'[21] Bork states, 'yes,' that about sums up the American way.[22] The unquestioned supremacy of the legislative majority is recognized, however, only when the Constitution is deemed to be 'silent' on a particular issue.[23] Consequently, why majorities should be *ignored* when they challenge what would be considered to be the choice of the Constitution seems to leave in the argument of majoritarianism an irreparable hole. In other words, the countermajoritarianism displayed by Peckham in *Lochner*, for instance, and despised by Bork, is at once *the* principle that is behind constitutionalism. One solution, of course, would be to distinguish between the countermajoritarianism of the Constitution and that of the judge, just as a distinction is installed between the law and its readings. The dichotomy is taken for granted by James Thayer in his classic argument for majoritarianism.[24] The sole basis of the designation, by Learned Hand, of instances of judiciary as a usurpation of the legislative power, a 'third chamber,' presupposes that same dichotomy.[25] It alone makes possible the Wechslerian conception of a 'neutral' judiciary.[26] And Alexander Bickel, finally, in a seminal exposition of the subject, condemns what he considers to be the countermajoritarianism of the Court by confirming a prior dichotomy of the law and its readings and thus for an ensuing fear of the *freakish*, 'judicial review is a deviant institution in the American democracy.'[27]

As a dichotomy of the law and its readings appears equally to mark the positions that resist the idea of a timid judiciary, on the other hand, the paradox of countermajoritarianism turns out to be one with two sharp edges. When John Hart Ely confers upon the court what he calls a 'refereeing' duty[28] whose example he finds in the performance of the Warren Court, a court in the centre of the controversy over the political involvements of the judiciary,[29] he at once opposes the refereeing pursuits of the court to a value-imposing, partisan, position, namely one which would risk the freakish. William Brennan, in a condemnation of what he calls an '[u]nabashed enshrinement of majority,' points out as the American way quite the opposite of the plain majoritarianism suggested by Bork.[30] He refers, instead, to a tradition in the order of which 'certain values transcen[d]... the reach of temporary political majorities.'[31] What a distinction between the majority and the transcendent values primarily places on the side of the (majority) readings, in turn, is a capacity to turn freakish. According to another writer, Philip Bobbitt, a countermajoritarian threat will not be the issue unless judicial review ceases merely to safeguard the legitimacy of the Constitution and becomes instead politically motivated.[32] The political, in contradistinction to the constitutional, therefore, stands for the freakish. And Michael Perry, in his view of an active judicial involvement in the recognition and preservation of what he calls the constitutional 'aspirations,' yields to the countermajoritarian paradox as he ventures to sidestep it.[33] In one attempt, he distinguishes between the 'extraconstitutional' and the 'contraconstitutional.'[34] Extraconstitutional policy-making by judiciary poses no immediate problems of legitimacy insofar as stretching beyond the original understanding does not *necessarily* invite a countermajoritarian difficulty. While the latter, the contraconstitutional, clearly stands for that which is freakish. In another attempt Perry neutralizes the problematic implications of that which is extraconstitutional by a distinction between the aspirations in the text and those that are extratextual. '*My* argument is merely that a judge should bring to bear, in constitutional cases, only aspirations signified by the text.'[35] Being charted

'aspirations' even though not in the text, extratextual aspirations necessarily suggest *weight*. The aspirations in the *text*, on the other hand, will be aspirations some of which weight-less, that is to say weight-less as such, for the significance of some of the textual so-called *aspirations* will be merely a *textual* significance[36] — a further distinction which Perry himself indeed does proceed to make; textual aspirations are divided into those that are 'worthwhile' and those that are not.[37] What he ignores entirely, of course, is the troublesome conception of an instance, a constitutional case, in which the judge would have to choose to give voice to an aspiration that is not worthwhile but is in the text, in the face of a worthwhile but extratextual aspiration. Does the choice in *Dred Scott* signify some such confrontation? If, on the other hand, the conception by the judge of that which is freakish is *not* a private, independent, solitary, event, but very much *in* while, in that case the argument will have a hellish difficulty pinpointing what exactly it is about the judgement that makes it freakish. If it is *in* while, it *is* worthwhile. As with the decision of *Dred Scott*, the freakish will be possible only on the basis of a dichotomy of the law and its readings, a concept whereby a particular reading could be tested against an unmediated and value-free presence that is the law.

The countermajoritarian objection indicates in the direction of a paradox for the positions that are majoritarian, for countermajoritarianism stands at once right behind the very idea of constitutionalism. And it forms a paradox also for the positions that favour an inspired, as it were, notion of judicial review in that these positions simply *are* for being ill at ease with the constitutional principle that is countermajoritarianism *par excellence*. One curious effect of the paradox seems to be that often one and the same argument will appear to make the entire stock in the controversy irrespective of the differences that define the sides. In one such instance Paul Brest puts into question the very authority of the Constitution. 'What authority does the written Constitution have in our system of constitutional government?'[38] He points out the English case of a successfully accountable constitution without a written document and emphasizes the propriety of the question. 'We did not adopt

the Constitution, and those who did are dead and gone.'[39] He presupposes, naturally, that the text of the Constitution has a binding value for the American political association that is *greater* than that which its constitutional documents have for the English system. Needless to mention the blurred notion of a comparison with England where *overlooking* the text, as far as there is one, and as far as the rhetoric goes, has hardly ever been the case. Whether ignoring it (if that is what Brest means) or doing away with it altogether, will not the entire point of the concept of *judicial review* also go with the Constitution? A certain coherence of logic on the part of Brest's argument, however, must not go unnoticed. Writers who have dismissed originalist objections have often done so without at once questioning the authority of the Constitution.[40] Instead, the originalist criticisms of a politically adventurous judiciary have been met with the counter-objection of the dubious political neutrality of the original choice.[41] The counter-objection, however, hardly sufficiently rationalizes the so-called departures from the original meaning. As Bork has shrewdly indicated it, originalism does not claim political neutrality. Its choice is in each case a political choice.[42] The simple point, however, is that, once an 'original' choice is *acknowledged*, in the professed company of the principle of constitutionalism the *consistency* of a 'non-originalist' position becomes questionable. Is the general and absolute force of a specific set of choices, made at a specific point in time, not simultaneously acknowledged and disdained? To question originalism is to question constitutionalism. Yet, as Brest avoids the predicament by challenging the authority of the Constitution altogether, he does so only to invite the paradox of the countermajoritarian objection. 'We did not adopt the Constitution, and those who did are dead and gone.'[43] Bork questions the authority of judiciary, where it seems to be overinventive, from a majoritarian point of view.[44] Curiously, a *majoritarian* point of view equally marks Brest's questioning of the authority of the Constitution. Bork fails, subsequently, to account for the constitutional principle that is fundamentally countermajoritarian. And, likewise, Brest will not succeed to explain why an audacious judiciary that is the epitome of countermajoritarianism is

indispensable even though the Constitution is not.

The countermajoritarianism of imaginative judicial review transforms into majoritarianism, and majoritarianism into the countermajoritarianism of constitutionalism, in the fashion in which textualism and extratextualism,[45] and intentionalism and counterintentionalism,[46] turn out to be metamorphic, and defy categories that are clear-cut and generally assertable. What appears to characterize arguments on either side in any of the binary oppositions, in this respect, is a consistent oversight of the nature of that which is decidable. A typical example of the omission is the apology with which a departure from the traditional formula of the separation of powers is advocated in the comparative work by Cappelletti.[47] Its argument draws attention to the contemporary phenomenon of judicial growth, especially in the European domain, as the modern government rapidly expands and more and more problems are brought about by the expansion. And one lesson learned from the comparative experience, he points out, is that the difficulties thus encountered can be held under control least problematically by giving judiciary the upper hand over a complicated network of government and legislative functions. That it upsets the traditional formula, on the other hand, points simply in the direction of the long overdue task, for the theory, to think less of its 'dogma' and try and come to terms with 'reality.'[48] Come to terms with reality, however, Cappelletti's own argument does very little. Although judicial creativity 'has its own modes of accountability,' in that the adjudicator is in a clear distance from, and yet at once part of, the community (hence her impartiality and at the same time closeness to the heartbeat of things),[49] that the democratic accountability is risked in some level has to be conceded.[50] What defines the 'mighty problem' of countermajoritarianism, according to Cappelletti, is a 'contradiction' that cannot be overcome but that one can learn to live with.[51] Cappelletti misses the point about the nature of that which is decidable, however, as he acknowledges the dramatism of a *choice* between the 'reality' and the 'principle' of the separation of powers. By acknowledging a choice, a *dichotomy* between the two is professed to be equally

part of reality, a notion in which a good deal is invested. The apology which marks the argument, therefore, signifies the *tragedy*, as it were, of a choice that has to be made between two different orders of reality. And the contradiction that is 'insoluble' but that has to be accepted is none other than a way, for Cappelletti, to save the *soul* of his argument in the face of the pragmatic choice it is compelled to make.

2.3.2 An Inconspicuous Concept of Judiciary

The all soul instance, famously, has been the French delegation of powers. One early undertaking of the Revolution was to separate the realms of judiciary and executive. According to a decree issued before the end of 1789, '[the administrators] cannot be disturbed in the exercise of their administrative functions by any act of the judicial power.'[52] It was confirmed the following year by a law[53] which also established absolute judicial restraint with regard to the legislative functions. The courts 'shall not take part, either directly or indirectly, in the exercise of the legislative power, nor impede or suspend the execution of the enactments of the legislative body...'[54] 'Of the three powers above mentioned,' writes Montesquieu, whose ideas reflected and influenced the thinking that was behind the Revolution, 'the judiciary is in some measure next to nothing: there remain, therefore, only two...'[55] In view of the traditional rhetoric, therefore, it is hardly a surprise that the judiciary is designated in the 1958 Constitution as an 'authority,' [56] rather than a power. Subsequently, the administrative tribunals are considered to be part, not of judiciary, but of the organisation of the executive.[57] For the same reason, the conformity of laws to the Constitution, before their promulgation, is decided upon by a 'council,' not by a court.[58] The French diffidence of creative judiciary is usually explained by the abuses of the notion under the *ancient régime*.[59] The regional appellate courts of the pre-Revolutionary era, the *Parlements*, had not been exactly

the objects of popular affection with their law-making powers. Under the new regime, therefore, the courts were designed to play no more than a *technical* rôle in the delivery of justice.[60] Customarily, their relative insignificance within the system has been emphasized with contrasting references to the part played by courts in the common law tradition.[61] In certain civil law systems, however, a notion of the separation of powers is retained even though the system at once empowers the judge in some cases to legislate after the exact fashion of the legislature.[62] For that reason, it ought to be less than accurate to make the two opposite poles on the issue of judicial creativity those of civil and common law systems.[63] The customary division is upset even more profoundly by the frequent envy, on the part of the very common law jurist, of the unstrained manner in which statutory interpretation is pursued in France.[64] The relaxed performance of the courts has been explained by the drafting style of the French legislator which apparently concentrates on the general lines and leaves it to the judge to fill in the details.[65] One significant indicator of the judicial manners that goes beyond the particular character and style of the statutes is a rhetoric that refuses to concede gaps in the law.[66] It is intended to be a categorical negation of judicial participation in the making of the law.[67] Yet its strategy seems to have worked out to bestow upon the French judge an ease of attitude in handling controversial cases,[68] one that lacks in the common law adjudication probably, and paradoxically, because the common law judge does not have what some might consider to be the excellent cover of rhetoric which a system that refuses gaps conveniently provides. The conviction that the law yields solution for every conceivable question seems to have abandoned the common law rhetoric since the days of Blackstone. In that sense, an almost Blackstonian view of the law has been very much the defining character of the mainstream rhetoric in France. It is judicial *creativity* that is ultimately encouraged, rather than simply a teleological view of law, in the well known Civil Code provision that makes the 'denial of justice' (*déni de justice*) by the court on the grounds of 'silence, obscurity or insufficiency' of the law a punishable offence.[69] The system whose negation of

judicial participation in the legislative functions means its refusal of court opinions as part of the law, as reflected in the canonical dichotomy of law and fact, stimulates at once a judicial independence from precedence, a state of affairs which in turn saves the rhetoric tiresome manoeuvres and a busy industry of interpretative strategies. It is, not the civil, but common law rhetoric that an overworking junction of interpretative ploys seems to characterize, unless it is the no-nonsense 'Grand Style' favoured by Llewellyn.[70] An impersonality is ensured in the 'all soul' rhetoric of the French law not only by a distinction between the law and its readings, but also by the fact that only a limited number of court opinions ever get published, and that the opinions are kept as short as possible, often only a few lines expressed in a monotonous formula, not signed, and never accompanied by dissenting views.[71] In warning against a 'dangerous confusion' of judicial creativity and legislative functions, '[o]nly bad judges,' notes Cappelletti, '...would *act* as legislators.'[72] Perhaps the impersonality which the French rhetoric seeks to establish ought to be understood in the light of the inadvertent insight of Cappelletti's statement. The secret of an unstrained judiciary in reading the law probably lies in an inconspicuous, 'nullified,'[73] notion of judicial power. And that may be so not necessarily because what is a convenient illusion of rhetoric provides the judge with *more* room for manoeuvre without at once disturbing the sleeping dogs. But perhaps 'null' is the true mark of judicial authenticity, the freakish, at large, considering the primordially, and unavoidably, *attached* quality of adjudication.

That 'the interpreter feels especially assured in his work' under the unobtrusive concept of judiciary entertained by the traditional rhetoric is indicated also by Gény.[74] The 'illusory' character of legal rhetoric has often been discussed. According to Mark Tushnet, a notion of 'neutral principles' to characterize the judicial process, alongside a textualistic view of the law, is what the legal project of liberalism is all about.[75] The neutral principles, as conceived by Herbert Wechsler, promise a morality-free, non-discretionary, bound, and objective legal reasoning.[76] Towards the far end on the heart-warming side, one particular theory of law

expresses as its principal point the view that 'there is a right answer to all scientific queries and moral dilemmas.'[77] On the more realistic side, Walter Weyrauch concedes 'masking' as a fact of law.[78] Unmasking the legal reasoning, however, may mean more trouble than good. 'Such insight might make [lawyers and judges] cynical and eventually ineffective in their tasks...'[79] In response to more recent criticisms of legal self-image and concealment, again, 'the need for the illusion of order'[80] has been suggested. 'I have no difficulty,' writes Gény, 'in recognizing that the traditional method has, in certain aspects, serious advantages which should make us think before we begin to undermine its foundations.'[81] Interpretation as principled reasoning, and adjudication as detached application, as suggested by the traditional rhetoric, accordingly, have a significant part to play in bringing about 'the indispensable security of legal relations.'[82] Similarly, Felix Cohen acknowledges positive uses of concepts as masks in a seminal criticism of what he calls 'a special branch of the science of transcendental nonsense,' namely the traditional rhetoric. As he puts it, 'myths may impress the imagination and memory where more exact discourse would leave minds cold.'[83] A cool mind, however, is precisely what a *study* of the workings of legal phenomena requires. In this respect, law's self-image as reflected in the traditional rhetoric is 'entirely useless.'[84] In the face of the 'stabling' benefits created by its illusory rhetoric,[85] Gény, likewise, points out the gross inaccuracy on the part of the tradition regarding its account of the legal mechanism. To exemplify the illusion that characterizes the traditional rhetoric, Gény cites Liard, the University of Paris rector, on legal education. According to Liard, as Gény quotes him:

> 'Law is written law. Hence the mission of the Faculties of Law is to teach the interpretation of the statute law. The method is, therefore, deductive. The articles of the code are theorems; their mutual relations have to be demonstrated and the conclusions drawn from them. The true lawyer is a geometrician.'[86]

The dichotomy between law's self-image and what actually happens, according to Gény, is not merely an academic concern. On the contrary, he questions law's self-image in order to assist to *improve* the actual state that it conceals.[87] The concealment, he maintains, works out ultimately to bring about an 'immobilization of the law,' a resulting 'impotency to satisfy the needs of life,' and finally a 'most disorderly subjectivism' as objectivity displayed in the self-image provides at once an excellent cover.[88] In so doing, Gény simultaneously invokes and refuses a notion of judicial authenticity. Authenticity manifests itself in the possible, unbridled, subjectivity of the judge under law's *false* self-image, yet at the same time what is merely a self-image succeeds to exert constraints on the judge to cause in turn a *real* stagnancy.

That which makes tricky a designation of the traditional rhetoric as illusory — a dichotomy of the illusory and the real is problematic — exposes at once that, *for perhaps the wrong reason*, the traditional rhetoric may not be too wide off the mark in its promise of continuity on the basis of a *nullified*[89] concept of judiciary. In the classic phraseology of the principle of the separation of powers, 'there is no liberty' if the powers be not safely clear of one another.[90] To read the 'liberal' as the freakish, and identify the elusive house in which all three powers would primordially repose as none other than that of the *polis*, a world fraternity, would be one way of reading into the Montesquiean formula the attached, as opposed to free-floating, quality of that which is decidable. Reading the liberal as the freakish only to outrule it by no means signifies a negation of the liberal, but a *redefinition* of it in terms of its grammatical potentialities.

2.3.3 The Dworkin-Fish Debate

What judicial licence may entail *performatively* is made the pivotal point by Fish in his debate with Dworkin, an encounter that is arguably a milestone in recent

theory.[91] 'The true lawyer,' says Liard, as quoted by Gény, 'is a geometrician.'[92] Geometry has been a paradigm of unerring knowledge for sciences since the classical times. I have already discussed the Aristotelian dichotomy of geometry and the 'fine language' of rhetoric.[93] Descartes, famously, lays great emphasis on the centrality of the plain and infallible methods customarily used by geometricians to his ideas.[94] That in a much discussed literary analogy Dworkin lets the 'fine language' of literature replace geometry as an exemplar, however, does not necessarily signify his departure from the tradition. The literary analogy has the rhetorical charm to compliment the most obvious demands of the contemporary legal theory. The literary traditionally conveys an *elusive* quality, one which somehow rationalizes the discord that often ensues over its significance, and yet a heart-warming end is often assured as the whole thing seems ultimately to yield to some *ineluctable* judgement. In fact, the ultimate judgement is thought to be there and present all the time, obscured as merely one of the discordant voices, until its vindication is complete. Crudely put, Fish agrees entirely that the ineluctable is there in each case. The sole connection between that which is judged and the right judgement, however, is an assemblage of contingencies rather than some quality intrinsic to the object of judgement. In addition to the primordiality of the ineluctable, that is to say, Fish's contention suggests two basic effects. First, because judgement has a contingent quality, the ineluctable may comprise more than one trace. When it does so, different traces will have equal ineluctability, a balance that can be upset by *persuasion* only. And secondly, guidelines which would seek to manipulate, as it were, the process will not hold, as the guidelines themselves will be read ineluctably, that is to say, in terms of the attachments that are already in place. As he notoriously puts it, 'theory has no consequences.'[95] Dworkin's response to Fish to counter what he deems to be an intolerable picture of things suggested by the latter bears significant clue to what has effectively been the defining quality of Dworkin's entire project.

In his comment on Dworkin's original essay, Fish draws attention to a 'pattern'

that forms out of several of the mistakes committed in the text.[96] He points out that Dworkin often subscribes to views on an issue that are in fact wildly incompatible. He appears to qualify meaning as a selfsame substance to be collected by a neutral agent from a transcendental source. In the same breath, however, he at once attempts to introduce meaning as an artefact of the very interpretative position the agent holds.[97] In his second contribution to the exchange, Fish treats to an entire section of his essay the subject of 'the vague and slippery nature of Dworkin's writing and thought.'[98] He notes that Dworkin often 'shifts back and forth between lines of argument that are finally contradictory.'[99] Picking one's way on either side of an argument is hardly a new ploy. As I have already mentioned it,[100] in *Rhetoric* Aristotle guides the counsel 'to employ persuasion... on opposite sides of a question' in order to vindicate that which she believes is right.[101] 'If the written law tells against our case,' he advises, we invoke the *spirit* of the law and the *universal* justice. 'If however the written law supports our case,' amongst the arguments we can put to work are 'that not to use the laws is as bad as to have no laws at all,' or 'that trying to be cleverer than the laws is just what is forbidden by those codes of law that are accounted best.'[102] In another example, he suggests arguments that can be used for or against the text of a contract. The significance of that which is written is emphasized if it speaks on our side. If the text does not support our case, however, 'in the first place those arguments are suitable which we can use to fight a law that tells against us... Again, we may argue that the duty of the judge as umpire is to decide what is just, and therefore he must ask where justice lies, and not what this or that document means.' He adds, 'whichever way suits us.'[103] And yet another example Aristotle cites is perjury. If it is you who is implicated in the crime, you can split your words of oath from your intention of it: lacking the volition, you could not have committed a wrongdoing that has to be voluntary. But if it is your opponent that is implicated, you make of him an 'enemy of society.'[104] The ability to advance lines on either side of a question may make a good rhetorician. Introducing lines on opposite sides *at once*, however, makes a mockery of the art of rhetoric.

What Fish observes to be a fascinating feature of the two essays by Dworkin, in fact, has been the distinctive seal of the latter's entire work.

Dworkin's early work has often been evaluated with a focus on its critique of the Hartian view of law. Of the two traits that characterize his project, in fact, one can be said to be its *proliferation* of the most basic feature of Hart's work, and the second, its dissent from what it proliferates. Gény's criticism of the mechanistic jurisprudence holds that its simulation of geometry risks a 'most disorderly subjectivism.'[105] That happens because in what may be called hard cases the geometrical model falls short of issuing constraints to guide the judge. Hence, the hazardous prospect of a concealed, free-floating, judiciary. Dworkin criticizes Hart's work for exactly the same reason.[106] The view of law as rules suggested by the latter risks subjectivism for it calls for judicial improvisation in hard cases.[107] By definition hard cases concern positions that are marginal within the community. For a concept of law not to incorporate a mechanism to secure the minority interests involved in those cases ought to be a major defect.[108] What Hart's model does, on the contrary, is to try and rationalize the loose, unbridled institution of judicial discretion,[109] a notion that serves as a seal of defeatism on the part of the system. The mechanism which Dworkin suggests in hard cases, on the other hand, is the working out, by the judge, of the *principles* behind the rules.[110] The refutation, in his later work, of what he calls the 'plain-fact view of law' simply restates this. The disagreements within the legal community, according to the plain-fact view, are not on the matter of what the law is. But because often the solution of the law is only one of the moral positions that can be held on the specific issue, the disagreements are on the point of what the law *should* be.[111] Dworkin rejects the plain-fact view for the same reason he dismisses Hart's notion of law. It is also the reason Gény finds intolerable the rhetoric of mechanistic jurisprudence. The plain-fact view suggests defeatism, immobility, and subjectivism in dispensing justice.[112]

That which Dworkin finds wrong with the Hartian work, namely a dichotomy of rules and discretion, paradoxically, haunts throughout Dworkin's own project. The

duality Hart establishes is made possible by a set of concepts the exact equivalents of which can be shown to lie at the heart of Dworkin's own work. It is a hollow claim, in the first place, that a dichotomy of rules and *principles* suggests a notion that is fundamentally different from that of rules and *discretion*. Whether the decision of *Riggs v Palmer*[113] reflects the outcome of a principled inference, or discretion, or even legislation,[114] hardly indicates a key divergence between the holders of the respective positions. Could anyone really entertain a notion of judicial discretion that would be *unprincipled*? How is the difference to be told between principled interpretation and legislation? Where the principles involved turn out to be more than one, in turn, we only have Dworkin's word that a state of conflicting principles on a particular issue somehow differs from what he terms the plain-fact view of the law. The ensuing notion, in that case, is that of the *right principle*.[115] The right principle is the principle that fits better into what is already settled about the law. An opposition of the settled law and the law of hard cases once more simply reproduces a variant of the Hartian dichotomy, namely the core and penumbra of a rule, the meaning of whose latter term is to be ascertained on the basis of the former.[116] The 'open texture' of the language of rules is thus conceded by Hart.[117] Dworkin, in a similar vein, designates law as an essentially 'interpretive concept.'[118] What exactly *is* the settled law on whose basis to pursue the interpretation and work out the right principle? What defines, according to Dworkin, both the Hartian position and the plain-fact view is the 'thesis that propositions of law describe decisions made by people or institutions in the past.'[119] If an illusion of the *past* is the defining feature of those positions, what is the motive behind Dworkin's own condemnation of discretion other than an imminent threat to break up with what is obviously *some* concept of the past?

The past, indeed, has been more and more a pivotal concept in Dworkin's view of the law.[120] If one major theme in his thinking has been a critique of judicial discretion, the second has been a refutation of the notion of intention, one invoked in particular in the constitutional controversy.[121] What is in some sense the past,

therefore, is at once postulated and disqualified. His later formulation of 'law as integrity'[122] signifies a combination of the two themes: a historical continuity that precludes the freakish, and an interpretative emphasis that at once incapacitates historical appeal by disconnecting the text of the law from what is effectively its past.[123] The non-argument of law as integrity becomes reality, therefore, as the two themes cancel out each other.

The pattern which marks Dworkin's relation to Hart's work marks his relation to a whole range of subjects. The two themes that amount to his argument on the matter of authorial intention and that end up deleting each other are, first, intention as a 'state of mind,' and second, 'certain complexities in that state of mind,' complexities which make the characters 'intended' by the author in a narrative 'seem to have minds of their own.'

> Intentionalists make the author's state of mind central to interpretation. But they misunderstand, so far as I can tell, certain complexities in that state of mind... This is sometimes (though I think not very well) expressed in the author's cliché, that his characters seem to have minds of their own.[124]

He adds: 'a legislator's intention is complex in similar ways.'[125] The latter theme points out the extensional quality of intention[126] and therefore questions the privacy ('state of mind') suggested by the former, while the former, at once, indicates the limits of the intentionalist project by denying the transparency implied in the latter. On the subject of the text, again, a play of two themes that are uncomfortable with each other equally pervades the argument. The model of law as rules is rejected for its strict textualism. For what ensues the textualist, positivistic, approach is an implicit call for the exercise of discretion, a 'most disorderly subjectivism.'[127] That, paradoxically, is the standard argument invoked in the constitutional controversy by textual positivists such as Rehnquist, Bork, Monaghan, and Berger, writers whose positions Dworkin would otherwise despise. Not surprisingly, therefore, the

abortion issue of the controversy, for Dworkin, centres around the equal protection clause of the fourteenth amendment, the clause central to the principal textualist, and pro-life, argument in *Roe v Wade*.[128] Consequently, it is the chief textualist concern that is primarily answered when Dworkin, commenting on the case, delivers the judgement that '[a] fetus is not a constitutional person.'[129] That the foetus is not a person, he emphasizes, is the answer to a *legal* question, as opposed to a moral one, even though 'it does involve moral issues.'[130] The premises shared by Dworkin and Bork on an issue they fiercely diverge are crucial to notice: first, the centrality of the text, the distinctive mark of positivism, and second, what is the very epitome of positivism, namely a dichotomy of the legal and the moral.[131]

That the foetus is not a person is the right answer, according to Dworkin, because its solution 'fits better with other parts of our law.'[132] The *scepticism* of right answers, he explains, is based simply on a 'demonstrability thesis' which precludes the notion if the right answer is not demonstrable, 'after all the hard facts that might be relevant to its truth are either known or stipulated.'[133] Theoretically, however, the possibility of the right answer cannot be refuted just because the answer is not *demonstrably* so.[134] 'For all practical purposes,' concludes Dworkin, 'there will always be a right answer in the seamless web of our law.'[135] It is worthy of consideration whether he is led to the notion of a right answer occasioned for all practical purposes because it is theoretically not impossible, or the very possibility of a right answer is occasioned *by* its practical purposes. What happens is that he takes no chances and rationalizes the notion of a right answer at once on both sides of the argument, the pattern established in his critique of the Hartian discretion, that is to say, at once pragmatically ('[f]or... practical purposes') *and* epistemologically (by exposing the fallacy of the demonstrability thesis). But what does it mean to say that the notion is theoretically not impossible? There must be (or 'might be' — Dworkin uses the two modes interchangeably) a right answer to the question whether God exists even though we shall never know. The proposition is senseless not because it would fail some verification test, of the logical positivist kind, but

because, bearing the mark of a logic suggested by Dworkin, it refuses beforehand the *attachments* in which and only in which its question will make sense.[136] The divine inquiry, in fact, is paradigmatic of many of the inquiries encountered in the interpretative controversy, that of abortion being one of them. What abandons the argument even before its sense when the attachments are repressed, however, is its integrity regarding 'rights.' The right answer thesis is introduced in the first place to counter the subjectivism of the Hartian discretion and thus provide better protection for the rights of individuals. What it ends up diminishing, however, is the concept of *difference*, heterogeneity, an effect of the *locality* of individual attachments. Paradoxically, a notion of difference is lay great emphasis upon in the celebrated inaugural lecture by Hart, where the *context* and distinct *forms of life* are suggested as basis for legal analysis.[137] One would think it self-evident that an awareness of the difference between the majority and a minority as merely *rhetorical*, as opposed to something to be abrogated in favour of what would be the 'right' practice, would undermine the majority complacency and at once boost the morale and the standing of the minority.[138] I have already indicated the accomplished history of the difference-emphasized rhetoric, starting from the Sophists, in the protection and improvement of individual rights, as opposed to the poor record of the mainstream rhetoric of homogeneity.[139]

It is not that Dworkin does not recognize the case to be so. He does try to maintain a heterogeneous theme. The propositions of law are true, for instance, if they are just.[140] Justice, on the other hand, is an interpretative concept.[141] He panics, however, as he notices the *circularity* that defines the process. What therefore follows a heterogeneous theme is one that supplies an exit, as it were, by temporarily *divorcing* justice from its provinciality. Accordingly,

> we must treat different people's conceptions of justice, while inevitably developed as interpretations of practices in which they themselves participate, as claiming a more global or transcendental authority so that they can serve as the basis for

> criticising other people's practices of justice even, or especially, when these are radically different.[142]

Circularity must be avoided if critical reflection is to have a *progressive* value. Transforming the provinciality of justice, for convenience's sake, into a transcendental notion is to repress the *grammaticality* that marks distinct forms of life, the *difference*, a notion which makes rights defensible whatever the odds in the first place. Aware of the difficulties the two themes by Dworkin inflict on one another, David Brink attempts to provide an elaboration of the former's concept so that 'genuine disagreement' between different forms of life can be possible without at once upsetting the heterogeneous theme of the concept.[143] The circularity Dworkin observes in a local notion of the just distresses him because it is perceived as an *option*, to start with. And Brink seeks a way out, for he ignores in the first place that what appears to be a circularity exists only as a *generalized* category, that which is ordinarily circular and that which is not being merely the sub-categories of it. There is definitely a choice, therefore, not to be circular, even though the *primordiality* of a generalized category of circularity is conceded. In another attempt to hold on to the heterogeneous theme, Dworkin invokes 'circumstances' as criteria for the just. 'I believe, for example, that slavery is unjust in the circumstances of the modern world.'[144] Circumstances, however, is a poor word to convey the primordiality of the ineluctable. It bespeaks cynicism where it should voice concern. Voice concern, the *second* theme does. 'A moral philosopher who denies that slavery can be really or objectively unjust does not wish to be understood as holding the same position as a fascist who argues that there is nothing wrong with slavery.'[145] That the two positions do not suggest a difference of *kind*[146] is a depressing thought for Dworkin because it somehow attenuates the force of the rhetoric against slavery. The second theme, therefore, intercepts the heterogeneous theme of the 'circumstances' to form the non-argument of what is considered to be a genuine disagreement. The depressing notion of the lack of criteria to distinguish

between the two instances is an effect at once of the suppression of the mimetic, rhetorical, difference between the two instances as *fake*, as opposed to genuine, or inadequate. What is disregarded, as with the panic about circularity, is that the 'fakeness' that would in that case define the difference between the two positions would only be so as a *generalized* category, that is to say, as an ontological primordiality, the genuine and the fake, grammatically understood, being in turn the 'genuinely' divergent *sub-categories* of it.

A play of two themes that end up cancelling each other out is established as a pattern in the critique of the Hartian discretion. That which is presupposed in the argument against discretion is a dichotomy of inside and outside the law. What a notion of law as rules risks, accordingly, are incursions in hard cases from outside, whereas *principles* signify resistance in the face of infiltration and subversion. Dworkin, therefore, not only reproduces the *supplementarity* of discretion in the Hartian scheme through principles, but also that which inspires the notion of law as rules to start with, namely the concept of *silly judgement*, stands right behind his criticism of discretion. Paradoxically, however, an inconspicuous judiciary, the kind that underlies Dworkin's critique of discretion, as I have already indicated it, *encourages* judicial improvisation rather than diminish it.[147] In this respect, the congruence of rhetoric between the French brand of the separation of powers, an account of it which refuses to acknowledge gaps in the law, and Dworkin's notion of law must be noticed. The highly personalized aporias and bad rhetoricianship on Dworkin's part ignored, the view of the law closest to that of Dworkin therefore would be Blackstone's: the law, unmade, and informally prevalent, provides an answer for every question.

Fish would be first to agree: the judge does not, and cannot, make the law, and that which thus prevails *impersonally* involves no gaps: there is always a right answer. To be more exact, the law does not have the imagined *formal existence* in order to entail gaps. What would appear as gaps would be complications in the elusive assemblage of variables that is the life of the community. As a matter of

fact, rather than contradicting its conclusions, Fish offers in his comment on Dworkin's essay, to take the strain off its overwrought rhetoric. I have already related his insight of the dilemma that characteristically underpins formalism.[148] He reads it in Hart's discourse, and yet finds it more succinctly expressed in the immediate logic behind the parol evidence rule of contract doctrine. What their solutions ensue in each case is an offer *that cannot be refused*. That which one turns down in accepting Hart's offer is the brute force of a gunman that symbolizes the Austenean notion of validity. And the parol evidence rule is a choice against the 'general disaster'[149] that would follow were casual extratextual criteria to be admitted to determine the terms of a contract. Dworkin's rhetoric is wound up for exactly the same reason. And the words of threat that characterize its discourse are not dissimilar to those of Hart and the parol evidence rule: it is either 'a system of principle,' or *else*. The concluding paragraph of the *Law's Empire* describes the desired attitude as one which 'aims, in the interpretive spirit, to lay principle over practice...'[150] It is tempting to point out, once more, the idea of an interpretive spirit (a keen heterogeneity) on the one hand, and that of a practice without principles (a markedly homogenous notion of existence, namely existence as a free-for-all, and thus something to be *tamed*) on the other, as two themes uncomfortable together, yet pronounced in the same breath. But it is at once an argument that is terrified at the sound of its own threats: the hermetic spirit haunts, out of nowhere, a practice that is all smoke and eerie. On the less Gothic side, 'a freewheeling judicial discretion,' indicates Dworkin, signifies his idea of hell. It stands right opposite 'the vision of the Constitution as a system of principle.'[151] Accordingly, one either recognizes the system of principle 'the Constitution creates,' or one chooses to see the Constitution as nothing more than 'a set of independent and historically limited rules' to be utilized to conceal the passion, the real drive, that is behind the reading. He writes,

> treating the Constitution as only a set of independent and

> historically limited rules masks a freewheeling judicial discretion that is guided only by a justice's own political or moral convictions, unchecked by the constraints that treating the Constitution as a charter of principle would necessarily impose.
>
> That vision of the Constitution as principle, whose importance I have been emphasizing, is a jurisprudential conviction rather than a distinctly liberal or even moderate position.[152]

The originalist zeal which Dworkin therefore opposes to his view of the Constitution as principle 'masks a freewheeling judicial discretion' in the exact fashion in which mechanistic jurisprudence provides a front for what Gény calls a 'most disorderly subjectivism.'[153] The dilemma thus formulated, Dworkin introduces in the second paragraph what he would otherwise associate with the plain-fact view that is characteristic of the rhetoric of originalism, namely a dichotomy of the legal and the moral. Since its sole alternative is a hellish state of 'freewheeling judicial discretion,' his vision is not *a* jurisprudential position, as he modestly puts it, but *the* jurisprudential position available. It is in order to emphasize the political neutrality of what he, again, modestly terms his 'conviction' that he goes on to cite Justice Harlan, a judge with 'conservative' politics, and yet with the same vision of the Constitution: the Constitution as principle.[154] The formalistic scaremongering and a dichotomy of the legal and the moral, of course, are intertwined. They form together the theme which is, once more, challenged with the promised heterogeneity of the theme that follows, namely law as an interpretative concept. In the paper Fish comments on, Dworkin states:

> My apparently banal suggestion (which I shall call the 'aesthetic hypothesis') is this: an interpretation of a piece of literature attempts to show which way of reading (or speaking or directing or acting) the text reveals it as the best work of art.[155]

What the aesthetic hypothesis amounts to is something that seems to be very close to Fish and at once something that could not be further away. That *good* interpretation is *paradigmatic*[156] interpretation is one of the things it says. As such, it is a statement about the primordiality of what Fish would call the 'institutional' quality of the performance, rather than a suggestion as to *how* to get the interpretation right. That it is no word of advice is evident by the fact that Dworkin introduces it as a 'hypothesis' on the workings of the aesthetic judgement. It is crucial to establish this distinction because it is simultaneously the case, where Fish stands, that, once acknowledged the distinction cannot be maintained. In other words, the way it happens, it could not be otherwise: *all* interpretation is paradigmatic interpretation, and all interpretation is therefore *good* interpretation. What Dworkin does not do, however, is to lead the hypothesis to its consequences. That, he does not do, even though he goes one step 'further' than Fish on the wild side, as it were, and notes that the aesthetic hypothesis is formulated in order to avoid the problems involved in maintaining such notions as objectivity and subjectivity. He states that, 'since people's views about what makes art good art are inherently subjective, the aesthetic hypothesis abandones hope of rescuing objectivity in interpretation except, perhaps, among those who hold very much the same theory of art, which is hardly very helpful.'[157] It is one step further, because, where he stands, it seems that Fish would not dream of questioning the operational efficacy of a dichotomy of objectivity and subjectivity. But then, further in *what* direction? It is only when Dworkin declares ideas of beauty as 'inherently subjective,' and objectivity as a lost paradise, that one is compelled to go back to his formulation of the aesthetic hypothesis and realize that he really believes it to be so himself, when he introduces the formulation with the words '[m]y apparently *banal* suggestion...'[158] He does believe it to be banal, unless the word 'apparently' is accentuated with the weight of his entire opus and thereby the aesthetic hypothesis rendered as much *homogenous*. It is therefore the end of the 'interpretive concept,' and the beginning of the theme 'principle over practice.' Instead of getting out of the

way, consequently, problems of *firm* knowledge avoided earlier come to *dominate* the argument of the literary analogy. If the aesthetic undemonstrability means that aesthetic judgements are subjective, holds Dworkin, 'then of course they are subjective. But it does not follow that no normative theory about art is better than any other...'[159] That their value is not independently assertable is by no means to say that different positions on an issue, whether aesthetic or otherwise, cannot be ranked. In this respect Dworkin is right. Ranking can be problematic, however, if one's discourse is already set on an *epistemological* basis.[160] What makes one position better than another, while neither has an independent value in whose terms to compete and rank, Dworkin will be at loss to tell. The literary analogy refers to the model of a chain novel where several authors work on one coherent story. The authors, however, have to remain *inconspicuous* in their personal contribution so that the combined work can emerge as a *unified* piece. 'Deciding hard cases at law,' writes Dworkin, 'is rather like this strange literary exercise.'[161] The authors of the collaborative project of law are represented by judges in the chain. The performance in the chain differs from the exercise of judicial *discretion* in that discretion does not involve, as such, the sort of *commitment* that characterizes the judge in the chain from the moment she chooses to be part of the chain enterprise.[162] The constraining character of the chain venture does not end at the choice to partake. The performance of the judge is constrained during the process, first, in terms of its *integrity* with the ongoing work (formal constraints), and, secondly, regarding the *quality* of the work produced (substantive constraints).[163] For either set of constraints *disagreement* between the members in the chain is possible to a certain degree. Yet, nothing that would *personalize* the combined work is allowed. Lest he might be thought to be underplaying the peculiarities of style that would normally be the case on the literary side,[164] Dworkin takes no chances and introduces the dichotomy of the political and the artistic. The individual performance should comply with the enterprise as a whole both formally and substantively. In other words, 'it must both fit that practice and show its point or value. But point or value

here cannot mean artistic value because law, unlike literature, is not an artistic enterprise. Law is a political enterprise...'[165] This latest move is particularly revealing about the nature of Dworkin's discourse. It creates one predicament when positions in aesthetics are designated as essentially *subjective*. Because subjectivity is understood in epistemological terms, namely as unbridled privacy, it becomes impossible to account for *theory choice*, on which he lays much emphasis, epistemologically. That predicament Dworkin simply eschews. Although he appears to betray it frequently, often for perversely pragmatic solutions,[166] an *epistemological* reasoning nevertheless gives his discourse its most persistent theme. It is, therefore, the undeniably epistemological quality of his reasoning that seeks to leave nothing unconsidered, no gaps unfilled, on the theoretical level, when he ventures to distinguish between the artistic and the political. The dichotomy, however, is at once absurd and inaccurate. It is *absurd* insofar as it anticipates artistry as a problem to be addressed in law, a distinct form of life. The dichotomy seems to lend no practical avail unless Dworkin himself could conceive of a judge whose perception of himself would be that he were a living incarnation of Andy Warhol with a mission to revolutionize law. Before one could conceive of that judge, one would have to conceive of a legal establishment that would have allocated that person a place on the bench. And if that is not likely (if it *were* likely, Dworkin's dichotomy would still be redundant; there would be no possible criteria on whose basis to challenge the conception of the *legal* therefore recognized by the legal establishment or defy the way the system wishes to define itself at large), anything short of Warhol will be considered to be perfectly legal, as opposed to artistic, by many within the same form of life, even if the particular *performance* is not supported by all. In other words, if the performance has succeeded to take place, it has already had a *place*. The performance already licensed in practical terms, including it in a form of life alien, as it were, to law would be either senseless, or an entirely different game, such as a pejorative remark. Secondly, the distinction is *inaccurate*, for it attempts to repress the artistic attachments of the political and the

political attachments of the artistic. The artistic is as much legal in the sense of forestructured, prejudiced, and dry. And the legal involves a good deal of artistry in that like any other institution it is *staged* and *performative*. The (a) absurdity and (b) inaccuracy of the concept of the freakish that is responsible for a dichotomy of free-wheeling discretion and principled interpretation, as well as that of the artistic and the legal, have been two principal arguments of Fish's work.[167]

'A judge's duty,' writes Dworkin, 'is to *interpret* the legal history he finds, not to *invent* a better history.'[168] The freakish is postulated in the dichotomy between interpretation and invention exactly the way it is responsible for the distinction between the legal and the artistic. In another rendering, 'a fresh, clean-slate decision about what the law ought to be' is put in opposition to mere *interpretation*, a 'difference on which,' notes Dworkin, 'I insist.'[169] The 'ought' issue designated as an element that *can*, and, perversely, *ought* to, be discarded, simply reproduces the feature attributed by the author himself to the plain-fact view.[170] And yet another formulation of the dichotomy confers upon the judge the duty 'to advance the enterprise in hand rather than strike out in some new direction of his own.'[171] The privacy that makes what is artistic *subjective*, equally characterizes the passion of the judge whose performance is political. The politics assigned to the judge, however, is one of *working out* the choices that he 'finds' and that are 'in hand,' rather than a politics 'of his own.' I mentioned above the defence of the originalist rhetoric by Robert Bork on the very same basis: the politics that is *found* is what marks the judge's performance, not, as often understood, an *absence* of politics.[172] The curious thing about Bork's argument is that it is in order to counter the criticism by, of all people, Dworkin that originalism represses the fact that its choice is political.[173] 'It certainly is,' responds Bork, 'but the political content of that choice is *not made by the judge*: it was made long ago by those who designed and enacted the Constitution.'[174] As a non-grammatical, absolute, privacy describes the subject, that which is freakish is rationalized. In each case an apocalyptic free play sets in as a consistent feature of the tradition whose concept of man recognizes no fraternal

attachments.[175] It is crucial to notice where the respective rhetorics by Dworkin and Bork converge — the *apocalyptic* that in the absence of fraternal attachments defines the fantastic possibilities of man, the judge. 'But is there in fact any such possibility?' asks Fish.

> What would it mean for a judge to strike out in a new direction? Dworkin doesn't tell us, but presumably it would mean deciding a case in such a way as to have no relationship to the history of previous decisions. It is hard to imagine what such a decision would be like since any decision, to be recognized as a decision by a judge, would have to be made in recognizably judicial terms. A judge who decided a case on the basis of whether or not the defendant had red hair would not be striking out in a new direction: he would simply not be acting as a judge, because he could give no reasons for his decision that would be seen *as* reasons by competent members of the legal community. (Even in so extreme a case it would not be accurate to describe the judge as striking out in a new direction; rather he would be continuing the direction of an enterprise — perhaps a bizarre one — *other* than the judicial.) And conversely, if in deciding a case a judge *is* able to give such reasons, than the direction he strikes out in will not be new because it will have been implicit in the enterprise as a direction one could conceive of and argue for. This does not mean that his decision will be above criticism, but that it will be criticized, if it is criticized, for having gone in one judicial direction rather than another, neither direction being 'new' in a sense that would give substance to Dworkin's fears.[176]

The invented, as well as the interpreted, regarding a particular reading, therefore, will have to be already within the range of that which is decidable at the particular instance. If one sense conveyed grammatically by the inventive is that it refers to that which is fabricated, in another sense the inventive signifies mere *disparagement*. It will be a grammatical abuse to confuse the two. Invention as mock interpretation, as conceived by Dworkin, exemplifies precisely some such

abuse. The abuse becomes the issue not because the inventive indicates a pejorative designation for a given interpretation. On the contrary, in its pejorative use the inventive creates a specific game based on a grammatical *possibility* of itself. The abuse occurs when the game is misqualified. The game, according to Fish, when someone charts a particular reading inventive, as opposed to interpretative, is simply that the reading so recognized *differs* from the one that is favoured by the person who does the charting. 'One man's 'found' history,' as he puts it, 'will be another man's invented history.'[177] In the absence of independent criteria against which to test the respective readings, a dichotomy of the inventive and the interpretative will be *opinion-based* in each case.

That the dichotomy is in each case rhetorical scandalizes Dworkin as he understands by it two things that are, now characteristic with him, uneasy with each other: first, that a rhetorical distinction means that one has no criteria by which to distinguish between the interpretative and the inventive, and, second, that persuasion as a criterion (there *is* a criterion after all) suggests circularity. In inquiring the first, he once more invokes two themes that are fiercely contradictory. 'How *do* we distinguish between interpreting and inventing?' he asks, emphasizing the 'do.'[178] It is a pragmatic question and yet seeks desperately an epistemological answer. How one *does* distinguish, he is in fact hardly 'genuinely' interested in, as he relates Fish's account of the actual workings of the distinction with a decidedly epistemological contempt. 'There can be no genuine distinction,' he rephrases Fish, 'between interpretation and invention, and if two interpretations are each recognizable as interpretations — if they are both 'institutional possibilities' — one cannot be said to be any better than the other.'[179] The genuine stands opposite the *illusory*. 'Fish's general argument,' he writes, '[is] that the distinction between interpreting and inventing is always illusory.'[180]

I pointed out above how Dworkin goes one step 'further' than Fish to disqualify a dichotomy of the objective and the subjective; a step, in fact, not quite in the same direction.[181] The *rhetoricity* that marks the dichotomy, as far as Fish is concerned, is

not to be scorned on the grounds that the terms of the binary opposition thereby cease to be operational, but that, on the contrary, rhetoricity is the very *condition* on which the terms are operational. As Dworkin himself regards his move with the aesthetic hypothesis as a step *towards* Fish, however, his response to the latter's criticisms is one of obvious frustration over the eventual fiasco. '[Fish] thought, when he began my essay,' writes Dworkin, 'that I was joining him and his skeptical colleagues in rejecting the idea that interpretive judgements could be 'purely objective.' But then he discovered, to his disgust, that I was actually relying on rather than making fun of the right-wrong picture.'[182] A disillusionment is what characterizes the brazen blocking out of the fiasco on Dworkin's part, even though a non-grammatical theme of right-wrong did characteristically co-inhabit his venture. The blocking out takes the form of *projecting*. His response to Fish bears the title 'Please Don't Talk About Objectivity Any More.' The addressee of the request is not Fish (nor Michaels[183]) not because, as Fish later points it out,[184] not once does Fish refer to the problems of objectivity in his essay, but because the addressee could not be anyone other than a disillusioned and self-disgusted ('to his disgust') Dworkin who retains a non-grammatical notion of objectivity and yet at once ventures into the grammatical, the interpretative. The contradiction of the original essay is in fact still manifest even when seeking to suppress it in the response to Fish. The 'rejection' he acknowledges to have occurred in the first essay of what he calls 'pure objectivity' simply reproduces in the form of a dichotomy of objectivity and pure objectivity the apocalypse that marks the aesthetic hypothesis of the early essay: a rejection of 'pure objectivity' not only assumes a category of *pure presence*, however inaccessible, but it also, and more significantly, *minimizes* the efficacy of objectivity termed not pure. The force of objectivity attenuated in favour of that which is subjective, it is Dworkin who appears to 'make fun of' a dichotomy of objectivity and subjectivity, not Fish. And because the dichotomy is played down on the basis of an apocalyptic privacy that describes the subject in relation to the object of inquiry, the 'skepticism' he speaks of is an attribute, not of Fish's position,

but of the *tradition* in which Dworkin himself writes.

It is precisely the scepticism inherent in the specific tradition that entertains the notion of invention as mock interpretation. 'How *do* we distinguish between interpreting and inventing?' asks Dworkin.[185] In most cases a distinction between the two will not be problematic. And when it *is* problematic, it will not be a problem of *deciphering*, textual or otherwise. To make it an *epistemological* problem is to invoke a scepticism that is notoriously insoluble: the freakish, a concept that describes the possibilities of the subject in her relation to the object of inquiry. That the dichotomy cannot be maintained epistemologically, however, hardly means that it is 'illusory' every time a distinction is drawn between interpretation and invention. If the illusory stands for the political, the ordinary categories of illusory and genuine, to put it once again, will be conceivable only as *sub-categories* of the illusory. The illusory, as a generalized category, will be primordial because it will be the prerequisite of distinction *per se* — the sign. In other words, *iterability*[186] is what a primordial category of the illusory signifies; a transparency, as opposed to the privacy that characterizes the tradition in which Dworkin writes. Where Fish stands, therefore, the illusory in the sense of political, or opinion-based, is what makes *difference*, the constitutive quality of the sign, possible in the first place, rather than diminish it. In turn, because signification is opinion-based, the difference will in each case be one of *grammar*. Every time a dichotomy of the inventive and the interpretative suggests 'stability,' as Fish puts it, it is a *grammatical* stability, 'its force is felt from *within* interpretive conditions that give certain objects and shapes a real but constructed — and therefore unsettleable — stability.'[187]

Opinion forms the sole criterion of stability not in an optional manner, but primordially. I noted above Dworkin's panic over the circularity suggested by the interpretative theme to which he subscribes on and off.[188] He once more notices the circularity that comes with *persuasion* as the criterion of stability. 'No one,' he writes, 'who has a new interpretation to offer believes his interpretation better

because it will convince others because it is better.'[189] As the primordiality of opinion is ignored, a radical distinction of the self and the others is assumed. The privacy thereby conferred upon the self makes of her an essentially *detached* reader. Dworkin's remark about the circularity of the opinionated criterion comes in an essay which seeks, alongside responding to Fish, to reply to a comment by Walter Benn Michaels where the idea of a *politics of interpretation* is refuted for appealing to an interpreter who somehow evades the primordiality of politics.[190] Dworkin assumes an interpreter who is detached not only from the constitutive association of the others in the house of the *polis*, but also, and more significantly, from *himself*. He can put before him and contemplate his convictions as he would his hat. Michaels points out in his comment on the original essay, on the other hand, the fallacy of the presupposition that interpretation is pursued in a mechanic sequence of processes. In the course of the act, according to the mechanistic concept, one first interacts, and gets, as it were, acquainted, with the object of interpretation, each side recognizable in its own terms; and, second, through a stage that follows, one weighs the choices that are available, and finally one does the interpreting. The mechanistic concept supposes 'a moment in which one simply has no beliefs whatsoever, no sense at all of what is true.'[191] An instant of vacuum-like existence is anticipated to conceive of a non-grammatical, non-opinion-based, idea of *weighing*. 'Believing nothing, he chooses to believe whatever he wants to believe, or rather whatever seems morally responsible to believe.'[192] Weighing, therefore, is carried out on the basis of an historically non-extant self, a pure rationality that transcends senses.

Unless persuasion as the criterion of stability is defined in mechanistic terms, on the other hand, circularity as an incidental category will hardly necessarily follow. 'The whole point of being *convinced*,' notes Michaels, 'is that we cannot help believing whatever it is we are convinced of,' a state which resists a non-grammatical concept of choice.[193] A concept of choice that free-floats and that entails among its possibilities the freakish is refuted; the circularity which thereby receives primordiality, however, rather than necessarily suggest a sterile circularity,

makes *possible* the everyday grammatical, the ordinary, categories of that which is *not* circular, as well as that which *is* circular.

To 'see this circle as a vicious one and look out for ways of avoiding it,' warns Heidegger, when expounding the *forestructure* of understanding where interpretation is grounded in the first place, is to miss the meaning of 'the act of understanding' altogether.[194] 'What is decisive is not to get out of the circle, but to come into it the right way.'[195] The circularity that characterizes understanding, he points out, is no less than constitutive to the Being of man, the earthly entity. 'An entity for which, as Being-in-the-world, its Being is itself an issue, has, ontologically, a circular structure.'[196] The circularity of understanding, however, is not to be confused with the circularity that is merely one of its grammatical possibilities: 'If, however, we note that 'circularity' belongs ontologically to a kind of Being which is present-at-hand (namely, to subsistence [Bestand]), we must altogether avoid using this phenomenon to characterize anything like [man's Being] ontologically.'[197]

That which a dissolution of the distinction between the self and the others also discloses is the *extensional* character of the authorial will,[198] whose negation, as I have already noted it, forms one of the principal objectives of Dworkin's project.[199] The Dworkinean refutation of reading on the basis of intention, Fish points out, presupposes intention as a 'private property' on the part of the scribe.[200] Intention as a private state, however, not only ignores the circularity of understanding, the primordial hermeneutic condition, but from a more immediately striking angle, it also entertains a concept of reading which is wildly at variance with the everyday experiences of reading. Every time one reads, Fish points out, one ineluctably and constitutively situates the script in an *intentional context.* Unless that is so, regardless of the kind, length or style of the particular script, one will not be able even to begin to make sense of it. The act of reading, Fish elucidates, is in each case preceded by an 'assumption that one is dealing with marks or sounds produced by an intentional being, a being situated in some enterprise in relation to which he has

a purpose or a point of view.'[201] The mistake that is made customarily is to suppose that the *placement* achieved through the intentional assumption constitutes merely *one* of the ways of reading, possibly the soundest one. The truth, however, is that reading without having already *synchronized*, as it were, the text with a specific intention would not be conceivable. 'One cannot understand an utterance,' writes Fish, 'without *at the same time* hearing or reading it as the utterance of someone with more or less specific concerns, interests, and desires, someone with an intention.'[202] What one synchronizes the text with, however, is not a state of mind that would settle the text in a private but definite manner. This is not so even for the scribe himself. But one in each case synchronizes the script with *another text*; one which engulfs the private script but which resists edges for itself.

The *vanishing* of the script engulfed in the elusive text of history, a world fraternity, crudely describes Fish's position regarding the interpretative controversy.[203] Because the formal script ceases to *exist*, in the sense that in order to be meaningful in each case it has to be enveloped and un-edged, as it were, in a setting that is perpetually shifting and uncircumscribeable, *as such* no text is capable of issuing constraints to guide or restrain the interpreter. The play of meaning that can be the issue with a specific text will hardly be a *free* play, however, as the attachments in whose fraternity the specific text is in each case placed will at once be the dissolution of a non-grammatical distinction between the self and the others.

Conversely, the kind of constraints Dworkin invokes[204] will not be achievable because that which is 'settled,' as it is put, about the combined enterprise in the chain model, and which is supposed to provide constraints for hard cases, will itself have only an *interpretative*, constructed, existence.[205] In fact the characteristic mistake Dworkin makes is a non-grammatical, non-interpretative, dichotomy of plain and hard cases. Because he understands the settled practice as an effect of the system of rules that is the formal law, hard cases designate instances where the law as a system of rules fails to function. Fish points out that the appeal to the plain,

settled law will not work, for it misunderstands the nature of the settled law in the first place. The settled law, just as the plainest of everyday notices that instructs one to keep off the grass, is *within*, rather than an *evasion* of, the engulfing of the elusive text of history.

> A plain case is a case that was once *argued*; that is, its configurations were once in dispute; at a certain point one characterization of its meaning and significance — of its *rule* — was found to be more persuasive than its rivals; and at *that* point the case became settled, became perspicuous, became undoubted, became plain. Plainness, in short, is not a property of the case itself — there is no case itself — but of an interpretive history in the course of which one interpretive agenda — complete with stipulative definitions, assumed distinctions, canons of evidence, etc. — has subdued another. That history is then closed, but it can always be reopened. That is, on some later occasion the settled assumptions within which the case acquired its plain meaning can become unsettled, can become the object of debate rather than the in-place background in the context of which debate occurs; and when that happens, contending arguments or interpretive agendas will once again vie in the field until one of them is regnant and the case acquires a *new* settled and plain meaning.[206]

The *imperceptibility* of the opinion-based character of that which is settled, consequently, tells merely how very *settled* the opinion on the subject is. That in each case opinions, and nothing 'firmer,' as it were, underlie the enterprise, however, by no means questions the settled quality of the practice when it is considered to be so. In other words, a dichotomy of the settled law and hard cases does not necessarily have to be defunct following a grammatical redefinition. There is no reason, in turn, why the settled opinion should not guide and constrain interpretation in hard cases. The concept that it could be *otherwise*, according to Fish, is precisely what is wrong with formalism — not only that of Dworkin, but

that of an entire tradition. As a matter of fact, Dworkin himself does appeal in the literary analogy to the *inescapeability* of that which is settled — the chain. 'Deciding hard cases at law,' he writes, 'is rather like this strange literary exercise... Each judge is then like a novelist in the chain.'[207] The chain symbolizes not only the organic structure within the particular domain, but also the *absurdity* of trying to break loose from it. Yet a typically self-deleting Dworkin *at once* introduces a second theme in order to recast a primordial hermeneutic condition, the chain, as a *strategy* to guide and constrain interpretation: the *freakish* that 'strike[s] out'[208] of the settled practice of the chain is presupposed in order to bestow upon theory, once again, a privileged *hold* over practice. Fish draws attention to the elitistic overtones of Dworkin's project generally, which are in fact pre-empted by its simultaneous discourse of chain, or integrity. He notes in a review of *Law's Empire* that the book 'urges us to adopt 'law as integrity,' but since that is the form our judicial practice *already and necessarily* takes, the urging is superfluous.'[209] Because that which is invoked in a dichotomy of the tame and the freakish is really a distinction between two different *traces* of the tame, one rhetorical effect of Dworkin's otherwise void discourse may be its attack, as I have already noted it,[210] on the concept of difference. Its political support for a generalized, non-historical, reason that has been known only too well for its rationalization of repression and suffering is inconspicuous enough, considering the political position Dworkin happens to hold regarding minority interests. That, however, by no means neutralizes the alarming implications of a rhetoric of homogeneity that is intolerance *par excellence*. 'Not that we would not fight and die for [our own difference] if important' in a state of heterogeneous awareness, if one may cite Justice Holmes writing at a time when a world war was on, '— we all, whether we know it or not, are fighting to make the kind of a world that we should like — but that we [would] have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief.'[211] It is not accidental that the words by Holmes come in an awesomely insightful review of Gény's *Science et technique*.[212] The review

comprises just over four pages where not once either Gény or his work is mentioned, though a footnote to the title, 'Natural Law,' records that the piece has been inspired by Gény's recently published book, a work whose project seeks to outline a model of adjudication for hard cases which is principled (*technique*) on the bases of relevant empirical data and weighable morals (*science*) and in order to seal the way for good for what is a 'most disorderly subjectivism,'[213] the *freakish*, a concept thought to be risked so long as law is understood merely as a system of rules.

2.4 The Real and the Formal

Llewellyn ascribes what he calls 'the cold-shouldering of the great Gény by Holmes' to the latter's impatience to read enough of Gény.[1] In fact, an apocalyptic free play is invoked not only by the markedly transcendentalistic rhetoric of writers such as Hart and Dworkin.[2] But it seems to be equally anticipated in some of the positions that have been fervent opponents of a formalistic understanding of the workings of law. Notably, the 'reality' of a free play, especially in the appellate readings of the law, has been lay much emphasis upon by legal realists, who, in pointing it out, have made much use of the argument by Holmes, considered to be a precursor, about the *generality* of the propositions of law.[3] 'General propositions,' notes Holmes in his dissenting opinion in *Lochner v New York*, 'do not decide concrete cases.'[4] In a private letter he reiterates the point, and adds: 'I will admit any general proposition you like and decide the case either way.'[5]

A paradox of the generality of the propositions of law in relation to cases that are particular and unforeseen is indicated by Paul de Man in his reading of the *Social Contract*.[6] 'In a word,' writes Rousseau, where he describes the form laws can possibly take within the meaning of the concept of a general will, 'no function

which has a particular object belongs to the legislative power.'[7] Generality, de Man reads, is the defining quality of the text of law.[8] Amongst the antinomies to which law yields in order to achieve itself, in turn, are those between rules and rights, and legislative action and history, or time.[9] Law appears to mark itself as a generality through its negation of the individuality of rights and the elusive manifestations of history. While it is conceivable only as a timely enterprise and applicable only on an individual basis; perversely, in order to remain in this capacity, at once law has to resist time and that which is individual.[10] 'The indifference of the text with regard to its referential meaning,' writes de Man, 'is what allows the legal text to proliferate...'[11] The law will apply so long as it transcends its particular applications.

Of the generality paradox as formulated by de Man, a dichotomy of the law and its readings is clearly a prerequisite. I have already referred to a set of antinomies a reconciliation between the terms of each one of which is central to both Hegel and Marx.[12] The formal guidelines which represent the law will fail in their task unless they avoid being specific and at once have the *teleological* dimension to unfold from a compact, timeless generality to specific and unforeseen instances. The Hegelian antinomy of the rational and the actual is dissolved as the rational becomes actualized in its specific manifestations; while at the same time, that which is specific, the actual, is already contained, as a germ, so to speak, in what is rational. A phenomenological unfolding of the legal text seems to bring about not a dissimilar reconciliation: the phenomenological aspect makes the idea of law possible as it ensures textual longevity in the face of history and thereby the continuity of the fundamental, timeless, idea encapsulated in the text; and the resulting reconciliation that is the matching of the pre-existing law with the individual event signifies the concept of the rule of law. The phenomenological manifestations of the law in scholarly, as well as judicial and formally binding, constructions, applications, readings, comments and criticisms will therefore involve, beside more frequent overlappings, *contradictions* that are inevitable and that are equally constitutive to the process. 'Thou shall not kill,' says the law. Is the

historical instance of terminating foetal life at a certain stage of pregnancy, in a twentieth century society, covered by it? One way of maintaining a unified concept of law appears to be not only to take for granted the uninterrupted efficacy, as well as relevance, of the law, but also consider the opposing arguments on the question to be equally valid manifestations of it, even though the law itself will not be reduced to any of its individual extensions.

One conclusion that may be drawn from the generality argument points in the direction of an aporia in the prevailing concept: the idea that the general and not readily amendable texts should govern cases which are individual and in time, hints at the profoundly metaphysical foundations of the concept of law that we have. Because the condition that is inherent in the concept of law makes the whole enterprise of text-government impossible, it at once signifies the inevitability of a free play which in reality defines the process of reconciliation. Hence, the principal realist themes. Hägerström's legal writing, for instance, which has been immensely influential,[13] is seized throughout with a questioning of the metaphysical assumptions that underlie legal notions. And the project which the American realists have pursued following a critical examination of the concept of rule-government has been a redefinition of the reconciliatory process as subjective and unpredictable.

The crucial point, however, is that, before the supposed paradox of generality that marks the concept of law, which consequently stands in the absurd need of a phenomenological reconciliation, which in turn invites a free play, the notion that *detects* the paradox in the first place is defined by a dichotomy of the law and its readings. Realism arrests the wrong person for a crime uncommitted. Just as the earlier antinomies by Hegel and Marx, namely the rational and the actual, and the public and the private, the 'estrangement' which de Man detects between the general and the individual in the Rousseauean concept of law[14] is not conceivable unless a binary opposition of two *radically* distinct categories is presupposed.

In the *Social Contract*, the model for the structural description

> of textuality derives from the incompatibility between the formulation and the application of the law, reiterating the estrangement that exists between the sovereign as an active, and the State as a static, principle.[15]

In questioning the claim of the legal text to uncontested monopoly over its meaning and thereby unsurpassable mastery in dispensing justice (an 'active,' delegating, general will), in that the constructed quality of the legal meaning is played down within the framework of a formal or mechanistic concept of law (a 'static' political machine whose relation to the general will is merely technical), de Man is at once trapped into the very delusion that characterizes the ideology of the legal text: a dichotomy of the law and its readings. The typical realist-New Dealist criticism of the state of law has been a fine example of the kind of mistake that is ultimately self-refuting: that the law lags behind the reality.[16] While at the same time the very realist concept is built upon the *impossibility* of such discrepancy between the two.[17]

2.4.1 Formalism as Subjectivism

The impossibility of a formal concept of law has been a persistent theme of the realist rhetoric. I referred above to one of the seminal pieces of the realist literature in the form of Saleilles' preface to the *Method*.[18] It formulates, perhaps for the first time in such clarity, a binary opposition of fiction and reality; and declares: 'It is time to return to reality.'[19] The fiction designates the legal ideology that confines adjudication within the strict boundaries of formal guidelines and what can be made of them through inquiry into the legislative will and exegetical uncovering.[20] Because the ideology of a mechanically guided adjudication is but a fiction, however, the reality it opposes does not indicate a process that is radically different. In other words, the dichotomy between the two positions is hardly that reality does not have its way with the formal concept. The formalists, on the contrary, are just as

good students of reality, if not by conviction, by the sheer force of the place which they occupy officially and which often compels them to go beyond formal guidelines and detached logical deductions in pursuit of sound judgement. The dichotomy between the advocates of the tradition and the realists, therefore, is one not of *doing*, but of *acknowledging* that which is done. The formalists, as Saleilles puts it, 'do it without admitting it. Even more, and out of loyalty to principles, they pretend that they do not do it.'[21] The reality to be 'returned' to, subsequently, is one of *rhetoric* on the part of the tradition, rather than one of bringing into line the somehow discrepant levels of law and reality. Does that mean, then, that the realist vision consists of setting merely the *record* straight? Because a merely *rhetorical* objective could diminish the force of the realist discourse itself, however self-refuting, theoretical designs for the *reality* of the law often follow. 'For more than a century,' writes Saleilles, 'we have lived under a fiction which had brought forth all the advantages it was designed to, and from which we have now for a long time gotten only *inconvenient results*. It is time to return to reality.'[22] Just as de Man, Saleilles refuses the text a binding authority that would make possible a formal concept of law in contradistinction to the reality of it. Once the only difference a formal concept of law could possibly make is established to be merely rhetorical, however, at the cost of self-falsification, the authority of the text is *restored* in order to hold responsible for the 'inconvenient results' a formal concept of law — formalism is *possible* after all.

If there is a crime committed in the form of a dichotomy between the law and its readings, and an ensuing free play, formalism ought to be understood as the sole *remedy* to it rather than responsible for its inconveniences. Once the effects of formalism are admitted as *real*, and thereby formalism as a doctrine of constraints is established to be in good working order (as indeed it is done in the dichotomy of the law and its readings), there can be no good reason to *abandon* it: reshuffle the pack, change it, add some cards, leave out some; but remember, this is a game of *cards*. And if, on the other hand, the crime is not committed, as implied by the realist

contention that formalism is a rhetorical effect rather than a practicable strategy, then formalism is held either for the wrong reason or without reason whatsoever: the inconveniences spoken of refer merely to *different traces of reality*, as opposed to the artificially imposed effects of some category that would be non-reality. What sounds like an impropriety of logic, therefore, is at once an accurate depiction of the realist predicament: the wrong person is arrested for a crime uncommitted.

That the realist critique pertains to the *record* rather than the process is emphasized repeatedly by Gény. The Swiss legislator is praised in the second edition of the *Method* for the 'frankness' of the Civil Code of 1907, a code which concedes the exhaustibility of the formal sources of the law in the very first article and confers upon the judge rule-making powers. The principal merit of the Code, according to Gény, is an 'ethical' one; its authors have 'sincerely recognized the limits of their ability and the need to supplement it by other means.'[23] Although the traditional method is basically about misrepresentation, on the other hand, just as practical inconveniences follow the rhetorical argument of Saleilles, Gény too points out that 'in the hypocrisy behind which [the traditional method] operates' lie hazards which are very much *real*.[24] 'When one considers the practical aspects,' he writes, 'one notices at once the capital defect of the system: the immobilization of the law and the stultification of any new ideas.'[25] Immobilization becomes an issue as the tradition recognizes no rule other than the 'formulae positively enacted by the legislator, and [the] principles construed on their basis.'[26] Even though realism is defended on the sole basis of its *ineluctability* in the first place, the formalistic concept of the tradition is made to give realism the lie by *eluding* its ineluctability. In its choice for the vacuum-packed dictates of formal guidelines, and against reality, formalism as a doctrine of constraints turns out to be more than mere promise after all. On the contrary, it succeeds to keep everything regarding the law absolutely frozen, as Gény cares particularly to emphasize it, '*at the moment the law was passed*.'[27] The text of the law does its bit on the side of the method by tolerating its liberal interpretations up to a point only, where its existence begins to develop a

brittle quality.[28] When this happens, according to Gény, there are two things the interpreter can do. One thing she can do is to defer the matter to the legislator, which often means a slow, 'difficult' and 'inconvenient' course, apart from signifying 'a defeat of the legal method and a confession of its impotency to satisfy the needs of life.'[29] Now the perverse logic of Gény's argument must not go unnoticed. In designating the legislative will as the only basis for interpreting the (written) law, as I discussed it above,[30] he upholds fervently the principle of the parliamentary supremacy against the *Volksgeist* considerations of the historical school.[31] In the argument about defeatism, however, deference to the parliament is despised, among other reasons, for promoting the idea of a submissive judiciary. And this is where the argument once again shows a truly paradoxical quality. The entire point of the *Method* is to prove the fallacy of the traditional claim to completeness and perfection in its formal guidelines. But now for the legal *method* to have qualities less ambitious than those of the legal *text*, namely the qualities of omniscience and omnipotence, is considered to be a shameful defect. The second course is marked by a similar displacement of logic. The other course that the interpreter can take, according to Gény, when the law shows a brittle quality is to abandon the law altogether and substitute for it her own freely acquired rule.

> [The] lack of adaptability imposed by the positive law — for me the basic defect of the purely legalistic and deductive system of interpretation — is aggravated by another defect which offers an opportunity for a more precise criticism. While it appears to remain faithful to the statute and its spirit, the traditional method leaves in reality a place for the most disorderly subjectivism. This is a necessary consequence and almost the price for the precise and restrictive procedures which it alone considers legitimate. When it is necessary to ascribe to the legislator an idea he has not expressed, nor perhaps conceived, or frequently could not have harboured at all, the interpreter tends by the very force of the circumstances to substitute his own ideas for those he does

not find in the legislation.[32]

In the first course the interpreter finds herself before a set of rules that are *frozen* in time. What that means first and foremost is that the rules are bendable only up to a degree. The point that ought to be noticed therefore is that to the process Gény describes in the first course it is absolutely crucial that the state of the bendability of the rules is an accountable, monitored matter. In the second course that follows, on the other hand, a more drastic action on the part of the interpreter, namely the *abandoning* of the law altogether, is taken, yet this time with less or even no concern at all regarding its accountability. How is that? How is it possible within one and the same system of law that one interpreter's mere touch of the legal text is felt within the monitoring audience to a degree where the text is recognized as becoming brittle, while one interpreter's *skipping* of it entirely goes unnoticed? If the 'basic defect' of formalism is its 'lack of adaptability,' we are told, even more horrendous is its 'necessary consequence' and 'price,' namely a 'most disorderly subjectivism.' If subjectivism *necessarily* follows the lack of adaptability on the part of the law, it is not clear how formalism is held responsible for causing subjectivism and immobilization in the workings of the law *at once*. The paradox, however, is that if formalism is cleared on *one* of the two charges, it is cleared of *both*. If it is responsible for immobilization, that only shows that formalism *works*; and it works as the *sole* remedy against the freakish that underlies the realist charge about subjectivism. If it fails, on the other hand, in sustaining immobilization, and instead subjectivism reigns, then formalism simply does not work; failed its rationale, it does not exist, and can hardly, therefore, be responsible for any of the things that happen.

The preliminary draft of the Swiss Civil Code, made about the same time Gény was finishing the *Method*,[33] uses the same argument against the traditional method: formalism risks subjectivism, because its cloak of a purely mechanistic reading of the law provides the perfect cover for the personal whims of the interpreter.[34] The

Code bestows upon the judge the authority to make the rule where legislation and custom are silent. Acknowledging the rule-making powers of the judge, however, does not necessarily mean a widening of the powers he already holds. On the contrary, it signifies an *openness* whereby the process becomes more accountable and the interpreter a lot more restricted than he would be behind the closed doors of formalism. Because formalism is precisely where 'the most questionable tricks of interpretation' are employed to beat meaning into the text of the law.[35]

Not surprisingly, the equation that holds together formalism and subjectivism is reproduced by Llewellyn. As he opposes the Grand Style of the common law to the Formal Style, the former distinguishes itself as a 'tradition,' and thereby a 'duty,' to ensure the continuity of practice on a principled basis, while the deductive and exegetical manners of the latter are simply make-believe and therefore devoid of capability to constrain. In the early work, *The Bramble Bush*, Llewellyn formulates the risk involved in abandoning the realist tradition of the common law for a formal concept in terms not dissimilar to Gény's formulation of it for the Napoléonic Code. 'Lacking full realization of the duty, the method, the tradition, the appellate judge can come and to some extent is coming *to see himself as free* — and that way lies disaster.'[36] In elucidating the traditional suspicion towards the immediacy behind speech, which is paradoxical for speech is usually the privileged term for exactly the same reason, I referred above to the Aristotelian concept of government by well-drawn laws as opposed to government by men.[37] I also related the Hobbesean objection to the dichotomy which he designates as 'another Errour of Aristotles Politiques.'[38] What is crucial to notice is how central the dichotomy is to a formalistic notion of law. In the mature work by Llewellyn, *The Common Law Tradition*, the equation that makes subjectivist disorder a consequent and price of formalism is invoked on the basis of the very dichotomy that is the epitome of formalism.

> [F]irst, the Grand Style is the best device ever invented by

> man for drying up that free-flowing spring of uncertainty, conflict between the seeming commands of the authorities and the felt demands of justice. Second, when a frozen text happens to be the crux, to insist that an acceptable answer shall satisfy the reason *as well as* the language is not only to escape much occasion for divergence, but to radically reduce the degree thereof... Third, the future-directed quest for ever better formulations for guidance, which is inherent in the Grand Style, means the on-going production and improvement of rules which make sense on their face, and which can be understood and reasonably well applied even by mediocre men. *Such* rules have a fair chance to get the same results out of very different judges, and so in truth to hit close to the ancient target of 'laws and not men.'[39]

The three features that are listed in fact only proliferate one fundamental antinomy of laws and men, or the law and its readings, which is made conceivable by a distinctive concept of world fraternity where the freakish is anticipated as the attachments constitutive of the event of signification are suppressed. The 'commands of authorities' are put, in the first feature, in opposition to the 'demands of justice' in an anticipation of the freakish, even though the 'seeming' installed before the 'commands of authorities' aims to attenuate the effects of the dichotomy which is ultimately threatening to the *sole* realist rationale in the game. Yet, in the second feature introduced, the dichotomy is only reiterated in the form of an opposition between the language of the law and reason, a diversity that can be rationalised only on the basis of a concept of *silly rule*.[40] And finally, a distinction is made between the immobile character of formalism and a progressive quality that marks the Grand Style, which not only reproduces the basic dichotomy, but which does so, as with Gény before, at the cost of the concept of a 'free-flowing spring of uncertainty' whose remedy is the *unique* contribution of the Grand Style. Formalism is held responsible at once for immobilization *and* a free-flowing subjectivism. What brand is the concept of world fraternity presupposed in the argument for the

Grand Style?

Llewellyn repeats Gény with little or no difference in not only drawing a radical and ultimately problematic distinction between the Formal and the Grand Styles, but he also reproduces the latter's concept of a free scientific search, where statute and custom are exhausted, in defining the nature and the procedure of the Grand Style. The realism of the Grand Style signifies a 'conscious seeking' of the right rule with a careful observance of precedent and statute, while the subjectivist interpreter accommodated within the Formal Style is expected to find a *fourth* category in which to make presentable his passion and whims.

> To *recognize* that there are limits to the certainty sought by words and deduction, to seek to define those limits, is to open the door to that other and far more useful judicial procedure: *conscious* seeking, within the limits laid down by precedent and statute, for the wise decision. Decisions thus reached, *within those limits*, may fairly be hoped to be more certainly predictable than decisions are now — for today no man can tell when the court will, and when it will not, thus seek the wise decision, but hide the seeking under words. And not only more certain, but... more just and wise (or more frequently just and wise).[41]

The words Llewellyn emphasizes in the text signify the three categories that are available as a basis for the decision: the first two are precedent and statute; and the third, a 'recognition' of the *limits* of the first two, contained in, and followed by, a 'conscious seeking.' The conscious seeking, for Gény, is what free objective search is all about where statute and custom (which is technically a species of decisional law) do not provide an answer for the case in hand. A free search can be pursued, however, not only when there is no answer, but also when the answer, or in Llewellyn's delicate phraseology, the 'seeming'[42] answer, is not up to the required standard. As Gény puts it, the judge is justified to take the place of the legislator in the specific case when an 'absence or insufficience of formal sources' is the issue.[43]

Because subjectivist disorder is in a sense the very inaugurator of the quest for a realist methodology, it is enigmatic why a choice of such significance on the part of the interpreter should be left out of the general distrust of personal whims and passion. Gény finds the project of the Savignean historical school 'dangerous' precisely for leaving it to the choice of the interpreter to decide whether the law is right for the specific occasion. As he relates with scorn the thinking of the historical school,[44] 'if the thought of the legislator as it appears from the natural sense of the text is repugnant to what the interpreter according to his personal feeling considers to be the expression of the collective conscience of the people, he will not hesitate to apply the statute giving preference to the direct revelation of the common and profound source over its imperfect statutory expression.'[45] What is particularly revealing is the fact that the position of the historical school, which would be perfectly justifiable from a certain point of view 'for drying up that free-flowing spring of uncertainty, conflict between the seeming commands of the authorities and the felt demands of justice'[46] (the word 'felt' having its own story there), is frowned upon for, not drying up, but *inducing* uncertainty.[47] 'To authorize such freedom,' writes Gény about the choice the interpreter exercises within the meaning of the historical method, 'is nothing less than to suppress the precision and stability which are the capital merit and salient advantage of the written law.'[48] Without making it clear how exactly the interpreter of the free objective search differs in his decision of the insufficiency of the formal sources of law from the interpreter of the historical method, Gény declares objectivity as the backbone of the realist methodology:

> in order to prevent any arbitrariness, he must eliminate as much as possible any personal influence... and base his decision on objective elements. This is the reason why it has seemed to me that his activity could be properly labelled 'libre recherche scientifique': *free* search, because it is outside the reach of any positive authority; *objective* search, because it can be solidly based only upon objective elements which

systematic-scientific jurisprudence alone can reveal.[49]

Of the scientific disciplines to guide the search, Gény cites sociology as one of the utmost significance. 'If this science should ever realize the hopes that have been put into it, I think it would suffice to provide us with the necessary clear information.'[50] However, 'at least for the time being,' the interpreter must be allowed the benefit of the scientific disciplines amongst which are 'general philosophy,' 'psychology,' 'individual and social ethics,' 'political theory,' and 'political economy.' History, in its broadest sense, is a natural contributor to the process. 'Thus I say that in the absence of formal source, which are certainly the most exact and firm indicators for the interpreter, he can find the necessary and sufficiently secure directive in the purely scientific data.'[51] The concept of the *purity* of data would seem to be uneasy with the idea that the data should at once provide the *directives*. What the search entails in its scientific project, however, is to ascertain merely the *rule* in the specific case which Gény designates as the 'means.'[52] The 'direction,' on the other hand, which transcends the particular application of the rule, is determined, not empirically, but on a *rational* level. The direction of the search, accordingly, is its 'goal,' while the specific rule is an instrument to make it happen.[53] The goal that is founded on rational principles, Gény explains, is 'absolute justice.' And excitingly, absolute justice finds evidence for its conceptual validity in the authority of 'our great Montesquieu, neither the clarity nor the power of whom can be questioned.'[54] As Montesquieu states in *The Spirit of Laws* that 'I have not drawn my principles from my own prejudices, but from the nature of things,'[55] Gény not only takes the former's word for what he claims to have done, but, more surprisingly perhaps, he also considers the former's mere *appeal* to the nature of things to be sufficient evidence for its validity as a concept. 'Montesquieu indicated clearly,' writes Gény, 'that the nature of things from which he declared to have drawn his principles, did not consist only of phenomena, facts and contingencies, but rested on a more solid foundation, which is the work of reason and represents absolute justice.'[56]

Interpretation on the basis of *free* search, therefore, is indeed *principled* in its scientific project insofar as it merely seeks ways to achieve on a phenomenal level that which is just *independently* of phenomena. Interpretation, according to Gény, is motivated by 'the principle of *justice in itself*, which implies a certain order in human relations to be sanctioned by the social power, imposes itself absolutely, [and which] is recognized through reason, and every act of legal interpretation involves automatically its finding and proclamation.'[57] Justice, he elucidates, belongs to an order that is *about* human experience but that, at the same time, *transcends* its sensory ties. The guidance that is required in an objective search, therefore, is not to be sought in the ordinary, sensory domain. The right rule in the absence or insufficience of formal directives will be inquired within an independent realm where discordant claims for the just and the right can be resolved with finality.

> Here is an absolute prerequisite for a firm basis for interpretation in the sphere of free objective search: beyond and above the *positive* nature of things, which consists of physical and dynamic elements, we must refer to a *higher* nature of things, which consists entirely of rational principles and immutable moral elements.[58]

Transcending criteria, which belong to the realm of senses, on the uniquely firm basis of a suprasensibility refers us back to the themes we have already explored with Lyotard.[59] The conscious seeking that defines realism appears, rather revealingly, to correspond to Lyotard's notion of 'anticipation,'[60] and the realist 'reason' to his 'capability to decide.'[61] Better still, Lyotard designates the moment of transcendence, in an intricate and therefore more striking overlap, as a hunch, 'a matter of feelings,'[62] rather than concepts. 'General propositions do not decide concrete cases,' writes Holmes. 'The decision will depend on a judgement or intuition more subtle than any articulate major premise.'[63] Gény too refers to an

'instinctive feeling' for the right decision in the specific case, as opposed to principled reasoning.[64] Gény's reference, however, comes in a discussion of such matters as the principle of bona fide in Roman law and, notably, the part played in the English system by equity, a concept defined as 'an inarticulate and not reasoned feeling about the exigencies of law.'[65] Gény expresses regret that the French system does not offer equivalent notions, or that their existence in practice is not acknowledged. Regardless of its context, the appeal to 'instinctive feeling' has been usually construed in the interpretations of Gény's work as an implicit support for the notion of hunch.[66] What is mistaken for a notion of awareness within the elusive attachments of a world fraternity, in the sense Holmes means it, however, is none other than the Kantian rationality, which, just as the Lyotardian hunch, Gény entertains within the meaning of a binary opposition of heteronomy, namely the lower, sensory side of man, and autonomy, his rational and higher being.[67] Not surprisingly, therefore, in the second edition of the *Method*, Gény takes pains clearly to distance himself from the idea of a mode of awareness which is other than a *rational* suprasensibility.[68] What brand is the fraternity presupposed in the Génian-Lyotardian notion of awareness in the search for that which is right?

Llewellyn reproduces Gény's formulation of the means and the goal in an *aware* pursuit of the right decision in his concept of 'reason.' A distinction he makes between what he calls the 'situation-sense' and 'wisdom' in the specific case encapsulates the idea that characterizes the crucial, Génian dichotomy of the domain of senses and absolute justice. Combining the sensory with the transcendental, and at once dictating a frankness of rhetoric regarding the way the two are in league within the enterprise, Llewellyn's *reason* is a concept that captures the whole message of Gény's project for a free objective search.

> *Situation-sense* will serve well enough to indicate the type-facts in their context and at the same time in their pressure for a satisfying working result, coupled with whatever the judge or court brings and adds to the evidence, in the way of

> knowledge and experience and values to see with, and to judge with. *Wisdom* will serve well enough to indicate a goal of right decision weighted heavily with and for the future. *Reason* I use to lap over both of these, and to include as well the conscious use of the court's best powers to be articulate, especially about wisdom and guidance in the result.[69]

In the *awareness* reason signifies, therefore, the interpreter finds the *third* category, after statute and precedent, on the basis of which to justify the particular reading. What gives away the brand of fraternity that defines realism, on the other hand, is the fact that, given the frame of reference it anticipates, there simply cannot be a *fourth* category for the formalist interpreter within the confines of which to introduce her private passion. The passion, in other words, will have to take a form that would allow it into one of the three categories if it is to merit consideration at all. Paradoxically, however, when the passion unleashed under the permissive cloak of formalism does therefore enter the game, it at once falls out of use for consideration, for its reality is then but a non-reality, as, having already secured a place in one of the three non-passionate categories, its mode of being as pure passion will be, not one of reality, but one of a *state of mind*. Realism betrays its very rationale, as it presupposes a non-grammatical distinction between seeking and *conscious* seeking, or between *whimsical* and conscious seeking, whereby the not-conscious to be deposited into a category that is 'dangerously supplementary' to the three legitimate categories of statute, precedent, and reason. Realism does assume a *fourth* category, a category that fails reason, but it does not tell us what the unreasonable interpretation a judge might come up with would be like. The concept of a fourth category that is non-manifest yet dictating is at once that which enables Groucho in the Marx Brothers joke to tell *which partner exactly* has been left out when Zeppo misses a Hungadonga in the title of a letter to the lawyers *Hungadonga, Hungadonga, Hungadonga & McCormick*. The supplementarity of the fourth category, namely the personal whim, transcends the reality of itself,

which it abandons in one of the three non-passionate categories, and survives by and in itself as pure intention with no necessary connections with the reality of itself, its *extension*, to go on being an impending, if non-real, hazard to the workings of law. The reality so heartily championed therefore leaves realism, just as intelligibility does the phrase 'its extension,' where no essential connections between 'it,' namely the intention, and the extension, can be conceded. The non-fraternity of a fallacious Cartesianism, consequently, appears to be what defines realism.

A non-grammatical, absolute, dichotomy between intention and extension makes conceivable the realist equation of formalism and subjectivism, thereby lending force to its rhetoric for a *better* order. Perversely, however, what the dichotomy at once does is to nullify the sole rationale for realism, namely that formalism is impossible. The ineluctability of realism pre-empts the question: what sort of positive attitude does realism require? The history of realism, nevertheless, has been a long and frustrated answer to the question of what to do. 'I am — I make no secret of it — a reformer,' declares Frank.[70] In *Science et technique*, Gény contrasts 'blind practice' with an 'enlightened practice.' To argue that 'theory is without influence on the actual development of legal practice,' he writes, in an anticipatory response to the notorious thesis by Fish,[71] '[that] method is more a matter of *pouvoir* than of *savoir*,' is 'a sheer sophism.'[72] The Génian dichotomy between the enlightened and blind instances of practice is reproduced in what I quoted above from Llewellyn, as he distinguishes a tomorrow that is wiser and less uncertain from the 'today' and 'now' of formalism where wisdom is scarce and the reign is that of uncertainty.[73] According to Llewellyn, the concept of law that defined what he terms the 'Formal period,' whose end interestingly coincides with the rise of realism,[74] comprised 'the *mere rules* of law. And in action, the whole drive of the Formal Style was toward making sure, so far as might be, that it should be just those phrased rules which did do the deciding.'[75] That in turn meant a 'wooden and literal reading' of statutes in the Formal period.[76] While 'in the period of the Grand Style of case law statutes were construed 'freely' to implement their purpose.'[77] Llewellyn, therefore,

subscribes to the idea of *phases of practice that are radically distinct*, even though the 'steadying factors' and the 'craft' which he also includes in his account[78] are clearly uneasy with the concept of a blind, unprincipled or misguided practice. Enigmatically, however, the styles are at once introduced as those, not of reading, but of *opinion-writing*,[79] a process held distinct from the actual reading and placed instead within a genre where performance is measured by the capability to persuade.[80] Llewellyn points out the 'impossibility' of the deductive reading advocated in the Formal Style.[81] Its impossibility, however, is quite another matter from its use as a mode of persuasion. 'An opinion written in the Formal Style,' he notes, 'has no need to reflect a deciding done in like cold deductive manner, for in such an opinion no other factor which may have been at work in the deciding rates mention or even hint.'[82] As the Formal Style is redefined in terms of *rhetoric*, to observe the Grand Style at work, likewise, we are urged to go to the 'law reports of the 1830's or 1840's.'[83] We are referred, in other words, to that which is repeatedly designated as a different genre of practice rather than an *account* of it. The difference between the Grand and the Formal Styles is, one, therefore, not of genre, but *within* genre. Even if, at the expense of further problems for the theory, the Grand Style were somehow to be left out of the genre in which is the Formal Style, and considered instead, to be an *account* of the actual process; rather than implying a non-grammatical difference between the two instances of practice, the frankness of rhetoric on the part of the Grand Style would only *justify* the question I posed to start with: does the realist vision, then, consist merely of setting the *record* straight?

2.4.2 Realism About Realism

If so, where formalism signifies first and foremost a *record-oriented* enterprise, and where it is the realist rhetoric that makes good record-keeping the key issue of its project, even though a dichotomy of the law and its readings is out of the question

(meaning, practice is what counts and it has its own mode of continuity) and records constitute only a different genre of practice rather than an independent venture to depict the workings of practice in a detached manner, realism simply *mimics* formalism. And because its zeal in that case far exceeds that of formalism, realism may be better designated as an *ultra-formalism*. And, conversely, if realism seeks not only to record accurately but also to alter, guide or manipulate that which it records, and therefore presupposes a distinction between formalist and realist phases of practice, then every single feature that is attributable to formalism can be shown to mark the very project of realism with, again, a far greater zeal. If a formalist rhetoric is pinpointable, (a) in its belief in managing practice by means of formal guidelines; (b) in its belief in the fantastic that is dangerously at large in the absence of formal constraints, hence subjectivism and unpredictability in court outcomes; and finally (c) in its belief in a dichotomy between the legal and the moral, or between as realists often put it, is and ought, underpinned by a formal concept of language in the form of a logical positivist verificationism, accompanied by a formal (picture) theory of truth; then realism can safely be regarded as an instance of, not merely formalism, but, again, ultra-formalism.

In the early essay 'Some Realism About Realism,' Llewellyn points out amongst the major constituents of a 'common core' for a variety of realist positions the idea that rules are not '*the* heavily operative factor in producing court decisions.'[84] The duality this early essay (co-authored by Frank) establishes in the form of *rules* and *supplementary factors* must be considered at the heart of many of realist predicaments, even though, apart from the early formative period, the duality has not always remained unquestioned. What realism appears to do after abandoning a formal notion of validity is to substitute for it a patchwork notion of validity. In this hastily arranged concept, it is hardly clear why rules should be operative in court decisions at all, or why some rules should *fail* to exert constraints while some should succeed. The crucial point is that if rules are to be conceded to work even with a minimal success, ultimately that will be a *vindication* of formalism, rather

than a refutation of it: the possibility of its concept proved, its specific application can be *improved;* rules can be formulated with greater precision.[85] When Llewellyn states in that same essay that 'the authoritative tradition speaks with a forked tongue,'[86] his contention bears the mark of *four* unrealistic presuppositions at once. First, it anticipates an interpreter in the position of Zeno's arrow, out of time and place, and overwhelmed with the presence of forks of meaning to choose between, rather than one single command mechanically to apply in the particular case.[87] It fails both a realistic concept of interpreter and a realistic concept of *choice.*[88] Secondly, the statement anticipates one single right answer in the specific assemblage of contingencies; an answer that is lost in the imprecision of the solution provided by the rule, and yet can be attained by the judge in the specific case if only he were to be allowed to go about it free of the constraints of the rule. It fails a realistic concept of conflict and of its remedies, and becomes indistinguishable, at least in one significant aspect, from the notion of a right, natural answer. Thirdly, the deceptive quality of law's imprecision, namely its 'forked tongue,' invokes a concept of deception whose wildly unrealistic character I have already emphasized with the deceptive quality of the command of Lyotard's rabbi:[89] the *reality* of deception is far less open-ended than realism would have us believe. The unrealistic character of all three is surpassed, however, as, fourthly, the self-proclaimed authenticity of the speech of rules is taken for granted. That 'the authoritative tradition *speaks*,' in fact, supplies formalism with more evidence than it actually needs to assert its validity. Later in the development of his thinking, even though his approach modified, Llewellyn can be seen still to retain the notion that it is the *authoritative tradition* that speaks. His refusal of intentional argument in statutory interpretation, for instance, is motivated solely by fear that intentional reading will be one of *recovering* the authentic speech which will be uselessly archaic 'as a statute ages.'[90]

The duality of the authentic speech of rules and the supplementary factors, however, need not be limited to its unequivocal statements. Even when rules as

constraints are rejected altogether,[91] realism hardly dreams of questioning the rule-related authority of at least the *court* and its officials. That is to say, a minimum authority of rules has to be designated as given even in the extremest of realist positions. As for the *supplementary factors* of the realist duality, within the meaning of a patchwork concept of validity, their rationalisation has been conspicuous merely by omission: the improvised solution in the absence of a concept to assimilate factors other than rules has been to equate the dreaded prospect of subjectivism with *formalism*, and shout it as loudly as possible in the hope that it drowns out the criticism that it is the realist rhetoric that leaves the charges of subjectivism unanswered for in the first place. The void in the realist concept of validity for factors other than rules is filled in *The Common Law Tradition* with the notion of the 'craft.'[92] The elements that are supplementary in court decisions are vouched for by means of the 'steadying factors' which the craft offers to secure its continuity.[93] The supplementary elements, in fact, grow to challenge the very centrality of rules and assimilate the entire process in Llewellyn's later formulation. In the end the duality is abandoned altogether. 'It is not, I repeat, necessary,' he notes, 'that there be any rule. Neither is it necessary that there be any effort to formulate a rule, nor even that there be effort to phrase a justification. The matter goes instead to an attitude, an attitude in first instance internal to the actor.'[94] The primordiality of attitude is emphasized, with interesting comparison, in a middle period study which Llewellyn undertakes with the anthropologist E.A. Hoebel and which is based on the field investigations carried out amongst the Cheyenne people of the Native Americans, *The Cheyenne Way*.[95] The Cheyenne way, Llewellyn detects in an examination of the narrative accounts of the 'trouble cases,' displays a notable similarity to the workings of the common law system. It is for the most part 'intuitive,' lacks rule-based law, and yet at once exhibits a 'juristic precision.' The continuity attested by the native cases, Llewellyn observes, is clearly one of attitude rather than a rule-imposed phenomenon.

> It may well be that a very large degree of the regularity and predictability which we ourselves now enjoy in things of law is actually due not to the rules of law to which we have long been ascribing it, but to underlying legal institutions of our own which are as inarticulate, but which in their own way are as effective as those one can observe at work in the Cheyenne cases.[96]

I recorded above Lyotard's fascination with the narrative tradition of the Amazon Indians.[97] That Llewellyn should be equally dazzled with the Cheyenne Indians tells more than a simple coincidence. In both instances the pagan attitude is emphasized as a *condition* of human existence and therefore ineluctable. The ineluctability of paganism is at once ignored by both writers, however, as a radical dichotomy between the pagan attitude and the Jewish pole (the *German pole*, in Llewellyn's case, a category that epitomizes [the formalist] faith) is introduced. In the very context he refutes the centrality of rules to a system, Llewellyn seeks to illuminate the significance of the Cheyenne way within the framework of a contrast between the German and the Anglo-American attitudes, a distinction that can hardly be made on a level other than that of the centrality of rules.[98] In the common law attitude, he elucidates, the judge plays the central part, while in the German attitude the most significant part is played by the legislator and the scholar. As the latter tends to emphasize 'articulation,' with the former a 'feeling' on the basis of the particular case always comes first.[99] Llewellyn finds 'the great Romans' closer in this respect to the Anglo-Americans than the Germans for the Roman preference also was for the 'case by case' work.[100] Since the continuity of attitude and the steadying factors of the craft should not cease with the Germans just because they like articulating more than the Anglo-Americans, it is hard to see on what basis other than that of the *centrality of rules* the distinction is drawn. Unless, that is, Llewellyn wishes to stress a difference of *rhetoric* between the two traditions, as opposed to a difference in decision-making. Does the title of *The Common Law Tradition* refer, then, simply to a tradition of *rhetoric*? Where does the *Cheyenne rhetoric* come in? What

does it mean to say that the German rhetoric refuses to work on a 'case by case' basis?

I pointed out above the age-old distrust towards speech, which is paradoxical because, as Derrida teaches us, speech has been the privileged term traditionally.[101] The rankings of speech and writing in apparently discordant patterns, however, complies with one consistent motif which eventually dissolves the paradox: the privacy that marks speech serves a function similar to the distance that defines writing; in both cases an anticipated immediacy, pure presence, underlies the distrust. I have no way of knowing the true nature of the relation between what you say and what you have in mind, that which you have in mind being private; a similar discontinuity is brought about by the distance that characterizes writing. It is impossible not to notice the two apparently paradoxical rankings of speech and writing at work *at the same time* in Llewellyn's dismissal of the *articulate*. In the distinction between that which is felt and that which is articulated, which indicates the dichotomy between the two attitudes, the articulate clearly represents the alienated. On the other hand, the articulate is also written. And the written represents the alienated in its frozen, prejudiced archaicness. While that which is not written signifies adaptability and freshness in the sense that it enables articulation on an immediate, or as Llewellyn puts it, 'case by case,' basis.

What is really perverse, of course, is the fact that at the very time the *Cheyenne Way* was being composed, Llewellyn was busy also *articulating* the famous Uniform Commercial Code, part of whose aim, to give the lie to the conclusion drawn from the Cheyenne cases, was 'to simplify and modernize and develop greater precision and certainty in the rules of law governing commercial transactions.'[102] The Code's approach differs from that of the Swiss Civil Code, whose Article 1 Gény considers to be 'the best summary of my arguments,'[103] as Llewellyn's strategy, and *not* concept, of the legislative will differs from Gény's.[104] 'This Act,' states the Section 1-102 (1) of the Uniform Code, 'shall be liberally construed and applied to promote its underlying purposes and policies.'[105] Unlike

the Swiss Code, law-making by the judge, as opposed to liberal reading, is not introduced in the Uniform Code, for Llewellyn chooses simply to skip the problem of the legislative will in favour of the 'underlying purposes and policies' of the legislation, a phraseology which *technically* satisfies the requirement of legislative intention while at once suggesting an interpretive tool to operate on a liberal basis. Gény, on the other hand, urges the interpreter to read the law on the basis of the historical will in the first place, then she can abandon the law altogether, if, originally understood, it does not provide an answer in the specific case or if the answer it provides is not satisfactory. The Article 1 of the Swiss Civil Code reads:

> Application of the law. — The statute determines all legal issues covered by its text or interpretation.
>
> If no rule can be drawn from the statute, the judge shall decide according to customary law and, when even that is not available, according to the rule he would make as legislator.
>
> In this he shall follow established doctrine and decisional law.[106]

It is not hard to see why Gény would consider Llewellyn's solution a compromise that renders pointless the long and painful struggle on the part of realism against technical conformism and for frankness of rhetoric. Perhaps not surprisingly, Jaro Mayda, Gény's English translator, in his follow up on the system of the Swiss Code, finds the Swiss practice, since at least 1948, guilty of abandoning the realism of the Article 1 along the Génian lines, and adopting instead an approach similar to Llewellyn's.[107] The Swiss tend to read the Code liberally, irrespective of the historical intention, the codified need for judicial law-making where the law, originally understood, does not provide, thereby being aborted. The great irony, of course, is in the fact that a senseless zeal over the mechanical application of that which is written, regardless of the *effects*, is precisely what that which is written, namely the Article 1, is designed to abrogate in the first place. In terms of the *effects*, which are in a strong sense what realism is all about,[108] on the other hand,

the decisions of the Swiss Federal High Court, whether pursuing interpretation on the basis of a mechanistic guidance of the Article 1, or disregarding it altogether for a liberal reading of the specific law, do not exhibit a particular quality. In other words, the two modes of reading the Court is said to apply are distinguishable only when they have their name tags on. The 1948 'Suisa' decision which is thought to signify a turning point in the practice of the Federal Court designates judicial law-making as confined merely to 'cases of extreme need.'[109] Other than those cases, the 'analogous use' of the prevailing law is considered sufficient instrument with which to address new issues. The idea of judicial gap-filling in cases other than 'extreme need,' according to the Court, stands uncomfortably with the concept of the separation of powers.[110] The dramatic change of policy on the part of the judiciary, however, does not necessarily amount to a change in the *effects* of the ongoing practice. Mayda notes that one result, if at all, has been in fact quite the contrary; 'under guises and fictions,' the judiciary has performed the impressive functions the Code lays out for it with renewed strength.[111] Its promised subordination, he observes, has been one to changing circumstances, and not one to the legislator.[112] Was not Gény being hasty in his designation of the mechanistic jurisprudence as merely worshipful of the written? How efficiently has the formal guidance of the Article 1 managed the practice in Swiss courts? Judging from the effects which the 'Suisa' decision seems to have failed to produce for a change of direction in practice, the change of direction intended by the *Code* in the first place imposes itself as an issue. Has the Code provision made a difference in the workings of Swiss judiciary? 'Most commentators agree that it has not,' answers Mayda.[113] A Swiss jurist he quotes remarks that the free-searching formula of the Article 1 should be understood less as a remedy thought up for the inconveniences of formalism than a fair description of the long established practice of Swiss courts.[114] To re-read the established practice he refers to as the *established theoretical practice* may help to explain the rhetorical success of Gény's formula in Switzerland while failing in France, even though we have every reason to believe that the established *practice* in

France could not possibly be operating differently from the Swiss courts before or after the Code.[115] The Turks adopted the Swiss Code in 1926 with negligible alterations.[116] The rhetoric of the Code did not only appeal to the *elitist* revolutionaries of the young Turkish Republic, but the established *theoretical* practice, in particular the institution of *ijtihâd*, which characterizes interpretation within the meaning of Islamic law,[117] offered the formula of the Swiss Code the rhetorical support which it could not have in France.[118]

Paradoxically, however, the rule-sceptical track of realism converges with the rule-centred formalism of the French rhetoric in anticipating the *unruly* in the absence of rules as formal constraints. Realism shares the most basic tenet of formalism as it invokes an anthropologism to mark judicial process. 'Behind decisions stand judges;' writes Llewellyn (with Frank), 'judges are men; as men they have human backgrounds.'[119] He opposes, once more, government by laws to government by men, and dissenting from the judgement of his later work,[120] points out government by men as a primordiality.[121] I emphasized above the subjectivist concept presupposed in the formulations of Saleilles, Gény, and Llewellyn, where rules are naturally imprecise, and therefore devoid, in at least fringe cases, of capability to constrain, and where a well thought-out method to address that which evades the formal law is lacking. Frank, many of whose later ideas the other realists do not concur with, makes a free-floating subjectivism a condition which transcends the particular juristic position or method held.[122] After rigidly distinguishing between fact and fiction, especially at trial courts, he adopts an attitude regarding the handling of facts by the court not dissimilar to that of Descartes' all-doubting sceptic. For him, the unpredictability of court outcomes is accounted for by what he calls the 'unknowability' of the true nature of the facts in the specific case.[123] He draws attention to the manner in which facts are established in court.

> The actual event, the real objective acts and words... do not walk into court. The court usually learns about these real, objective past facts only through the oral testimony of fallible

> witnesses. Accordingly, the court, from hearing the testimony, must guess at the actual, past facts... There can be no assurance that... that guess will coincide with those actual, past facts.[124]

Fact-finding is a process *ruptured* in the mediation of 'fallible,' *passionate*, witness testimonies. The unknowability, however, does not only pertain to the nature of facts, but the *finding* of facts, 'the way in which [the court] 'found' those facts,' also forms an instance of unknowability.[125] The word Frank has for the general uncertainty which therefore marks the judicial fate of the specific assemblage of facts is 'chanciness.'[126] What is more, the uncertainty regarding facts is coupled in the process with the passion and prejudices of judges and jurors; prejudices that are 'concealed, publicly unscrutinized, uncommunicated... secret, unconscious, private, idiosyncratic.'[127] Cohen, on the other hand, opposes not only Frank's account of judicial predictability, but he also dissents from the anthropologism which characterizes the early Llewellyn's approach. 'Actual experience does reveal,' he writes, 'a significant body of predictable uniformity in the behaviour of courts. Law is not a mass of unrelated decisions nor a product of judicial bellyaches.'[128] The unpredictability argument, according to Cohen, arises from an anthropologism which is misguided in its emphasis on individual personality. The assumed privacy ignores the fundamental condition of human existence. An anthropocentrist notion of decision-making, therefore, cannot be accommodated with the assumptions of realism.

> A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say, as a product of social determinants and an index of social consequences. A judicial decision is a social event.[129]

The private dissolved within the social, you would not expect the unruly, central to

the positions of both Llewellyn and Frank, to procure basis in Cohen's thinking. The unruly becomes equally central to Cohen's project, however, as he makes an exclusion of the *unverifiable* from the conceptual order of law the primary task of the realist enterprise. The concepts that are unverifiable are those 'which cannot be defined in terms of experience, and [yet] from which all sorts of empirical decisions are supposed to follow.'[130] How exactly does the unverifiable elude the realm of the social, or of experience, while doing so is plainly out of the question for that which is private? Is the private simply reintroduced into the argument in the mode of the unverifiable? In fact, when Llewellyn (and Frank) emphasize 'the need of a more accurate description, of Is and not of Ought' in the studies of law,[131] that which transcends the domain of *is* is clearly equated with the private. Accordingly, for the inquiry to be pursued on the basis of a distinction between is and ought, apart from the initial choice, signifies no less than being kept *'as largely as possible* uncontaminated by the desires of the observer or by what he wishes might be or thinks ought (ethically) to be.'[132] The distinction is listed as one of the elements that form the 'common core' of realism.[133] The telltale phraseology ('uncontaminated'), on the other hand, betrays the extent of the realist trouble stuck in the metaphysical mud it sets out to eliminate.

The conceptual order that defines the traditional theory, according to Cohen, 'serves only to obstruct the path of understanding with the pretense of knowledge.'[134] Its knowledge is one of pretence, because it presupposes for its tools of inquiry a conceptual universe that is closed up in itself and yet at once eternally self-sufficient. It does not bear organic connections to either the realm of morals or that of experience. '*Jurisprudence*, then, as an autonomous system of legal concepts, rules, and arguments, must be independent both of ethics and of such positive sciences as economics or psychology. In effect, it is a special branch of the science of transcendental nonsense.'[135] Such supposedly unadorned concepts as corporate entity, property, contract, due process, malice, conspiracy, title, fair value, proximate cause, and so on, accordingly, often present themselves as open-ended

conundrums, simply because they purport to convey a fixed and verifiable content pertaining to the legal practice, while within the meaning of the transcendental principle that is pivotal to the system, in most cases they are invoked, *what they factually correspond to* is but a big void. In one example Cohen provides to illustrate the logic that encourages riddles in its effort to maintain the ideological front of the system, the particular riddle concerns the ascertaining of a corporate address so as to enable litigation against it.[136] The corporation in the specific case holds an office in New York, where the litigant actually sought legal action, but is chartered in the State of Pennsylvania. As he reads the opinion of Justice Cardozo deliberating on the issue at the Appellate Court of New York State (at once considering an opinion by Justice Brandeis at the Supreme Court who pursues in a similar case an inquiry along the parallel lines[137]), Cohen remarks that the typical attitude in resolving the question is a consistent suppression of the extent of law's inability to provide an answer on the conceptual level, a realistic acknowledgement of which might mean the tackling of the conflict of interests involved on a head-on basis. Because the law's principled self-sufficiency is taken for granted, however, the traditional mentality is typically expressed in the question, 'Where is a corporation?' Both Cardozo and Brandeis go to great lengths in their deliberations on the subject to avoid doing the realistic thing. Whereas the question on which the entire inquiry is built instead 'is, in fact a question identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, 'How many angels can stand on the point of a needle?"[138] Given that the question of the personality of the foetus in the ongoing debate over abortion is very much in the same mode of inquiry,[139] Cohen's point seems as topical today as it was in the heyday of the American realism. But is he being perhaps unrealistically optimistic? Is, perhaps, the breakthrough he evidently anticipates following a realistic acknowledgement of incapacity rather hasty? What if the traditional muddle on the conceptual level reflects a *factual* confusion (in some cases at least, such as in the personality of the foetus) over what should stand as law? Does the

realistic acknowledgement of a *gap*, instead of a pretend puzzle-solving, not presuppose a *formal* concept of law where the problem tackled does not invite immediate controversy? Does the whole issue of verification not centre around the *meaning* attributed to the question 'Where is a corporation?' Is the question not read in a distinctly *formal* way? Is its suspected verifiability not to do with the fact that its *rhetorical* character is suppressed? Is that suppressing perhaps revelatory of the nature of the entire argument regarding the unverifiable, in that the elusiveness of the relationship between the word and what it is about (its other) is wildly underrated to be reduced to a photographic correspondence? As with the question 'Where is a corporation,' would one not have to refuse the mediation of the attachments in place, before one were to declare nonsensical the *scholastic argument*? And would that be *realistic*? As I have already discussed it, a verifiability which would have to transcend the criteria of fraternal attachments and seek instead 'firmer,' as it were, ground, would fail not only the angels on a needlepoint, but also what Cohen would presumably consider the very epitome of verifiability, namely the mathematical or pictorial reality.[140]

In expounding the verificationist principle, Cohen calls in such diverse names as Pierce, James, Russell, Wittgenstein ('the protagonist of logical positivism'), and Carnap, who do not always agree with one another's views, but who 'in one fundamental respect... assume an identical position. This is currently expressed in the sentence, 'A thing is what it does."[141] It is dubious that Russell and Carnap would readily give their blessing to Cohen's formulation. Doubtless, however, the two do receive their share of say in the combined enterprise. 'Any word that cannot pay up in the currency of fact, upon demand,' writes Cohen, 'is to be declared bankrupt, and we are to have no further dealings with it.'[142] The tension between the two themes, one pragmatist (use),[143] one verificationist (truth), is hardly the kind to be suppressed. '[I]nstead of assuming hidden causes or transcendental principles behind everything we see or do,' he notes, 'we are to redefine the concepts of abstract thought as constructs, or functions, or complexes, or patterns, or

arrangements, of the things that we do actually see or do. All concepts that cannot be defined in terms of the elements of actual experience are meaningless.'[144] Surely, the two sentences cancel each other out. If there are to be concepts outside experience, albeit 'meaningless,' then the transcendentality ascribed to the traditional theory is not excluded but *invoked* (as it is in the *Tractatus* in the case of logic, God, ethics, and aesthetics[145] — the part of the work, according to Wittgenstein, that is 'unwritten,' yet more significant[146]). And conversely, the concepts of the traditional theory *are* busy concepts. The idea that certain concepts elude experience for *they do not do what they promise* is fallacious, because the process is the other way around: as we are reminded of it by none other than Cohen himself, concepts do not make promises in an abstract manner, but *they are what they do*. Yet their operational capability is not on the basis of experience, Cohen objects, but on the basis of *faith*. The traditional concepts 'do not have a verifiable existence except to the eyes of faith.'[147] The faith metaphor has performed a key part in the present study. Its employment by Cohen only completes the pattern. What his argument does in distinguishing between verificationism and faith is to appeal in the former term to *an order which transcends the attachments of a world fraternity*, the primordial human condition, resulting in a brand of metaphysics which he would otherwise like to attribute to the traditional theory. The idea of a higher order, the hallmark of the traditional theory, in fact *proliferates* in Cohen's argument. 'Intellectual clarity requires,' he notes, 'that we carefully distinguish between the problems of (1) objective description, and (2) critical judgement, which classical jurisprudence lumps under the same phrase.'[148] Far from violating the distinction, I have already quoted Cohen pointing out a non-grammatical dichotomy between the descriptive and the prescriptive as a fundamental character of the traditional theory.[149] Accordingly, what defines the rules of law first and foremost is an objective quality that is unpenetrable by either the dictates of ethics or scientific data. The ought terms do not automatically enter the 'is' castle of the law for just being commendable, but require the gate-keeping consent of the legislator. In

contrast to the natural law positions, a dichotomy of is and ought has always been the undeniable feature of formalism. I noted above the equation Llewellyn and Frank establish between the ought term and that which is private.[150] In a further reproduction of the concept of a higher order Cohen comes to affirm what he originally terms a pretension of the traditional theory, as he posits a *dispassionate* discourse in the studies of law. 'The realistic lawyer,' he writes, 'when he attempts to discover how courts are actually dealing with certain situations, will seek to rise above his own moral bias and to discount the moral bias of the author whose treatise he consults.'[151] The unruly is thereby named the passionate. And individual passion designated as dispensable, the individual is conferred upon a split constitution, the non-passionate, non-moral, non-dispensable half of which in turn signifying her *higher* being. As Cohen ends up dissolving his own dissolution of the dichotomy between the social and the private, the anthropologism of Frank and Llewellyn earlier refuted becomes reinstated.

A verificationist criticism of the conceptual order of the traditional theory has been central to the writings of the Scandinavian realists.[152] In a dissolution of the dichotomy between positivism and natural law theory, Hägerström reverses the peripheral position of the latter by pointing out what he terms the 'natural law notions' that underlie the conceptual order of positivism.[153] In the introductory chapter of his work on the Roman concept of obligation,[154] Hägerström draws attention to the vulnerability of notions such as right, duty, and will, to a critical probing. He ventures to find out whether the particular concept signifies anything that is essential to it *in the face of varying instances of its use* within the system, a paradigmatically verificationist approach whose repudiation in the later work of Wittgenstein I have already mentioned — the idea of family resemblances.[155] Family resemblances, as a notion that is the basis of the elusive relationship between the word and its other, yields to the idea of the *grammar* of the particular word, as opposed to the presupposition of pictorial correspondence between the word and that which it is about. A pictorial correspondence, rather than the

grammar, forms the object of Hägerström's search in his investigation of the conceptual order of formalism, as he declares the lack of a common element in different instances of a legal concept at the heart of legal discontinuity. Concepts such as the right of property, personal right, and legal duty do not correspond to facts in reality.[156] '[T]he insuperable difficulty,' he writes, 'in finding the facts which correspond to our ideas of such rights forces us to suppose that there are no such facts and that we are here concerned with ideas which have nothing to do with reality.'[157] As with Cohen, the Hägerströmian realism *invokes* transcendentalism in its notion of *non-real ideas* rather than exclude it. The latter, however, offers a formulation which is not dissimilar in its accommodation of the transcendental to that of the early Wittgenstein. As the non-reality of the concept of duty is added to that of rights, Hägerström notes that 'we are inevitably led to the view that the notion of legal duty cannot be defined by reference to any fact, but has a *mystical* basis, as is the case with right.'[158] That the 'traditional ideas of mystical forces and bonds' are the place where the 'roots' of the concepts of law are to be sought[159] constitutes the celebrated thesis of Hägerström's legal work. The significance of an enlightened study of Roman law, in turn, derives from the fact that in Roman law 'we may expect to find the ideas [prevalent today] presenting themselves in a more naive form.'[160] In other words, concepts prevalent today are defined by a *semantic continuity*, a promise, which transcends the contemporary, historical, usage. Is the very Hägerströmian project of magic-busting not made possible by a concept that itself sounds oddly *magical*?

That words make promises which they sometimes cannot keep dominates equally the writings of Lundstedt and Olivecrona. According to Lundstedt, 'all the conceptions of legal ideology are metaphysical.'[161] Amongst the words he suggests 'not be used even as terms or labels' (meaning not be used even *figuratively*?) are justice, right, duty, wrong, wrongful, lawful, obligation, legal relationship, fault, guilt, claim, and demand.[162] 'But I think it will be impossible,' he adds with regret, 'in the common practice of law... to eradicate them.'[163] The project for eliminating

the concepts of the traditional theory is justified on the basis of a distinction between 'value judgements,' which lack an empirical context, and 'proper judgements,' which are of scientific value.[164] Closer to the formulation of the early Wittgenstein, value judgements are designated, not as nonsensical (as Cohen so deems following a vulgar version of logical positivism), but as *'neither true nor false.'*[165] They emanate from the 'feeling' one has of a thing, and are, in this respect, unverifiable.[166] While proper judgements are based on 'the thing itself' in an unmediated manner and qualify to be the subject of scientific interest.[167] Lundstedt divides the judgements of value which form the entire conceptual order of jurisprudence into three categories, namely those of ought, guilt, and justice, all three being the expressions of personal emotions about reality, rather than reality itself.[168] Consequently, all judgements of value are subjective. 'For only that is objective which can be determined independently of our feelings.'[169] The transcendentalism which vacuum-packs, as it were, the Hägerströmian concepts to survive the sensory is reproduced by Lundstedt as he defines the personal in terms of a privacy. In turn, the undeniable metaphysics of a dichotomy between the personal and the proper makes conceivable his own anti-metaphysical stance.

A milder form of verificationism characterizes Olivecrona's work, as a view of language somewhat similar to that of J.L. Austin is at once posited.[170] In that respect, his approach is comparable to that of Cohen in its blend of pragmatist and logical positivist themes.[171] Olivecrona distinguishes between descriptive and directive uses of language without, however, the *tension* which defines Austin's distinction of constatives and performatives.[172] While descriptive instances of language correspond to fact-situations of reality in an austere manner, directive instances do not signify a content that is factually analyzeable; they 'actually denote nothing, not even imaginary entities.'[173] The words in directive uses of language are 'hollow' for they are no more than code-marks which represent nothing as such, but which serve in certain combinations as 'points of reference' for performances that are established and operational within the habitual life of a community.[174] The

language of law, according to Olivecrona, must be understood as a medium of performatives.

> Legal language is not a descriptive language. It is a directive, influential language serving as an instrument of social control. The 'hollow' words are like sign-posts with which people have been taught to associate ideas concerning their own behaviour and that of others.[175]

Olivecrona's distinction lacks the tension in Austin's formulation as it leaves unaccounted for a whole range of *directive* (performative) presuppositions required in order to draw a distinction between the descriptive and directive instances of language in the first place. The expression 'I end my case,' in one example Austin provides,[176] may be designated as a directive instance in the sense of performing a ritual action, a habit, or it may be designated as a descriptive instance whose content can be factually analyzed. A local combination of *doings* is, in each case, even when it is not immediately detectable as in the present example, required beforehand, to ascertain whether the expression is (1) an *abstract promise*, a picture, whose content may or may not overlap with what it claims to depict, of independent reality, (and therefore true or false); or whether it is merely (2) a *doing* to be understood on its own terms (and to which a verifiability test, of the non-grammatical kind, is irrelevant). The hollowness, in other words, is a *general* quality of language which makes conceivable a grammatical dichotomy of descriptive and directive in the first place. 'Taught-to-associate' is an attribute, not only of legal language, as Olivecrona would have us believe, but of language *generally*.[177]

As he disregards the primordiality of stage-setting not only for the directives, but also for the descriptives,[178] Olivecrona misses out on two significant consequences. First, even though a dichotomy between the two may have a grammatical validity, or a practical use, the primordially directive quality of language signifies that the

sole guarantee for the continuity of the dichotomy in the specific case is the criteria, the *mise en scène*, concerned. The very descriptive, just as the ambivalent statement of 'I end my case,' therefore, cannot be decided with the *finality* which verificationism aims to secure for statements as a condition of validity.[179] When Olivecrona notes that 'the word 'right', as used in jurisprudence as well as in common discourse, lacks semantic reference. It does not even denote something existing in imagination only,'[180] he assumes a radical dichotomy between the semantic operations of the word 'right' and, for instance, the word 'chair.' The word 'right,' does not *baptize*, to use Wittgenstein's expression,[181] a fixed entity the way the word 'chair' does. The relation of the latter word to its other (i.e. what it is about), accordingly, typifies the relationship of truth that can be resolved with finality. The second consequence of the primordiality of stage-setting is the forestructured quality of judgement. Because Olivecrona attributes stage-setting as a prerequisite exclusively to the directive instances of language, thereby ignoring the primoridally attached character of experience, what he observes in the absence of rules as formal constraints is a state of anything goes — the most fundamental assumption of formalism which he would otherwise have nothing to do with.

> In a review... Alf Ross reproaches me for paying so little attention to the statements of Radbruch and Kelsen on the so-called 'will'. He defends their use of the term 'will' as a means of 'figuratively personifying the systematic unity of the legal order'. In his view it serves to emphasize that the legal order is 'an order, a unity, and not only a conglomerate of rules'.
>
> I cannot agree with this opinion. Think of the English common law. Is it anything but a conglomerate of rules? As everybody knows the precedents are subject to many different interpretations. It seems to be not only useless, but highly misleading, to ascribe a fictitious unity to the mass of precedents by means of the figurative talk of a will.[182]

The dichotomy between the real and the figurative features also when he, in another

context, objects to Ross for contending that 'the words are tools for presenting, in a simplified manner, underlying rules about the use of force.'[183] In ascertaining the significance of concepts such as right and duty, accordingly, Ross puts the figurative before the real. While, for Olivecrona, 'the role of such words as 'right' and 'duty' has to be explained in a realistic way.'[184] Furthermore, he detects in Ross' reasoning a combination of two distinct positions 'that cannot be reconciled.'[185] On the one hand, he explains, Ross holds (a) that a word such as 'right' labels no definite entity, it corresponds to no fact; yet, on the other hand, he also claims (b) that statements of rights may refer to situations that are real.[186] It would be minimizing the extent of frustration on Olivecrona's part to note simply that he fails to appreciate how absurd it would be to try and hold, of a word that is in circulation, *one* of what he considers to be two distinct positions on the relation of the word to that which it is about, while refusing the other. That the word 'chair' does not make a promise in an abstract manner, namely the statement in (a), by no means amounts to conceding that it does not refer to real situations. On the contrary, the word 'chair' has an operational capability in the first place, *because* it does not primordially 'baptize' an entity. Besides, in formulating the directive character of legal language Olivecrona himself adopts the 'two positions' at once. The descriptive instances of language make promises that are verifiable. The directive instances, on the other hand, are 'hollow' in that, lacking an empirical content, they serve merely as code-marks 'taught to associate,' as he puts its,[187] with *real situations*. Even as he points out Ross' so-called contradiction, in that very context, he fails to make sense what exactly he means by a dichotomy of the real and the figurative. Since he clearly affirms the proposition in (a) (or *almost* so, for he subscribes to a picture theory of signification in the case of *descriptives*), one assumes that he rejects the one in (b), namely that the statements of rights refer to actual situations. The fact that he acknowledges then and there, however, that the word right 'is constantly used to convey information... in such manner as to imply that the word has got some semantic reference,'[188] makes it difficult to infer that he (always) does reject the

proposition in (b).[189] 'There seems to be a dilemma,' he then notices the predicament.[190] And he attempts to resolve it by synchronizing the 'hollow' statements of rights with the *attached*, as opposed to free-floating, quality of experience (earlier refuted in the English case[191]); as a habitual event in one's social being, rights 'are to us as real as horses and dogs.'[192] The staged character of life ensures the reality of rights eventually, while failing, for some inexplicable reason, to confer upon the English law a unity and order.

2.4.3 Following a Rule

According to Ross, on the other hand, the staged quality of experience resists a non-grammatical dichotomy of descriptives and performatives.[193] That the criteria experience provides are constitutive of understanding (and of, therefore, interpretation and judgement), in turn, *redefines* the wayward quality of performatives, as opposed to the tamed character of descriptives, to exclude a notion of privacy, and thereby the idea of a free-wheeling practice, suggested by Olivecrona and other writers in the absence of rules as formal constraints. Ross challenges the verificationism that is almost the distinctive seal of his generation of realists in terms of the plausibility of its concept of pictorial correspondence as a condition of validity, and questions the notion that a *dual feature*, descriptive (verifiable) and performative (non-verifiable), defines language in its different instances.[194] 'Many delusions and illusory problems of metaphysical philosophy,' he writes, 'spring from the belief that words represent objectively given concepts or ideas, whose meaning philosophy should discover and define.'[195] The questions that typify metaphysical inquiry in its classical mode often concern the reference of notions such as truth, beauty, and goodness.[196] A word such as 'table,' however, may be equally subject to the same fallacious logic with the presupposition that, as a concept, the word 'table' is marked by a fixed, abstract promise — a promise that

transcends its uses. 'What does the word 'table' signify in English?' Ross asks.[197] What it signifies, according to him, is the elusive, yet dictating, grammar it displays in a good deal of utterances in which it lends use. Questions about the *true* reference of the word irrespective of its performance in the particular usage, on the other hand, exemplifying the customary logic of metaphysical inquiry, hardly form a realistic objective. 'There is... no point in inquiring what a table 'really is."[198] The *grammar* of the word designated as the basis of the relationship between the word and that which it is about, not surprisingly, Ross is critical of writers such as Lundstedt and Olivecrona for overlooking the primordiality of the figurative. As with Olivecrona, he points out behind the reasoning of Duguit and Lundstedt in refuting the reality of the concept of right[199] 'the naïve idea that a word has an immanent meaning that cannot be changed.'[200] As the word is expected to perform one invariable promise which, in Wittgenstein's word, it is 'shadowed' with at all times,[201] irrespective of its different instances, both Duguit and Lundstedt declare the word non-real when it fails to feature one essential element that is common in all its uses. The question, according to Ross, on the other hand, that is the key to a true appreciation of the reality of the word is 'to ask what is characteristic of the situations designated as 'rights."[202] The figurative reality (the only reality there is) of the word is completely missed out on by both writers.

> Neither author offers an analysis from this point of view. Neither of them is aware of the value of the concept as a tool of presentation, nor of the various legal relations that can be distinguished in a situation of rights. It is paradoxical that these ardent denouncers of the metaphysical ideas involved in the concept of rights uncritically accept the idea of the right as a single and undivided entity — although this very idea is the most palpable precipitate of the banned metaphysics.[203]

It is not difficult to see how the 'banned metaphysics' pops back into the realist argument. As I have stated repeatedly, realism has as its sole rationale the absurdity

of formalism in its claim mechanically and sufficiently to manipulate practice. The *attached* quality of practice is therefore invoked by realism, and the formalist dichotomy between the law and its readings is repudiated. The repudiation, however, is confined within a hunch, as it were, in the pre-departure stage of the realist argument where it is hardly carefully thought out to assert itself in later stages. Not surprisingly, the dichotomy is reintroduced as realism goes on to emphasize individual readings of the law by the judge in a clear opposition to a formal concept of law. Law is thereby bestowed on a *detached* existence in the face of its practice, and formalism is restored to its status as a possibility rather than an absurd project. The manipulative capability of formalism conceded, the attached, and at once dictating, quality of practice leaves its place to a concept of practice that free-floats in the absence of formal guidelines. The binary opposition of rules and practice, in turn, is reproduced in the verificationist argument between the word and its other where the word does not suggest a one-to-one correspondence with that which it is about: lacking an immanent meaning, what the word gives rise to by way of reference is a state of anything goes. While Ross observes the metamorphic *tension* within each one of the binary oppositions. Just as descriptives and performatives are redefined as mere extensions of a generalized category of performatives, namely the staged quality of experience; the staged quality of experience as a generalized category of individual readings, at once, redraws the opposition between the law and its readings. The typically *deconstructive*, to use Derrida's word, displacement and the transfigurational effect the redrawing achieves, Ross describes as 'like looking down the endless vista of parallel mirrors.'[204] The opposition of the law (validity) and its readings (fact), so very essential to the rhetoric of both formalism and realism, will not hold, for

> whether we take our point of departure in the historical acts by which the law came into existence or in the historical acts by which it was applied, the thesis will in both cases land us in the antithesis. The consideration of it as a fact will

> necessarily change into a consideration of it as validity, and the reverse.[205]

I mentioned above the minimal rule-formalism invoked even by the most rule-sceptical of the realist positions: where the binding force and sufficiency of rules are refuted, leaving unaccounted for the evident force and sufficiency of rules at least in *assigning the interpreter* constitutes a formidable predicament on the realist part.[206] The 'experiences of validity,' as the staged, attached, and attaching, quality of practice, on the basis of which Ross dissolves the dichotomy between validity and fact, resolves the realist paradox by accounting for rule-following as a fundamentally *attached* enterprise: just as reading is in each case reading *figuratively*, insofar as a generalized category of performatives always precedes that which is grammatically descriptive or performative; that which is read in rule-reading is none other than the elusive, uncircumscribeable dictates of experience, sometimes temporarily settled — an event in which the formal existence of the rule takes no essential part. 'The principle of dissolution,' writes Ross '...consists in introducing, instead of 'validity' in the sense of a category radically discrepant from reality, the *experiences of validity* (in the sense of certain actual behaviour attitudes) underlying this rationalisation and symbolised by it.'[207] Ross elucidates his concept to leave out a crude behaviouralism. As he puts it, 'a tenable interpretation of the validity of the law is possible only by a synthesis of psychological and behaviouristic views.'[208] The psychological dimension highlights the rôle of individual motivation. Yet it carefully avoids a conception of privacy that traditionally underlies the ideas of individual motivation; 'in his spiritual life,' notes Ross, 'the judge is governed and motivated by a normative ideology of a known content.'[209] Despite the considerable barrier of terminology and method between the two authors, the similarity of Ross' solution on the matter of rule-following to that of Wittgenstein, a much debated aspect of the latter's work,[210] is striking.

> This was our paradox: no course of action could be

> determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.[211]

Indeed, the word *paradox* is the key to the emerging pattern in that the contradiction it refers to simply reiterates the paradox Olivecrona detects in Ross' argument for a figurative concept of language: the word 'right' corresponds to no fact, yet its reference may be at once as real and firm as that of the word 'chair' — 'two propositions,' according to Olivecrona, 'that cannot be reconciled.'[212] The relation of the word to that which it is about, Olivecrona assumes to be an immanent one: the word is defined by a promise that is abstract but that is at once factually analyzeable. The assumption which brings about the paradox in following a rule, likewise, characterizes the relationship between the rule and that which accords with it as *immanent*.

In *The Blue and Brown Books*, Wittgenstein distinguishes 'being *in accordance with* a rule' from 'involving a rule.'[213] Asked to *square* the numbers in the row 1, 2, 3, and 4, one is likely to come up with the answer 1, 4, 9, and 16. This is what obeying a rule is. The game performed, however, is less one that intrinsically involves a rule, than one that is merely in accordance with it. '[B]ut it obviously is also in accordance with any number of other rules; and amongst these it is not more in accordance with one than with another.'[214] Producing the row 1, 4, 9, and 16, after the row 1, 2, 3, and 4, does not suggest an essential involvement on the part of the rule of squaring, for some other regularity that is attributable to the order between the numbers in the first row might well have been repeated in the particular case to work out the second row, which happens also to conform to the rule of squaring. Even if the mode of calculation that 'belongs' to the rule of squaring *was* used to produce the second row (namely, 1x1, 2x2, 3x3, 4x4), it would still not signify an *intrinsic* involvement on the part of the rule. An altogether different rule

held in the privacy of mind, as it were, of the calculator, might have dictated a calculation similar to that in the rule of squaring up to number 4 (where our row ends), after which, however, an entirely different mode, such as 5+5, 6+6, and so on, might have to be adopted. 'We shall say that the rule is *involved*,' draws the conclusion Wittgenstein, 'in the understanding, obeying, etc., if, as I should like to express it, the symbol of the rule forms part of the calculation. (As we are not interested in where the process of thinking, calculating, take place, we can for our purpose imagine the calculations being done entirely on paper. We are not concerned with the difference: internal, external.)'[215] Clearly, the idea of the *involvement* of the rule counts on an intentional, 'internal,' argument, namely rule-following as a private experience.[216] The difficulties the privacy argument raises, in turn, are far greater than those of the so-called paradox of rule-following on the basis of the 'symbol of the rule,' namely its common criteria. The choice, to be more exact, is not between two arguments to eliminate the more problematic. Rather, within the concept of the predicament of other minds the traditional argument yields to, the acquisition and performance of the game rule-following cease to be possibilities in the first place.

The *third* formulation of the paradox, which completes the pattern, is one with which the present chapter commenced, namely that of the generality of law which de Man reads in Rousseau's *Social Contract*.[217] Law survives as a force in history so long as it *negates* history. 'The indifference of the text with regard to its referential meaning,' writes de Man, 'is what allows the legal text to proliferate...'[218] That it forms on aporia on the part of the law that is irreconcilable, however, is an idea which misses the fact that the negation at issue is more exactly an *affirmation* of history. The ineluctable affirmation of experience precludes a distinction of the text and its interpretations not only for the text of law, but it is what makes language as a medium conceivable in the first place. The fundamental assumption entertained by the *paradoxical* view of law (that of de Man, beside others, even though he would wish to disassociate from the assumption), on the other hand, is a dichotomy

between the meaning of the text and the meaning that is *read into* it. In fact, where Wittgenstein states the paradox, he also points out the dichotomy the paradox presupposes between the rule and its interpretation, a paragraph that elucidates his actual stance beyond reasonable doubt, yet somehow omitted in the grand controversy surrounding his notion of rule-following.[219] 'Hence there is an inclination to say: every action according to the rule is an interpretation,' he notes after relating the paradox. 'But we ought to restrict the term 'interpretation' to *the substitution of one expression of the rule for another*.'[220] The rule, in other words, is not a term *privileged*, as it were, over its interpretations. It does not possess a quality that transcends its individual readings. Conflict and accord do not exist as fixed, permanently settled, essential states in the application of the rule, because the *rule* as a fixed, permanently settled, essential state is not a possibility of language. The paradox arises because a pictorial, as opposed to figurative, view of validity assumed makes compliance on the part of the particular action a relation that is *intrinsic* to the rule. Yet, rule-following is a game performed and recognizable precisely because there is no immanent relationship between the rule and that which accords with it. That the rule is in each case *that which it is made of*, namely its interpretations, however, by no means amounts to a state of anything goes which the formal ideas of validity presuppose in the absence of an immanent concept of rule-following; 'a person goes by a sign-post,' notes Wittgenstein, 'only in so far as there exits a regular use of sign-posts, a custom.'[221] The freakish as an interpretative possibility cannot be entertained unless the attached quality of understanding is suppressed. 'Interpretations by themselves,' writes Wittgenstein, 'do not determine meaning.'[222] My reaction to the sign-post will in no instance be a detached interpretation of *a sign which I come upon*; on the contrary, 'I have been trained to react to this sign in a particular way, and now I do so react to it.'[223] It would be inconceivable for someone to interpret the sign-post in a private, detached way.[224] Just as the rule in the formal sense is not a possibility of language, on the contrary, language is possible precisely because its performances are not formally confined;

nor does meaning associated with the rule equal the personal whim of the interpreter. It will never be so, even though the particular interpretation may not always be consented by all. And just as consent regarding the action does not stem from a source that is fixed and permanently settled, namely the rule, nor is consent to be understood in the mode of a formal, public approval. Consent, according to Wittgenstein, is in forms of life, the *fraternities*, whose paths often uncomfortably cross that of one another, but yet even the crossing forms of life are capable of fitting into one greater form of life — best reflected in language as a common medium.

> 240. Disputes do not break out (among mathematicians, say) over the question whether a rule has been obeyed or not. People don't come to blows over it, for example. That is part of the framework on which the working of our language is based (for example, in giving descriptions).
>
> 241. 'So you are saying that human agreement decides what is true and what is false?' — It is what human beings *say* that is true and false; and they agree in the *language* they use. That is not agreement in opinions but in form of life.
>
> 242. If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgements. This seems to abolish logic, but does not do so.[225]

The primordial hermeneutic condition Wittgenstein points out seems to elude the positions of both formalism and realism. The traditional theory conceives the delivery of justice within the meaning of a dichotomy between government by rules and government by men. Meaning, accordingly, is vested in the rule. The absence of rules as formal constraints, on the other hand, signifies the reign of the interpreter.[226] Classical formalism, therefore, oscillates between the two sources where, according to Wittgenstein, meaning will be sought only in vain. Realism, in this respect, mimics the traditional theory to perfection. Formalism is emphasized to

be a possibility of language as it constitutes a working alternative to realism. The formal concept is acknowledged not only in this negative sense, namely that it may impede a more realistic solution in actual decision-making, but also in a *positive* sense, in that a minimal rule-formalism is consistently left unaccounted for by realism. Where the rule as the source of meaning has neither a constraining capability nor sufficiency, on the other hand, realism entrusts the *interpreter* with the meaning. Even when the interpreter is thought *not* to be detached (as with Llewellyn's *craft*), the formalist tenet is affirmed on the basis of a muted epistemology that *it could possibly be otherwise* — not at all 'muted' in the case of the so-called *hazards* professed by realists to be involved in formalist readings. 'This seems to abolish logic,' is how Wittgenstein points out yet another paradox — one which follows from the primordiality of consent. The logic it abolishes is none other than that of the Cartesian (non-)fraternity whose concept within the framework of a non-grammatical dichotomy between the text and the interpreter confers on each term a suprasensible identity. Hence, the mutual exclusion between the text and the interpreter, and more significantly, the preclusion of consent within the community of interpreters.

Conclusion: The Same and the Similar

The oscillation between the text and the interpreter, which is constitutive of realistic, as well as more traditional, legal positions, and yet which, according to Wittgenstein, misses out on the true locus of meaning, namely the elusive, uncircumscribeable house of life-form(s),[1] equally underlies what may be termed after the Dostoyevskean character a *Kirilov complex* in recent theory. 'If there is no god, then I am a god.'[2] The appeals in the past decade to a Kirilov-like reasoning by otherwise unanchored names such as Sanford Levinson[3] and Mark Kelman,[4] the latter, notably, representing the attitude of a group of writers with an unmistakable style, induced impassioned debates over a growing rhetoric of *nihilism* in legal theory.[5] One writer, Owen Fiss, designates the 'new nihilism' which recognizes the absolute reign of the interpreter where the law is in each instance an interpretation of itself as 'the deepest and darkest of all nihilisms.'[6] Another writer questions the integrity of the jurists who hold nihilistic views about law but who are at once professionally engaged in its teaching.[7]

In the essay where he invokes a 'Nietzschean interpreter,' Levinson states: 'I increasingly find it impossible to imagine any other way of making sense of our own constitutional universe.'[8] In that universe, accordingly, the interpreter reads the text of the Constitution in each case in terms of his own experience, thereby a *generally* valid vocabulary of the 'correct' and the 'wrong' to designate particular instances of reading being rendered impossible. (The telltale phraseology Levinson employs to describe that which he deems anticipated in a possible concept of a critical vocabulary is the *'knowability* of constitutional essence.'[9]) As an epistemological *privacy* clearly marks Levinson's Nietzschean interpreter, the *circularity* Nietzsche seeks to express as the defining character of the act of reading is in fact pre-empted; 'man finds in things,' as Levinson quotes him, 'nothing but what he himself has imported into them.'[10] In *Ecce Homo,* when accounting for the less than exuberant reception of his own work, Nietzsche once again posits the

circularity of understanding as a primordial condition. 'Ultimately,' he writes, 'no one can extract from things, books included, more than he already knows. What one has no access to through experience one has no ear for.'[11] And that is so quite literally. Elsewhere Nietzsche defines the very act of *hearing* in terms of a circularity.[12] One can only hear that which one has already heard.[13] 'When we hear a foreign language,' he explains, 'we involuntarily attempt to form the sounds we hear into words which have a more familiar and homely ring: thus the Germans, for example, once heard *arcubalista* and adapted it into *Armbrust*.'[14] Unlike the apparent idiosyncrasy of Levinson's Nietzschean judge, Nietzsche himself points out the *staged* quality of experience[15] in the very context he relates the circularity of hearing; at bottom, 'one is much more of an artist than one realizes.'[16] That one's hearing is in each case a *rehearsed* hearing, rather than *private,* is merely to rephrase the idea of circularity. The 'uncommon' does not exist. It is hard to see how one could maintain a hermeneutic circularity as a primordial condition if one were at once to hold the view of the privacy of the interpreter, namely the view of the *subjective,* subject-centred, quality of what the interpreter might import into that which he interprets. That is because it is precisely the idea of *privacy* that offers the unique access to an order that is higher than that of senses; elevated above experience, the interpreter will be in a position to *transcend* the dictates of his own experience, rather than necessarily be confined within that domain.[17]

The Nietzschean repudiation of the notion of a high order[18] is read by Levinson as the *order of the interpreter* exactly the way Kirilov infers in the absence of a received, all-present, order the absolute reign of the subject. The oscillation between the two orders, once more, excludes that whose suppression, paradoxically, Nietzsche equates with nihilistic values,[19] namely the *order of life* — as with Wittgenstein, the true locus of meaning. That which underlies the idea of the order of the interpreter, Nietzsche in fact designates as 'the *hyperbolic naiveté* of man: positing himself as the meaning and measure of the value of things.'[20] Man's status as the criterion of values[21] is dependent on a constant negation of the fraternal,

attached, condition which he is in. Nihilism is a negation of existence-as-it-is for a mode of it that is not.[22] Levinson's negation of experience as will to power, in Nietzschean terms, *is* for a formal concept of it (just as the ultimate negation by Kirilov, namely his suicide,[23] *is* a testament to the concept of a high moral order that is in Dostoyevsky's head), a position he might otherwise like not to have anything to do with. Meaning is not a possibility unless within a formal mode of experience. That is to say, unless meaning, in exact opposition to Nietzsche's definition of it as will to power,[24] which Levinson, again, cites,[25] is the *property* of a thing. The mode of nihilism Levinson's writing displays, therefore, is not so much one which Nietzsche goes along with as one he despises for its nay-saying, life-negating oscillation between the mutually exclusive realms of the subject and the object.

In this respect, Fiss himself, who designates Levinson's approach as nihilistic, hardly eludes the nihilism whose distinctive seal is a negation of the order of life. What Fiss identifies the writings of Levinson, Brest, and the 'deconstructionists' with[26] is not in fact dissimilar to what, according to Gény, is a constituent of the 'nucleus' of all historical-school-inspired ideas: the 'personal feeling' of the interpreter in the specific case supplants the formal authority of the law; a displacement whose hazardous ramifications Gény compares to the dangers immanent in the stagnancy of a formal concept of law.[27] In rejecting the notion of law as a 'mechanical activity,' Fiss concurs with Gény.[28] 'Adjudication is interpretation,' as he puts it[29] — swapping, just as Llewellyn before,[30] the idea of an all-encompassing *method*, where the text ends, with that of *interpretation*. Agreeing with Gény, once more, Fiss lays out a radical contrast of objectivity and subjectivity as the basis of interpretation;[31] legal interpretation, accordingly, is a process that is relatively objective,[32] for, though law is interpretative, it cannot be said to be interpretative the way literature is[33] — law is organized-interpretative; it has its 'disciplining rules' to set standards for it and an 'interpretive community' to enforce those rules;[34] a quality Fiss, for some reason, denies literature.[35] 'Legal texts,' he

notes in marking the difference, 'are prescriptive,' as opposed to the texts of literature (thus turning a *semantic* difficulty suggested by Levinson, and especially by the 'deconstructionists,' into one of whether or not to *obey* a text that is semantically unproblematic, i.e. 'prescriptive').[36] The idea of the autonomy of the text abandoned through an *interpretative* notion of it to start with (a good indicator of the force of the trend even in the attempts to *counter* it) makes an ultimate return to Fiss' argument, therefore, when he has to distinguish between law and literature — a distinction that screams *no* to the idea of a *generally* organized, dictating quality of experience, the Nietzschean life-energy,[37] which is in fact what underlies the concept of interpretive communities as formulated by Fish[38] (and Kuhn[39]) in the first place, borrowed by Fiss, and made simply a sad travesty of. The dichotomy between law and literature is that of the orders of the object and the subject. While the order of common experience (promised fleetingly in the notion of an interpretive community) is left entirely out of the event of signification. Fiss reproduces the very nihilism that marks Levinson's concept of interpretation — the only nihilism there is.

According to Heidegger, however, Nietzsche's formulation of nihilism is not an altogether happy affair.[40] If nihilism, an apparent negation of fraternal attachments, and of therefore the hermeneutic circularity, is what seems to underlie the traditional oscillation between the text and the reader, or between the object and the subject; Nietzsche's very doctrine of it goes on merely to reproduce the traditional polarity. First of all, the order of the object as a category that is radically distinct from the domain of the subject, namely as *presence,* is affirmed, as nihilism is defined in terms of *values.*[41] Nietzsche's concept of nihilism, as it is laid out at the very outset of his notes in *The Will to Power*, where he elaborates it, is one of *valuation*. In nihilism, as he puts it, 'the highest *values devaluate* themselves.'[42] The idea of a *re-valuation* is borne out of it, however, as, secondly, in a move that is characteristic of nihilism (as displayed by Levinson and Fiss), Nietzsche appears to perceive in the de-valuation that is nihilism the potentiality of a 'transition to new

conditions of existence,' a transformation made conceivable through an essentially *detached* concept of the subject (a concept, again, shared by both Levinson and Fiss). 'Dissatisfaction, nihilism,' writes Nietzsche, '*could* be a good sign.'[43]

> Actually, every major growth is accompanied by a tremendous crumbling and passing away: suffering, the symptoms of decline *belong* in the times of tremendous advances; every fruitful and powerful movement of humanity has also created at the same time a nihilistic movement. It could be the sign of a crucial and most essential growth, of the transition to new conditions of existence, that the most extreme form of pessimism, genuine *nihilism*, would come into the world. *This I have comprehended.*[44]

The re-presencing that is the creation of 'new conditions of existence' is pursued on the basis of *will to power*, a mechanism, according to Heidegger, that mimics uncannily that of consciousness within the meaning of the Cartesian epistemology; it 'unfolds its pure powerfulness without restraint in man.'[45] Heidegger points out what he calls an 'essential inner connection' between the positions of Descartes and Nietzsche.[46] As a matter of fact, we have already recorded clues in this study as to the brand of metaphysics Nietzsche entertains. I mentioned just now the circularity he posits regarding the reception of his work.[47] 'What one has no access to through experience one has no ear for.'[48] Clearly, however, Nietzsche's *own* experience, in the form of his work, *evades* the boundaries of common experience: circularity is so formulated as to leave Nietzsche himself out. That which is *his,* in other words, is the artefact of an experience that is radically discrepant from that of his own audience.[49] The grand evasion that is the distinguishing mark of his work, however, is that of Christianity, which, again, I have already mentioned.[50] Just as that which is *his* escapes the sphere of common experience, the primordial transparency; Christianity eludes the primeval pagan condition to epitomize that which is formal or that which is not life; an evasion one should hardly think to be possible within

the framework of what is undoubtedly the most significant consequence of his rhetoric as a whole, namely the ineluctability of the natural. In this respect, Nietzsche anticipates both Lyotard and Llewellyn, who, not accidentally, invest much in a dichotomy between the pagan and the formal, or between the natural and the prejudiced.[51] Paradoxically, because the natural appears ultimately to require an *active involvement* on the part of man, as opposed to being simply ineluctable, the evasion becomes at once that of *man*. A *prejudiced* (i.e. conscious[52]) transcendence, in a characteristic reversal, therefore, turns out to be the defining quality of that which is pagan, as well as that which is Christian (hence the eclecticism of the pagan primordiality and the Kantian transcendence in both Lyotard[53] and [through Gény] Llewellyn[54]). Man's ultimate evasion, Heidegger points out, signifies Nietzsche's relation to Descartes in both positive and negative senses. 'We must grasp Nietzsche's philosophy,' he writes, 'as the metaphysics of subjectivity.'[55] Nietzsche adopts the concept of man as the subject in terms of the body — bodily drives and energy. What the subject redefined in terms of the world achieves, in turn, is that which the Cartesian subject, borne into a world that is still very much scholastic, as opposed to modern, fails to realize, namely 'absolute prominence among beings.'[56] The notion of *overman* as paradigmatic of ultimate evasion, according to Heidegger, achieves just that. 'In that doctrine,' he writes, 'Descartes celebrates his supreme triumph.'[57] Hence Nietzsche's paradoxical distance from the former's project; 'he turns against Descartes only because the latter *still* does *not* posit man as *subiectum* in a way that is complete and decisive enough.'[58] While the Nietzschean evasion signifies in its completeness and certainty the very culmination of modern metaphysics, one whose distinctive feature is an essentially *detached* concept of man within a world of picture or *view*.[59] Heidegger declares the closure of Western metaphysics in the sense of its ultimate consummation, not surprisingly, in his reading of Nietzsche's doctrine of nihilism. 'As the fulfillment of modern metaphysics, Nietzsche's metaphysics is at the same time the fulfillment of Western metaphysics in general and is thus — in a correctly understood sense — the end of

metaphysics as such.'[60] Nihilism, therefore, is a characteristic of modern metaphysics which engulfs, rather than elude, Nietzsche's own formulation of it.[61]

Nietzsche's concept of nihilism is *itself* nihilistic for it is a concept of *presence* in the mode of de-presencing. On the other hand, its potentiality as re-presencing, in the form of a 'transition to new conditions of existence,'[62] sets a pattern to which, perversely, Heidegger himself owes the mode of re-presencing that forms the metalanguage of *Being and Time*. The connection Nietzsche establishes between what he calls 'the most extreme form of pessimism, genuine nihilism' and a 'most essential growth'[63] is uncannily reproduced in *Being and Time* between anxiety and authenticity; with genuine anxiety '[e]veryday familiarity collapses,'[64] and Dasein, There-being, man, becomes 'individualized.'[65] Genuine scare makes one jump, as it were, out of the common, inauthentic, skin one wears ordinarily. 'This individualization brings Dasein back from its falling [a feature of the primordial ontological state in which man is lost, dissolved, in others and in his worldly concern[66]], and makes manifest to it that authenticity and inauthenticity are possibilities of its Being.'[67] The dichotomy between authenticity and inauthenticity is that of the same and the similar; that which is similar in each case *betrays*, in both senses of the word, namely as both representation (disclosure, giving away) and misrepresentation (concealment, violation), that which it simulates, namely the (self)same. In a pattern set therefore by Nietzsche nihilism as nullifying pessimism and at once as transition, that is to say, nihilism as de-presencing and re-presencing, signifies a mode of presence anticipated in the concept of the same, the authentic. Nihilism as anxiety provides Heidegger in distinguishing between authenticity and inauthenticity with that which is other than simply *more* inauthenticity.[68] That authenticity can be marked out on the basis of a frame of reference that is other than simply more inauthenticity, in turn, indicates Heidegger's own brand of nihilism. Simulation is betrayal in the sense of violation. Mimetic violation becomes the seal of modern times for Heidegger as he declares representation, the *representatio*, in the celebrated lecture 'The Age of the World View,' as a modern concept that is a

consequence of, and on a par with, the concept of man as the *subiectum*.[69] The obvious dichotomy presupposed by Heidegger between that which *is* and its representation, or between representation and misrepresentation, however, merely puts back into his argument, rather than repudiate, the idea of man as the *subiectum* — the genuine, the authentic, in *Being and Time.* Mimetic hostility *affirms* the idea of presence and therefore the evasion of man in the rhetoric of philosophy rather than avoid, or indicate an awareness of, it.

The oscillation that characterizes nihilism, in other words, is between two concepts that are metamorphic: those of presence and evasion. What mimetic uneasiness that appears to define Heidegger's position in its affirmation of the concept of presence through its appeal to a dichotomy of that which *is* and its representation eludes therefore is the primordially *staged,* mimetic, quality of experience. The difference between the same and the similar is at once that of a series of binary oppositions: representation and misrepresentation, reality and fiction, science and ideology, truth and politics, law and literature, and so on. Paradoxically, the mimetic, notably poetry, is at once the unique house, for Heidegger, in which the modes of authenticity are explored.[70] What seems to be mere contradiction is in fact part of the pattern established in the very formulation of nihilism. In the face of a clear detestation of the fictitious, the oratorial, not only is the staged equally emphasized by Nietzsche, as I have already recorded it,[71] but whose work, famously, resides in the very margins of language. There are, therefore, two intertwined paradoxes to the pattern: (1) nihilism as re-presencing while de-presencing, and (2) a mimetic uneasiness in the face of a discourse that is at once committed to the idea of the primordiality of the mimetic.

Rhetoric

The pattern is well illustrated in two recent examples. In one of them Peter

Goodrich borrows from Nietzsche the distinction between the two senses of nihilism. Nihilism may mean decadence in the sense Christianity was to Nietzsche.[72] But it may also mean 'an active historical and political consciousness' which refuses to recognize the traditional rationality.[73] Nihilism in the latter sense contrasts with the mainstream perceptions of it as merely another word for aimlessness, and becomes instead a method of inquiry. As a way of reading nihilism is anything but despair and cynicism.[74] What is unavoidably linked to the nihilistic paradox is that of the mimetic. The privilege consciousness is bestowed upon as a constitutive and transformative force at once signifies an end or an exception to the primordiality of the mimetic: the difference of the similar to the same permeates Goodrich's critical writing to form almost a textbook example of mimetic hostility. His reading of legal 'simulacra' is a hot pursuit between the assumed categories of reality and myth, or truth and fable — a distinction he finds suppressed in the intrinsic symbolism of law and for which he once again, and now hardly surprisingly, draws on Nietzsche.[75] In so doing, Goodrich characteristically reverses his *own* commitments to a (notably Derridean) concept of the primordiality of the staged, the mimetic, the iterable, the archi-written. He ends up affirming the very binary opposition on whose dissolution his whole critical project hinges to start with — the real and the mythical in the rhetoric of law.

In the second recent example of the pattern, Christopher Norris, who also professes commitment to a Derridean primordiality of the mimetic, reverses his position, as he declares in an attempt to counter Fish's brand of mimetic ineluctability that it is wrong to '[treat] rhetoric entirely at the level of straightforward performative effect.'[76] The mimetic paradox of Norris' essay is once again typically and inseparably linked to another paradox, one which he observes to emerge curiously in an essay on Nietzsche (by de Man) and which distinguishes between two senses of rhetoric: rhetoric as de-presencing and re-presencing. The effect of rhetoric on the performative level, accordingly, is forever unstationary and therefore in a mode which constantly de-presences itself. This is rhetoric with its

'shady reputation,' namely rhetoric as persuasion.[77] The rhetorical effect may take the form of re-presencing, however, as rhetoric may be utilized to (de-)de-presence, as it were, its own mood as a linguistic performance. Rhetoric in the latter sense, namely as a 'study of linguistic tropes and devices,' as pointed out by de Man, according to Norris, may cease to be a mere mimetic instance that conceals by definition in order to persuade; instead, it 'can have precisely the opposite effect of *exposing* — and thus counteracting — this insidious persuasive power.'[78] The mere mimetic is qualified as 'insidious,' following, in a characteristically nihilistic reversal, and through a logic of betrayal, the establishment of rhetoric as re-presencing: the similar *betrays*, in the sense that it violates and thus conceals that which is the same, but it at once discloses and gives away.

Discourse as also re-presencing, rather than merely an unstationary and yet ultimately circular concept of de-presencing, is intended in the essay by Norris, a literary critic, to be a tip to the beleaguered writers of the movement known as critical legal studies[79] in the face of objections notably by Fish. What the latter reads in the writings of those writers and what he terms the 'anti-foundationalist theory hope' is precisely the mood for a mode to enable the specific discourse to survive the consequences of its own rhetoric; a mode to re-presence while de-presencing, a mode to elude the mimetic and thereby obtain a non-grammatical, non-performative, validity, while at once invoking the primordiality and ineluctability of the mimetic.[80] As Norris commences to explore Fish's position on the uses of theory, however, and as this goes on and on and the essay nears its end, one finds that what the author does in fact is more like getting himself painted more and more into a corner, and that Fish's objections sound rightly worrisome not only against the naïve theoretical endeavour of lawyers whom the author aims to help out, but are perhaps as much valid for literary studies. Curiously, in an essay whose primary aim is to counter Fish's argument on the theory mood, the sole evidence is introduced only in the closing paragraphs. 'But his objections would entirely miss the mark,' Norris produces the bombshell, albeit in a tone not striking for its self-

confidence, 'if applied to de Man's very different account of what constitutes a rhetorical reading.'[81] His tone is markedly dramatic for he knows only too well that a binary opposition of concealing and exposing, namely the two senses of rhetoric, which he reportedly finds in de Man's essay, would dissolve at the slightest probing, before Fish, by the very deconstructionism which he himself champions and which he considers to be de Man's device in the specific essay.[82] But what exactly does de Man say? 'Considered as persuasion,' he is quoted by Norris, 'rhetoric is performative but when considered as a system of tropes, it deconstructs its own performance.'[83] Hence two distinct senses of rhetoric. Norris is the author of a monograph on de Man (as he is also the author of one on Derrida).[84] The fact that when quoting de Man he chooses to suppress the very following sentence where de Man goes on actually to *repudiate* the duality that has just emerged, however, hardly makes a good testament to Norris' prowess as a writer of monographs. To quote de Man in full:

> Considered as persuasion, rhetoric is performative but when considered as a system of tropes, it deconstructs its own performance. Rhetoric is a *text* in that it *allows for two incompatible, mutually self-destructive points of view, and therefore puts an insurmountable obstacle in the way of any reading or understanding.* The aporia between performative and constative language is merely a version of the aporia between trope and persuasion that both generates and paralyzes rhetoric and thus gives it the appearance of a history.[85]

Where Norris sees 'two distinct meanings'[86] de Man sees an *aporia*, one that is 'insurmountable.' And that is so, according to him, for '*any* reading or understanding' — that which betrays *betrays*. That which violates and conceals, and that which is violated and concealed, in other words, may be exposed. But disclosure, giving away, is at once, and in each case, a performance that violates and conceals. Violation and concealment, namely the mimetic, after all, are the

prerequisite of language rather than 'insidious' elements[87] simply in the way of a more proper, as it were, functioning of it. Hence the binary opposition of performatives and constatives, the deconstructive tension between whose terms I have already noted in this study,[88] being a 'version' of the two assumed senses of rhetoric: a greater category of performatives, of context-bound, not wholly pinpointable *deeds* staged through or for language, is in each case presupposed in order to distinguish the constative instances of language, instances where a measurable effect of disclosure is exercised, from performatives. In this respect, Norris' affirmation of the dichotomy in the 'two distinct meanings' of rhetoric, not as a mimetic refinement, but as an *exception* to that which is mimetic, an evasion to which Fish's objections on the theory mood would not apply, makes his concept of language one that is, certainly *not* Derridean, and not Austenean (for, as I have, again, already made a note of it in this study, the tension, the aporia, to which de Man refers, *is* felt and acknowledged within J.L. Austin's theory of performative and constative instances of language), but *pre-Austenean* and nihilistic: it is *presence-thinking* in its exclusion of fraternal, mimetic attachments in constative, or verifiable, instances of language, and *anthropological* in its subsequent notion of the meta-mimetic, meta-discursive, metalinguistic.

The 'theory' in another essay by de Man, 'The Resistance to Theory,'[89] is read by Goodrich as 'openness to context.'[90] The resistance to theory is the resistance of legal tradition to critical reflection and disclosure. Norris, who construes the 'theory' as a 'kind of reflective and meticulous close-reading,'[91] makes the title of de Man's essay part of the title of his own where he takes issue with Fish on theory, 'Law, Deconstruction, and the Resistance to Theory.' The 'resistance' becomes a description of the pragmatist, Fish-like, opposition to theory-talk. Whereas that which de Man designates as 'non-reading' in the original essay, namely theory 'as the rooting of literary exegesis and of critical evaluation in a system of some conceptual generality,'[92] agrees with Fish's notion of theory[93] in one very significant aspect.[94] He does, however, reproach Fish for 'empty[ing] rhetoric of its

epistemological impact,'[95] which ultimately affirms Norris' interpretation. What Fish overlooks in his understanding of theory as rhetoric on a purely performative level, namely as persuasion, accordingly, is that its modes may be 'of the order of persuasion by *proof* as well as 'by seduction.'[96] In an essay where he explores the possibilities and fresh perspectives the classical *trivium* may offer for the contemporary debates of methodology in humanities, de Man's dichotomy between persuasion by proof and persuasion by seduction seems merely to reproduce the classical dichotomy between eristic and dialectic — a distinction that can be made, as I have already argued it in this study,[97] only on an *intentional* basis.

Norris regards Fish's position in assuming theory in each case a mimetic artefact, rather than a possible evasion of the mimetic, as 'basically conservative.'[98] The phraseology is hardly Derridean whose reproductive insights Norris intends to benefit lawyers in the face of the sterilizing, as it were, effect of Fish's writing. As a matter of fact, Derrida and Fish are *not* put in opposition to one another, but put *together*, at least in one aspect, within the framework of what is a specific vein of thinking represented in Norris' phraseology. Not unlike the way Norris qualifies Fish's position, Derrida is classified (alongside Bataille and Foucault) as a 'young conservative' by a philosopher of somewhat different order, Habermas,[99] whose work, paradoxically, strikes Norris in his monograph on Derrida as one virtually indistinguishable from that of the latter. In other words, Derrida eludes the charge Fish receives, as far as Norris is concerned, for a good reason. *His* is a Derrida already neutralized. According to Norris, a 'ceaseless problematization of the principle of reason' on the part of Derrida's work does contrast with the confident rationalism of Habermas' rhetoric.[100] Yet despite the obvious discrepancy of methods, just as the latter's work, the work by Derrida, particularly the recent work, 'seeks new grounds for the exercise of enlightened critique through an idea of communicative competence which allows for specific *distortions* in present-day discourse, but which also holds out the possibility of grasping and transcending these irrational blocks.'[101] Habermas himself could barely be more Habermasian,

you may think. The affinity between Norris' nihilistic paradox, namely the two senses of rhetoric, one 'insidious,' derivative, secondary, dependent, and marginal, and one meta-mimetic, and Habermas' distinction of what Norris relates as the 'irrational blocks' in communicative action and the 'possibility of grasping and transcending these irrational blocks' is evident. It is dubious, however, that the dichotomy in either case relates to Derrida's thinking. In a review of Habermas' theory from the standpoint of Derrida's project Jonathan Culler finds the former a poor instance of exactly that on whose repudiation the latter is built.[102] And Culler should know. He is the writer whom Habermas chooses in his (later) critique of Derrida's work as the latter's special envoy.[103] Habermas' venture rationally to reconstruct communicative competence, according to Culler, is merely 'one of the weaker versions of the classic metaphysical attempt to separate intrinsic from extrinsic or pure from corrupt and deem the latter irrelevant.'[104] The tradition from whose vantage point Fish is countered and which is clearly pre-Austenean in its mimetic hostility is only Derridean, therefore, when Derrida is considered, as Norris does, to be pursuing, alongside Habermas, a 'fulfillment' of what the latter terms 'the project of modernity,' a brand of rationality thought up and materially inaugurated by the Enlightenment philosophers for everyday life and which remains to be 'completed' in its absolute engulfing of everyday social and political practice.[105] (Ironically enough, Habermas' call to complete the project of the Enlightenment comes in an address delivered at the award ceremony of a prize named after Adorno.) Conservatism, in this respect, is disbelief in, or mere indifference to, the logic and ideals of the Enlightenment rationality, a particular concept of (non-) fraternity whose distinguishing marks are evasion and distance, that is to say a specific trend of anthropologism and a presumed suppression of the mimetic.

The assumption behind what Norris qualifies as a position 'basically conservative,' namely that theory will remain mimetic in each case, is famously entertained in the concept of ideology as false consciousness.[106] This concept, however, is not to be confused with what is termed the 'negative' aspect of theory,

or ideology, by writers such as Goodrich and Kerruish. A theory, according to Valerie Kerruish, ceases to be 'neutral' when it seeks to 'justify' the relations it reconstructs.[107] It is an obviously problematic notion, however, that theory should frame, define, limit, situate, without at once justifying. Theory, by definition, seems to be an attempt to *rationalize*. In Goodrich's distinction, likewise, the negative aspect of ideology signifies 'a system of ideas which falsely represents or mystifies individual and collective relations to the material conditions of existence.'[108] While in its positive aspect ideology is 'a programme or a strategy in relation to the terms of social life,' a vehicle for organization and transformation.[109] Ideology as false consciousness, on the other hand, unlike either of the aspects pointed out by Kerruish and Goodrich, refers to an epiphenomenal, purely mimetic, *passiveness*. What is often thought to be the dreary, sterile conservatism of the latter concept has haunted Marxist thinking since at least its evasive, undecided, ultimately problematic statement by Lukács on the basis of a notion expressed by Engels in a letter.[110] Yet its so-called crude positivism is to be found perhaps most memorably manifest in the famous Preface to *A Contribution to the Critique of Political Economy*. 'It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness.'[111] Lukács fleetingly points out the drastic implications the concept of mimetic ineluctability professed by dialectic materialism holds for the validity of its own discourse, and yet chooses to bury the question in an irresolute rhetoric. The primordiality of the mimetic, accordingly, does not necessarily signify an effective redundancy of the concept of conscious act in history, even though the awareness that defines it will always be a partial one: rather than simply abrogated in an 'inflexible' polarity of true and false, consciousness is to be treated as ultimately part of a 'historical totality' and therefore worthy of analysis.[112] Deliberately vague and evasive though its mood is, Lukács' statement clearly challenges the catechismic conservatism, the so-called economic reductionism or determinism, of the Second International. Amongst the writers in the years between the two world wars with an aim to rid the theory of the stagnancy

of the concept of ideology as mere shadow is Gramsci, whose revised notion of ideology, ideology as a *constitutive, transformative consciousness*, that is to say, rather than simply a passive element, ideology as an instrument of 'hegemony' within society, a device to sustain the system and a program, is the basis of both aspects of ideology indicated by Goodrich.[113] What might therefore be called an *active* concept of ideology along the lines suggested by Gramsci has been elaborated by Althusser, a student of psychoanalysis and structuralism.[114]

That which defines the concept of ideology as false consciousness in the first place is an emphasis on the inevitably *attached* character of consciousness. Behind the 'falseness,' the supplementarity, of the concept, however, are the assumptions at the same time of an essentially *detached* concept of understanding (the 'true' consciousness) and an intertwined notion of presence, of non-mediation.[115] What may seem to be the appeal of the concept to that which is primordially mimetic, therefore, is ultimately very much an uneasiness, on its part, of the mimetic. Althusser, on the other hand, objects to the principle of false consciousness for *both* its passive nature on a mimetic basis and, paradoxically, its assumption of the mimetic as historical, that is to say *dispensable*. And based on his critique of the two paradoxical aspects of the principle is Althusser's own paradoxical position.

He does affirm the duality of Marx' formulation expressed in the Preface to *Political Economy* (consciousness *is* tied to the economic practice, to put it in his terminology, 'in the last instance'[116]). But the duality effectively disappears as he attempts to formulate a non-ideal, non-anthropological concept of ideology (ideology with 'a material existence'[117]), and postulates it as a primordial ineluctability that is constitutive ('ideology has no history'[118]). The 'paradox' that characterizes Althusser's position, therefore, is the resistance of his formulation for its frame of reference to a polarity of epiphenomenal and constitutive, or autonomous, concepts of consciousness. He ventures to lead the theory out of a vulgar positivism, as it were, *not* to an anthropologism ('humanism') that is inherent in the positions of most of the dissenters regarding the principle of false

consciousness,[119] amongst whom notably (as far as Althusser is concerned) is Lukács, but to a *positivism*, for the want of a better term, that is loyal to its most significant presupposition, the primordiality of the mimetic. Ideology, for Althusser, is a matter more of the unconscious than of consciousness.[120] The choice for the unconscious is a choice against evasion and distance, that is to say against anthropologism and the suppression of the mimetic, notions that characterize, as with Habermas, the traditional criticisms of positivism. Althusser reaches the concept of ideology as the unconscious through an inversion of the concept offered in *The German Ideology,* an exposition of it where the truth of ideology is merely that of an 'illusion,' a 'dream.'[121] The dream-like truth of ideology, according to Althusser, is the only clear and complete formulation of ideology available in the Marxean corpus; a 'positivist' one nevertheless, rather than 'Marxist.'[122] Its (vulgar) positivism, however, is an effect of its pre-Freudean concept of the dream as nothingness. The dream as the *unconscious*, on the other hand, is hardly the concept with which history always takes place elsewhere. The unconscious, on the contrary, is a condition *for* history insofar as history is reproduced through the unconscious. The 'link,' according to Althusser, between the inverted supplementarity of the unconscious and ideology is an 'organic' one.[123] Rather than having its history, its truth, in each case outside itself; just as the unconscious, the reproductive mediation of ideology is very much constitutive of that which is history. 'As St. Paul admirably put it, it is in the 'Logos', meaning in ideology, that we 'live, move and have our being'.'[124] The moment ideology signifies, therefore, has neither a before nor an after. 'If eternal means,' writes Althusser, 'not transcendent to all (temporal) history, but omnipresent, trans-historical and therefore immutable in form throughout the extent of history, I shall adopt Freud's expression word for word, and write *ideology is eternal*, exactly like the unconscious.'[125] Althusser affirms the primordiality of the mimetic as he repudiates ideology as a concept of supplement. In what may be called a 'deconstructive' reversal, the hierarchy between history and ideology, a dichotomy he reads in *The German Ideology*, is displaced, and the terms

of the binary opposition are redrawn on the basis of a greater, *eternal,* concept of ideology.

The dualism of *The German Ideology* is deconstructed, however, only to be replaced by what is simply another version of it. The dissolution of the dichotomy is pursued through a concept which is not clearly formulated by Marx, not even (according to Althusser) entirely grasped by him, yet which is based on a period of Marx's work that contrasts with the work of the earlier period. The 'discovery' of what he calls a 'rupture' in the development of Marx's thinking, an 'epistemological break' he situates in 1845, enables Althusser to carry out a critical reading of the earlier, 'ideological period' of Marx's work through the frame of reference provided by the work that signifies his later, 'scientific period.'[126] The ideological period, accordingly, includes *The 1844 Manuscripts, The Holy Family,* and the work produced before. While *The Theses on Feuerbach* and *The German Ideology* form 'the Works of the Break.'[127] Yet as he pursues a dissolution of the 'positivist' dichotomy, that of history and ideology, on the presumed basis of the later work; paradoxically, the later work, as Althusser reconstructs it, appears to be marked by a similar dichotomy. 'The theoretical practice of a science,' writes Althusser, 'is always completely distinct from the ideological theoretical practice of its prehistory: the distinction takes the form of a 'qualitative' theoretical and historical discontinuity which I shall follow Bachelard in calling an 'epistemological break'.'[128] The concept of a *true* consciousness, namely science, the privileged term of a binary opposition of science and ideology, is an implicit affirmation of the principle of false consciousness rejected earlier. A reproduction of the mimetic paradox becomes the distinguishing feature of Althusser's reading, as the dichotomy between history and ideology, the crude positivism of *The German Ideology*, turns out to be merely supplanted, rather than dissolved, with that of science and ideology — the substitution of one variation on the theme of the same and the similar for that which is simply another variation. Because a distinction between the two is conceivable only on the basis of the re-presencing effect of evasion and distance, it

is none other than the *supplementarity* of ideology that makes a return to Althusser's argument. If ideology as the historical unconscious, on whose basis the dichotomy between history and ideology is dissolved, indicates the *de-presencing* mode of ideology — for, instead of being a passive looking glass of history it defines history in terms of undecidable absence, dream, illusion, nothingness — ideology as science signifies it in the mode of *re-presencing*. By exempting its discourse from the consequences of its own rhetoric,[129] ideology as science completes the nihilistic paradox, a swerve once again concurrent with the mimetic reversal.

Simulation

It seems perverse that simulation, a concept central to Goodrich's project, should be related to the Althusserean ideology, in contradistinction to science, for the former practically identifies simulation with the pretences of science and objectivity in contemporary theory.[130] Yet Althusser's own attack on positivism, a 'false' epistemology which the claims of scientific rigour and objectivity are all about, is very much *towards* a mimetically hostile dichotomy of science and ideology. By *science*, after all, Althusser hardly has in mind the so-called scientific method. The special mode of validity Althusser's science implies, precisely that which Norris perceives as the exposing effect of rhetoric,[131] is already presupposed in the concept of simulation. Perhaps not surprisingly, therefore, one of the main sources behind Goodrich's uses of the concept, Michel Pêcheux's *Language, Semantics and Ideology*, is an Althusserean study of language, a rather orthodox statement of the dichotomy between science and ideology.[132] In turn, the notions of evasion and distance, that is to say the basis of science in the Althusserean sense, are equally pivotal in Goodrich's own discourse. His project seeks, within the meaning of what is termed postmodernity, 'a *break* with the temporal charter of tradition, a *breach* of the contract, a *free* or *irreligious* association of words.'[133] Postmodernity seems to

define itself in terms, not of the primordiality of positions of prejudice, the mimetic ineluctability, but of the very distinguishing marks of the project of *modernity*, evasion and distance.[134] 'The problem that faces critical legal studies,' he writes, the statement comes in an exposition of nihilism in the mode of re-presencing and refers, perversely, to Nietzsche indicating the primacy of the mimetic, 'is that of reappropriating the space of interpretation, the space of the sublime, and so of recreating the *distance* necessary to communication, to the overflow of communication.'[135] The idea of distance underlies a variety of oppositions Goodrich establishes between two distinct categories of concepts; one which includes the real, the historical, the genuine; and one amongst whose terms are fiction, representation, simulation, simulacrum, similitude, semblance, image, imitation, emulation, mark, icon, symbol, form, shadow, appearance, visibility, spectacle, religion, faith, and so on. Goodrich contrasts the law as a 'system of rules' with the law as a 'system of images,' which is not really a dichotomy since the former is merely an effect of the latter, a self-image. Subsequently, a grasp of the legal tradition may only mean an analysis of the law as a 'sign.'

> In cultural and so also semiotic terms a tradition, legal or otherwise, is not an historical discipline, it is not a rational, proven or evidenced sense of the past but much more a mythology, an unconscious reservoir of images and symbols, of fictive narratives and oracular (or immemorial) truths. A semiotics of common law must thus pursue the tradition through its images, through the forms in which it is seen, precisely because it is an image, as a sign that law is recognized, accepted and lived. It is not as a system of rules that the individual is born into and adheres to the law as an aspect of everyday life. The law as a structure of material life, as an institution, is a system of images, and it is through its symbolisation of authority and through its signs of power that the law dwells within the subject. The law is in that sense nothing other than its image, no more and no less than a sign; it is the spectacle of the scaffold, the aura of judgement, the

sense of the normal.[136]

The concept which is not only distance *par excellence* but which also once again relates Goodrich to Althusser is the *unconscious,* the idea of the 'unconscious of a science,'[137] a borrowing from Foucault who employs it interchangeably with what he calls the 'archaeological level' of knowledge.[138] The concept designates the layer of discourse where the exposing effect of rhetoric is pursued. Both psychoanalysis and archaeology aim to unearth, as the verb implies, that which is in both cases *already* there and that which *survives* time. In both psychoanalysis and archaeology, therefore, a distinctive mode of *presence*, of *continuity*, is postulated. Distinguishing the unconscious from the conscious, Freud declares the former as present, *out there*, though physically 'inaccessible to us.'[139] Revealingly, he compares the unconscious with the Kantian category of things-in-themselves, a mode of presence which is paradigmatic of mimetic hostility and which, as the unadorned *same*, stands behind each one of Goodrich's binary oppositions. Yet the project of psychoanalysis differs from that of the Kantian epistemology in one aspect, elucidates Freud, insofar as the unearthing of the states of 'inner perception does not present difficulties so great as [those] of outer perception.'[140] (Note the professed dichotomy of the inner and the outer, on whose repudiation, at once and perversely, is built the very principle of the unconscious.) The logic of unearthing is that of betrayal in the sense of disclosure yet without at once *betraying,* a distance ensured by archaeology as a study quite literally of *hard* facts and by the idea of the un-conscious as the deep, *underlying*, mechanism, the noumenal motivator. Althusser himself exercises choice for the term the unconscious hardly for the single reason of avoiding the anthropologism of the concept of ideology as consciousness. An equally seductive reason perhaps is that the unconscious uniquely signifies *distance* while being inseparably involved, allowing thereby a special mode of validity — a notion that in turn makes conceivable a radical dichotomy of science and ideology. The concept of parochial attachment ideology becomes in Althusser's

formulation as the primacy he confers upon the 'Logos' with Paul[141] is reversed is represented in Goodrich's reading of the common law tradition, a distinct order whose logic is one of 'memory' rather than 'theory,'[142] by what Goodrich terms 'a technique of faith'[143] — a manner of reading which precludes evasion and distance. Of one piece with one pattern the present study has sought to point out,[144] faith, a metaphor for the primordiality of the positions of prejudice in reading, contrasts in Goodrich's formulation of it with 'reason'[145] and 'life,'[146] that is to say evasion and distance in the exact Enlightenment tradition. It is *the* tradition, one must notice, that brings together projects as diverse as those of Goodrich and *The Federalist* where, famously, government by 'reflection and choice' is opposed to government, or non-government, founded upon 'accident and force.'[147]

Consequently, the indispensability of a non-grammatical dichotomy between faith and life to the exceptional mode of validity pursued induces Goodrich to dismiss the approaches inspired by Wittgenstein's concept of language-games, a concept of the primordiality of a greater category of faith, of the grammatical, the mimetic, for 'trivialis[ing] the social and political.'[148] The perspective from which he argues reflects at once an unmistakable affinity with that of Norris in reproaching Fish (a 'basically conservative standpoint')[149] or the manner in which Habermas classifies Derrida (a 'conservative').[150] The words Goodrich appears to have to describe the possible termini of the Wittgensteinean assumption of attachment, the concepts of language-games and rule-following, however, are less than uncomplicated considering the centrality of the very notions that underlie those words, namely distance and evasion, to Goodrich's own discourse in the first place. They are 'anthropologism,' 'subjectivism,' and 'psychologism.'[151] A further swerve on his part does little to help as he proceeds to contrast the Wittgensteinean mood of attachment with the mode of detachment that is 'objectivity'[152] — a concept that is the apotheosis of distance and evasion in its traditional sense, one designated earlier as mere positivistic pretension, while in a less orthodox sense as a notion of transparency, non-privacy, *postulated* by Wittgenstein, rather than opposed. A

concept of objectivity closer to its former, more traditional, sense, is affirmed as Goodrich goes on to define objectivity as a special mode of validity, an effect of 'the critical use of linguistic methodologies,'[153] once again precisely that which is suggested by Norris (writing *after* Goodrich) as the *exposing* effect of rhetoric, exposing without at once repressing or concealing, namely rhetoric as a 'study of linguistic tropes and devices.'[154] What a critical analysis of language seeks to achieve, according to Goodrich, where a Wittgensteinean approach would simply lock the particular formation in a circle of incommensurability is to disclose the mechanism through which power determines meaning formations within specific performances of language. 'The process in which such determination occurs,' he writes, 'may be analysed objectively (as opposed to anthropologically or psychologically) through the critical use of linguistic methodologies.'[155] It is not clear how exactly anthropologism is brought about by what is in effect an apathetic concept of reading on Wittgenstein's part. And if it is an *active* concept, rather than apathetic, conversely, attributing anthropologism to it is simply to ignore the chiastic relationship Wittgenstein clearly assumes between language-games, where man seems to be the master, the 'measure of things,'[156] and life-forms — a chiasm more systematically formulated in the Heideggerian *oeuvre* where it is termed 'the event of appropriation,' a primordiality 'in which man and Being are delivered over to each other.'[157] That the most significant characteristic of the Wittgensteinean concept of rule-following (the very key to the famous 'paradox') is a clear resistance to the traditional oscillation between the orders of the object and the subject, the reader and the text, man and Being, I have already noted.[158] What lies in that resistance is hardly an immediately striking form of anthropologism or psychologism, but rather an inevitable preclusion of that which is very much the epitome of the notions of evasion and distance and which seems to be a constitutive part of Goodrich's project for disclosure, disclosure without at once concealment — the idea of metalanguage. Not surprisingly, therefore, the unique paradigm for an analysis of the language, of the 'inner perception,' of that which is present, without

at once becoming simply another piece of language, namely the idea of the unconscious, is subsequently invoked by Goodrich to explain how exactly that which eludes faith, the Wittgensteinean mode of attachment, is captured in an open, life-orientated, analysis of language. 'Linguistic structure itself encodes inequalities of power and is also instrumental in enforcing them... [T]hese implicit or unconsciously regulated operative meanings are accessible to study through their expression in the lexicon, syntax and semantics of the text.'[159]

That access to what would be the linguistic unconscious is through a *formal* concept of the text is an affirmation on Goodrich's part of the traditional dichotomy between the text and the reader, the text and history. 'It is language in the end which remembers...'[160] That it is the *language* which remembers, the obvious positivism of the concept that makes meaning an effect of the marks on a page or of sound patterns,[161] *present,* as with Freud's 'inner perception' awaiting simply to be collected through an act of reading that is willing to dig the right way and place, wildly contrasts with the commitment Goodrich professes to an unstationary concept of the text, one which has no 'outside.'[162] Two distinct veins that are simultaneously at work in Goodrich's discourse, therefore seem to contribute to a dialectic that is less than productive: one which resists a dichotomy of the same and the similar and defines that which is the same in terms of a greater category of similitudes, and one that seeks to unearth or reconstruct that which is the same, the present, through an analysis of the similar, a category that is secondary and parasitic — one vein, in other words, that is post-semiotic, and one semiotic. What happens eventually is that the two simply cancel each other out. An illustrative instance is where Goodrich refers to the postal rule in contract law, a rule which makes an acceptance pursued by letter take effect the moment the letter is posted — a metaphor for what is the prime example of the concept of a contract, the social contract, the law.[163] One remarkable consequence of the postal rule, Goodrich points out, is the fact that one may become party to a contract and be bound by its terms without being aware what exactly it is to which one is party. 'It is possible

that the letter fails to arrive at its destination, or that it arrives late, and yet a binding contract none the less subsists.'[164] The addressee, naturally, is the person who has made the offer to start with; furthermore, the parties' apparent intentions are by no means preceded by the postal rule — details that may spoil the metaphor. Ignoring the details for the sake of simplicity, as indeed Goodrich himself does, the metaphor is a statement of the primordial undecidability of that which is sent, of non-presence. The law, just as the letter, does not *exist*; it is what you make of it: it resists a dichotomy of that which is and its representation. That is what the metaphor is about. At a parallel level, however, one knows at once that the author does not really mean it, that the letter will never really fail to arrive at its destination, and that there is no such thing as *lost letter*. For the letters deemed lost are merely ones addressed to the *author*. The unconscious is where they are retained temporarily eventually to turn up at the analyst's couch for the analyst (thereby affirming two distinct positions, famously those of Derrida and Lacan, at once[165]). The assumption that the law is what you make of it is cancelled out by another which is entertained simultaneously and which makes the law a formal process whose terms are created and put into effect by one of the parties while the other party is absent spatially and temporally. Just as that of the postal rule, the logic of the text of law is a non-logic, one absurd consequence of which is that '[i]t is possible... to be bound by texts that one has not read, to be engaged in a relation with the institution on terms that have been established in advance'[166] — the *generality* paradox de Man reads in Rousseau.[167] (It is again Rousseau, incidentally, whom Goodrich reads where he analyzes the postal rule.)

The difference between the two veins that permeate Goodrich's work may be a subtle one on the surface, but its consequences are dramatic. Just as a confusion between two philosophical positions on language (both famously represented by Wittgenstein) has been responsible for much of legal realist philosophizing, for a dichotomy of the real and the non-real;[168] not infrequently, the post-semiotic positions, notably that of Derrida (apparently for its dismantling, subversive effect

on the text) have been construed as an instance of mimetic hostility which in turn presupposes a dichotomy of the same and the similar.[169] In an essay where he reads Heidegger's 'The Age of the World View,' the lecture in which the latter discusses representation,[170] Derrida relates the anti-mimetic attitude with admirable economy: 'representation is bad.'[171] It is never that a series of binary oppositions Goodrich establishes on the basis of a dichotomy between the same and the similar cannot be maintained grammatically, that is to say as a mimetic refinement. They will hardly hold, however, if the secondary term in each one of those binary oppositions appears to be so designated *because* it is mere similitude. As Derrida puts it,

> a criticism or a deconstruction of representation would remain feeble, vain, and irrelevant if it were to lead to some rehabilitation of immediacy, of original simplicity, of presence without repetition or delegation, if it were to induce a criticism of calculable objectivity, of criticism, of science, of technique, or of political representation. The worst regressions can put themselves at the service of this antirepresentative prejudice.[172]

In fact mimetic hostility simply restates what Derrida demonstrates as the traditional prejudice against writing.[173] Writing is thought to lack the moment of presence which defines speech. Simulation, 'the fiction of appearance, of semblance,'[174] is a characteristic, in this respect, customarily attributed to writing. And just as writing, defined as 'the disappearance of natural presence,'[175] simulation, what is a mere synonym for Goodrich for fake and fraud, is a *prerequisite* of both the categories of the same (*som-*) and the similar (*som-*), being and seeing.[176] The *absence* simulation implies, the paradoxical *distance* (for, just as writing, simulation is defined in terms of distance — inverted distance —, disparity, difference, impersonality, reproducibility) and *evasion* (undecidability, unpinpointability), is not simply an attribute of the law as a sign, but it is a condition for sign *generally*. I have recorded in this study the perverse privileging of writing in the parol evidence rule in view of

the traditional hierarchy.[177] In both cases, however, writing is defined in terms of absence; the absence of passion and privacy. Unlike speech, writing is depersonalized, detached. What is an exclusion of private passion and of therefore partiality in contract doctrine signifies in the traditional hierarchy the suppression of that which is the immediate meaning — intention. With respect to the dichotomy between that which is and its representation, distance and evasion undergo a displacement not dissimilar. The notions which appear to make conceivable a distinction of the same and the similar, life and faith, reality and fiction, authenticity and inauthenticity, science and ideology, disclosure and concealment, choice and force, and so on, in the first place, turn out to be none other than the defining features of that which is the marginal term in each one of the binary oppositions — the religious, the forceful, the simulated, the mimetic.

Faith

The dichotomy between the law and its readings, then, is to be defined as one primordially of mimesis, of habit, of *faith*. The faith metaphor has performed a key part in the present study. Both discourses on the basis of whose motifs and thematic unfoldings this study has sought an evaluation of some of the contemporary arguments posit faith as on order which transcends the attachments, the so-called realities, of a world fraternity, a life-form, a discernible (con)text, and signifies instead a *formal* mode, a way of being that resists, and contrasts with, what is classified as the natural, the pagan, the secular. Gény draws a radical distinction between the realistic an the faith-based attitudes, the latter being epitomized in the mechanistic jurisprudence of the exegetical school.[178] And Lyotard contrasts the heteronomous outlook of the pagans with the formalism of two basic approaches, the autonomous approach of the mainstream Western thinking, one based on a markedly fallacious notion of the subject, and the Judaic tradition, one which, while

repudiating the anthropologism of the mainstream Western thinking, at once tends to supplant the pagan narrative with that of *faith* and thereby banish that which is natural.[179] Lyotard's Judaism ('the Jewish pole') simply reproduces Nietzsche's Zarathustrianism, the symbolic starting point of the opposition between the natural and the formal. The critique of formalism Nietzsche more concretely pursues in the case of Christianity is mimicked in the present essay by writers amongst whom are, notably, Llewellyn and Goodrich.[180] One of the objectives of this thesis is to make sense of the interpretative controversy that surrounds the American Constitution. The title of a book by one of the key contributors to the debate, Levinson, is *Constitutional Faith*.[181] The pagan way appears to be invoked as a primordial condition of human existence and therefore ineluctable. The ineluctability of paganism, the natural, is at once ignored, however, as a *radical* dichotomy of the pagan and formalist attitudes is subsequently introduced. References, it has been argued, by a revealing variety of writers to (suppress) the divine have a symbolic significance: to exclude (or simply distinguish) the divine is to exclude the primordiality of positions of prejudice not only in reading the divine, but in reading generally. Catechismic reading, accordingly, is not a paradigm merely in reading the commandments of faith. But reading is in each case catechismic reading. It is by means of the inevitably *prejudiced* nature of reading that (a) the law, a concept that is in each case *read* — a concept of absence, as opposed to presence — has been reassessed in terms of its readings; the viewpoint, that is to say, from which the law is interpreted and evaluated has been taken form periphery to the centre, or, to be more exact, a perpetually shifting concept of the centre and the periphery has been suggested; and (b) the individual evaluations and interpretations of the law have been defined as *attached*; while a specific reading is based on, and mirrors, a particular fraternity, a faith, a life-form, a *diversity* of readings on an issue are equally characterized by a fraternity which engulfs individual distinctions. That is to say, a displacement of the traditional hierarchy between the law and its readings does not necessarily amount to an effectively free-floating concept of the law. What

may be termed a *nihilistic* concept of the law, therefore, has been refuted. Crucially, nihilism as a term of presence signifies the traditional approach as well as that of its critics, who have been traditionally labelled nihilistic. A concept of anything-goes in the absence of a formally circumscribed set of principles has equally underlay the mainstream mentality. Therefore, the thesis has sought to indicate not only the primordiality of the positions of prejudice in reading, whether the text of the law or its intention, whether the reality or the formal law, has been the rhetorical basis, but it has also attempted to point out the essentially transfigurational — absent, mimetic, discursive — character of the terms of each one of the thematic distinctions that have been central to the theory: the text and the extratext, intention and extension, the tame and the freakish, the real and the formal. In pointing out the essentially mimetic character of these binary oppositions, however, the thesis itself has presupposed a dichotomy of that which *is* and that which merely mimics it, the same and the similar.

NOTES AND REFERENCES

Introduction

1 J. Austin, *1 Lectures on Jurisprudence or the Philosophy of Positive Law* 292, n.v (ed. R. Campbell, 1879).

2 *Id.*

3 Aristotle, 'Politics,' *The Politics of Aristotle* I, 1253 a (transl. E. Barker, 1946).

4 Aristotle, 'Nicomachean Ethics,' transl. W.D. Ross, revised by J.O. Urmson, *2 The Complete Works of Aristotle* V, 1134 a-b (ed. J. Barnes, 1984).

5 J. Madison *et al.*, *The Federalist Papers* No. 1, at 88 (ed. I. Kramnick, 1987). *Cf.* C. Fried, 'Sonnet LXV and the 'Black Ink' of the Framers' Intention' in *Interpreting Law and Literature: A Hermeneutic Reader* 45, 51 (eds. S. Levinson and S. Mailloux, 1988): 'This is what law is: a constraint, not of force, but of reason...'

6 L. Wittgenstein, *Philosophical Investigations* par. 243 (transl. G.E.M. Anscombe, 1988).

7 *Id.* par. 1.

8 R. Descartes, 'Discourse on the Method,' *1 The Philosophical Writings of Descartes* 111, 127 (transl. J. Cottingham *et al.*, 1984).

9 *Id.*; R. Descartes, 'Meditations on First Philosophy,' *2 The Philosophical Writings of Descartes* 3, 54 (transl. J. Cottingham *et al.*, 1985).

10 R. Descartes, 'Principles of Philosophy,' *supra*, note 8, at 179, 195.

11 Aristotle, 'Rhetoric,' transl. W.R. Roberts, *supra*, note 4, at 1378 a - 1388 b.

12 L. Wittgenstein, *Zettel* pars. 484-504 (eds. G.E.M. Anscombe and G.H. von Wright, transl. G.E.M. Anscombe, 1988).

13 It has to be noted that Wittgenstein considers to be outright abuse the uses of the word 'know' for a person in reference to her or his pain, thoughts, or bodily possessions; 'I know my pain,' 'I know what I am thinking,' 'I know I have two hands' (the famous 'proof' by G.E. Moore of the external world), and so on, accordingly, may only constitute figures of speech in ordinary language, rather than what might be called the 'literal' uses of the word 'know.' See, *Investigations, supra,* note 6, pars. 246 and 222; *Zettel, supra*, note 12, par. 405.

14 *Investigations, supra*, note 6, pars. 580 and 257; L. Wittgenstein, *The Blue and Brown Books* 24-25 (1989).

15 *Investigations, supra*, note 6, par. 293 (emphasis in original). *Cf. id.* par. 50. The last words — that 'the box might even be empty' — ought not to be construed as a behaviouristic scepticism. Wittgenstein has in mind simulation and pretense. Pain, joy, and so on, do not simply equal their behaviour patterns ('So you are saying that the word 'pain' really means crying?' 'And of course joy is not joyful behaviour, nor yet a feeling round the corners of the mouth and the eyes'). *Id.* par. 244; *Zettel, supra,* note 12, par. 487. See also, *Investigations, supra,* note 6, par. 308.

16 S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 366 (1989).

17 *Id.*

18 Indicating the irrelevance of the so-called private object to the meaning of the particular word, 'a wheel that can be turned though nothing else moves with it,' remarks Wittgenstein, 'is not part of the mechanism.' *Investigations, supra,* note 6, par. 271. To be more exact, the mechanism is a possibility at all *precisely* because it is not tied to a private wheel.

19 *Doing What Comes Naturally, supra,* note 16, at 366.

20 *Id.*

21 'Second Meditation,' *supra*, note 9, at 16-23; 'I know plainly that I can achieve an easier and more evident perception of my own mind than of anything else' (*id.* at 22-23).

22 J. Derrida, *Of Grammatology* (transl. G.C. Spivak, 1976).

23 M. Heidegger, *Being and Time* (transl. J. Macquarrie and E. Robinson, 1990).

24 'Our investigation is therefore a grammatical one,' notes Wittgenstein in *Philosophical Investigations, supra*, note 6, par. 90, '...this may be called an 'analysis' of our forms of expression, for the process is sometimes like one of *taking a thing apart* [einem Zerlegen]' (emphasis added). In another paragraph, par. 118, Wittgenstein appears to designate the kind of investigation he pursues as a form of *destruction*. 'Where does our investigation gets its importance from, since it seems only to destroy [zerstören] everything interesting, that is, all that is great and important? (As it were all the buildings, leaving behind only bits of stone and rubble.) What we are destroying is nothing but houses of cards and we are clearing up the ground of language on which they stand.' The two paragraphs reflect ideas that are not dissimilar to those that make the Heideggerian concepts, respectively, of *Abbau*, what Derrida defines as 'taking apart an edifice in order to see how it is constituted or deconstituted,' and of *Destruktion* defined, again, by Derrida as 'dismantling the structural layers in a system' (*cf. Being and Time,*

supra, note 23, at 44) — concepts that in turn form the basis of *deconstruction* as a way of reading. J. Derrida, *The Ear of the Other: Texts and Discussions with Jacques Derrida* 86-87 (ed. C.V. McDonald, 1985).

25 J.F. Lyotard and J.L. Thébaud, *Just Gaming* (transl. W. Godzich, 1985).

26 Aristotle, 'Nicomachean Ethics,' transl. W.D. Ross, revised by J.O. Urmson, in *The Complete Works of Aristotle* Vol. 2, V, 1134 a-b (ed. J. Barnes, 1984).

27 See, e.g., the 'original position' Rawls seeks as a state of being which 'veils' or transcends private passion, J. Rawls, *A Theory of Justice* esp. 251-257 (1973); and Dworkin's reading of the Hartian concept of law as rules (*and*, unavoidably, judicial discretion) as a dangerous violation of the distinction between the law and men, R. Dworkin, *Taking Rights Seriously* chs. 2-4 (1978).

28 See, *supra*.

29 See, the present work, 2.3, the text accompanying notes 132-136.

30 See, *Conclusion*, the text accompanying notes 72-177.

31 See, esp. 1.4, the text accompanying notes 30-34; 2.3, the text accompanying notes 136-146 and 210-211.

32 *Cf.* 1.3, the text accompanying notes 55-71.

33 *Cf.* on childhood as a *constructed* state, I. Illich, *Deschooling Society* (1971).

34 F. Gény, *Method of Interpretation and Sources of Private Positive Law: Critical Essay* [1899] (transl. J. Mayda, 1963).

35 60 U.S. (19 How.) 393, 403-405 (1857).

36 F. Dostoyevsky, *The Devils* 612 (transl. D. Magarshack, 1971).

1 JUDGEMENT, CRITERIA, JUSTICE

1 J.-F. Lyotard and J.-L. Thébaud, *Just Gaming* 76 (transl. W. Godzich, 1985).

2 *Id.* at 74.

3 For the debate, see H.L.A. Hart, 'Positivism and the Separation of Law and Morals,' 71 *Harvard L.R.* 593 (1958); L.L. Fuller, 'Positivism and Fidelity to Law,' *id.* at 630. The major titles of this famous debate say almost it all. The former argues that the possible immorality of the Nazi rules (which in the present case permits the denunciation of the husband by the wife) is not a legal matter and that what counts as legal is purely technical. While the latter claims that fidelity to immoral rules is a contradiction in terms, for in order to qualify

as law the rules have to bear a moral essence. It would certainly be interesting to know about the extent of *Fuller's own* fidelity, at about the same time the Nazis were busy in Germany, to the state laws and the Supreme Court decisions on *his* side of Atlantic, which, presumably not less immorally, enforced racial intolerance and organized cynicism. For an interesting re-interpretation of the positivist position in the debate, as a more liberating and morally justifiable one (in that, unlike the Fullerian position of natural law, positivism grants no undue strength and authority to that which is the law, and is therefore more sensitive and alert to its abuses), see D.M. MacCormick, 'A Moralistic Case for A-Moralistic Law,' 20 *Valparaiso Law Review* 1 (1985). See also H.L.A. Hart, *The Concept of Law* 206 (1988) where the point is made, in clear support of MacCormick's later interpretation, that 'the certification of something as legally valid is not conclusive of the question of obedience, and... however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to moral scrutiny.' But for a criticism of the positivist position morally understood, see P. Soper, 'Choosing A Legal Theory on Moral Grounds' *Philosophy and Law* 31 (eds. J. Coleman and E.F. Paul, 1987). For a careful account of the case itself, see H.O. Pappe, 'On the Validity of Judicial Decisions in the Nazi Era,' 23 *Modern Law Review* 260, 261 - 63 (1960). And see, for a wider perspective on both the question of the legality of the Nazi rules and the judicial problems encountered in this era by the post-war Allied and German courts, H. McCoubrey, *The Development of Naturalist Legal Theory*, ch. 7 (1987).

4 B Verf GE 6, 214 - 215; cited in 'On the Validity...' *supra* note 3, at 263, n. 22. But see, for an account to the contrary by Karl Loewenstein, who, during the War, was an advisor to the U.S. Government on the German law, K. Loewenstein, 'Reconstruction of the Administration of Justice in American Occupied Germany,' 61 *Harvard Law Review* 419, 432 (1948). Writing immediately after the War, he makes (perhaps *not*) surprising revelations on the inhuman, in both senses, *technicalism* of the German judge. Loewenstein states: 'The truly exasperating feature of the Nazi legal system lay in the fact that the most arbitrary and unjust of its acts were couched in the form of a statute, decree, or similar enactment, which, because of its formal character as a legal norm, was applied by the judge as 'law' regardless of its inherently arbitrary character. The German judge worships the written law and slavishly follows its letter. He is unaffected by intellectual doubts as to the intrinsic justice of the legal rule he has to apply, provided it is enacted by the authority of the state, and he does not question whether the authority is legitimate or

not' (*id.*). That which is immediately questionable in this account is not that the Nazis had the *full* cooperation of the legal establishment, not even the state of the German legal thought at the time, but that the cooperation came naturally because those who then manned the courts happened to be holding *the wrong beliefs* on such matters as the nature of law and legal obligation. The *locus classicus* on the positivist culpability for the Nazi regime is Gustav Radbruch's 1946 lecture 'Gesetzliches Unrecht und übergesetzliches Recht,' *Rechtsphilosophie* 347 (4th ed. 1950) — cited in Alf Ross, *On Law and Justice* 31 (transl. M. Dutton, 1958).

5 R. Lange, 5 *Süddeutsche Juristenzeitung* 210 (1950); cited in 'On the Validity...' *supra* note 3, at 269, n. 26.

6 *Id.* at 263.

7 The Federal Supreme Court decision of July 8, 1952; 1 ST R 123/51; BGHST 3, 110 - 129; cited *id.* at 264 - 68.

8 B Verf GE 3, 58 *et seq.*; 6, 132 *et seq.*; cited *id.* at 273.

9 Lyotard is a writer with relentless curiosity. 'Justice' will not be done to him unless one considers his specific arguments in the general direction of probably the single persistent line in his thinking — a constant defiance to being somehow captivated by one single line of thinking. Hence his later celebration of a refined kind of 'inconsistencies.' See, G. Van Den Abeele's interview with him in 14 *Diacritics* 16 (1984). For an account of his work and ideas, see G. Bennington, *Lyotard: Writing the Event* (1988).

10 In fact, a certain vision of moral apocalypse has *always* been part of the project of modern philosophy in the true Cartesian spirit from Kant down to John Rawls. The dilemma of that apocalypse, I mention in 1.3, note 4.

1.1 Judgement, Authorship, Audience

1 J.-F. Lyotard and J.-L. Thébaud, *Just Gaming* 9 (transl. W. Godzich, 1985).

2 *Id.*, at 12. Postmodernity, the term which Lyotard favoured in his later studies and is widely known for, does not originally enter the discussion here. In a footnote, however, he divides the modernity side of the dichotomy further and distinguishes the postmodern from the modern as the situation in which there is absolutely 'no assigned addressee and no regulating ideal' while, for instance, the modernity of romanticism, has, as its addressee, 'the 'people,' an

idea whose referent oscillates between the romantics' *Volk* and the *fin-de-siècle* bourgeoisie.' He adds: 'Postmodern is not to be taken in a periodizing sense.' (*id.* at 16). See, for his later, and better known, formulation of it, J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (transl. G. Bennington and B. Massumi, 1989)

3 *Just Gaming*, *supra* note 1, at 15.

4 *Id.*

5 *Id.* at 9.

6 *Id.* at 15.

7 *Id.* at 9 (emphasis added).

8 *Id.* at 17 (emphasis added).

9 *Id.* at 15.

10 See, *Introduction*, the text accompanying notes 6-15.

11 J. Derrida, 'Signature Event Context' in his *Limited Inc* 1 (transl. S. Weber and J. Mehlman, 1990); *cf.* the present study, 2.2, the text accompanying notes 1-7.

12 *Just Gaming*, *supra* note 1, at 9.

13 See, I. Kant, *The Critique of Judgement* 65 (transl. J.C. Meredith, 1952). See also, the present study, 1.4, the text accompanying notes 14-20.

14 'The essence of things is not changed by their external relations...' I. Kant, *Foundations of the Metaphysics of Morals* 439 (transl. L.W. Beck, 1959).

15 *Id.* at 429.

16 *Just Gaming*, *supra* note 1, at 15.

17 *Id.* at 17.

18 *Id.* at 14.

19 Aristotle, 'Nicomachean Ethics,' transl. W.D. Ross, revised by J.O. Urmson 2 *The Complete Works of Aristotle* VI, 1140 a 24 - b 30 (ed. J. Barnes, 1984).

20 *Just Gaming*, *supra* note 1, at 26 (emphasis added).

21 Plato, *Republic* IV, 433 (transl. A.D. Lindsay 1950); see, 1.4, the text accompanying note 30.

22 *Just Gaming*, *supra* note 1, at 26.

23 *Id.*

24 Aristotle, 'Rhetoric,' transl. W.R. Roberts, *supra* note 19, at I, 1364 b 11-16.

25 (emphasis added).

26 (emphasis added).

27 M. Heidegger, *Being and Time* 98 (transl. J. Macquarrie and E. Robinson, 1990).

28 On theory and practice *cf. id.* at 238.

29 *Id.* at 237.

30 *Id.* at 186.

31 *Id.* at 157 and 237.

32 *Id.*

33 *Id.* at 159 and 96-98.

34 *Id.* at 186-187. *Cf.* *'Dasein is its disclosedness'* (*id.* at 171, emphasis in original).

35 *Supra*, note 24.

36 *Id.* (emphasis added).

37 J. Derrida, *Writing and Difference* 279-280 (transl. A. Bass, 1978); J. Derrida, *Positions* 7 (transl. A. Bass, 1987).

38 *Just Gaming*, *supra* note 1, at 26.

39 *Id.* at 9.

40 *Id.*

41 *Id.*

42 *Id.* at 26.

43 *Id.* at 15.

44 *Id.* at 26.

45 Aristotle, 'Politics,' *The Politics of Aristotle,* I, 1253 a (transl. E. Barker, 1946).

46 *Just Gaming, supra,* note 1, at 29.

47 *Id.* at 26.

48 *Id.* at 15.

49 *Id.*

50 *Id.*

51 *Id.* at 29 (emphasis added).

52 *Cf.* Derrida, 'Signature Event Context,' *supra*, note 11, at 21: 'There is no concept that is metaphysical in itself. There is a labour — metaphysical or not — performed on conceptual systems.'

53 *Just Gaming, supra,* note 1, at 43.

1.2 Judgement and Blind Faith

1 J.-F. Lyotard and J.-L. Thébaud, *Just Gaming* 38 (transl. W. Godzich, 1985).

2 *Id.* at 31.

3 *Id.* at 38-39,

4 See, I. Kant, *Foundations of the Metaphysics of Morals* 453 (transl. L.W. Beck, 1959).

5 See, the present study, 1.1, the text accompanying notes 38-51.

6 *Just Gaming*, *supra* note 1, at 35.

7 *Id.* at 32 (emphasis added).

8 (emphasis added).

9 *Id.* at 40.

10 *Id.* at 43.

11 *Supra*, note 7.

12 *Id.*

13 *Just Gaming, supra*, note 1, at 40.

14 *Id.* at 65-6.

15 *Id.* at 66 (emphasis added).

16 *Id.*

17 *Id.*

18 *Id.*

19 *Cf.* Wittgenstein on certainty ('Doubt comes *after* belief'), L. Wittgenstein, *On Certainty* par. 160 and *passim* (eds. G.E.M. Anscombe and G.H. von Wright, transl. D. Paul and G.E.M. Anscombe, 1989).

20 *Just Gaming, supra,* note 1, at 66 (emphasis added).

21 *Supra,* note 15.

22 *Supra,* note 20.

23 *Supra,* note 18.

24 'When Dasein directs itself towards something and grasps it, it does not somehow first get out of an inner sphere in which it has been proximally encapsulated, but its primary kind of Being is such that it is always 'outside' alongside entities which it encounters and which belong to a world already discovered.' M. Heidegger, *Being and Time* 89 (transl J. Macquarrie and E. Robinson, 1990).

25 *Just Gaming*, *supra* note 1, at 66.

26 Martin Buber, 'Upsetting the Bowl,' *Tales of the Hassidim: The Early Masters* 259 (transl. O. Marx, 1972).

27 S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 11 (1989).

28 'The Bowl,' *supra,* note 26, at 259.

29 *Supra,* note 15.

30 *Just Gaming*, *supra*, note 1, at 66 (emphasis added).

31 See, the present study, 1.1.

32 L. Wittgenstein, *Tractatus Logico-Philosophicus* par. 4.2 (transl. D.F. Pears and B.F. McGuinness, 1988).

33 See, *id.*, par 6. 522.

34 *Just Gaming*, *supra*, note 1, at 66 (emphasis added).

35 For the sources, inspirations and philosophical programme of Logical Positivism from a semi-official angle, see, J. Joergensen, *The Development of Logical Empricism* (1951); A.J. Ayer's *Language, Truth and Logic* (1936) is the celebrated, if naïve and overenthusiastic, manifesto of the movement in the English speaking world; Ayer's 'Introduction' to his edition of the classical logical positivist essays, *Logical Positivism* (1959), is his mature account of the movement; a concise record of the sources, development and fundamental ideas of the movement in the recent literature is to be found in O. Hanfling, *Logical Positivism* (1981). For Wittgenstein's personal involvement with the group of philosophers behind Logical Positivism, see F. Waismann's notes, of the conversations by Wittgenstein in the years 1929-31, in his *Wittgenstein and the Vienna Circle* (ed. B. Mc Guinness, transl. J. Schulte & B. Mc Guinness, 1979).

36 See, the text accompanying, *supra*, note 20.

37 *Just Gaming*, *supra*, note 1, at 60.

38 *On Certainty, supra,* note 19, par. 160 (emphasis in original).

39 For a comparison, Nietzsche disagrees, a view hardly compatible with his general rhetoric of the ineluctability of experience on the basis of will to power. His *Christianity* seems to elude the primeval pagan condition the way Lyotard distinguishes Judaism from paganism. 'The affirmation of the natural, the sense of innocence in the natural, 'naturalness,' is pagan. The denial of the natural, unnaturalness, is Christian.' F. Nietzsche, *The Will to Power* par. 147 (transl. W. Kaufmann and R.J. Hollingdale, 1968).

1.3 The Just, the Unjust, and the Ugly

1 *Cf.* Arendt's *consent*, a notion that is the basis of representative government and yet that 'has lost, in the course of time, all institutions that permitted the citizens' actual participation,' H. Arendt, *Crises of the Republic* 89 (1972); and Habermas' bourgeois *public realm* (*Öffentlichkeit*) as the uninterrupted state of

transparency that serves as the frame of reference for political legitimacy within the meaning of liberal (as opposed to *advanced*) capitalism, J. Habermas, *Legitimation Crisis* 36-37 (transl. T. McCarthy, 1975).

2 I. Kant, *Foundations of the Metaphysics of Morals* 453 (transl. L.W. Beck, 1959); dicussed in the present study, 1.4, the text accompanying notes 7-12.

3 What is it that makes one particular idea of justice better amongst others? In *Whose Justice? Which Rationality* (1988), Alasdair MacIntyre's answer to that question is that different rhetorics of justice are artefacts of different traditions of rational inquiry. The diversity of views follows from a diversity of rationalities, 'each with its own specific mode of rational justification.' The traditions of inquiry, as far as the European culture is concerned, MacIntyre exemplifies with the conceptions developed by such philosophers as Aristotle, Aquinas, and Hume. Behind each conception are demands, claims, and impositions of a particular culture and community. 'That Aristotle, Aquinas and Hume... were historically situated in the way that they were... is not then a merely accidental or peripheral fact about the philosophy of each' (*id.* at 389). But the forms of life which they had to be parts and participants of were truly constitutive of how they thought about justice. The reply, then, to the question 'Whose justice? Which rationality?' is that one's choice will always depend on the particular connections of rationality in which one is situated and which one is. 'This is not the kind of answer,' he adds, 'which we have been educated to expect in philosophy, but that is because our education in and about philosophy has by and large presupposed what is in fact not true, that there are standards of rationality, adequate for the evaluation of rival answers to such questions, equally available, at least in principle, to all persons, whatever tradition they may happen to find themselves in and whether or not they inhabit any tradition' (*id.* at 393).

4 J.-F. Lyotard and J.-L. Thébaud, *Just Gaming* 66 (transl. W. Godzich, 1985).

5 The Cartesian dichotomy sets out to eliminate the chaos of scepticism. The first thing which a radical separation of matter and thought establishes, however, is the essential privacy of mind, and hence a truly apocalyptic free play of 'other minds.' Which turns out to make Cartesianism a *vindication* of scepticism, rather than a repudiation of it. *Cf.* the present study, *Introduction*, the text accompanying notes 8-15. The Kantian dichotomy of the sensible and the intelligible gives rise to a very much similar dilemma; see, 1.4, the text accompanying notes 7-12. The most recent example of the pattern is found in John Rawls' influential work *A Theory of Justice* (1973). Rawls makes the basis of morality, in the footsteps of Kant, the individual capacity to make

choices. His principles of justice as fairness accompany his criticism of utilitarian tradition, a vein which, despite being customarily thought of as individualistic, 'does not take seriously the distinction between persons' (*id.* at 27). Indeed, Rawls' project owes much to the idea of persons as ends in themselves. Utilitarianism does make individuals sound as ends with emphasis on the equality and the well being of each of the members of society. In so doing, however, utilitarianism proceeds to treat them at once as 'means' in that individuals are made responsible for each other's welfare. 'In the design of the social system,' states Rawls in his criticism, 'we must treat persons solely as ends and not in any way as means' (*id.* at 183). The full significance of his position is particularly in sight in the event of the rights of individuals being challenged by thoughts of the good of society as a whole. 'Impartiality,' according to Rawls, must not necessarily bring about 'impersonality' (*id.* at 190). And 'in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interest' (*id.* at 28). Instead, Rawls seeks to achieve the desired impartiality by one of the two fundamental principles of his theory — the difference principle. We do not need to get into the intricacies of that principle. In connection with it, however, a view by Rawls which does away with one of the 'pillars' of the liberal conceptions of justice, namely the notion of desert, has attracted interesting criticism. Accordingly, one of the things which gets in the way of impartiality is the totally arbitrary distribution of the assets, by birth, of individuals. 'The natural distribution' of personal accidents such as better fortune, gift, and social position, states Rawls, 'is neither just nor unjust; nor is it unjust that men are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that *institutions* deal with these facts' (*id.* at 102, emphasis mine). These contingencies, therefore, Rawls suggests, must be so institutionally managed that the least well off can benefit the mere fact of the arbitrariness of these assets. 'In justice as fairness men agree to share one another's fate' (*id.*). One of Rawls' critics, Robert Nozick, *Anarchy, State, and Utopia* (1974), objects to that idea of 'sharing,' of 'having to share,' by simply bringing against him the very charges which according to Rawls utilitarianism is guilty of; namely (a) that he does not seem to take the separateness of persons seriously, and (b) that his quest for impartiality leads him, inadvertently, to *impersonality* (*id.* at 228). For Nozick, it does not make sense to regard natural assets of persons as 'common property' to be managed institutionally and invoke, simultaneously, the idea that persons cannot be considered to be means to each other's well

being. Finally, for the conception of the person that emerges with the problem of natural assets, Nozick doubts that 'any coherent conception of a person remains' in the absence of the accidental traits from which Rawls strips off his individual — can 'the distinction between men and their talents, assets, abilities, and special traits' be so '*very* hard' pressed? (*id.*) Where Nozick spots a fundamental inconsistency, however, is a curious sort of integrity. Rawls states that the principle of desert, which he rejects, 'would not be chosen in the original position' (*A Theory of Justice, supra*, at 310; for the 'original position,' see the present work, 1.4, note 37). Because it is a position which is absolutely independent of sensory ties it is only natural that it will eschew that which is arbitrary and accidental. How could one maintain a radical separation of persons and make it the very basis of one's theory if one were not, at once, to have a notion of the person free of contingencies? Persons are private, contingencies common. The privacy of persons, accordingly, should be uninfected by what is accidental and contingent about them. The paradox is that when one ceases to exist commonly, one will also cease to exist privately. What Nozick recognizes as an inconsistency, therefore, is more likely the mark of the very tradition in which Rawls' project is firmly situated. An insightful criticism of the Rawlsian notion of the person is to be found in M.J. Sandel, *Liberalism and the Limits of Justice* (1982), where it is stated: 'To imagine a person incapable of constitutive attachments such as these is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth. For to have character is to know that I move in a history I neither summon nor command... As a self-interpreting being, I am able to reflect on my history and in this sense to distance myself from it, but the distance is always precarious and provisional, the point of reflection never finally secured outside the history itself' (*id.* at 179). But, see R. Dworkin, 'Liberal Community,' 77 *California Law Review* 479, 488 - 490 (1989), where what the writer calls the 'communitarian' view of the personal identity formulated by Sandel comes under attack. And see, for a discussion of personal autonomy *vis-à-vis* the 'individualism' of contemporary moral theories with their fundamental emphasis upon the priority of personal rights, J. Raz, 'Right-Based Moralities,' *Theories of Rights* 182 (ed. J. Waldron, 1989). Raz maintains that right-based moralities are misled in that they, not accidentally, view collective goods as instrumental while at once invoking the intrinsic value and priority of personal autonomy. No personal autonomy, according to him, would plausibly come out of an instrumental view of that which is collective, simply because a person's right is another person's duty. In

order for a right (such as that of an homosexual man to be able to marry his partner) to be exercised, it will, in the first place, need, 'a society where such opportunities exist and make it possible for individuals to have autonomous life' (*id.* at 193). The intrinsic value of some of the collective goods, therefore, must be recognized in an account of legal morality. For a concise account of the theories of distributive justice, see Tom Campbell, *Justice* (1988); see also W. Sadurski, *Giving Desert its Due* (1985), and G. Sher, *Desert* (1987).

6 *Just Gaming*, *supra*, note 4, at 66-7 (emphasis added).

7 From the back cover of the book. In an interview, in 1984, Lyotard announced his second thoughts about the notion of language games as he came to find it anthropocentric. See G. Van Den Abeele's interview with him, 1, note 9.

8 *Just Gaming*, *supra*, note 4, at 67.

9 *Id.* (emphasis added).

10 *Id.*

11 *Id.* (emphasis added).

12 *Id.*

13 *Id.* at 70.

14 *Id.* at 67 (emphasis added).

15 *Id.*

16 *Cf.* Rawls' difficulty, *supra*, note 5, in formulating a conception of persons as 'ends' in contradistinction to the utilitarian idea of persons as 'means.'

17 *Just Gaming*, *supra*, note 4, at 67.

18 C. Dobson and R. Payne, *The Terrorists* 180 (1982).

19 *Just Gaming*, *supra*, note 4, at 67 (emphasis added).

20 *Id.* at 70.

21 *The Terrorists*, *supra* note 18, at 181.

22 *Id.* at 180.

23 In fact, a conception of *the moral as the unruly* has been the supreme drive behind much legal philosophizing since Bentham. As he puts it, 'all is uncertainty, darkness, and confusion' where there are no rules 'expressed in words.' This, accordingly, is a state where 'there can scarcely be said to be right or wrong in any case.' J. Bentham, *Of Laws in General* 184 (ed. H.L.A. Hart, 1970).

24 *Just Gaming*, *supra*, note 4, at 70.

25 *Id.* at 35.

26 *Foundations*, *supra*, note 2, at 447.

27 See, the text accompanying, *supra*, note 18.

28 *Cf.* L. Wittgenstein, *Philosophical Investigations* pars. 31 and 219 (transl.

G.E.M. Anscombe, 1988): 'When one shews someone the king in chess and says: 'This is the king', this does not tell him the use of this piece — unless he *already* knows the rules of the game up to this last point...

'[The] explanation... only tells him the use of the piece because, as we might say, the place for it was *already* prepared. Or even: we shall only say that it tells him the use, *if the place is already prepared*. And in this case it is so, not because the person to whom we give the explanation already knows rules, but because in another sense he is *already* master of a game' (emphasis added). "All the steps are really already taken' means: I no longer have any choice.' *Cf.* M. Heidegger, *Being and Time* 41 (transl. J. Macquarrie and E. Robinson, 1990): '[His] own past — and this always means the past of [his] 'generation' — is not something which *follows along after* [man], but something which already goes ahead of [him].'

29 Consider, on the quest for absolute lines, boundaries, two recent conceptions: Dworkin's 'liberal conception of equality,' as a postulate of political morality and a possible ground, therefore, for rights, in R. Dworkin, *Taking Rights Seriously* 272-78 (1978); and Ackerman's notion of 'Neutrality' as 'a place... that can be reached by countless pathways of argument coming from very different directions,' in B.A. Ackerman, *Social Justice in the Liberal State* 12 and *passim* (1980).

30 *Just Gaming*, *supra*, note 4, at 68 (emphasis added).

31 *Being and Time*, *supra*, note 28, at 215; M. Heidegger, *Identity and Difference* 27 (transl. J. Stambaugh, 1969).

32 'Categories are concepts which prescribe laws *a priori* to appearances, and therefore to nature, the sum of all appearances (*natura materialiter spectata*). (...) For just as appearances do not exist in themselves but only relatively to the subject in which, so far as it has senses, they inhere, so the laws do not exist in the appearances but only relatively to this same being, so far as it has understanding. Things in themselves would necessarily, *apart from any understanding that knows them*, conform to laws of their own. But appearances are *only representations* of things which are unknown as regards what they may be in themselves.' I. Kant, *Critique of Pure Reason* B 163 - 64 (transl. N.K. Smith, 1968) (emphasis added).

33 *Being and Time*, *supra*, note 28, at 215.

34 'What is rational is actual and what is actual is rational'. Hegel's 'Preface' to his *Philosophy of Right* 10 (transl. T.M. Knox, 1969)

35 'What does the history of ideas prove if not that mental production changes concomitantly with material production?' K. Marx and F. Engels, *The*

Communist Manifesto 50 (transl. M. Lawrence, 1963).

36 'Thinking and being are thus certainly *distinct*, but at the same time they are in *unity* with each other.' K. Marx, *Economic and Philosophic Manuscripts of 1844* 93 (transl. not cited, 1981) (emphasis in original).

37 Aristotle, 'Rhetoric,' transl. W.R. Roberts 2 *The Complete Works of Aristotle* I, 1364 b 11-16 (ed. J. Barnes, 1984) (emphasis added). *Cf.* 'The reasons why we call things true is the reason why they *are* true...' William James, *Pragmatism: A New Name for Some Old Ways of Thinking* 37 (1978).

38 *Cf.* the present study, 1.2, the text accompanying notes 36-39.

39 'Politics,' *The Politics of Aristotle*, I, 1253 a (transl. E. Barker, 1946).

40 *Being and Time*, *supra*, note 28, at 67 (emphasis added).

41 Aristotle, 'Nicomachean Ethics,' transl. W.D. Ross, revised by J.O. Urmson, *supra*, note 37, at V, 1134 a (emphasis added).

42 Plato, *The Republic* IV, 433 (transl. A.D. Lindsay, 1950).

43 *Being and Time*, *supra*, note 28, at 67.

44 *Politics*, *supra*, note 39, at I, 1253 a (emphasis added).

45 *Id.*

46 *Rhetoric*, I, 1374 b.

47 *Ethics* 1134 b - 1135 a; *Rhetoric* 1373 b.

48 *Politics*, 1253 a.

49 See, *Rhetoric*, I, 1368 b.

50 *Id.* at, I, 1354 a-b; *Ethics*, V, 1134 a-b.

51 See, for Aristotle employing 'persuasion... on opposite sides of a question,' 2.3, the text accompanying notes 101-104.

52 E. Barker, 'Introduction,' *The Politics of Aristotle* XI, LXX (1946).

53 *Id.*

54 *Ethics*, V, 1135 a.

55 *Rhetoric*, I, 1373 b. *Cf.* Blackstone on natural law as 'binding over all the globe in all countries, and at all times.' Sir William Blackstone, *The Sovereignty of the Law: Selections from Blackstone's 'Commentaries on the Laws of England'* 29 (ed. G. Jones, 1973).

56 *Rhetoric*, I, 1373 b.

57 *Id.* at I, 1368 b.

58 *Id.*

59 *Ethics*, V, 1135 a.

60 *Id.* at VIII, 1162 b.

61 *Id.* at V, 1135 a.

62 *Id.* (emphasis added).

63 'Appendix,' *The Politics of Aristotle, supra*, note 39, at 366.

64 *Cf.* Kelsen's 'substantive (material) constitution,' as opposed to 'formal (procedural) constitution,' a sense of the constitution which represents the highest level in the hierarchical structure within a system. Validity, accordingly, is a matter regarding the constitution in its substantive sense. H. Kelsen, *Introduction to the Problems of Legal Theory* [The First Edition of the 'Pure Theory of Law,' 1934] 63-64 (transl. B.L. Paulson and S.L. Paulson, 1992).

65 *Rhetoric*, I, 1373 b (emphasis added).

66 *Philosophical Investigations, supra*, note 28, par. 415.

67 *Id.* note [to par. 142] at 56.

68 *Cf. id.* at 226: 'What has to be accepted, the given, is — so one could say — *forms of life*' (emphasis in original).

69 In a short story, Woody Allen relates the exploits of the genius who 'invented' sandwich, amongst whose early, and failed, projects were that of 'a slice of bread, a slice of bread on top of that, and a slice of turkey on top of both,' that of 'two slices of turkey with a slice of bread in the middle,' that of 'three consecutive slices of ham stacked on one another,' and finally that of '[t]hree slices of bread on top of one another.' W. Allen, 'Yes, But Can the Steam Engine Do This?' in his *Complete Prose* 175, 179 (1992).

70 *Cf.* 'It is true that beliefes and wishes have a transcendental basis in the sense that their foundation is arbitrary. You cannot help entertaining and feeling them, and there is an end of it. As an arbitrary fact people wish to live, and we say with various degrees of certainty that they can do so only on certain conditions. To do it they must eat and drink. That necessity is absolute.' O.W. Holmes, 'Natural Law' 32 *Harvard Law Review* 40, 41 (1918).

71 *Politics*, I, 1252 a.

72 *Ethics*, VIII; 1160 a.

73 *Politics*, I, 1253 a.

74 *Cf.* Heidegger's translation of the 'polis' in the first chorus in Sophocles' *Antigone*: '[T]he foundation and scene of man's being-there... the *polis*. *Polis* is usually translated as city or city-state. This does not capture the full meaning. *Polis* means, rather, the place, the there, wherein and as which historical being-there is. The *polis* is the historical place, the there *in* which, *out of* which, and *for* which history happens.' M. Heidegger, *An Introduction to Metaphysics* 152 (transl. R. Manheim, 1987).

75 *Politics*, I, 1253 a.

76 *Being and Time, supra*, note 28, at 164.

77 *Id.* at 165.

78 See, the present study, *Conclusion*, the text accompanying notes 63-68.

79 See, *Introduction*, the text accompanying notes 6-15; 1.1, the text accompanying notes 10-11.

80 *Politics*, I, 1253 a.

81 *Id. Cf.* 'Justice, and Injustice are none of the Faculties neither of the Body, nor Mind. If they were, they might be in a man that were alone in the world, as well as his Senses, and Passions. They are Qualities, that relate to men in Society, not in Solitude.' T. Hobbes, *Leviathan*, Part I, ch. 13 [p. 66] (1940).

82 *Politics*, I, 1253 a.

1.4 The Ordinary and the Extraordinary

1 R. Descarates, 'Meditations on First Philosophy,' *2 The Philosophical Writings of Descartes* 3, 16-23 (transl. J. Cottingham *et. al.*, 1985).

2 J.-F. Lyotard and J.-L. Thébaud, *Just Gaming* 70 (transl. W. Godzich, 1985).

3 See, 1.3.

4 *Just Gaming, supra,* note 2, at 73.

5 *Id.*

6 *Id.* at 83.

7 I. Kant, *Foundations of Metaphysics of Morals* 453 (transl. L.W. Beck, 1959)

8 *Id.*

9 *Id.*

10 See, J. Derrida, *Writing and Difference* 279-280 (transl. A. Bass, 1978); J. Derrida, *Positions* 7 (transl. A. Bass, 1987).

11 *Foundations, supra*, note 7, at 454.

12 *Id.* at 447.

13 *Just Gaming, supra*, note 2, at 74.

14 J. Derrida, 'Parergon,' in his *The Truth in Painting* 15-147 (transl. G. Bennington and I. McLeod, 1987).

15 I. Kant, *Critique of Judgement* 65 (transl. J.C. Meredith, 1952).

16 *Id.* at 68.

17 Preceding Kant, the conception of a *parergon* seems to have lent a curious use to Bentham. See, J. Bentham, 'Preface' to his *A Fragment on Government* 93 (ed. F.C. Montague, 1980). In this polemic against Blackstone's *Commentaries*

upon the Laws of England (of which premiere volume appeared in 1765, and the early edition of Bentham's polemic was published, anonymously, in 1776), he distinguishes between the work of what he calls the 'Expositor,' who merely describes what the law is, and that of the 'Censor,' who contemplates and makes suggestions as to what the law ought to be. 'The *Expositor*... is always the citizen of this or that particular country: the *Censor* is, or ought to be the citizen of the world' (*id.* at 99). To someone such as Blackstone ('the downfall of [whose] work,' Bentham thought, meant nothing less than 'the welfare of mankind' [*id.* at 94]), accordingly, the work of the 'Censor' was nothing but a *parergon* (*id.* at 99). One is very much tempted, however, in the anticipatory reference of Bentham's argument to the lonely sadness of one 'eleventh thesis' that once was and that invoked, along similar lines, 'change' as opposed to 'interpretation' (see, K. Marx, 'Theses on Feuerbach' in K. Marx and F. Engels *Selected Works*, 30 [transl. not cited, 1970]), to bring up the question of *parerga* as formulated *in* and *for* his own project (of, perhaps, the delicate swing between the two notions of 'reformation,' as the *ergon*, yet somehow ultimately defined in terms of the *parergon*, of 'what-is-already-there' — of which Blackstone is the 'Expositor').

18 *Truth in Painting*, *supra*, note 14, at 45.

19 *Id.* at 97-98.

20 *Id.* at 81.

21 *Supra*, note 2.

22 See, for the *politeia*, 1.3, the text accompanying notes 60-62.

23 *Just Gaming*, *supra*, note 2, at 74.

24 *Id.*

25 *Id.*

26 See, 1.1, 1.2, and 1.3.

27 *Supra*, note 4.

28 *Just Gaming, supra*, note 2, at 74.

29 See, 1.

30 Plato, *The Republic* I, 338 (transl. A.D. Lindsay, 1950). See, for a reading of the statement by Thrasymachus from a 'Wittgensteinean' point of view which wildly contrasts with the position I, likewise, hold to be Wittgensteinean, H.F. Pitkin, *Wittgenstein and Justice* 169-180 (1972). According to the author, Thrasymachus identifies an individual — accidental — pattern of the just with the word 'justice' the way the picture theory of the early Wittgenstein *labels* facts with propositions. Realist Felix Cohen makes the same choice as he finds in Socrates' definition of justice a functionalism congenial to the realist stance.

F.S. Cohen, *The Legal Conscience: Selected Papers of Felix S. Cohen* 55-56 (ed. L.K. Cohen, 1970). *Cf.* my discussion of Cohen's pictorialism, 2.4, the text accompanying notes 128-151.

31 For an account of the Sophist morality in this respect, see G.B. Kerferd, *The Sophistic Movement* ch. 12 (1981).

32 *Just Gaming, supra,* note 2, at 76.

33 J. Locke, *An Essay Concerning Human Understanding*, book IV, ch. XV, par. 6 (ed. P.H. Nidditch, 1975) (emphasis in original).

34 *Just Gaming, supra*, note 2, at 76.

35 See, 1.1.

36 *Just Gaming, supra,* note 2, at 82.

37 The pure transcendence Lyotard seeks to achieve through what he calls one's 'capability to decide,' Rawls achieves by his 'veil of ignorance,' of the original position of his contractarian theory. See, J. Rawls, 'The Kantian Interpretation of Justice as Fairness,' *A Theory of Justice* 251-57 (1973). The Kantian dichotomy of autonomy and heteronomy is wholly preserved in Rawls' theory. The original position, accordingly, is the position in which, by means of a veil of ignorance, man is assumed to be *deprived* of his phenomenal, heteronomous side. He therefore becomes a noumenal and autonomous being. 'The original position may be viewed, then, as a procedural interpretation of Kant's conception of autonomy and the categorical imperative' (*id.* at 256).

38 Aristotle, 'Rhetoric,' transl. W.R. Roberts 2 *The Complete Works of Aristotle* II, 1402 a (ed. J. Barnes, 1984).

39 *Just Gaming, supra*, note 2, at 78.

40 *Rhetoric, supra,* note 38, at II, 1402 a.

41 *Id.*

42 See, 1.1, the text accompanying notes 18-26.

43 *Just Gaming, supra*, note 2, at 78. *The* Kantian theory of justice along the specific lines Lyotard suggests is that of Rudolf Stammler, *The Theory of Justice* (transl. I. Husik, 1969), first published in 1902, *Die Lehre von dem richtigen Rechte*, Berlin. According to François Gény, Stammler's work 'merits a place beside the great works of Savigny, Ihering and Kohler.' F. Gény, 'The Critical System (Idealistic and Formal) of R. Stammler,' Appendix I to *id.* 493, at 494. Stammler is sometimes recognized as the final word of an eventful period of German legal philosophy, in particular in his apparent reconciliation of positivism and the views of natural law. He separated law from morals, yet he at once attempted to formulate an idea of universal validity for legal rules, a notion crudely reflected in the misleading slogan

associated with the bulk of his work, 'natural law with variable content' (*id.*). Lyotard's project of justice appears to be significantly marked by his Kantian conceptions of 'Idea' and of 'anticipation.' In an absurdly paradoxical way, contrary to its outmoded overtones at first, Stammler appears to be not only definitely less problematic but probably more profoundly 'non-transcendental,' if that can be said at all, whose work on justice, similarly, is based on the Kantian notions of 'Idea' and of 'critical reflection.' As he puts it, 'the idea of just law... is found by critical reflection upon the possibility of a unitary comprehension of all empirical legal material' (*id.* at 211, *cf.* the Lyotardian conception of 'capability to decide' as 'anticipation,' or consideration, of 'all of society as a sensible nature, as an ensemble that already has its laws, its customs, and its regularities,' *supra* the text accompanying note 36). The model and principles of just law, Stammler finds in the concept, suggested by Kant, of the 'neighbour.' '[T]he celebrated formula of the Old Testament as well as that of the New has in view what in technical philosophical language is known as an *idea* ('Idee' = idea, ideal), i.e. a principle that serves as a criterion for the content of volition and its application in practice' (*id.* at 219, *cf.* the Lyotardian 'willing' — '[t]here is a willing. What this will wants we do not know. We feel it in the form of an obligation, but this obligation is empty, in a way. So if it can be given a content in the specific occasion, this content can be only circumscribed by an Idea,' *supra* the text accompanying note 2). Stammler adds: 'To realize completely the love of one's fellowman as oneself would presuppose a perfect rational being that was at the same time social without any limitation. But since in both respects the life of man is subject to limiting conditions, the command in question as an ideal ['Love thy neighbour...'] can only serve as a maxim, to the fulfilment of which every one must earnestly strive to approach; but to attain it absolutely is impossible if only because of the limitation of man's *physical* power. And secondly in carrying out our fundamental norm we must not fail to take account of the conditioning *social* bases upon which it must be realized' (*id.* at 220-21). Universal validity Stammler seeks to establish for law can easily be sneered at unless it is understood in the very terms of his formulation. 'Just law,' he notes, 'is positive law whose content has certain objective qualities. It applies to all law, past, present, future' (*id.* at 19). Max Weber was among the first, as a champion of the then newly fashionable dichotomy of natural and human sciences, to criticize the conception of objectivity ascribed here to law, according to the said dichotomy only natural sciences being genuinely blessed by it. Weber's polemic is practically a hatchet job he does on Stammler's book

Wirtschaft und Recht nach der materialistischen Geschichtsauffassung: Eine sozialphilosophische Untersuchung [The Historical Materialist Conception of Economy and Law: A Sociophilosophical Investigation] (2nd ed. 1906, Leipzig) where Stammler elaborates his project of a social science on the basis of a notion of 'social life.' As he, in so doing, sidesteps the current problematic characterized by the dichotomy things-as-they-are-seen-culturally and things-as-they-are, Weber's basic (and markedly Cartesian-Kantian) objection to his work is its conception of objectivity. It is Cartesian, because behind it is the *privacy* that is significantly alloted by Weber to that which is *social*. It is Kantian, because it takes for granted the above dichotomy that defines the current problematic, and finds in the Stammlerian objectivity a claim to the knowledge of what may loosely be called noumena (object-ivity). See, M. Weber, *Critique of Stammler* (transl. G. Oakes, 1977). Stammler's response to him is to try and elucidate his notion of objectivity as a *teleologic* one in contradistinction to the objectivity of natural sciences. See, John C.H. Wu, 'Stammler and His Critics,' Appendix II to Stammler, *supra*, 553, at 559-61. Only he hardly need have taken the trouble, if the then trendy, Diltheian movement of *Geisteswissenschaft* had not obscured, for Weber, the textual, outside, non-private, hence the 'objective,' quality of understanding (*verstehen*). Is not the shakiness it might suggest equally (in 'kind,' that is) prevalent in the objectivity of natural sciences? According to Stammler, just law 'denotes a critical treatment of a historically growing legal content, in so far as it classifies its content systematically as just or unjust' (*id.* at 19). What is fundamental about it is that 'we constantly *make* this division... And therefore it must be possible to have a clear and adequate idea of *what we are actually doing*' when we make it (*id.* at 19-20, emphasis added). All positive law, accordingly, is an attempt to capture that which permeates that division (*id.* at 24). What Stammler has to say about the division between the positions of positive law and natural law, on the other hand, is hardly an affirmation of the classical views on the subject. 'The contents of positive and natural law do not come from two distinct spheres. The subject matter is the same for both, the conditions of their origin are the same, and both of them were born in one and the same world' (*id.* at 78). In both, he adds, '[t]he subject matter is gotten from *historical experience* and *there is no material that is independent thereof* (*id.* at 80, emphasis added). What naturally follows is that no universal validity can have claim for the content, 'there are no concrete legal rules whose content is absolutely valid,' hence the tragic mistake of the natural law position (*id.* at 91). Can universal validity have claims for the 'method,' then?

'We must admit that a systematic and universal *view* [as opposed to the 'content'] of law may also undergo change and progress. And experience tells of many differences of opinion concerning the absolutely valid method of *just* legal content. Nevertheless the aim of the investigation is to find something absolute' (*id.* at 92, emphasis added). 'Something absolute' Stammler comes up with in the end is the above mentioned categorical imperative, the 'Idea,' of the concept of 'neighbour' (*cf.* the Lyotardian conception of the pragmatics of obligation, 1.3, the text accompanying note 5). See for a lucid and critical account of Stammler's work, Morris Ginsberg, 'Stammler's Philosophy of Law' in *Modern Theories of Law* 38 (ed. W.I. Jennings, 1933).

44 *Rhetoric, supra*, note 38, at II, 1402 a (emphasis added).

45 *Id.* at I, 1355 a.

46 *Id.* at I, 1354 a.

47 *Id.* at I, 1355 b.

48 See, 2.3, the text accompanying notes 101-104.

49 *Rhetoric, supra*, note 38, at I, 1355 a.

50 Aristotle on *phronesis*, 1.1, the text accompanying note 24; and 1.3, the text accompanying note 36.

51 *Rhetoric, supra,* note 38, at I, 1355 b (emphasis added).

52 *Id.* at II, 1402 a.

53 *Id.* at III, 1404 a (emphasis added).

54 See, 1.3, the text accompanying note 36.

55 See, J. Derrida, 'Signature Event Context' in his *Limited Inc.* 1 (transl. S.Weber and J. Mehlman, 1990).

56 J.L. Austin, *How to Do Things with Words* 22 (eds. J.O. Urmson and M. Sbisà, 1989).

57 *Id.* (emphasis in original).

58 L. Wittgenstein, *Philosophical Investigations* par. 257 (transl. G.E.M. Anscombe, 1988).

59 'Signature Event Context,' *supra*, note 55.

60 *Rhetoric, supra*, note 38, at III, 1404 a.

61 *Supra*, note 55.

62 *Supra*, note 53.

63 See, for a discussion of the Aristotelian dichotomy, S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 475-479 (1989).

64 T.S. Kuhn, *The Structure of Scientific Revolutions* (1970). See, for Fish's discussion of Kuhn's project in the wider context of the rhetorical controversy,

Doing What Comes Naturally, *supra*, note 63, at 486-488.

65 *Cf.* 'The use of impossible probabilities is preferable to that of unpersuasive possibilities.' Aristotle, 'Poetics,' *Aristotle's Poetics*, 1460 a (transl. L. Golden, 1968).

66 *Rhetoric*, *supra*, note 38, at II, 1402 a.

67 *Just Gaming*, *supra*, note 2, at 79.

68 *Id.* at 76.

69 *Id.*

70 *Id.* at 80.

71 *Cf.* Heidegger on anxiety as a possible vehicle of transition to the domain of authenticity, the present study, *Conclusion*, the text accompanying notes 64-68.

2 THE LAW AND ITS READINGS

1 F. Gény, *Method of Interpretation and Sources of Private Positive Law: Critical Essay* [1899] par. 149 (transl. J. Mayda, 1963).

2 *Id.*

3 *Id.* par. 146.

4 E. Lambert, 'Codified Law and Case-Law: Their Part in Shaping the Policies of Justice' [1903], *The Science of Legal Method* 251, 278 (transl. L.B. Register, 1969).

5 H. Kantorowicz, 'Some Rationalism About Realism' 43 *Yale Law Journal* 1240, 1241 (1934).

6 *Method*, *supra*, note 1, par. 97. In the Second Edition (1919) of the *Method*, Gény offers a panoramic account and criticism (see, pars. 205-222) of this German legal movement which has come to be known by such diverse titles as *freies Recht*, *freie Rechtsfindung*, the Free Search of the Rule, and *freie Rechtswissenschaft*, the Free Jurisprudence.

7 H. Kantorowicz, 'Legal Science — The Summary of Its Methodology' 28 *Columbia Law Review* 679 (1928).

8 See, 2.4, the text accompanying notes 23-69.

9 *Method*, *supra*, note 1, par. 98.

10 *Id.* par. 57.

11 See, 2.4 generally.

12 K. N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* 42 (1962) (the celebrated 1931 article 'Some Realism About Realism' [*cf.* the title of Kantorowicz's article, *supra*, note 5], with Jerome Frank as its co-author, reprinted *id.* pp. 42-76).

13 See R. David, *French Law: Its Structure, Sources and Methodology* 83 (transl. M. Kindred, 1972); and H. P. de Vries, *Civil Law and the Anglo-American Lawyer* 243-248 (1976).

14 The title of Llewellyn's seminal book *The Common Law Tradition: Deciding Appeals* (1960) is a clear reference to the 'realist' (and not 'validist' [formal]: hence the civil law view of 'short circuit') nature of decisional law based systems 'by definition.'

15 See, 1.4, note 17.

16 See, 1, note 3.

17 See, 2.3, the text accompanying notes 105-119.

18 H.L.A. Hart, *The Concept of Law* 124-125 (1988).

19 R. Dworkin, *Law's Empire* 87 (1986).

20 *Cf.* Justice Sutherland dissenting in *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 451 (1934): 'The provisions of the Federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their group every new condition which falls within their *meaning*. But, their meaning is changeless; it is only their *application* which is extensible' (footnote omitted).

21 See, 1.3, the text accompanying notes 31-36.

22 See, *id.*, the text accompanying notes 49-53.

23 J. Locke, *Two Treatises of Government* Second Treatise par. 124 (ed. P. Laslett, 1965).

24 J.-J. Rousseau, *'The Social Contract' in his The Social Contract and Discourses* Book 2, ch. 6 [Law] (transl. G.D.H. Cole, 1986).

25 *The Interpretation of Statutes* par. 1, Law Com. No. 21, Scott. Law Com. 11 (1969).

26 See, for a classic essay exploring the three rules, J. Willis, 'Statute Interpretation in a Nutshell' 16 *Canadian Bar Review* 1 (1938).

27 E. McWhinney, *Supreme Courts and Judicial Law Making: Constitutional Tribunals and Constitutional Review* 94 (1986).

28 S. Levinson, *Constitutional Faith* 21 (1988). See also on the same theme, T.C. Grey, 'The Constitution as Scripture' 37 *Stanford Law Review* 1 (1984); M.J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* 142-144 (1988); and S.D. Smith, 'Idolatry in Constitutional Interpretation' 79 *Virginia Law Review*

583 (1993).

29 One such project is that of the Comparative Statutory Interpretation Group part of whose work is to be found in D.N. MacCormick and R.S. Summers (eds), *Interpreting Statutes: A Comparative Study* (1991). Another project seeking to establish a uniform discourse is that of 'constitutional modalities' by P. Bobbitt, *Constitutional Interpretation* (1991). As distinct from the former, Bobbitt emphasizes that his 'modalities' in the verification of interpretative propositions operate on an 'incommensurate' (as opposed to logical-analytical) basis.

30 *Supra*, note 1.

31 See, for an account of Gény's work generally and in its links to the legal thought prevalent at the time, J. Mayda, *François Gény and Modern Jurisprudence* ch. 1 (1978); and T.J. O'Toole, 'Jurisprudence of François Gény' 3 *Villanova Law Review* 455 (1958). For the Anglo-American influence of Gény's work, see A. Kocourek, 'Libre Recherche in America' in *Recueil d'études sur les sources du droit en l'honneur de François Gény* Vol. 2 at 459 (ed. E. Lambert, 1935); J.G. Rogers, 'A Scientific Approach to Free Judicial Decision' *id.* at 552; and B.A. Wortley, 'François Gény' in *Modern Theories of Law* 139 (ed. W.I. Jennings, 1933).

2.1 The Text and Its Edges

1 R. Saleilles, 'Preface' [1899] to F. Gény, *Method of Interpretation and Sources of Private Positive Law: Critical Essay* [1899] LXXVII (transl. J. Mayda, 1963).

2 *Id.* at LXXVII - LXXX.

3 *Id.* at LXXXV - LXXXVI.

4 See, for the problem of the correct rendering of the phrase into English, J. Mayda, 'Gény's *Méthode* After 60 Years: A Critical Introduction' to the *Method, supra*, note 1, at V, XI - XII.

5 *Method, supra*, note 1, par. 35.

6 *Id.* (footnotes omitted). In a footnote added to the Second Edition, *id.* 23 a, Gény draws attention to his slightly revised position regarding the absolute supremacy of the written law and refers to his later work *Science et technique en droit privé positif* 4 Volumes (1914-1924).

7 *Method, supra*, note 1, par. 35.

8 *Id.* par. 36.

9 *Id.* par 57.

10 *Id.* fn. 135.

11 *Id.* par. 146.

12 P. Brest, 'The Misconceived Quest for the Original Understanding' 60 *Boston University Law Review* 204 (1980).

13 J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* 1 (1980).

14 Brest divides originalism into its moderate and extreme forms. A further division of the latter is, in turn, introduced: strict textualism and strict intentionalism. See, 'The Misconceived Quest,' *supra*, note 12, at 204. See, for a succinct statement of the concepts of the text in the interpretative controversy, namely the text (a) as a structure referring to the world logically or pictorially, (b) as a historical discourse, a model, an object of comparison, and finally (c) as a self-referential unit, G.L. Bruns, 'Law and Language: A Hermeneutics of the Legal Text' in *Legal Hermeneutics: History, Theory, and Practice* 23 (ed. G. Leyh, 1992).

15 J. Bentham, *Of Laws in General* 162 - 163 (ed. H.L.A. Hart, 1970).

16 *Id.* at 163.

17 *Id.* at 239 - 241.

18 *Method, supra*, note 1, par. 33.

19 C. Fried, 'Sonnet LXV and the 'Black Ink' of the Framers' Intention' in *Interpreting Law and Literature: A Hermeneutic Reader* 45 (eds. S. Levinson and S. Mailloux, 1988).

20 *Id.*

21 An epistemological indeterminacy is invoked by some of the writers in the critical legal studies movement. Indeed, it is this very movement that is targeted by Fried rather than the traditional extratextualist positions. See, for critical legal studies, *Conclusion*, note 79. His point is equally relevant to the traditional extratextualist views, however, for abandoning reading on a textual basis without at once giving up the principle of the rule of law can be said to suggest problematic consequences for the extratextualist rhetoric.

22 E. Meese III, 'Address Before the D.C. Chapter of the Federalist Society Lawyers Division' in *Interpreting Law, supra*, note 19, at 25, 29.

23 *Democracy and Distrust, supra*, note 13, at 1.

24 See, *id.* ch. 4.

25 'The Misconceived Quest,' *supra*, note 12, at 224-226.

26 T.C. Grey, 'Do We Have an Unwritten Constitution?' 27 *Stanford Law Review*

703, 707 (1974-1975).

27 M.J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* 133 (1988).

28 W.J. Brennan, Jr., 'The Constitution of the United States: Contemporary Ratification' in *Interpreting Law, supra*, note 19, at 13, 18. *Cf.* Sandalow on constitutional reading 'not as exegesis, but as a process by which each generation gives formal expression to values it holds fundamental in the operations of government,' T. Sandalow, 'Constitutional Interpretation' 79 *Michigan Law Review* 1033, 1068 (1981).

29 'Contemporary Ratification,' *supra*, note 28, at 18 (emphasis added).

30 *Morality, Politics, and Law, supra*, note 27, at 133.

31 *Id.* (emphasis added).

32 See, 'The Misconceived Quest,' *supra*, note 12, at 224; M.J. Perry, *The Constitution, the Courts, and Human Rights* 92 (1982); D. Lyons, 'Constitutional Interpretation and Original Meaning' in *Philosophy and Law* 75, 89-90 (eds. J. Coleman and E.F. Paul, 1987).

33 5 U.S. (1 Cranch) 137 (1803). See, the text accompanying *infra*, notes 98-109.

34 But see, for a study that questions the historical *Marbury* as 'an all-encompassing symbol of the modern doctrine of judicial review,' R.L. Clinton, *Marbury v. Madison and Judicial Review* 190 (1989). According to Clinton, the case was an 'essentially obscure case, whose holdings were very narrow' (*id.*).

35 347 U.S. 483 (1954).

36 A.M. Bickel, 'The Original Understanding and the Segregation Decision,' appendix to his *Politics and the Warren Court* 211, 256 (1965).

37 163 U.S. 537 (1896).

38 The decision of *Brown* found the holding 'separate but equal,' of *Plessy*, non-applicable only 'in the field of public education.' *Supra*, note 35, at 495.

39 H. Wechsler, 'Toward Neutral Principles of Constitutional Law' 73 *Harvard Law Review* 1 (1959).

40 'Address,' *supra*, note 22, at 30.

41 R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 412 (1977).

42 R. Berger, 'Lawyering vs. Philosophizing: Facts or Fancies' 9 *University of Dayton Law Review* 171 (1984).

43 R.H. Bork, *The Tempting of America* 76 (1990).

44 *Id.* at 76-77.

45 *Morality, Politics, and Law, supra*, note 27, at 279-280, n.7.

46 *Democracy and Distrust, supra*, note 13, at 221, n. 4 (the square-bracketed

term is 'interpretivism' in Ely's original, *cf.* the text accompanying, *supra*, notes 12-14).

47 See, the text accompanying, *supra*, notes 29-31.

48 *Cf.* Lyotard on the loss of origins in modernity, 1.2, the text accompanying note 9.

49 *Cf.* Derrida on framing; 1.4, the text accompanying notes 14-20.

50 See, the text accompanying, *supra*, note 19.

51 See, the text accompanying, *supra*, notes 37-44.

52 'Address,' *supra*, note 22, at 31.

53 F. Douglass, 'The Constitution and Slavery' [1849] in *The Life and Writings of Frederick Douglass* Vol. 1, at 361, 362 (ed. P.S. Foner, 1950).

54 See, the text accompanying, *supra*, note 10.

55 'Constitution and Slavery,' *supra*, note 53, at 362.

56 W. Goodell, 'Views of American Constitutional Law in Its Bearing Upon American Slavery' [1844] in *The Influence of the Slave Power with other Anti-Slavery Pamphlets* 155 (1970).

57 *Id.*

58 See, 1.2.

59 *Method*, *supra*, note 1, par. 57, n. 135.

60 *Id.* par. 57.

61 See, 2.2.

62 See, 2, note 28.

63 See the text accompanying, *supra*, note 3.

64 C.J. Antieau, *Constitutional Construction* 51-52 (1982).

65 [1976] 1 All ER 353, 360. I have been referred to the present and following cases by Antieau, *supra*, note 64, at 51-52.

66 Lord Diplock in *Hinds v The Queen*, *supra*, note 65, at 360.

67 313 U.S. 299 (1941).

68 For a comparison with their constitutional counterparts, for the three basic sets of arguments in statutory interpretation, see, (1) textualism, F.H. Easterbrook, 'Statutes' Domains' 50 *University of Chicago Law Review* 533 (1983); (2) intentionalism, E.M. Maltz, 'Statutory Interpretation and Legislative Power: The case for a Modified Intentionalist Approach' 63 *Tulane Law Review* 1 (1988), and R.A. Posner, 'Statutory Interpretation - in the Classroom and in the Courtroom' 50 *University of Chicago Law Review* 800 (1983); (3) transformative (*ex tunc)* extratextualism (the 'present-minded' reading), T.A. Aleinikoff 'Updating Statutory Interpretation' 87 *Michigan Law Review* 20 (1988). And see, for the 'dynamic statutory interpretation' of Eskridge which

aims at a hermeneutic understanding of the reading process, as well as transcending the sterility of what he calls the 'foundationalism' of the three basic sets of arguments, W.N. Eskridge, Jr., 'Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation' 74 *Virginia Law Review* 275 (1988); W.N. Eskridge, Jr., 'Gadamer / Statutory Interpretation' 90 *Columbia Law Review* 609 (1990); W.N. Eskridge, Jr. and P.P. Frickey, 'Statutory Interpretation as Practical Reasoning' 42 *Stanford Law Review* 321 (1990).

69 '[God] hath made us able ministers of the new testament; not of the letter, but of the spirit: for the letter killeth, but the spirit giveth life.' 2 Cor. III, 6 (The King James Version).

70 R. David, *French Law: Its Structure, Sources, and Methodology* 159 (transl. M. Kindred, 1972). In a paradigmatic decision of the Turkish Court of Cassation, one to 'unify prior judicial holdings' (the *unifying decisions* have the effect of laws), the following dictum is expressed: 'The spirit of the law is to control its letter' (9.3.1955 E. 22 / K.2). In another unifying decision the Court cites it as 'one of the fundamental principles of jurisprudence and legal practice today' that 'in order to avoid contradicting the purpose of the law, rules are to be construed not solely by their letter but on the bases of both their letter and spirit' (4.2.1959 E.14 / K.6). Meaning is to be sought, accordingly, in the triangle of the letter, the purpose, and the spirit: 'the first principle is to determine the meaning by the plain words of the statute... if the meaning thus ascertained appears to contradict its purpose, then... the spirit of the statute is to dictate the decision' (27.3.1957 E.1 / K.3).

71 *French Law, supra* note 70, at 157.

72 See, *supra*, note 33.

73 T.C. Grey, 'The Constitution as Scripture' 37 *Stanford Law Review* 1, 14 (1984).

74 *Id.*

75 [1850] 20 L.J. C.P. 33.

76 *Id.* at 35. See also Lord Bramwell's words reiterating *Abley* in *Hill v East and West India Dock Co.* [1884] 9 AC 448, at 465; and those of Lord Esher in the same vein in *R. v The Judge of the City of London Court* [1892] 1 QB 273 (C.A.) at 290.

77 Cass. crim. 8.3.1930; cited in R. David and H.P. de Vries, *The French Legal System: An Introduction to Civil Law Systems* 88 (1958); and A. West *et al.*, *The French Legal System: An Introduction* 52-53 (1992).

78 [1919] 3 WLR 1025; cited in R. Cross, *Statutory Interpretation* 67 (eds. J.

Bell and G. Engle, 1987).

79 [1868] 4 QB 147.

80 [1964] 2 QB 7, [1964] 1 AII ER 628.

81 *Interpretation, supra*, note 78, at 67.

82 L. Wittgenstein, *Zettel* par. 405 (eds. G.E.M. Anscombe and G.H. von Wright, transl. G.E.M. Anscombe, 1988).

83 L. Wittgenstein, *On Certainty* par. 467 (eds. E.G. M. Anscombe and G.H. von Wright transl. D. Paul and G.E.M. Anscombe, 1989).

84 L. Wittgenstein, *Philosophical Investigations* par. 454 (transl. G.E.M. Anscombe, 1988); see also *id.* par. 86 (emphasis in original).

85 M. Heidegger, *Being and Time* 108-109 (transl. J. Macquarrie and E. Robinson, 1990).

86 *Id.* at 110.

87 *Philosophical Investigations, supra*, note 84, par. 454.

88 L. Wittgenstein, *The Blue and Brown Books* 36 (1989).

89 *Cf.* Derrida's reading of the Aristotelian dichotomy (in the *Topics*, I, 5, 102 a) of the *essence* of a thing as opposed to its *properties*, that which is literal being based on the former. The metaphorical, on the other hand, is a mere play of the properties, 'without directly, fully, and properly stating [the] essence itself, without bringing to light the truth of the thing itself.' J. Derrida, *Margins of Philosophy* 249 (transl. A. Bass, 1986).

90 *Philosophical Investigations, supra*, note 84, par. 454 (emphasis in original). *Cf. Blue and Brown Books, supra*, note 88, at 28; 'a word hasn't got a meaning given to it, as it were, by a power independent of us, so that there could be a kind of scientific investigation what the word *really* means. A word has the meaning someone has given to it.' *Cf. Being and Time, supra*, note 85, at 193: 'Meaning is an *existentiale* [a 'humanishness'] of Dasein, not a property attaching to entities, lying 'behind' them...'

91 *Id.* at 114-122.

92 *Philosophical Investigation, supra*, note 84, par. 38.

93 See, *Being and Time, supra*, note 85, at 112. *Cf. Philosophical Investigations, supra*, note 84, par. 129.

94 See, *supra*, note 69.

95 *Cf.* E.A. Driedger, 'Statutes: The Mischievous Literal Golden Rule,' 59 *Canadian Bar Review* 780 (1981), where a binary opposition of literal and secondary meaning is insightfully challenged; the author notes that 'the secondary meaning is the literal meaning in the context in which the words are used,' and that 'there is no such thing as a literal meaning as distinguished

from some other meaning' (*id.* at 780).

96 See, *supra*, note 78.

97 *Being and Time*, *supra*, note 85, at 122.

98 See, *supra*, note 33.

99 See, *supra*, notes 73-74.

100 17 U.S. (4 Wheat.) 316 (1819).

101 *Id.* at 414. *Cf.* J. Leubsdorf, 'Deconstructing the Constitution' 40 *Stanford Law Review* 181, 182: 'The Constitution's avoidance of figures of speech is itself a figure insinuating simplicity and honesty, like the plain dress of a Quaker.'

102 *Marbury*, *supra*, note 33, at 175-176: 'The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written.'

103 '*Interpretare* means 'to be mutually indebted'; prèt: from popular Latin *praestus*, from the classical adverb *praesto*, meaning 'close at hand,' 'nearby'; *praesto esse*: 'to be present, attend'; *praestare*: 'to furnish, to present...' J. Kristeva, 'Psychoanalysis and the Polis' 9 *Critical Inquiry* 77, 80 (transl. M. Waller, 1982). *Cf.* interpretation as 'presencing,' the present study, *Conclusion*, generally.

104 B. Cardozo, *The Growth of the Law* 60 (1924); quoted in K. Llewellyn, *The Common Law Tradition: Deciding Appeals* 25 (1960).

105 *Method*, *supra*, note 1, par. 99 (footnote omitted).

106 23 U.S. (10 Wheat.) 66 (1825). Levinson points out the difference of rhetoric between the opinion of the present decision and that of the following. I have been referred to the cases by his discussion. See, S. Levinson, *Constitutional Faith* 66-67 (1988).

107 The legal, in the present case, is represented by the domestic laws of Spanish and Portuguese slave-owners. *Id.*

108 10 U.S. (6 Cranch) 87 (1810).

109 The statute at issue is also found to overrun the contract clause of the Constitution. *Id.*

110 See, *supra*, note 35.

111 See, the text accompanying, *supra*, notes 32-36.

112 See, *supra*, notes 37-39 and 41-42.

113 See, *supra* notes 40 and 43-44.

114 See, the text accompanying, *supra*, notes 29-31 and 45-57.

115 347 U.S. 497 (1954).

116 *Id.* at 499.

117 410 U.S. 113 (1973).

118 The decision of *Plessy v Ferguson* is justified by a segregationist reading of the equal protection clause; see, *supra*, note 37.

119 *Supra*, note 115, at 500.

120 C.L. Black, Jr., 'The Lawfulness of the Segregation Decisions' 69 *Yale Law Journal* 421 (1960).

121 See, for Llewellyn's 'Grand Style,' 2.4, the text accompanying notes 36-83.

122 See, *Muir v Louisville Park Theatrical Association* 347 U.S. 971 (1954), desegregating the use of sports and leisure facilities; *Mayor and City Council of Baltimore City v Dawson* 350 U.S. 877 (1955), desegregating the use of public beaches and bathhouses; *Gayle v Browder* 352 U.S. 903 (1956), desegregating in public transportation. The decision of *Gayle* is usually considered to have officially buried that of *Plessy* (see, *supra*, note 118) even though this particular decision is not accompanied by an opinion and only affirms the lower court opinion in its reading of *Brown* as relevant also to public transportation.

123 *Supra*, note 35, at 495.

124 *Bourne v Norwich Crematorium Ltd.* [1967] 1 AII ER 576.

125 See, *supra*, note 37.

126 *Supra*, note 37.

127 *Method*, *supra*, note 1, 'Notice for the Second [1919] Edition,' at XCI.

128 *Id.* par. 146.

129 See, 1.4, the text accompanying notes 14-20.

130 See, J. Derrida, *Of Grammatology*, Part 2, ch. 2 (transl. G.C. Spivak, 1976).

131 *Id.* at 157.

132 *Id.*

133 See, the classic article, W.K. Wimsatt and M. Beardsley, 'The Intentional Fallacy' 54 *Sewanee Review* 468 (1946). Intentionalism returns with a vengeance in the much discussed essays by Knapp and Michaels. S. Knapp and W.B. Michaels, 'Against Theory' 8 *Critical Inquiry* 723 (1982); 'A Reply to Our Critics' 9 *Critical Inquiry* 790 (1983); 'A Reply to Richard Rorty: What is Pragmatism?' 11 *Critical Inquiry* 466 (1985); 'Against Theory 2: Hermeneutics and Deconstruction' 14 *Critical Inquiry* 49 (1987); 'Intention, Identity, and the Constitution: A Response to David Hoy' in *Legal Hermeneutics: History, Theory, and Practice* 187 (ed. G. Leyh, 1992). See, for a succinct statement of the new-intentionalist ideas regarding the issues surrounding the interpretative controversy in law, W.B. Michaels, 'Response to Perry and Simon' 58 *Southern California Law Review* 673 (1985).

134 A theory of reading based on a notion of *the text-itself* is to be found in B.S.

Jackson, *Semiotics and Legal Theory* (1987), where the grammar disclosed is stated to be 'itself part of the message of the text; it does not represent any mechanism, separate from that of narrative grammar, by which the text itself is produced' (*id.* at 299). In his more recent work, however, the author is anxious to counter the claims of the textual positivistic overtones of his reading. The text, he defends his position, is not the *only* semiotic object. On the contrary, 'any semiotic account of law at all... must necessarily include all types of semiotic objects which carry legal signification.' B.S. Jackson, *Law, Fact and Narrative Coherence* 177-179, 178 (1989). What makes his work susceptible to a positivistic vein, of course, is hardly the fact that he chooses to work on *texts*. But it is his view of the text as a closed, self-bordered, self-referential unit. See, for a critique of *Semiotics and Legal Theory* for its formalistic sterility and scientific and objectivist pretensions, P. Goodrich, 'Simulation and the Semiotics of Law' 2 *Textual Practice* 180 (1988).

135 W.B. Michaels, 'Against Formalism: The Autonomous Text in Legal and Literary Interpretation' 1 *Poetics Today* 23 (1979). The following by Frye is a good formulation of the New Criticist objectives of scientific maturity: 'If criticism exists, it must be an examination of literature in terms of a conceptual framework derivable from an inductive survey of the literary field.' N. Frye, *Anatomy of Criticism* 7 (1957).

136 'Against Formalism,' *supra*, note 135, at 25.

137 *Frigaliment Importing Co. v B.N.S. International Sales Corp.* 190 F. Supp. 116 [S.D.N.Y. 1960], *id.* at 25-26.

138 *Id.*

139 *Id.* at 27.

140 S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 506-507 (1989). In a later essay Fish points out the 'formalism' the parol evidence rule effectively achieves, albeit one suppressed and underrated in the traditional formulations and aspirations of formalism. The rule does constrain, accordingly, by demanding in the first place a high degree of persuasive capability from the ('extrinsic') evidence brought to the court's attention with respect to the specific contract. The second 'formal' function of the rule shows itself as the rule in turn becomes a weighty supporter and protector of the evidence once it is admitted. S. Fish, 'The Law Wishes to Have a Formal Existence' in *The Fate of Law* 159, sec. 1 (eds. A. Sarat and T.R. Kearns, 1991).

141 *Id.* at 507. Fish's reading of Hart's *The Concept of Law* is *id.* ch. 21.

142 *Id.* at 503. See, H.L.A. Hart, *The Concept of Law* ch. 2 (1988). See, for an

essay radically questioning the general Hartian approach to the Austinean morality, R.N. Moles, *Definition and Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Positivist Tradition* (1987).

143 *Doing What Comes Naturally*, *supra*, note 140 at 507.

144 See, *Concept of Law*, *supra*, note 142, at 89-96.

145 *Doing What Comes Naturally*, *supra*, note 140, at 509.

146 *Id.* at 301.

147 'Preface,' *supra*, note 1, at LXXXVI; See also the text accompanying, *supra*, notes 1-4.

148 *Cf.* J. Derrida, *Limited Inc* 21 (transl. S. Weber and J. Mehlman, 1990): 'Writing is read; it is not the site, 'in the last instance,' of a hermeneutic deciphering, the decoding of a meaning or truth...'

149 Ehrlich, whose work is often associated with that of Gény, also points out in his comment on Saleilles' dichotomy of the text and its beyond that the dichotomy cannot really be maintained and that *both* positions necessarily go beyond the text. The sole difference between the two positions, accordingly, 'lies rather in the *manner* of doing so.' E. Ehrlich, 'Judicial Freedom of Decision: Its Principles and Objects' [1903] in *The Science of Legal Method* 47, 73 (transl. E. Bruncken, 1969) (emphasis added). To have meant by 'manner' the differences of *rhetoric* between the two positions would have made all the difference. That Ehrlich means by it distinct *methodologies*, and that free decision-making he advocates is simply a *supplement* (notice below his *also*) to the formal core of the law, however, places his initial judgement not too far away from Saleilles' formalism. 'For the technical method [i.e., the mechanistic jurisprudence] requires that its work of art be achieved only by means of certain devices of legal thinking from which no variation must be permitted; while free decision [*Freie Rechtsfindung*] *counts also upon the element of creative thought by great individual minds*' (*id.*, emphasis in original).

150 See, the text accompanying, *supra*, notes 140-146.

151 C. Dalton, 'An Essay in the Deconstruction of Contract Doctrine,' in *Interpreting Law and Literature: A Hermeneutic Reader* 285 (eds. S. Levinson and S. Mailloux, 1988).

152 *Id.* at 309.

153 *Id.* at 293.

154 *Id.* at 291. *Cf.* Derrida on 'indeterminacy,' the present study, *Conclusion*, note 26.

155 *Id.*

156 See, the text accompanying, *supra*, notes 84-93.

157 See, 'Contract Doctrine,' *supra*, note 151, at 290-291, 317-318.

158 See, 1.2, the text accompanying notes 30-37; and, 1.3, the text accompanying note 29.

159 See, *supra*, note 135.

2.2 Intention and Extension

1 J. Derrida, *Writing and Difference* 279 (transl. A. Bass, 1978) (emphasis in original); see also J. Derrida, *Positions* 7 (transl. A. Bass, 1987).

2 J. Derrida, *Of Grammatology* 166 (transl. G.C. Spivak, 1976).

3 See, 2.1, the text accompanying notes 90-96.

4 *Grammatology*, *supra*, note 2, at 281.

5 *Cf.* Lyotard, authorship, and substitution, 1.1, the text accompanying notes 1-16.

6 'The system of 'hearing (understanding)-oneself-speak' [*s'entendre parler*].' *Grammatology*, *supra*, note 2, at 7-8. *Cf.* L. Wittgenstein, *Philosophical Investigations* par. 363 (transl. G.E.M. Anscombe, 1988): 'I should like to say: you regard it much too much as a matter of course that one can tell anything to anyone. That is to say: we are so much accustomed to communication through language, in conversation, that it looks to us as if the whole point of communication lay in this: someone else grasps the sense of my words — ...

'... (It is as if one said: 'The clock tells us the time...')'

7 See, for the derived quality of immediacy, *id.* at 157; for the notions of 'rupture' and 'iterability,' refer to J. Derrida, 'Signature Event Context' in his *Limited Inc* 1 (transl. S. Weber and J. Mehlman, 1990). '*[I]ter*... probably comes from *itara, other* in Sanskrit, and everything that follows can be read as the working out of the logic that ties repetition to alterity' (*id.* at 7). *Cf.* Heidegger on *das Man*, the present study, 1-3, the text accompanying note 73.

8 See, for Derrida's clarification of the point over which there has been some confusion, especially *Positions*, *supra*, note 1, at 13.

9 *Grammatology*, *supra*, note 2, at 159.

10 *Cf.* 2.1, the text accompanying notes 87-89.

11 J. Derrida, 'Plato's Pharmacy' in his *Dissemination* 61 (transl. B. Johnson, 1981).

12 The dichotomy to which Hobbes objects is that of government by laws and

government by men, 'that in a wel ordered Common-wealth, not Men should govern, but the Laws.' T. Hobbes, *Leviathan* Part IV, ch. 46 (1940). *Cf.* '[W]e do not allow a *man* to rule, but law, because a man behaves... in his own interests and becomes a tyrant.' Aristotle, 'Nicomachean Ethics,' transl. W.D. Ross, revised by J.O. Urmson, in *The Complete Works of Aristotle* Vol. 2, at V, 1134 a-b (ed. J. Barnes, 1984).

13 See, Aristotle, 'Rhetoric,' transl. W.R. Roberts, *ibid* at I, 1354 a-b.

14 See, E. Barker, 'Introduction' to his *The Politics of Aristotle* xi, lxx (1946); and the present study, 1.3, the text accompanying note 53.

15 *Ethics*, *supra*, note 12, at V, 1137 b.

16 See, 2.1, the text accompanying notes 140-146.

17 That of Hobbes, more precisely, is a *dissolution* of the opposition rather than siding simply with government by men as distinct from government by laws. See, *supra*, note 12.

18 *Cf.* Wittgenstein's reference to the 'soul,' the present work, 2.1, the text accompanying note 90.

19 F. Gény, *Method of Interpretation and Sources of Private Positive Law: Critical Essay* [1899] par. 97 (transl. J. Mayda, 1963).

20 *Id.* par. 98 (footnote omitted).

21 C. Fried, 'Sonnet LXV and the 'Black Ink' of the Framers' Intention' in *Interpreting Law and Literature: A Hermeneutic Reader* 45 (eds. S. Levinson and S. Mailloux, 1988).

22 E.M. Maltz, 'Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach' 63 *Tulane Law Review* 1 (1988).

23 S.E. Thorne, 'Introduction' to T. Egerton, *A Discourse upon the Exposicion & Understandinge of Statutes* 59 (ed. S.E. Thorne, 1942).

24 *Id.* (footnote omitted).

25 *Id.* at 62.

26 U. Eco, 'After Secret Knowledge' [based on his 1990 Tanner lectures at Cambridge] *TLS* 666 (June 22-28, 1990).

27 *Id.* Eco rather flatters himself over the part his own work he thinks must have played in the present *plague* of overinterpretation. See, for his 1962 work which, more accurately, stands somewhere in between the American New Criticist and the Continental Structuralist concepts of reading, U. Eco, *The Open Work* (transl. A. Cancogni, 1989). He explains that 'my readers mainly focused on the 'open' side of the whole business,' while in truth the 'work' was equally stressed. 'Secret Knowledge,' *supra*, note 26, at 666.

28 *Id.* at 678.

29 *Id.* at 666.

30 See, 2.1, particularly the text accompanying notes 45-57.

31 *Philosophical Investigations*, *supra*, note 6, par. 454 (emphasis in original); see, the present study, 2.1, the text accompanying note 90.

32 *Supra*, note 20.

33 L. Wittgenstein, *The Blue and Brown Books* 5 (1989).

34 'Secret Knowledge,' *supra*, note 26, at 666.

35 See, 1.2, the text accompanying notes 1-14.

36 See, 1.4, the text accompanying notes 38-71.

37 *Rhetoric supra*, note 13, at II, 1402 a; see, 1.4, the text accompanying note 52.

38 Lord Loreburn in *Vickers, Sons and Maxim Ltd. v Evans* [1910] AC 444, 445 (emphasis in original). *Cf.* Lord Diplock's statement of the rule in *Hadmor Productions Ltd v Hamilton*, [1983] 1 AC 191, 232.

39 [1584] 3 Co. Rep. 7a, 7b.

40 [1844] 11 Cl. & Fin. 85, 143.

41 But see, Lord Reid's rationalization in *Beswick v Beswick*, [1968] AC 58, 74, of the inadmissibility of parliamentary debates for the 'practical reasons' of time, expense, and poor access especially to older material.

42 [1897] AC 22, 38.

43 *Supra*, note 40, at 143.

44 [1975] 1 All ER 810.

45 It must be noted, however, that citing Hansard by the counsel in court without prior permission of the relevant House of the Parliament was forbidden by a parliamentary rule of privilege until 1980, a state of affairs which did not exactly encourage courts extensively to refer to the proceedings. See, W. Twining and D. Miers, *How to Do Things with Rules* 370-371 (1991).

46 As well known, the use of preparatory material has not been a great issue of controversy in the French legal rhetoric, even though recourse to it has sometimes been criticized in France too for the perplexing nature of parliamentary debates and for the exegetical and therefore unnecessarily *restraining* character of the enterprise. Its extensive use by French courts would seem to overlap with the special brand of the concept of separation of powers that marks the French rhetoric, and where, consequently, parliamentary references bear significant political weight. See, for the French uses of the *travaux préparatoires*, M. Troper, *et al.* 'Statutory Interpretation in France' in *Interpreting Statutes: A Comparative Study* 171, 185-186 (eds. D.N. MacCormick and R.S. Summers, 1991); A. West *et al.*, *The French Legal System: An Introduction* 53 (1992); R. David, *French Law: Its Structure,*

Sources, and Methodology 160 (transl. M. Kindred, 1972); and Sir W. Dale (ed), *British and French Statutory Drafting: The Proceedings of the Franco-British Conference of 7 and 8 April 1986* (1986). In the United States, the use of legislative history in constitutional or statutory interpretation has not been a problem of the scale that it has been in England despite the common origins of the respective legal domains. In constitutional interpretation the Supreme Court has been engaged in elaborate surveys of the genealogy of the Constitution especially in its controversial decisions such as those of *Brown v Board of Education*, 347 U.S. 483 (1954), and *Roe v Wade*, 410 U.S. 113 (1973). Of the use of parliamentary evidence in statutory interpretation, the Court declares, in its opinion of *United States v American Trucking Association*, 310 U.S. 534, 544 (1940), that 'there can certainly be no 'rule of law' which forbids its use, however clear the words may be on superficial investigation.' The interpretation of the Turkish Civil Code makes a distinct case in that, as its main body has been adopted from the Civil Code of Switzerland, of 1907, it enables liberal uses of both the preparatory works of the original code and the Parliamentary evidence in the making of the Turkish version of that code, especially where it clearly departs from the solution of the former. See, M.K. Oguzman, *Medeni Hukuk Dersleri: Giris, Kaynaklar, Temel Kavramlar* [Course in Private Positive Law: Introduction, Sources, Fundamental Notions] 45-46 (1971).

47 *Sturges v Crowningshield* 17 U.S. (4 Wheat.) 122, 202 (1819).

48 *Dartmouth College v Woodward* 17 U.S. (4 Wheat.) 518, 644 (1819).

49 *Method*, *supra*, note 19, par. 97.

50 See, *id.* par. 98; see also the present study, 2.1, the text accompanying notes 15-18.

51 See, 1.4, the text accompanying notes 53-59.

52 See, 'Signature Event Context,' *supra*, note 7; see also the text accompanying, *supra*, notes 1-9.

53 See, *Philosophical Investigations*, supra, note 31, par. 243 *et seq.*

54 *Id.* par. 293.

55 *Id.* par. 271.

56 See, J.L. Austin, *How to Do Things with Words* 22 (eds. J.O. Urmson and M. Sbisà, 1989). Derrida's reading of Austin is countered in J.R. Searle, 'Reiterating the Differences: A Reply to Derrida' 1 *Glyph* 198 (1977). Derrida's long response forms one of the most accessible accounts of his entire project, *Limited Inc, supra*, note 7. A succinct statement of the positions in the first two essays in the debate is to be found in F.B. Farrell, 'Iterability and

Meaning: The Searle-Derrida Debate' 19 *Metaphilosophy* 53 (1988). See, for two significant commentaries on the debate, B. Johnson, 'Mallarmé and Austin' in her *The Critical Difference: Essays in the Rhetoric of Contemporary Reading* 52 (1980); and S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* ch. 2 (1989).

57 See, 1.4, the text accompanying notes 53-60.

58 *Rhetoric*, *supra*, note 13, at III, 1404 a.

59 *Id.*

60 *Supra*, note 38, at 201.

61 *Id.*

62 [1993] 1 All ER 42. The text in question is the Section 63 (2) of the Finance Act 1976. Lord Mackay dissents on the ground of the increasing cost of litigation, a state of affairs he thinks a relaxing of the exclusionary rule would immediately result in, *id.* at 46-49.

63 See also the earlier decision of *Pickstone v Freemans plc* [1988] 2 All ER 803, 807 and 814, where parliamentary references by Lords Keith and Templeman receive general consent.

64 Lord Browne-Wilkinson in *Pepper*, *supra*, note 62, at 64.

65 March 26, 1981; cited by Lord Denning in *Hadmor*, *supra*, note 38, at 201.

66 V. Sacks, 'Towards Discovering Parliamentary Intent,' *Statute Law Review* 143 (1982).

67 *Id.* at 157.

68 *Id.*

69 *Id.* at 158.

70 *Id.* (emphasis added) (the footnote that follows refers to Lord Denning's reading in *Hadmor* case, *supra*, note 60).

71 *Supra*, note 64.

72 Justice Frankfurter, 'Some Reflections on the Reading of Statutes' 2 *The Record of the Association of the Bar of the City of New York* 213, 234 (1947); cited in F.A.R. Bennion, *Bennion on Statute Law* 111 (1990).

73 See, 2.1, the text accompanying notes 56-57.

74 C.E. 17.2.1950 [*Dame Lamotte*], cited in 'Statutory Interpretation in France,' *supra* note 46, at 181-182. *Cf.* C. Dadomo and S. Farran, *The French Legal System* 213 (1993).

75 *Id.*

76 See, 2.1, the text accompanying notes 75-84.

77 See, *supra*, note 40.

78 See, for the uses of the notion in the French rhetoric of statutory reading, 'Statutory Interpretation in France,' *supra*, note 46, at 179-180.

79 See, for a discussion of the distinction, G.C. MacCallum, Jr., 'Legislative Intent' in *Essays in Legal Philosophy* 237, 264 (ed. R.S. Summers, 1970).

80 *French Law*, *supra*, note 46, at 156.

81 *Id.*

82 Quoted in 'Statutory Interpretation in France,' *supra*, note 46, at 180.

83 [1857] 6 HL Cas 61.

84 See, the text accompanying, *supra*, note 20.

85 *Supra*, note 83, at 106.

86 [1877] 2 AC 743, 763.

87 See, *supra*, note 47.

88 *Id*, at 202-3.

89 *Leviathan*, *supra*, note 12, at Part II, ch. 26.

90 *Id.* [p. 149] (emphasis added).

91 *Id.* (emphasis added).

92 *Id. Cf.* the Aristotelian notion of equity in determining the intention of the legislator. 'Equity bids us be merciful to the weakness of human nature, to think less about the laws than about the man who framed them, and less about what he said than about what he meant...' *Rhetoric*, *supra*, note 13, at I, 1374 b.

93 *Leviathan*, *supra*, note 12, at Part II, ch. 26 [p. 149].

94 Aristotle, 'Politics' in *The Politics of Aristotle* I, 1253 a (transl. E. Barker, 1946); see, for a discussion of it, the present study, 1.3, the text accompanying notes 74-79.

95 *Supra*, note 83, at 106.

96 See, the text accompanying, *supra*, notes 30-34.

97 J.M. Landis, 'A Note on Statutory Interpretation,' 43 *Harvard Law Review* 886, 888-890 (1930).

98 H.P. Monaghan, 'Our Perfect Constitution' 56 *New York University Law Review* 353, 377 (1981); R.H. Bork, *The Tempting of America* 162-165 (1990).

99 'Perfect Constitution,' *supra*, note 98 at 377.

100 *Id.*

101 *Tempting*, *supra*, note 98 at 164.

102 Hirsch introduces his notion of 'valid' interpretation on the basis of authorial will as a criterion to enable judgement between the competing senses attributed to the text. Its impetus is the otherwise engulfing chaos in the event

of signification, a free-for-all to be remedied by valid interpretation. Ironically enough, the fiercely opposing camp of New Criticism (see, 2.1, notes 133-135) is motivated by the very same anxiety to acquire scientific reliability and order in its *refusal* of claims to intentional validity. In fact, Hirsch only chooses the term validation, and not 'verification,' a word strongly associated earlier this century with scientific rigour, because of the attenuated quality (through the Continental-hermeneutic connections of his work) of validity he suggests in comparison with the more exacting validity of natural sciences. See, E.D. Hirsch, Jr., *Validity in Interpretation* (1967) (see, for the choice for validity as opposed to verifiability, *id.* at 171). In his later work Hirsch offers a *revised* definition of meaning where it is no longer associated exclusively with the authorial will. 'The enlarged definition now comprises constructions where authorial will is partly or totally disregarded.' E.D. Hirsch, Jr., *The Aims of Interpretation* 80 (1978). That which is immediately mystifying, naturally, is how one is possibly to rationalize partial or total exclusion of authorial will where it *is* available.

103 See, for a use of the Hirschean ideas of authorial will and validity to prevent law from being an 'arbitrary' enterprise where it 'would be whatever a judge takes it to mean at any time,' S.C.R. McIntosh, 'Legal Hermeneutics: A Philosophical Critique' 35 *Oklahoma Law Review* 1, 36 (1982).

104 See, 'Legislative Intent,' *supra*, note 79, at 242-245.

105 *Id.* at 242. The state of *common awareness* that defines the entire process is emphasized by Lord Simon of Glaisdale in *Ealing London Borough Council v Race Relations Board* [1972] AC 342, 360 (emphasis added): 'It is the duty of a court so to interpret an Act of Parliament as to give effect to its intention. *The court* sometimes asks itself what *the draftsman* must have intended... [T]he draftsman knows what is the intention of *the legislative initiator*... [H]e knows what canons of construction the court will apply; and he will express himself in such a way as accordingly to give effect to the legislative intention.'

106 'Statutory Interpretation,' *supra*, note 97, at 888.

107 'Legislative Intent,' *supra*, note 79, at 242.

108 *Tempting*, *supra*, note 98, at 162-165.

109 M. Radin, 'Statutory Interpretation' 43 *Harvard Law Review* 863 (1930).

110 *Id.* at 867.

111 *Id.* at 870.

112 *Id.*

113 J. Willis, 'Statute Interpretation in a Nutshell' 16 *Canadian Bar Review* 1, 3 (1938).

114 D. Payne, 'The Intention of the Legislature in the Interpretation of Statutes' 9 *Current Legal Problems* 96, 97-98 (1956). *Cf.* '[T]he general proposition that it is the duty of the court to find out the intention of Parliament — and not only of Parliament but of Ministers also — cannot be supported.' Lord Simonds in *Magor and St. Mellons R.D.C. v Newport Corporation* [1952] AC 189, 191.

115 *Cf.* 'Of course we use a fiction if we speak of the legislature *as if it were a being of one mind.* But so durable a fiction endures because it has a use validated by experience.' J.W. Hurst, *Dealing with Statutes* 33 (1982) (emphasis added).

116 See, 2.1, the text accompanying note 36.

117 J.P. Frank and R.F. Munro, 'The Original Understanding of 'Equal Protection of the Laws" 50 *Columbia Law Review* 131, 133 (1950).

118 *Id.*

119 W.J. Brennan, Jr., 'The Constitution of the United States: Contemporary Ratification' in *Interpreting Law and Literature: A Hermeneutic Reader* 13, 15 (eds. S. Levinson and S. Mailloux, 1988). *Cf.* 'To attempt to treat the Constitution as one would a text by a single author is to commit the single-author fallacy.' T. Ball, 'Constitutional Interpretation and Conceptual Change' in *Legal Hermeneutics: History, Theory, and Practice* 129, 138 (ed. G. Leyh, 1992).

120 See, 2.4, the text accompanying notes 130 *et seq.*

121 See, 1.2, note 35, and the accompanying text.

122 M. Heidegger, *Being and Time* 89 (transl. J. Macquarrie and E. Robinson, 1990).

123 S. Levinson and S. Maillaux, *Interpreting Law, supra*, note 115, at 37.

124 Sir T. Egerton, *A Discourse upon the Exposicion & Understandinge of Statutes* [1557-1567] 151 (ed. S.E. Thorne, 1942) (emphasis added, editor's footnote omitted).

125 'Parliamentary Intent,' *supra*, note 66, at 149-150.

126 See, for the intentionality of *ambiguity* by the French legislator, 'Statutory Interpretation in France,' *supra*, note 46, at 174.

127 In the Swiss-Turkish civil law system, for instance, silence *intended* by the legislator indicates no lacunae in the law. Deliberate omission means simply a *refusal* of involvement on the part of the legislator. If silence is *not* intended, on the other hand, it is a duty of the judge either to use discretion (the gap is *intra legem*) or himself make the law (the gap is *praeter legem*). See, A. Egger, *Isviçre Medeni Kanunu Serhi* [Commentary upon the Swiss Civil

Code] Vol. 1, at 65 (transl. V. Çernis, 1947); and A. Ataay, *Medeni Hukukun Genel Teorisi* [The General Theory of Private Positive Law] 233-235 (1980). According to the Swiss Federal High Court (*Bundesgericht*), silence is intentional when it is in the face of the evident fact that the legislator was in a position at the time of the legislation to have been aware of the specific problem and had the means to regulate it (BGE 76 II 62 [1950], BGE 82 II 224 [1957], BGE 87 II 355 [1962]; cited *ibid* at 233, 237). There have been issues, however, over the intentionality of which the Swiss Court and the Turkish Court of Cassation have had to part company. One specific issue which has ended up ascribing a split mind, as it were, to the legislator is the disputed intentionality of the Code's silence on the paternal grandmother's position regarding the legal recognition of the child born out of marriage, while the Code does entitle the *grandfather* the right to pursue the matter (The Turkish Civil Code, Art. 291). The Swiss Court finds no compelling reason to construe the legislator's silence unintentional. The grandmother is refused the entitlement in the intended silence (BGE 54 II 4-12 [1918]; cited *ibid*, at 234-235). The Turkish Court, on the other hand, interprets the silence unintentional in one of its decisions-to-unify-prior-court-holdings, decisions which have the binding force equal to that of laws, and, declaring a *gap* in the law, instructs the judge to fill it accordingly (*Yargitay Iç. Bir. Kar.* 18 11 1959 E. 12 / K. 29; cited *ibid*, at 235).

128 *Being and Time, supra*, note 118, at 89.

129 *Id.* at 90 (emphasis added).

130 *Supra*, note 113.

131 C. McGinn, *Wittgenstein on Meaning* viii (1989) (emphasis added).

132 *Cf.* S. Fish, 'Play of Surfaces: Theory and the Law' in *Legal Hermeneutics, supra*, note 119, at 297, 300: 'The thesis that interpretation always and necessarily involves the specification of intention [*cf. Doing What Comes Naturally, supra*, note 56, at 295: 'There is only one way to read or interpret, and that is the way of intention.'] does not grant priority and authority to the author, who is in no more a privileged relation to his own intentions than is anyone else. Each of us has had the experience of walking from a conversation and asking himself or herself, with respect to something just said, 'Now what did I mean by that?' The question is shorthand for 'With what kind of motives and in the context of what hopes, fears, anxieties, and desires did those words issue?"

133 *Philosophical Investigations, supra*, note 6, par. 342.

134 [1990] 2 All ER 170 (Divisional Court).

135 The Adoption Act of 1976 (Section 51).

136 *R v Registrar*, *supra*, note 134, at 171-172.

137 Lord Watkins' words, *id.* at 175 (emphasis added).

138 *Supra*, note 124.

139 *Supra*, note 109.

140 See, 2, the text accompanying notes 6-10

141 *Method*, *supra*, note 19, pars. 97-98; see, the present study, the text accompanying, *supra*, notes 19-20.

142 See, the text accompanying, *supra*, notes 106-110.

143 *Blue and Brown*, *supra*, note 33, at 5; see, the text accompanying, *supra*, notes 31-33.

144 J. Kohler, 'Judicial Interpretation of Enacted Law' in *The Science of Legal Method* 187, 188 (transl. E. Bruncken, 1969).

145 *Id.*

146 *Id.* at 195.

147 *Id.* at 189.

148 *Id.* (footnote omitted).

149 See, the text accompanying, *supra*, notes 120-122.

150 *Philosophical Investigations*, *supra*, note 6, pars. 65 and 67.

151 *Supra*, note 124.

152 *Cf.* 'And in the same way we also use the word 'to read' for a family of cases. And in different circumstances we apply different criteria for a person's reading.' *Philosophical Investigations*, *supra*, note 6, par. 164.

153 J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* Vol. 1, at 455 (ed. R. Campbell, 1879) (emphasis added).

154 H. Kantorowicz, *The Definition of Law* 44 (ed. A.H. Campbell, 1958).

155 *Id.* at 44-45 (emphasis added).

156 *Id.* at 49.

157 *Id.* (emphasis added).

2.3 The Tame and the Freakish

1 See, 1, notes 3-4 and the accompanying text.

2 See, 1, generally; and in particular, 1.4, the text accompanying notes 28-34.

3 60 U.S. (19 How.) 393 (1857).

4 W. Rehnquist, 'The Notion of a Living Constitution' 54 *Texas Law Review* 693, 700-702 (1976); R. H. Bork, *The Tempting of America* 28-34 (1990).

5 *Id.* at 28.

6 198 U.S. 45 (1905).

7 410 U.S. 113 (1973).

8 *Tempting*, *supra*, note 4, at 32. See also, Justice Rehnquist's dissenting opinion in *Roe*, *supra*, note 7, at 174.

9 *Lochner*, *supra*, note 6, at 57.

10 *Supra*, note 7, at 158 (footnote omitted).

11 *Supra*, note 3, at 403 - 405.

12 See, 2.1, the text accompanying notes 53-55.

13 But see, for the *inaccuracy* of Taney's account of the established rights which in some instances gave a black man superior status over a married white woman, D.E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 349 (1978).

14 347 U.S. 483 (1954); see, for a discussion of this case, the present study, 2.1, the text accompanying notes 35-44 and 110-126.

15 *Tempting*, *supra*, note 4, at 76-77.

16 *Id.* at 34.

17 See, S.H. Asch, *The Supreme Court and its Great Justices* 75 (1972).

18 163 U.S. 537, 552-562 (1896).

19 See, for a formulation of *judicial self-restraint* in the review of legislative acts to help to keep the powers separate, the concurring opinion by Justice Brandeis in *Ashwander v Tennessee Valley Authority* 297 U.S. 288, 346-348 (1936).

20 The 'interpretative statutes' in the French system aim to help to retain the separation of powers thereby risked. To make a point about the current practice by means of legislative acts is possible, naturally, in all representative systems. The French uses of interpretative laws, however, seem to serve in practice to make retrospective points which are not possible through ordinary laws. See, M. Troper *et al.*, 'Statutory Interpretation in France' in *Interpreting Statutes*: *A Comparative Study* 171, 211 (eds. D.N. MacCormick and R.S. Summers, 1991). Similarly, the 1924 Turkish Constitution provided for interpretative statutes. The Constitution of 1961, however, abandoned the system, for what significantly characterized its regime was an anxiety over the powers of the parliamentary majority whose abuses of its privileges were thought to have brought about the closure of the previous era, and to overcome which the solution of the French Fourth Republic was adopted. The

1982 Constitution has continued the 1961 system in this respect.

21 *Supra*, note 6, at 59.

22 *Tempting*, *supra*, note 4, at 49.

23 *Id.*

24 J. Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' 7 *Harvard Law Review* 129 (1893).

25 See, L. Hand, *The Bill of Rights* (1958) generally.

26 H. Wechsler, 'Toward Neutral Principles of Constitutional Law' 73 *Harvard Law Review* 1 (1959).

27 A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 18 (1962). See, for a recent work exploring the theme in a similar mood, R.A. Burt, *The Constitution in Conflict* (1992).

28 J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* ch. 4 (1980).

29 See, on politics and the Warren Court, A. Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* (1968); L.B. Bozell, *The Warren Revolution* (1969); A.M. Bickel, *Politics and the Warren Court* (1965) (the latter covering the period after 1962).

30 W.J. Brennan, Jr., 'The Constitution of the United States: Contemporary Ratification' in *Interpreting Law and Literature: A Hermeneutic Reader* 13, 16 (eds. S. Levinson and S. Mailloux, 1988).

31 *Id.*

32 P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982).

33 See, for a criticism of Perry's work in terms of its 'anti-democratic implications,' D.A.J. Richards, 'The Aims of Constitutional Theory' 8 *University of Dayton Law Review* 723 (1983), and M.W. McConnel, 'The Role of Democratic Politics in Transforming Moral Convictions into Law' 98 *Yale Law Journal* 1501 (1989).

34 M.J. Perry, *The Constitution, the Courts, and Human Rights* (1982).

35 M.J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* 134 (1988) (emphasis in original).

36 *Cf.* the 'ultra-textualism' which some of the extratextualist concerns really amount to, the present study, 2.1, the text accompanying notes 18, 53.

37 *Morality, Politics, and Law*, *supra*, note 35, at 134.

38 P. Brest, 'The Misconceived Quest for the Original Understanding' 60 *Boston University Law Review* 204, 225 (1980).

39 *Id.*

40 See, for a typical instance, Perry's dichotomy of the extraconstitutional and the contraconstitutional, the text accompanying, *supra*, note 34.

41 *Cf.* '[Original choice] is a choice no less political than any other; it expresses antipathy to claims of the minority to rights against the majority.' 'Constitution of the United States,' *supra*, note 30, at 16.

42 *Tempting*, *supra*, note 4, at 176-177.

43 *Supra*, note 38.

44 See, the text accompanying, *supra*, notes 21-23.

45 See, 2.1.

46 See, 2.3.

47 M. Cappelletti, *The Judicial Process in Comparative Perspective* (1989).

48 'Preface,' *id.*

49 *Id.* at xvii-xviii. See also, for accountability through judicial sensitivity to popular needs and desires, *id.* at 45.

50 In addition to the countermajoritarian difficulty, judicial creativity is deemed to differ from legislative acts in its 'inherent limits.' The major drawbacks from which it suffers are its inaccessibility for ordinary people, its unpredictability, and finally the lack of sufficient sources and equipment on the part of the court (*id.* at 35-40). The uncertainty the realists reach via rule scepticism, Cappelletti assumes for the same reason he finds judge-made law relatively inaccessible. He traces the law to statutes and law reports. And the uncertainty of decisional law is defined by the oddly understood notion of the Rule of Law which requires that people first read statute books and find out where they stand before they go ahead and do anything. That reading the law, reading not only by the 'ordinary citizens' (*id.* at 35) but also by the judge, in a mediation where ordinary and extraordinary are transfigurational, is a performance carried out, not in order to find out where people stand, but *in terms of* where people stand, I discuss regarding the realist concept of unpredictability, 2.4.

51 *Judicial Process*, *supra*, note 47, at xvi-xvii.

52 The Decree of December 22, 1789; cited in H.P. de Vries, *Civil Law and the Anglo-American Lawyer* 91 (1976).

53 The Law of August 16-24, 1790, art. 13; cited in *Judicial Process*, *supra*, note 47, at 195; see also, R. David, *French Law: Its Structure, Sources, and Methodology* 23-24 (transl. M. Kindred, 1972); C. Dadomo and S. Farran, *The French Legal System* 46-47 (1993); and A. West *et al.*, *The French Legal System: An Introduction* 23-24 (1992). The *décret* of 16 *Fructidor An III*, 1795, repeats the provision of the art. 13: 'Courts are constantly forbidden from subjecting administrative acts, whatever their nature, to judicial review.' Cited in Dadomo and Farran, *supra*, at 47. *Cf.* the *Conseil constitutionnel*

decision of January 23, 1987 [*Competition Law*] on the separation, *id.* at 48-49; and J. Bell, *French Constitutional Law* 194 (1992).

54 The Law of August 16-24, 1790, art. 10; cited in *Judicial Process*, *supra*, note 47, at 194; see also 'Statutory Interpretation in France,' *supra*, note 20, at 203.

55 Baron de Montesquieu, *The Spirit of Laws* Book XI, ch.VI (transl. T. Nugent, ed. and revised by J.V. Prichard, 1914).

56 Title VIII, the arts. 64-66.

57 See, for a review of the French *droit administratif* as a whole different interpretation of the principle of the separation of powers from that of the Anglo-American tradition, B. Schwartz, *French Administrative Law and the Common-Law World* (1954). And see briefly, on the dual character of the French court system, Dadomo and Farran, *supra*, note 53, at 47-48; and A. West *et al.*, *supra*, note 53, at 80-86.

58 The Constitution, art. 61. But, see, *French Constitutional Law, supra*, note 53, at 55: 'The Conseil constitutionnel is a court in all but name, though its procedure for reviewing legislation lacks significant attributes of a judicial process, even when compared just to ordinary French Courts.' Bell charts in this excellent study the development of the *Conseil constitutionnel*, gradually, since at least 1971, when in its decision *Liberté d'Association* the *Conseil* found a bill restricting the freedom of association — what the *Conseil* considered to be a general principle of law — unconstitutional, into a virtual court. See also his account of the growth of the idea of constitutional review in France, *id.* at 20-29.

59 See, for the judicial organization of the *ancien régime*, J. Brissaud, *A History of French Public Law* ch. 12 (transl. J.W. Garner, 1915). A vivid account of the workings of the pre-Revolutionary courts is to be found in J.P. Dawson, *The Oracles of the Law* 350-371 (1968).

60 *Id.*; see also 'Statutory Interpretation in France,' *supra*, note 20, at 203.

61 See, E. Lambert, 'Codified Law and Case-Law; Their Part in Shaping the Policies of Justice' [1903] in *The Science of Legal Method* 251 (transl. L.B. Register, 1969). See, for a recent account, R. David, *English Law and French Law* (1980).

62 In the Swiss-Turkish private postitive law system, the judge takes the place of the legislature when a rule to cover the particular case cannot be drawn from either the statute or the custom, the two formal sources of the law (The Swiss Civil Code, art. 1). See, for a discussion of the Swiss-Turkish regime, regarding Gény's conception of it and its consequences, 2.4, the text accompanying notes 103-118. A clash with the principle of the separation of

powers is thought not to be the case, however, because what the judge does is to perform a *duty*, to start with. Secondly, the duty is executed within the general framework of the prevailing law. S. Edis, *Medeni Hukuka Giris ve Baslangic Hükümleri* [An Introduction to the Civil Law and Commentary upon the Preliminary Provisions of its Code] 137 (1979). The Turkish Constitution concedes in a strained language a possible clash of the personal convictions of the judge and the regime drawn by the law: 'Judges shall be independent in the discharge of their duties; they shall give judgement in accordance with the Constitution, law, and their *personal conviction confirming with the law*' (art. 138 [1]) (emphasis added).

63 See, for a contrasting picture of courts in England and Germany, H.B. Gerland, 'The Operation of the Judicial Function in English Law' in *The Science of Legal Method* 229 (transl. E. Bruncken, 1969).

64 See, Sir W. Dale (ed), *British and French Statutory Drafting: The Proceedings of the Franco-British Conference of 7 and 8 April 1986* (1986); see, esp. the contributions by the editor. See also, *infra*.

65 Sir W. Dale, *Legislative Drafting: A New Approach* 332 (1977).

66 '[T]he intention of the authors of the Civil Code was to prevent the so-called 'arrêts de règlement' of the old monarchy. According to the principle of the separation of powers proclaimed by the French Revolution, a judge cannot act as a law-maker. Filling the gaps would be on this account a legislative function.' 'Statutory Interpretation in France,' *supra*, note 20, at 176. But see Portalis, in the *Discours préliminaire* to the Code, noting the insufficiency of the written law, excerpt provided in A. West *et al., supra*, note 53, at 39-42.

67 The subject of *gaps* points in the direction of yet another significant divergence between different systems of civil law. In the Swiss-Turkish system, acknowledgement of lacunae in the law takes place in the very opening articles of the Civil Code. The articles 1 and 4 regulate the *praeter legem* and *intra legem* gaps which relate to judicial law-making and judicial discretion, respectively. A fascinating literature is devoted to the classification of lacunae in the law. M.K. Oguzman, *Medeni Hukuk Dersleri: Giris, Kaynaklar, Temel Kavramlar* [Course in Civil Law: Introduction, Sources, Fundamental Notions] 58-61 (1971); *Medeni Hukuka Giris, supra*, note 62, at 107-109 and 116-119. According to a decision by the Swiss Federal High Court, '[a] gap in the law is to be acknowledged not only when there is absolute textual silence on a specific matter, but also when the legislative purpose is contradicted in the application of the text to the specific case' (BGE [*Bundesgericht*] 60 II 185 [1934]); cited in A. Ataay, *Medeni Hukukun Genel*

Teorisi [The General Theory of Civil Law] 239 (1980). See, for an acknowledgement of, or controversy over, the gaps in the text of the United States Constitution, the Supreme Court cases: *Baker v Carr*, 369 U.S. 186, 242 (1962); *H.P. Hood & Sons, Inc. v Du Mond*, 336 U.S. 525, 535 (1949); and *Prudential Ins. Co. v Benjamin*, 328 U.S. 408, 413 (1946).

68 'Ask a French Lawyer any question, no matter how novel, and you can rest assured that he will find, in the arsenal of legislative texts at his disposal or by an appeal to the spirit of these texts, a rationale which will permit him to answer it. (...)

'(...) Psychologically, without any question, the French judge always does apply a statute. Even in those cases where he most clearly rewrites the statute, he sees himself applying and interpreting it. He does not think he is making law and would be surprised to have his actions thus characterized.' *French Law*, *supra*, note 53, at 167.

69 Art. 4. The Turkish law, on the other hand, makes it a duty of the judge to decide the case in his jurisdiction *even if he has to improvise the law*. 'No court shall refuse to hear a case within its jurisdiction' (the Constitution, art. 36 [2]). In addition, the Criminal Code regulates the criminal responsibility of the judge in avoiding the delivery of a legal entitlement (art. 231), and the Civil Code of Procedure provides for compensation of the damages in the case of delay or non-delivery of the judgement (art. 573 [b6]).

70 See, 2.4, the text accompanying notes 36-41 and 74-83.

71 See, for the 'collegiality and anonymity in court practice' in the civil law systems generally, E. McWhinney, *Supreme Courts and Judicial Law Making: Constitutional Tribunals and Constitutional Review* 98 (1986); and see, for the French practice, A. West *et al.*, *supra*, note 53, at 60; 'Statutory Interpretation in France,' *supra*, note 20, at 172, 197, 199-200; and *French Law*, *supra*, note 53, at 45.

72 *Judicial Process*, *supra*, note 47, at 31 (emphasis in original).

73 *Supra*, note 55.

74 F. Gény, *Method of Interpretation and Sources of Private Positive Law: Critical Essay* [1899] par. 32 (transl. J. Mayda, 1963).

75 M.V. Tushnet, 'Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles' in *Interpreting Law and Literature: A Hermeneutic Reader* 193 (eds. S. Levinson and S. Mailloux, 1988).

76 'Neutral Principles,' *supra*, note 26.

77 M.S. Moore, 'The Interpretive Turn in Modern Theory: A Turn for the Worse?' 41 *Stanford Law Review* 871, 882 (1989).

78 W.O. Weyrauch, 'Law as Mask — Legal Ritual and Relevance' 66 *California Law Review* 699 (1978).

79 *Id.*

80 J.L. Harrison and A.R. Mashburn, 'Jean-Luc Godard and Critical Legal Studies (Because We Need the Eggs)' 87 *Michigan Law Review* 1924, 1943 (1989).

81 *Method, supra*, note 74, par. 32.

82 *Id.*

83 F.S. Cohen, *The Legal Conscience: Selected Papers of Felix S. Cohen* 37 (ed. L.K. Cohen, 1970).

84 *Id.*

85 *Method, supra*, note 74, par. 32.

86 *Id.* par. 26.

87 In the Turkish doctrine of civil law the criticisms by Gény of mechanistic jurisprudence are part of the canon via Gény's links with the Swiss-Turkish Civil Code (see, 2.4, the text accompanying notes 103-118). The Génian argument that the written law is essentially insufficient in view of changing circumstances and evolving concepts (see, 2.1, the text accompanying notes 5-9) is thoroughly incorporated in the rhetoric. One direct result is the acknowledgement of lacunae in the law. That,in turn, invites discretionary and even law-making involvements on the part of the judge. That what Gény argues for in the *Method* is taken for granted in the doctrine, however, seems to have little effect to reverse the lasting appeal of the rhetoric against which Gény advances his ideas in the first place. An image of the legal reasoning about the same league as Liard's concept of mechanistic adjudication phrased in 1894 (see, the text accompanying, *supra*, note 86) is displayed in a recent text-book discussion of the subject by a Turkish jurist: 'In a sense, adjudication is a process of matching the particular and concrete event with the general and abstract rule of the law. By its mechanism, this matching of the concrete event with the legal rule resembles syllogism in logic insofar as the legal rule corresponds to the 'general proposition' in logic and the legal event to the 'particular proposition.' And the conclusion that follows from the encounter of the legal event and the legal rule is equivalent of 'inference.'

'Take the Article 8 of the Civil Code as an example. Accordingly,

"Everyone [every person] is entitled to the civil rights' (= the general proposition)

'A is a person' (= the particular proposition)

'Then A is entitled to the civil rights (= the inference).' *Medeni Hukuka*

Giris, *supra*, note 62, at 57-58.

88 *Method*, *supra*, note 74, par. 33.

89 See, the text accompanying, *supra*, note 55.

90 *Spirit of Laws*, *supra*, note 55, at Book XI, ch. VI.

91 See, R. Dworkin, 'Law as Interpretation' 60 *Texas Law Review* 527 (1982), reprinted in R. Dworkin, *A Matter of Principle* ch. 6 (1985); S. Fish, 'Working on the Chain Gang: Interpretation in Law and Literature' 60 *Texas Law Review* 551 (1982), reprinted in S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, ch. 4 (1989); W.B. Michaels, 'Is There a Politics of Interpretation?' 9 *Critical Inquiry* 248 (1982); R. Dworkin, 'My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More' in *The Politics of Interpretation* 287 (ed. W.J. Mitchell, 1983), reprinted (altered and abbreviated) in *A Matter of Principle*, *supra*, ch.7; S. Fish, 'Wrong Again' 62 *Texas Law Review* 299 (1983), reprinted in *Doing What Comes Naturally*, *supra*, ch. 5; S. Fish, 'Still Wrong After All These Years' 6 *Law and Philosophy* 401 (1987) (reviewing *Law's Empire*), reprinted in *Doing What Comes Naturally*, *supra*, ch. 16.

92 *Supra*, note 86.

93 See, Aristotle, 'Rhetoric,' transl. W.R. Roberts, in *The Complete Works of Aristotle* Vol. 2, at III, 1404 a (ed. J. Barnes, 1984); and my discussion, 1.4, the text accompanying notes 53-64, and 2.2, the text accompanying notes 57-59.

94 See, R. Descartes, 'Rules for the Direction of the Mind' in *The Philosophical Writings of Descartes* Vol. 1, at 9, 12 (transl. J. Cottingham *et al.*, 1984); R. Descartes, 'Meditations on First Philosophy' *ibid* Vol. 2, at 3, 14 (1985).

95 *Doing What Comes Naturally*, *supra*, note 91, at 14.

96 *Id.* at 95.

97 *Id.* at 100.

98 *Id.* at 112 (footnote omitted).

99 *Id.* at 113.

100 See, 1.4, the text accompanying note 48.

101 *Rhetoric*, *supra*, note 93, at I, 1355 a.

102 *Id.* at I, 1375 a-b.

103 *Id.* at I, 1376 b.

104 *Id.* at I, 1377 b.

105 *Supra*, note 88.

106 See, R. Dworkin, *Taking Rights Seriously* chs. 2-4 (1978).

107 The 'strong' discretion implicitly rationalized in the Hartian positivism, Dworkin explains, 'means reaching beyond the law for some other sort of standard to guide [the judge] in manufacturing a fresh legal rule or supplementing an old one' (*id.* at 17). The 'weak' kind of discretion, on the other hand, is indispensable for creative interpretation. For the sake of simplicity I concur with Dworkin to consider Hart's to be a 'strong' discretion and therefore drop the former's distinction altogether. See, *infra*, note 109.

108 See, *id.* ch. 4.

109 'Here at the margin of rules and in the fields left open by the theory of precedents,' writes Hart, 'the courts perform a rule-producing function...' H.L.A. Hart, *The Concept of Law* 132 (1988).

110 The part of the law that complements and supplements the rules comprises principles and policies which Dworkin sometimes calls 'standards,' *Taking Rights*, *supra*, note 106, at 22. What differs principles from policies is that principles are to do with *rights*, as opposed to the economic, social, or political *goals* described in the policies (*id.* at 90). In my discussion the supplement to the rules is designated as principles, rather than standards, because, first, a transcendental quality that defines principles puts them in a customary opposition with the positive law and therefore contributes to simplicity, and secondly, Dworkin himself often uses standards and principles interchangeably as the interpretative controversy tends to centre around 'rights.'

111 R. Dworkin, *Law's Empire* 7 (1986).

112 *Supra*, note 88.

113 115 N.Y. 506, 22 N.E. 188 (1889). Palmer was denied the inheritance left to him by the will of his grandfather who had been contemplating altering his will and who, possibly for that reason, had been murdered by Palmer. The New York Court justified its decision: 'No one shall be permitted to profit by his own wrong, or to found any claim upon his own iniquity or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes' (*id.*). See, for Dworkin's discussion of the case to exemplify principled decision-making as opposed to discretion, *Taking Rights*, *supra*, note 106, at 23; and *Law's Empire*, *supra*, note 111, at 15-20. See also, for an insightful reading of the case to throw light on the common attachments behind divergent positions in the interpretative controversy, K.S. Abraham, 'Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair' in *Interpreting Law and*

Literature: A Hermeneutic Reader 115 (eds. S. Levinson and S. Mailloux, 1988).

114 R. Pound, whose work is sometimes thought to be a precursor to that of Dworkin, found the decision in *Riggs v Palmer* 'legislative' as opposed to judicial. R. Pound, 'Spurious Interpretation' 7 *Colombia Law Review* 381 (1907), cited *id.* at 119.

115 As a matter of fact, it is a notion of the *right* 'right principle,' for principles are so recognized through 'a sense of appropriateness' in the first place. Its sense is 'developed in the profession and the public over time.' And principles last as long as they are appropriate. In other words, there is hardly any chance of the 'wrong,' inappropriate principle to crop up, to start with. See, *Taking Rights*, *supra*, note 106, at 40. *Cf.* the present work, 2.1, the text accompanying notes 29-31.

116 See, H.L.A. Hart, *Essays in Jurisprudence and Philosophy* 63-64 (1983). Although a rule 'has... its area of open texture where [the interpreter] has to exercise a choice, [it also]... has a core of settled meaning. It is this which [the interpreter] is not free to depart from, and which, so far as it goes, constitutes the standard of correct and incorrect [interpretation]...' *Concept of Law*, *supra*, note 109, at 140.

117 Hart places his notion of 'open texture' in opposition to the notion of the text that defines mechanistic jurisprudence (*id.* at 124-125). 'The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the ligth of circumstances, between competing interests which vary in weight from case to case. None the less, the life of law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgement from case to case' (*id.* at 132).

118 *Law's Empire*, *supra*, note 111, at 87.

119 'Law as Interpretation,' *supra*, note 91, at 529.

120 See, for his notion of 'consistency with the past,' *Law's Empire*, *supra*, note 111, at 130-135 and *passim*.

121 See, *id.* at 359 *et seq.*

122 '[I]t aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past' (*id.* at 413).

123 See, *id.* ch. 7.

124 'Law as Interpretation,' *supra*, note 91, at 538.

125 *Id.* at 547.

126 See, 2.2.

127 *Supra*, note 88.

128 See, for the argument of the appellee in *Roe v Wade*, *supra*, note 7, at 156-157. Curiously enough, the pro-choice majority opinion of the Court dismisses the argument of the appellee on an *originalist* basis. See, the text accompanying, *supra*, note 10.

129 R. Dworkin, 'The Great Abortion Case,' *The New York Review* 49, 50 (June 29, 1989).

130 *Id.*

131 *Cf.* Bork on the decision of *Dred Scott*, the text accompanying, *supra*, notes 1-15.

132 'Abortion Case,' *supra*, note 129, at 50.

133 R. Dworkin, 'No Right Answer?' in *Law, Morality, and Science* 58, 76 (eds. P.M.S. Hacker and J. Raz, 1979).

134 *Id.* at 82.

135 *Id.* at 84.

136 *Cf.* Finnis on the want of *sense* in the right answer thesis, J. Finnis, 'On Reason and Authority in *Law's Empire*' 6 *Law and Philosophy* 357, 372 (1987).

137 See, H.L.A. Hart, 'Definition and Theory in Jurisprudence' [1953] in *Essays*, *supra*, note 116, at 21.

138 *Cf.* Dworkin on pragmatism and legal rights, *Law's Empire*, *supra*, note 111, ch.5.

139 See, 1.4, the text accompanying notes 31-33. And see, for a difference-affirming concept of rights, *Conclusion*, note 37. A weighing up of the rationalistic —totalistic— and localistic moralities (the latter, the author calls 'the Wittgensteinean challenge') is pursued in J. Lear, 'Moral Objectivity' in *Objectivity and Cultural Divergence* 135 (ed. S.C. Brown, 1984).

140 *Law's Empire*, *supra*, note 111, at 225.

141 *Id.* at 73.

142 *Id.* at 424-425.

143 See, D.O. Brink, 'Legal Theory, Legal Interpretation, and Judicial Review' 17 *Philosophy and Public Affairs* 105, 113-120 (1988).

144 'Reply to Fish,' *supra*, note 91, at 297.

145 *Id.* at 298.

146 *Cf.* 1.4, the text accompanying notes 28-30.

147 See, the text accompanying, *supra*, notes 72-74.

148 See, 2.1, the text accompanying notes 140-146.

149 The words of the opinion in *Cargill Commission Co. v Swartwood*, 198 N.W. 536, 538 (1924), cited in *Doing What Comes Naturally*, *supra*, note 91, at 507.

150 *Law's Empire*, *supra*, note 111, at 413.

151 R. Dworkin, 'The Center Holds!' *The New York Review* 29, 32 (Aug. 13, 1992).

152 *Id.*

153 *Supra*, note 88.

154 'Center Holds,' *supra*, note 151, at 32.

155 'Law as Interpretation,' *supra*, note 91, at 531.

156 *Cf.* Dworkin's elucidation of 'making the best' of that which is read, *Law's Empire*, *supra*, note 111, at 421, n.12.

157 'Law as Interpretation,' *supra*, note 91, at 534.

158 *Supra*, note 155 (emphasis added).

159 'Law as Interpretation,' *supra*, note 91, at 535.

160 *Cf.* Kuhn on the problems of theory choice in science, T.S. Kuhn, *The Structure of Scientific Revolutions* (1970).

161 'Law as Interpretation,' *supra*, note 91, at 542.

162 *Id.* at 541, n.6.

163 *Id.*

164 See, for a disappointed review by the disciples, of Dworkin's *A Matter of Principle* which reprints the 'Law as Interpretation' article, K. Kress and S.W. Anderson, 'Dworkin in Transition' 37 *American Journal of Comparative Law* 337 (1989), where it is stated: 'If Dworkin wishes to hold the Right Answer Thesis, then the analogy to the judge as an author in a chain novel seems problematic. Imagine presenting David Mamet, Berthold Brecht, and Sam Shepard with the first act of *Death of a Salesman*. No doubt the three would write three very different plays... Fortunately for Dworkin's theory, the analogy to literature can be excised, leaving the legal theory to stand on its own' (id. at 349-350).

165 'Law as Interpretation,' *supra*, note 91, at 543.

166 See, the text accompanying, *supra*, note 126.

167 See, S. Fish, *Is There a Text in This Class: The Authority of Interpretive Communities* (1980); S. Fish, 'Interpretation and the Pluralist Vision' 60 *Texas Law Review* 495 (1982); S. Fish, 'Fear of Fish: A Reply to Walter Davis' 10 *Critical Inquiry* 695 (1984); *Doing What Comes Naturally*, *supra*, note 91; S. Fish, 'Almost Pragmatism: Richard Posner's Jurisprudence' 57 *University of Chicago Law Review* 1447 (1990); S. Fish, 'The Law Wishes to Have a

Formal Existence' in *The Fate of Law* 159 (eds. A. Sarat and T.R. Kearns, 1991). An excellent, clear and incisive, statement of Fish's ideas on intention, text, history, politics, theory, criticism, change, and so on, is to be found in his comment, 'Play of Surfaces: Theory and the Law,' on the essays that make G. Leyh (ed), *Legal Hermeneutics: History, Theory, and Practice* (1992).

168 'Law as Interpretation,' *supra*, note 91, at 544 (emphasis added).

169 *Id.*

170 See, the text accompanying, *supra*, note 111.

171 'Law as Interpretation,' *supra*, note 91, at 543.

172 See, the text accompanying, *supra*, note 42.

173 Bork's reference is to R. Dworkin, 'The Forum of Principle,' 56 *New York University Law Review* 469 (1981); *Tempting*, *supra*, note 4, at 176-177.

174 *Id.* at 177 (emphasis added).

175 *Cf.* Rawls' concept of person, 1.3, note 5.

176 *Doing What Comes Naturally*, *supra*, note 91, at 92-93 (emphasis in original).

177 *Id.* at 95.

178 'Reply to Fish,' *supra*, note 91, at 289.

179 *Id.* at 290.

180 *Id.* at 310.

181 See, the text accompanying, *supra*, note 157.

182 'Reply to Fish,' *supra*, note 91, at 291.

183 W.B. Michaels is the co-addressee of Dworkin's response. See, his comment on the latter's essay, 'Politics of Interpretation,' *supra*, note 91.

184 See, *Doing What Comes Naturally*, *supra*, note 91, at 119.

185 *Supra*, note 178.

186 See, for *iterability*, J. Derrida, 'Signature Event Context' in his *Limited Inc* 1 (trans. S. Weber and J. Mehlman, 1990); *cf.* the present study, 2.2, the text accompanying notes 1-10.

187 *Doing What Comes Naturally*, *supra*, note 91, at 107.

188 See, the text accompanying, *supra*, notes 140-143.

189 'Reply to Fish,' *supra*, note 91, at 297.

190 See, 'Politics of Interpretation,' *supra*, note 91.

191 *Id.* at 253.

192 *Id.* at 254.

193 *Id.* at 249 (emphasis added).

194 M. Heidegger, *Being and Time* 194 (transl. J. Macquarrie and E. Robinson, 1990).

195 *Id.* at 195.

196 *Id.*

197 *Id.*

198 See, 2.2.

199 See, the text accompanying, *supra*, notes 121-126.

200 *Doing What Comes Naturally*, *supra*, note 91, at 98.

201 *Id.* at 99-100.

202 *Id.* at 100 (emphasis in original).

203 See especially *Is There a Text*, *supra*, note 167, Introduction and Part 2.

204 See, the text accompanying, *supra*, notes 161-165.

205 See, *Doing What Comes Naturally*, *supra*, note 91, at 90-91.

206 *Id.* at 513 (emphasis in original). See, for a fine discussion, and repudiation, of the radical, non-interpretative, distinction in contemporary theory between hard and easy cases, K.S. Abraham, 'Three Fallacies of Interpretation: A Comment on Precedent and Judicial Decision' 23 *Arizona Law Review* 771 (1981).

207 'Law as Interpretation,' *supra*, note 91, at 542.

208 *Id.* at 543.

209 *Doing What Comes Naturally*, *supra*, note 91, at 370 (emphasis added).

210 See, the text accompanying, *supra*, notes 136-139.

211 O.W. Holmes, 'Natural Law' 32 *Harvard Law Review* 40, 41 (1918). Commenting on Rorty's pragmatism, Fish expresses dissent that a heterogenous sort of awareness would have as its *consequence* a degree of tolerance: the notion of a *practical* effect of what is a *theoretical* position is at once an affirmation of the traditional —epistemological— dichotomy between theory and practice. 'Almost Pragmatism,' *supra*, note 167, at 1466-1468. My frequent emphasis on heterogenous awareness, on the other hand, is a suggestion, as I make it clear, merely for rhetorical ploy for a position that is already — and primordially — acquired, namely that of the advocacy of civil rights.

212 F. Gény, *Science et technique en droit privé positif*, 4 Vols. (Paris: Tenin, 1914-1924).

213 *Method*, *supra*, note 74, par. 33. See, the text accompanying, *supra*, note 88.

2.4 The Real and the Formal

1 K.N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 422, n. 46 (1960). See, for Holmes on Gény, the present study, 2.3, the text accompanying notes 211-213.

2 See, 2.3.

3 See, for the major works of American realism, K.N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (1960); K.N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (1962); *Common Law, supra*, note 1; J.N. Frank, *Law and the Modern Mind* (1963); J.N. Frank, *Courts on Trial: Myth and Reality in American Justice* (1949); F. Rodell, *Woe Unto You, Lawyers!* (1957); and F.S. Cohen, *The Legal Conscience: Selected Papers of Felix S. Cohen* (ed. L.K. Cohen, 1970). A comprehensive, and affectionate, account of Llewellyn's life and work is to be found in W. Twining, *Karl Llewellyn and the Realist Movement* (1973). The book also includes an account of the facts in the making of American realism, between 1870 and 1931, and two chapters (11 and 12) on Llewellyn's contribution to the Uniform Commercial Code. An analysis of the legal philosophy of Frank is pursued in J. Paul, *The Legal Realism of Jerome N. Frank: A Study of Fact-Skepticism and the Judicial Process* (1959). A general account of American realism and its precursors with a concise description of its major themes is to be found in W.E. Rumble, *American Legal Realism* (1968).

4 198 U.S. 45, 76 (1905).

5 D. Howe (ed), *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski* Vol. 1, at 243; cited in *Legal Realism, supra,* note 3, at 39-40. See, for a recent theory of rules that centres around the theme of law's generality, F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991). The language in which rules are formulated, according to the author, is essentially 'open-textured,' a term he borrows from F. Waismann (*id.* at 35-36). It signifies 'the possibility that even the *least* vague, the most precise, term will turn out to be vague as a consequence of our imperfect knowledge of the world and our limited ability to foresee the future' (*id.* at 36, emphasis in original). (*Cf.* Gény on the essential 'incompleteness' of that which is written, present work, 2.1, the text accompanying notes 7-11. See also Hart's notion of 'open texture,' borrowed from the same source, 2.3, the text accompanying notes, 116-117). Because rules have to be general, in turn, they have to be 'under-' and/or 'over-inclusive' regarding their reference (*id.* at 31-34). Hence

the 'presumptive positivistic' view of rules the author gathers from the performances of rules — the constraints rules exert on those who engage in decision-making are merely presumptive, as opposed to absolute in the traditional sense (*id.* at 196-206). See also, for a view that holds the generality of the constitutional text responsible for most of the controversy that surrounds its readings, J. Leubsdorf, 'Deconstructing the Constitution' 40 *Stanford Law Review* 181 (1987).

6 See, P. de Man, *Allegories of Reading* 246-277 (1979).

7 J.J. Rousseau, *The Social Contract* [*and Discourses*] Book 2, ch. 6 (transl. G.D.H. Cole, and revised by J.H. Brumfitt and J.C. Hall, 1986).

8 *Allegories*, *supra*, note 6, at 267.

9 *Id.* at 266.

10 See, *id.* at 267-269.

11 *Id.* at 268.

12 See, 1.3, the text accompanying notes 34-36.

13 See, for a collection of writings composed between 1916 and 1939 by the prolific Swedish philosopher who has been the inspiration behind the Scandinavian legal realism, A. Hägerström, *Inquiries Into the Nature of Law and Morals* (ed. K. Olivecrona, transl. C.D. Broad, 1953). A hyperbolic statement of the Hägerströmian concept on the metaphysical foundations of legal terminology is to be found in A.V. Lundstedt, *Legal Thinking Revised* (1956). A milder approach on the issue is adopted in K. Olivecrona, *Law as Fact* (1971), where the designation 'Scandinavian Realism' is explained as follows: 'The term 'Scandinavian Realism' applies to a group of authors who have all been strongly influenced by Axel Hägerström. In many ways their views are divergent; but for all of them Hägerström's critical examination of legal concepts has been of decisive importance' (*id.* at 174). Although likewise indebted to Hägerström's work, I aim to show later in the text the somewhat distinct stance of the critical enterprise by A. Ross, *Towards a Realistic Jurisprudence: A Criticism of the Dualism in Law* (transl. A.I. Fausboll, 1946); A. Ross, 'Tû-Tû' 70 *Harvard Law Review* 812 (1957); A. Ross, *On Law and Justice* (transl. M. Dutton, 1958); A. Ross, Reviewing 'The Concept of Law' by Hart, 71 *Yale Law Journal* 1185 (1962); and A. Ross, *Directives and Norms* (1968).

14 See, *Allegories, supra*, note 6, at 266.

15 *Id.* at 270.

16 See, for a typical expression of the concept of discrepancy, the essay Llewellyn and Frank wrote together, 'Some Realism About Realism' [1931] in

Jurisprudence, *supra*, note 3, at 42-76, where 'recognition of change in society' is listed on the top of the elements that form a 'common core' for otherwise diverse views of realism. The change in society, accordingly, 'may call for change in law' (*id.* at 68).

17 The realist foundation is succinctly expressed in Taylor's statement, 'No actual meaning can be given to the idea of an *illegal* judicial decision.' R. Taylor, 'Law and Morality' 43 *New York University Law Review* 611, 627 (1968) (emphasis in original). 'It is merely empty words,' Ross points out the realist rationale, 'if legal writers insist on upholding a rule as 'valid law,' admitting that practice 'wrongly' follows a different rule.' A dichotomy of validity and practice is a contradiction in terms. *On Law*, *supra*, note 13, at 50 (footnote omitted). *Cf.* the concept of silly judgement, the freakish, discussed in, the present study, 2.3.

18 R. Saleilles, 'Preface' [1899] to F. Gény, *Method of Interpretation and Sources of Private Positive Law: Critical Essay* [1899] LXXVII (transl. J. Mayda, 1963); see, for the previous reference, 2.1, the text accompanying notes 1-3.

19 'Preface,' *supra*, note 18, at LXXVII.

20 *Id.* at LXXVII - LXXX.

21 *Id.* at LXXVIII.

22 *Id.* at LXXVII (emphasis added).

23 *Method* [the Second Edition, 1919], *supra*, note 18, par. 202 (footnote omitted).

24 *Id.* par. 33. See, for a recent equation of formalism and subjectivism, F.J. Mootz, III, 'The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur' 68 *Boston University Law Review* 523 (1988). Mootz objects to Fish for minimizing the extent of possible subjectivism in decision-making and suggests a frankness of rhetoric regarding the actual process as the only true deterrent against judicial partisanships. 'To ensure that judges are constrained by the text's meaning,' he writes, 'the legal system should require judges to justify their decisions explicitly with reference to their actual hermeneutical activity rather than masking the reality of their decision with an abstract formalism' (*id.* at 554). See, Fish on judicial bias, 2.3, the text accompanying note 176.

25 *Method*, *supra*, note 18, par. 33.

26 *Id.*

27 *Id.* (emphasis in original).

28 *Id.*

29 *Id.*

30 See, 2.2, the text accompanying notes 19-20, 49-50, and 136-138.

31 See, *Method, supra*, note 18, par. 97.

32 *Id.* par. 33.

33 See, J. Mayda, *François Gény and Modern Jurisprudence* 31 (1978).

34 Cited in E. Ehrlich, 'Judicial Freedom of Decision: Its Principles and Objects' in *The Science of Legal Method* 47, 68 (transl. E. Bruncken, 1969).

35 *Id.*

36 *Bramble Bush, supra*, note 3, at 159 (emphasis in original).

37 See, 2.2, note 12 and the accompanying text.

38 T. Hobbes, *Leviathan* Part IV, ch. 46 (1940).

39 *Common Law, supra*, note 1, at 37-38 (emphasis in original). But see, the early Llewellyn on the dichotomy between government by laws and government by men, *Jurisprudence, supra*, note 3, at 62: 'All that has become clear is that our government is not a government of laws, but one of law through men.'

40 See, 2.1, the text accompanying note 75 *et seq.*

41 *Jurisprudence, supra*, note 3, at 70 (emphasis in original).

42 *Supra*, note 39.

43 *Method, supra*, note 18, par. 156.

44 See, for the Savignean notion of *Volksgeist* as the sole basis, or, as he puts it, the 'seat,' of law; in other words, law as a concept *in history,* in contradistinction to its formalistic considerations, F.C. von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (transl. A. Hayward, 1975) (the 'seat of law' at 28). See, for a brief, but authoritative account of Savigny's work, times, and achievements, H. Kantorowicz, 'Savigny and the Historical School' 53 *Law Quarterly Review* 326 (1937). See also, M. Franklin, 'Legal Method in the Philosophies of Hegel and Savigny' 44 *Tulane Law Review* 766 (1970).

45 *Method, supra*, note 18, par. 97. '[I]t is obvious that all this [suggested by the Free Law writers],' remarks a Jena professor in weighing the ideas to import the common law concept of judge to supplement the German civil law system, 'is but the preaching of a new law of nature which, like the old one, has no ultimate foundation but subjective whim.' H.B. Gerland, 'The Operation of Judicial Function in English Law' in *The Science of Legal Method* 229, 232 (transl. E. Bruncken, 1969). The idea that the Free Law school suggests a 'subjective' notion of law, thus jeopardizing legal continuity and confidence, is part of the canon of the Turkish jurists. M.K. Oguzman, *Medeni Hukuk Dersleri: Giris, Kaynaklar, Temel Kavramlar* [Course in Private Positive Law:

Introduction, Sources, Fundamental Notions] 42 (1971); S.S. Tekinay, *Medeni Hukuka Giris Dersleri* [Introductory Course in Private Positive Law] 54 (1978); and S. Edis, *Medeni Hukuka Giris ve Baslangiç Hükümleri* [An Introduction to Private Positive Law and Commentary upon the Preliminary Provisions of the Civil Code] 100 (1979).

46 *Supra*, note 39.

47 Ehrlich answers the question how justice is to be administered in the absence of formal guidelines without at once dispensing with a notion of certainty by arguing that practice has rules of its own. '[I]n every period of time,' he writes, 'there has existed a justice not hedged about by code sections. Such justice, however, is by no means arbitrary.' *Judicial Freedom*, *supra*, note 34, at 71. The 'judicial tradition,' he points out, provides practice with principles whose observance by the judge is not a matter of choice (*id.*). 'Free decision [Freie Rechtsfindung],' therefore, he adds, 'is conservative, as every kind of freedom is...' (*id.* at 72). 'In reality life creates primarily its own rules,' he elucidates the idea of a non-formal notion of law. 'How small is the influence of the law of family, as formulated in rules, on the actual conduct of family life; how different the interpretation and execution of contracts in actual business from the interpretation by the courts in the few cases in which a decision passes upon them!' (*id.* at 80).

48 *Method*, *supra*, note 18, par. 97. In the Second Edition (1919) of the *Method*, Gény chronicles in detail the rise and the fall of what he relates as a historical school inspired 'tendency' in the First Edition, namely the German-Austrian movement of Free Law (*freies Recht, freie Rechtsfindung,* or *freie Rechtswissenschaft*), pars. 205-222. 'All the manifold effort of the German Scholars,' Gény ends his account of the already stagnant movement, 'has not even equalled the so simple and yet complete formula of Art. 1 of the Swiss Civil Code' (*id.* par. 222).

49 *Id.* par. 156 (footnotes omitted, emphasis in original).

50 *Id.* par. 168 (footnote omitted).

51 *Id.*

52 *Id.* par. 162.

53 *Id.*

54 *Id.* par. 161.

55 Cited *id.*, n. 297.

56 *Id.* par. 161 (footnotes omitted).

57 *Id.* par. 162 (emphasis in original).

58 *Id.* par 161 (footnote omitted, emphasis in original).

59 See, 1.

60 See, 1.4, the text accompanying notes 43 and 67.

61 See, 1.4, the text accompanying note 36.

62 See, 1.1, the text accompanying notes 49-51.

63 *Lochner, supra*, note 4, at 76.

64 *Method, supra*, note 18, par. 163.

65 *Id.*

66 See, for instance, *François Gény, supra*, note 33, at 17. Mayda regards Gény's attitude regarding the concept of hunch as 'uncommitted and aloof' in the Second Edition (1919). The author provides a short, but useful, account of the concept in the early realist thinking (*id.* at 143-145). See, for two early, classic essays in the Anglo-American environment, T. Schroeder, 'The Psychologic Study of Judicial Opinions' 6 *California Law Review* 89 (1918) ('the written opinion is little more than a special plea made in defense of impulses which are largely unconscious,' at 95); and J.C. Hutcheson, 'The Judgement Intuitive: The Function of 'Hunch' in Judicial Process' 14 *Cornell Law Quarterly* 274 (1929) (by a federal district judge, 'hunching,' as opposed to 'judging,' as the true mechanism behind the decision). Frank considers the judge's hunch to be 'the key to the judicial process.' *Modern Mind, supra*, note 3, at 112. 'Judicial judgements, like other judgements, doubtless, in most cases, are worked out backward from conclusions tentatively formulated' (*id.* at 109). See, for Llewellyn's anecdote of the 'trifling,' the 'silly,' and the 'unworthy' in decision-making, *Common Law, supra*, note 1 at 264-265. Cohen, on the other hand, dismisses the concept of hunch for 'magnifying the personal' and obscuring the 'social determinants' behind the decision. *Legal Conscience, supra*, note 3, at 70.

67 See, 1.4, the text accompanying notes 7-9.

68 See, *Method, supra*, note 18, par. 219.

69 *Common Law, supra*, note 1, at 60-61 (emphasis in original).

70 *Courts on Trial, supra*, note 3, at 2.

71 '[T]heory has no consequences.' S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 14 (1989). See, for Fish's work, 2.3.

72 F. Gény, *Science et technique en droit privé positif* Vol. 1, at 14 f. (1914 - 1924); cited in *François Gény, supra*, note 33, at 124.

73 See, the text accompanying, *supra*, note 41.

74 See, *Common Law, supra*, note 1, at 41.

75 *Id.* at 186 (emphasis in original).

76 *Id.* at 374.

77 *Id. at 373.*

78 '[O]ne of the more obvious and obstinate facts about human beings,' writes Llewellyn, 'is that they operate in and respond to traditions, and especially to such traditions as are offered to them by the crafts they follow. Tradition grips them, shapes them, limits them, guides them...' (*id.* at 53). He contrasts the craft of an institution with its formal rules, and notes that 'the rules not only fail to tell the full tale, taken literally they tell much of it wrong,' while the craft moulds the attitudes and appeals to the feelings that handle the rules in the first place. 'Now appellate judging is a distinct and (along with spokesmanship) a central craft of the law side of the great-institution of Law-Government. Every aspect of the work and of the man at work is informed and infiltrated by the craft' (*id.* at 214). Llewellyn equates steady outcomes in appellate cases with 'depersonized' judges (*id.* at 51). The steadying factors he lists ensure the precedence of the craft over the man and thus secure continuity (*id.* at 16-49).

79 *Id.* at 41.

80 *Id.* at 132.

81 *Id.* at 189.

82 *Id.* at 129.

83 *Bramble Bush, supra*, note 3, at 157.

84 *Jurisprudence, supra*, note 3, at 56 (emphasis in original).

85 The closest Llewellyn comes to address the realist predicament in its rule-formalism is an apology, not for the formalism on the realist part, nor for the fact that realism leaves unaccounted for a minimal rule-formalism its rhetoric consistently retains, but, *on the contrary*, for the fact that the formalism invoked by the theory, namely law as a system of rules, is not realized *fully* and *in each instance*. See, *Common Law, supra*, note 1, at 191. Is it not demeaning for the institution that its practice should not always overlap with its theory? 'This is a problem,' justifies Llewellyn, 'faced by every institution, not merely nor in any special manner by the appellate courts or by Law-Government at large. It is a problem to which there is no easy answer' (*id.* at 192).

86 *Jurisprudence, supra*, note 3, at 70 (footnote omitted).

87 In formulating the difficulty, in common law systems, of locating the rule, 'we cannot interpret,' notes Schauer, 'what we cannot find.' *Playing by the Rules, supra*, note 5, at 209. The idea that (a) the rule, (b) the interpreter, and (c) interpretation are distinct elements constitutive of what we know as the

interpretation of the law typifies the realist affirmation of the mechanistic concept of rule-reading. See, for Schauer's reproduction of the realist argument on the generality of rules, *supra*, note 5.

88 *Cf.* 2.3, the text accompanying notes 189-193.

89 See, 1.2, the text accompanying notes 18-19.

90 *Common Law, supra*, note 1, at 529.

91 Rodell claims the poverty of rules not only for appellate cases, but generally. See, *Woe Unto You, supra*, note 3, ch. 7. '[S]ince no *two* cases ever fall 'naturally' into the same category so that they can be automatically subjected to the same rules of Law, the notion that twenty or thirty or a hundred cases can gather themselves, unshoved, under the wing of one 'controlling' principle is nothing short of absurd' (*id.* at 119). *Cf.* '[T]he law in any particular case is not the written enactment, in case such exists, and not the common law, and certainly not some unwritten natural law, but precisely the judicial decision itself.' 'Law and Morality,' *supra*, note 17, at 627.

92 See, *supra*, note 78.

93 *Id.*

94 *Common Law, supra*, note 1, at 217.

95 K.N. Llewellyn and E.A. Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* [1941] (1967).

96 *Id.* at 334.

97 See, 1.2. *Cf.* Nietzsche on the pagan as the natural, and the 'Christian' evasion, *id.*, note 39.

98 *Cheyenne Way, supra*, note 95, at 311.

99 *Id.* at 311-312.

100 *Id.* at 312.

101 See, 2.2, the text accompanying notes 8-18.

102 Section 1-102 (2) of the 1952 text; the other two purposes (paragraphs *a* and *b* in the same section) are designated as ensuring flexibility and uniformity of practice; cited in *Karl Llewellyn, supra*, note 3, at 303. The author notes that the words I quote above in the text are Llewellyn's (the official text of 1962 varies) (*id.* at 464, n.2).

103 *Method* [the Second Edition, 1919], *supra* note 18, par. 204. See, on the subject of the exchange of ideas between Gény and the principal architect of the Swiss Code E. Huber even though the former is not thought to have had a direct influence on the Code, *François Gény, supra*, note 33, at 31.

104 See, the text accompanying, *supra*, note 90.

105 Cited in *Karl Llewellyn, supra*, note 3, at 322.

106 Cited in *François Gény, supra*, note 33, at 162.

107 See, *id.* at 31-64.

108 Llewellyn and Frank list in 'Some Realism About Realism' [1931] 'interest in what happens; interest in effects' as constitutive of the 'common core' of diverse positions of realism. *Jurisprudence, supra* note 3, at 68.

109 BGE [Bundesgericht] 74 II 109 [1948], cited in *François Gény, supra*, note 33, at 47.

110 *Id.*

111 *Id.* at 51.

112 *Id.* at 52.

113 *Id.* at 53 (footnote omitted).

114 O.A. Germann, *Probleme und Methoden der Rechtsfindung* 396 (1965); cited in *François Gény, supra*, note 33, at 55.

115 In chronicling the introduction, at the turn of the century, of realist methodology into the readings of the French law, David cites Ballot-Beaupré, the first president of the Court of Cassation, speaking at the centenary celebration of the Civil Code in 1904, who gave his blessing to the newly flourishing realist ideas but who at once 'reassured the traditionalists that nothing would be changed thereby. The Court of Cassation, he was bold enough to say, had always taken account of considerations of public welfare and justice in interpreting French legislation.' R. David, *French Law: Its Structure, Sources, and Methodology* 163-164 (transl. M. Kindred, 1972). *Cf.* Ballot-Beaupré on the legislative will, the present study, 2.2, the text accompanying note 82.

116 See, on the Turkish naturalization of the Swiss Civil Code, H.V. Velidedeoglu, 'The Reception of the Swiss Civil Code in Turkey' 9 *International Social Science Bulletin: The Reception of Foreign Law in Turkey* 60 (1957); Ebulula [Mardin] and A. Samin, 'Le passage des anciennes sources aux nouvelles sources en droit privé turc' in *Recueil d'études sur les sources du droit en l'honneur de François Gény* Vol. 1 at 126 (ed. E. Lambert, 1935). The transformation of the Turkish system ('one of the most considerable events that has happened in the history of the East since fourteen centuries') is chronicled by a former judicial adviser to the Ottoman Government in Count L. Ostrorog, *The Angora Reform: Three Lectures Delivered at the Centenary Celebrations of University College on June 27, 28, and 29, 1927* (1927) (the quotation in brackets at 14). An account of the Turkish code law in the second half of the nineteenth century is provided in the essays by two eminent Turkish jurists, Ebulula Mardin and S.S. Onar, in

M. Khadduri and H.J. Liebesny (eds), *Law in the Middle East* Vol. 1 (Origin and Development of Islamic Law) at 279 and 292 (1955). See, for a vivid picture of the court room practices of first instance judges in Turkey with a brief account of discretionary and interpretative techniques, especially within the meaning of the Art. 1 of the Civil Code, J. Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice* ch.7 (1992).

117 *Ijtihâd,* namely the individual opinion of the jurist, follows the two formal sources of the law, the text (*Qur'ân*) and the tradition (*Sunnah*) (*cf.* the Swiss Civil Code Article 1, the text accompanying, *supra*, note 106). See, for the celebrated dialogue on individual opinion as the *third* source of the law between the Prophet of Islam and Mu'âdh b. Jabal whom he sends to Yemen to deliver justice, Abû Dâwud, *Sunan* Vol. 3, at 109 [*hadîth* no. 1038] (transl. A. Hasan, 1984). *Cf.* Umar, the second caliph, in a letter to Abû Mûsa al-Ash'ari at the appointment of the latter as a judge in Kûfah: 'Use your own individual judgement about matters that perplex and about which neither an answer is found in the Qur'ân and the Sunnah.' Cited in A.R.I. Doi, *Shari'ah: The Islamic Law* 14 (1984). Not to hold back from exercising individual opinion for fear of getting it 'wrong,' jurists receive the ultimate assurance from the Prophet. 'When a judge gives a decision having tried his best to decide correctly and is right [the term in the original is *ijtihâd*; thus, not literally translated: 'when a judge exercises *ijtihâd* and is right...'], there are two rewards for him; and if he gave a judgement after having tried his best but erred, there is one reward for him.' Imam Muslim, *Sahîh Muslim* Vol. 3, at 930 [*hadîth* no. 4261] (transl. A.H. Siddîqî, 1982). Difference of opinion (*ikhtilâf*) between jurists is considered in the tradition of the Prophet not to be a deficiency on the part of the system but a blessing (*rahmah*). *Ijtihâd* may mean in certain contexts mere interpretation on a strictly formal (textual) basis (when, notably, jurists disagree on the meaning of the particular textual or textual-traditional evidence); the standard Islamic terms for interpretation in the European sense, however, are *tafsîr* (reading that emphasizes literal-genealogical aspects) and *ta'wîl* (emphasizes purposive-contemporary aspects). *Ijtihâd* as formulated in the Mu'âdh b. Jabal *hadîth* seems more to be an *informal* source of the law in a sense that is perhaps closer to the concept of *libre recherche* within the meaning of European jurisprudence (the 'absolute justice' that is the 'direction' of the search in Gény's formulation — for it is not a free-floating search —, in that case, corresponds to the *Islamic rationality* which guides the jurist in his *ijtihâd; cf.* the text accompanying, *supra*, notes 52-58). An inspired study of the *usûl al-fiqh* in English is M.H. Kamali,

Principles of Islamic Jurisprudence (1991), of which chapters 3 and 4 provide an authoritative analysis of the concept of interpretation, chapter 8 is on analogical deduction (*qiyâs*), and chapter 19 on *ijtihâd*. A concise work on the developoment of Islamic law is N.J. Coulson, *A History of Islamic Law* (1991). See also, on *ijtihâd*, B. Weiss, 'Interpretation in Islamic Law: The Theory of *Ijtihâd*' 26 *American Journal of Comparative Law Review* 199 (1978).

118 That the institution of *ijtihâd* backs the image of the judge the Civil Code presents, however, does not mean that the Turkish rhetoric is keen to dispense with the ease of approach a *liberal* interpretation of the law, technically called an objective-contemporary method, as opposed to an intentionalist method along the Génian lines, seems to bring about. According to the majority opinion, once made, laws must be considered to have a life independently of their genealogy. Interpretation, therefore, should be pursued on the basis of the contemporary circumstances. The dynamism thereby ensured, by that account, is indispensable for the soundness and the good life of the law. A.B. Schwarz, *Medeni Hukuka Giris* [An Introduction to Private Positive Law] 41 (transl. H.V. [Velidedeoglu], 1942); A. Ataay, *Medeni Hukukun Genel Teorisi* [The General Theory of Private Positive Law] 166 (1980); E. Özsunay, *Medeni Hukuka Giris* [An Introduction to Private Positive Law] 202-204 (1970); *Medeni Hukuka Giris* [Tekinay] *supra*, note 45, at 54; and *Medeni Hukuka Giris ve Baslangiç* [Edis], *supra*, note 45, at 124-125. Oguzman, a prominent jurist, however, like Gény, finds the liberal approach demeaning especially when it is tantamount to the evasion of the law in the fashion of the Free Law authors. A total disregard of the genealogy of the statue, according to him, is incompatible with the very notion of a statute. Instead of the *contra legem* approach that seems to be at work in some cases when the objective-contemporary method is employed, Oguzman suggests that the interpreter avoid the rule at issue altogether on the grounds that its application in the specific case runs counter to the 'good faith' provision of the Code (Art. 2). In this respect Oguzman's thinking seems akin to that of Gény, even though no *practical* difference is suggested between the objective-contemporary and the historical (Génian) methods of reading in the particular case. *Medeni Hukuk Dersleri* [Oguzman], *supra*, note 45, at 46.

119 *Jurisprudence, supra*, note 3, at 42.

120 See, the text accompanying, *supra*, note 39.

121 *Jurisprudence, supra*, note 3, at 62.

122 See, for an evaluation of Frank's work, *The Legal Realism of Jerome N.*

Frank, supra, note 3.

123 *Modern Mind, supra*, note 3, at xiv.

124 *Courts on Trial, supra*, note 3, at 15-16.

125 *Modern Mind, supra*, note 3, at xiv.

126 *Courts on Trial, supra*, note 3, at 50. *Cf.* Llewellyn's concept of certainty in *Common Law, supra*, note 1, ensured 'by dynamics, moving in step with human need yet along and out of the lines laid out by history of the law and of the culture' (*id.* at 186). The certainty thus attained, he elucidates, is 'not of logical conclusion from a static *universal*, but of that *reasonable regularity* which is law's proper interplay with life' (*id.*, emphasis in original). *Cf.* the text accompanying, *supra*, note 39.

127 J.N. Frank, "Short of Sickness and Death': A Study of Moral Responsibility in Legal Criticism' 26 *New York University Law Review* 545, 582 (1951). *Cf.* '[T]here is little reason to fear that a judge, relying on his own deliberate reflections and the call of his own conscience, will apply erratic, capricious, or idiosyncratic moral standards. Our judges are products of our society, and... they will generally think along with the beliefs of some substantial segment of the citizenry. A man who uses a moral standard that no one shares in a population of 150 million probably does not belong at large, much less on the bench.' E.N. Cahn, 'Authority and Responsibility' 51 *Columbia Law Review* 838, 850 (1951). *Cf.* Aristotle on those free of the association of the *polis*, the present study, 1.3, the text accompanying notes 67-69. *Cf.* also, on the matter of the artist as a judge, 2.3, the text accompanying notes 165-167.

128 *Legal Conscience, supra*, note 3, at 70. *Cf.* 'Short of Sickness,' *supra*, note 127, at 582: 'Here [see, the text accompanying, *supra*, note 127] is a kind of rampant subjectivity ignored by legal thinkers (like Cohen) who minimize the difficulties of legal criticism and of prediction of decisions. These thinkers overlook the distinction between (1) the more or less 'objective' (uniform) character of the norms embodied in the legal rules (whether 'paper' or 'real' rules) and, (2) the 'subjective' character of the trial judges' or juries' responses to conflicting oral testimony. Why? Because those thinkers are thinking of cases in upper courts where the 'facts' are ordinarily those 'found' by the trial courts.'

129 *Legal Conscience, supra*, note 3, at 70.

130 *Id.* at 48.

131 *Jurisprudence, supra*, note 3, at 73.

132 *Id.* at 55-56 (emphasis in original).

133 *Id.* at 68-69.

134 *Legal Conscience, supra*, note 3, at 45.

135 *Id.* at 46 (emphasis in original).

136 *Tauza v Susquehanna Coal Company*, 220 N.Y. 259, 115 N.E. 915 (1917); *Legal Conscience, supra*, note 3, at 34.

137 *Bank of America v Whitney Central National Bank*, 261 U.S. 171 (1923); *Legal Conscience, supra*, note 3, at 36.

138 *Id.* at 35.

139 See, 2.3, the text accompanying notes 128-132.

140 See, for the scientific reality as *exemplary*, rather than pictorial, reality, T.S. Kuhn, *The Structure of Scientific Revolutions* (1970). Kuhn's view of science is akin to the view of mathematics advocated by both Heidegger and Wittgenstein. 'Modern physics is called mathematical,' notes Heidegger in a lecture delivered in the thirties, 'because it distinctively applies a very definite mathematics. But it can proceed mathematically in this way only because it is in a deeper sense already mathematical. *Ta mathemata* means for the Greeks that which man knows prior to his observation of the existent and his acquaintance with things... If we find three apples on the table, we recognize that there are three of them. But the number three, threeness, we know already.' M. Heidegger, 'The Age of the World View' in *Martin Heidegger and the Question of Literature: Toward a Postmodern Literary Hermeneutics* 1 (ed. W.V. Spanos, transl. M. Grene, 1979). Wittgenstein has basically the same paradigmatic, or forestructured, quality in mind when he, at about the same time (1939), opposes mathematical *invention* to mathematical *discovery*. 'I shall try again and again,' he sets the aim for his lectures on mathematics, 'to show that what is called a mathematical discovery had much better be called a mathematical invention.' L. Wittgenstein, *Lectures on the Foundations of Mathematics* 22 (ed. C. Diamond, 1976). (*Cf.* language-games as 'objects of comparison,' L. Wittgenstein, *Philosophical Investigations* pars. 130 and 131 [transl. G.E.M. Anscombe, 1988].) One single paragraph in the seminal lecture by Heidegger, in fact, encapsulates the entire message of Kuhn's much discussed project for a paradigmatic view of science: 'When we use the word science today, it means something which differs essentially from the *doctrina* and *scientia* of the Middle Ages, but also from the Greek *episteme*. Greek science was never exact — precisely for the reason that it could not by its nature be exact and did not need to be exact. There is therefore no sense whatever in supposing that modern science is more exact than that of antiquity. Nor can we say that Galileo's doctrine of freely falling bodies is true, and that Aristotle, who teaches that light bodies strive upward, is wrong;

for the Greek conception of the nature of body and place and their relation to one another rests on a different explanation of the existent, and therefore requires a correspondingly different kind of viewing and questioning of natural processes. No one would think of maintaining that Shakespeare's poetry is more advanced that that of Aeschylus. But it is even more impossible to say that the modern apprehension of the existent is more correct than the Greek. Thus if we want to understand the essence of modern science, we just first of all free ourselves of the habit of contrasting the newer science with the older simply by applying the standard of gradual progress.' 'The Age of the World View,' *supra*, at 2-3. *Cf.* Popper on theory-choice in science; 'scientific revolutions are rational in the sense that, in principle, it is rationally decidable whether or not a new theory is better than its predecessor,' K. Popper, 'The Rationality of Scientific Revolutions' in *Scientific Revolutions* 80, 95 (ed. I. Hacking, 1987).

141 *Legal Conscience, supra*, note 3, at 52.

142. *Id.* at 48.

143 See, for the realist debts to the pragmatism of James and Dewey, *American Legal Realism, supra*, note 3, at 4-8. An assessment of the influence of Peirce's pragmatism on realism is to be found in R. Kevelson, *The Law as a System of Signs* esp. ch. 17 (1988).

144 *Legal Conscience, supra*, note 3, at 52.

145 See, L. Wittgenstein, *Tractatus Logico-Philosophicus* pars. 6.13, 6.421, 6.432, and 6.522 (transl. D.F. Pears and B. McGuinness, 1988).

146 From a letter by Wittgenstein to L. von Ficker: 'The book's point is an ethical one. I once meant to include in the preface a sentence which is not in fact there now but which I will write our for you here, because it will perhaps be a key to the work for you. What I meant to write, then, was this: My work consists of two parts: the one presented here plus all that I have *not* written. And it is precisely this second part that is the important one.' Quoted in P. Engelmann, *Letters from Ludwig Wittgenstein, with a Memoir* 143-144 (1967).

147 *Legal Conscience, supra*, note 3, at 46.

148 *Id.* at 68.

149 See, the text accompanying, *supra*, note 135.

150 See, the text accompanying, *supra*, notes 131-133. *Cf.* Taylor on the realistic distinction of law and morality. 'Laws... are one thing, morals another, and nothing but confusion results from mixing the two.' 'Law and Morality,' *supra*, note 17, at 611.

151 *Legal Conscience, supra*, note 3, at 68. *Cf.* '[The appellate judge] is a human being, and... a lawyer. He [nevertheless] shows one sharp difference from the lawyer in practice. The practising lawyer's drive is to find and take a side, and at once, to see for, to see with, to see from. This drive the appellate judge must resist, and he does.' Llewellyn, *Common Law, supra*, note 1, at 118-119. *Cf.* Fish on the concept of side-taking by the judge, the present study, 2.3, the text accompanying note 176.

152 See, *supra*, note 13.

153 *Inquiries, supra*, note 13, at 48.

154 A. Hägerström, *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung*, Vol. 1, ch. 1 (1927); printed in English translation in *Inquiries, supra*, note 13, ch.1.

155 See, 2.2, the text accompanying notes 148-151.

156 *Inquiries, supra*, note 13, at 3-8.

157 *Id.* at 4.

158 *Id.* at 8 (emphasis added). *Cf.* 'There are, indeed, things that cannot be put into words. They *make themselves manifest.* They are what is mystical.' *Tractatus, supra*, note 145, par. 6.522 (emphasis in original). See, *supra,* notes 145 and 146.

159 *Inquiries, supra,* note 13, at 16.

160 *Id.*

161 *Legal Thinking*, supra, note 13, at 16.

162 *Id.* at 16-17.

163 *Id.* at 17.

164 *Id.* at 44-47.

165 *Id.* at 45 (emphasis in original).

166 *Id.* at 49-53.

167 *Id.* at 46-47.

168 *Id.* at 49-53.

169 *Id.* at 49.

170 See, *Law as Fact, supra*, note 13, ch. 8.

171 See, the text accompanying, *supra*, notes 141-146.

172 See, for a succinct statement of the Austenean duality, J.L. Austin, 'Performative-Constative' in *The Philosophy of Language* 13 (ed. J.R. Searle, transl. G.J. Warnock [from a paper written by Austin in French], 1979). '[I]t seems to me,' states Austin, indicating the need for contextual support not only on the side of performatives but also on the side of constatives, 'that the constative utterance is every bit as liable to unhappiness as the performative

utterances, and indeed to pretty much the same unhappiness' (*id.* at 19) — 'there is no purely verbal criterion by which to distinguish the performative from the constative utterance' (*id.* at 20). He concludes: 'What we need, perhaps, is a more general theory of these speech-acts, and in this theory our Constative-Performative antithesis will scarcely survive' (*id.*). The transfigurative tension between the terms of the duality permeates his entire venture, in the lecture notes, to establish and test possible criteria for a distinction between the two, J.L. Austin, *How to Do Things with Words* 55 *et seq.* (eds. J.O. Urmson and M. Sbisà, 1989). *Cf.* Derrida on the Austenean intentionalism, the present study, 1.4, the text accompanying notes 41-44; and 2.2, the text accompanying notes 51-58.

173 *Law as Fact, supra*, note 13, at 252.

174 *Id.*

175 *Id.* at 253.

176 *How to Do with Words, supra*, note 172, at 85.

177 *Cf.* Wittgenstein on training as prerequisite of sign-reading, the text accompanying, *infra*, notes 221-224.

178 *Cf. Philosophical Investigations, supra*, note 140, par. 257, 'a great deal of stage-setting in the language is presupposed [even for] the mere act of naming... to make sense.'

179 See, on logical positivism, 1.2, note 35.

180 *Law as Fact, supra*, note 13, at 184.

181 See, *Philosophical Investigations, supra*, note 140, par. 38.

182 *Law as Fact, supra*, note 13, at 76.

183 *Id.* at 180.

184 *Id.*

185 *Id.* at 181.

186 *Id.* at 181-182.

187 See, the text accompanying, *supra*, note 175.

188 *Law as Fact, supra*, note 13, at 193.

189 I see no reason to linger upon many points of problem with Olivecrona's stance. He reasons at one point, for instance, that the word 'right' may refer to 'relationships' after all, even though not to determinate entities; then he adds, 'this will be a relationship of a suprasensible kind,' as opposed to an 'actual relationship' (*id.* at 183).

190 *Id.* at 215.

191 See, the text accompanying, *supra*, note 182.

192 *Law as Fact, supra*, note 13, at 215.

193 See, for Ross' writings in English, *supra*, note 13.

194 An ambiguity regarding Ross' own work in this respect ought to be noted. In *Law and Justice, supra*, note 13, he makes verifiability a condition of validity for propositions both *on* and *of* law. Verifiability is introduced as 'a principle of modern empirical science that a proposition about reality (in contrast to an analytical, logical-mathematical proposition) must imply that by following a certain mode of procedure, under certain conditions certain direct experiences will result' (*id.* at 39). Accordingly, a proposition that lacks 'real content,' or 'verifiable implications,' will be deemed to be devoid of 'logical meaning' (*id.* at 40). He states: 'The interpretation of the doctrinal study of law presented in this book rests upon the postulate that the principle of verification must apply also to this field of cognition — that the doctrinal study of law must be recognized as an empirical social science' (*id.*). Propositions *on* law, he points out, have as their references 'the actions of the courts under certain conditions' (*id.*). The verifiability of rules, on the other hand, signifies the predictable validity of the particular rule under certain conditions in future (*id.* at 42). The predictability required, Ross elucidates, is merely 'a greater or lesser degree of probability depending on the strength of the points on which the calculations about the future rest' (*id.* at 45). In *Directives and Norms, supra*, note 13, special care is taken to refer to the logical positivism of the Vienna Circle (see, for the project of the Vienna Circle, the present study, 1.2, note 35). Even though dissent is expressed regarding the Circle's declaration of sentences without empirical content meaningless, 'since sentences of this kind do undoubtedly have a role in communication,' its basic contention, namely the invalidity of metaphysical propositions in the sphere of science, is concurred with. 'It remains an open question whether such [metaphysical] utterances, despite their fundamental untestability may possess not only emotive but also descriptive meaning. I shall not discuss this problem' (*id.* at 15). Although his verificationism is obviously at odds with that of logical positivism which he invokes, detectable particularly (a) in its mystifying 'contrast' to 'analytical, logical-mathematical' verifiability, and (b) in its reservations about a non-grammatical dichotomy of the emotive and the descriptive, it is not mere accident that Ross too, like Cohen, Hägerström, and Olivecrona above in the text, should eventually profess some sort of verificationism. The difference between the two positions Ross therefore alternates is roughly that of the early work by Wittgenstein to his later work. The frame of reference which the traditional dichotomy between positivism and antipositivism provides is hardly more than sterile. A 'subtle kind of

positivism' that is attributable to Wittgenstein's later work, as opposed to the *crude* positivism of the *Tractatus*, however, holds the key to the problem of the loose frontier between the two positions (the expression in inverted commas is Pears' in D. Pears, *Ludwig Wittgenstein* 184 [1970]). The difference between the two projects, in this respect, is truly paradoxical, for, though a wild one as many would agree, it could not at once be subtler. Slipping from one position into the other, and then perhaps back, is therefore not only possible, but happens very often. In his very later work Wittgenstein himself, in my opinion, does that not infrequently. On many occasions as he tends to reject the 'abuses' of grammar, what he in fact does is simply to disregard *another layer of grammar* the particular statement hinges on. He often issues rejections of linguistic uses almost with the assumption of a *transcendental category* where all those refuse uses may be deposited — a presupposition his work otherwise repudiates. As I have already hinted at it above in the text (see, 2.1, my comment on the text accompanying note 83), that may be said to be the case almost in each instance he denies philosophy its own game with language, thus to be understood in its own right — hence the whimsical exclusion of philosophical uses from the ordinary concept of language. In this respect, what is termed verificationism in Ross may even be comparable to Wittgenstein's idea of grammatical continuity in the performances of language. I discuss above in the text Ross' objections to the verificationism advocated by writers such as Duguit, Lundstedt, and Olivecrona. In another context Ross describes the Sophistic emphasis on *common sense* ('the agreement between the perceptions of persons of sound mind,' *cf.* the concept of *phronesis*, the present study, 1.1, the text accompanying notes 18-26) as 'the germ of a theory of verification.' *Law and Justice, supra*, note 13, at 234. That Ross stands uncomfortably with the brand of verificationism advocated by the writers I discuss in the present study is attested also by his stance on a variety of issues. Characteristically, amongst the binary oppositions he dismantles but which are indispensable for a verificationist position are is and ought (*A Realistic Jurisprudence, supra*, note 13, at 113 and 120; *cf.* Llewellyn and Frank on the distinction between is and ought, the present study, the text accompanying, *supra*, notes 131-133); right and might (*Law and Justice, supra*, note 13, at 56-58 and 69; *cf.* Hart on the dichotomy between law's authority and the authority of a gunman, the present study, 2.1, the text accompanying notes 140-143); theory and practice (*Law and Justice*, at 49-50; *cf.* Gény on the enlightened and benighted instances of practice, the present study, the text accompanying, *supra*, notes 71-73);

reading and passionate reading (*A Realistic Jurisprudence*, at 149-150; *Law and Justice*, at 118; *cf.* Cohen and Llewellyn on the dispensability of passion, the present study, *supra*, note 151 and the accompanying text); and finally persuasion and truth (*Law and Justice*, at 326; *cf.* Dworkin on the distinction between the persuasive and the right, the present study, 2.3, the text accompanying notes 188-197).

195 *Law and Justice, supra*, note 13, at 113, n.2.

196 *Id.*

197 *Id.* at 114.

198 *Id.* (the footnote omitted refers to the note accompanying, *supra*, note 195).

199 Ross refers to L. Duguit, *Traité de droit constitutionnel* Vol. 1 (1927).

200 *Law and Justice, supra*, note 13, at 187.

201 See, L. Wittgenstein, *The Blue and Brown Books* 36 (1989).

202 *Law and Justice, supra*, note 13, at 186. See, for a demonstration how 'the tû-tû pronouncements have semantic reference although the word is meaningless,' 'Tû-Tû,' *supra*, note 13.

203 *Law and Justice, supra,* note 13, at 187.

204 *A Realistic Jurisprudence, supra*, note 13, at 73.

205 *Id.*

206 See, the text accompanying, *supra*, notes 84-85 and 91. *Cf.* Llewellyn on rule-formalism, *supra*, note 85. *Cf. A Realistic Jurisprudence, supra*, note 13, at 68-71. Duncan Kennedy states, in the face of the claims, by some of the critical legal studies writers, of general *indeterminacy* in rule-following (a view based supposedly on the formulations by Wittgenstein and Derrida, a misconception Kennedy himself shares): 'My experience with legal argument doesn't allow me to meet your jurisprudential position on its own ground.' The rule which Kennedy tests the indeterminacy thesis against and which eventually fails the thesis is one that pronounces: 'the workers can't interfere with the owner's use of the means of production during a strike.' D. Kennedy, 'Toward a Critical Phenomenology of Judging' in *The Rule of Law: Ideal or Ideology* 141, 164 (eds. A.C. Hutchinson and P. Monahan, 1987).

207 *Id.* at 77 (emphasis added).

208 *Law and Justice, supra*, note 13, at 73.

209 *Id.* at 74.

210 See, for a much discussed reading of the notion of rule-following as paradoxical only within the meaning of a picture theory of truth, but not on the basis of an *attached*, 'communitarian,' view of the process, S.A. Kripke, *Wittgenstein on Rules and Private Language* (1989). In repudiating an

interpretation of the notion as an *intrinsic* correspondence between the rule and that which complies with it, and therefore *detached*, Kripke is joined by N. Malcolm, 'Wittgenstein on Language and Rules' 64 *Philosophy* 5 (1989); R. Fogelin, *Wittgenstein* ch.12 (1976); C. Peacocke, 'Rule-Following: The Nature of Wittgenstein's Arguments' in *Wittgenstein: To Follow A Rule* 72 (eds. S.H. Holtzman and C.M. Leich, 1976); and C. Wright, 'Rule-Following, Objectivity, and the Theory of Meaning' *id.* at 99. The counterpole is succinctly expressed in G.P. Baker and P.M.S. Hacker, *Wittgenstein: Rules, Grammar and Necessity* Vol. 2 of An Analytical Commentary on the Philosophical Investigations (1988), where the rule is stated to be '*internally* related to acts which accord with it' (at 171-172, emphasis in original). A polemic by the same authors in refuting the view that rule-following requires fraternal attachments in order to make sense, is to be found in G.P. Baker and P.M.S. Hacker, *Scepticism, Rules and Language* (1984). Another refutation is presented in C. McGinn, *Wittgenstein on Meaning* (1989). The legal implications of the debate are insightfully pointed out in a review of Kripke's book by C.M. Yablon, 'Law and Metaphysics' 96 *Yale Law Journal* 613 (1987). A combination of the communitarian and the correspondence views on the subject is pursued in D.M. Patterson, 'Law's Pragmatism: Law as Practice and Narrative' 76 *Virginia Law Review* 937 (1990). The 'point' of the rule, according to Patterson, is what dictates the response in following it. The point is determined in an *attached* manner, yet it at once forms an internal, *detached*, connection between the rule and the right response. And in a communitarian reading of the Wittgensteinean concept of rule-following, M.J. Radin, 'Reconsidering the Rule of Law' 69 *Boston University Law Review* 781 (1989), the author ventures to test the vigour of the traditional dichotomy between the Rule of Law and the rule of men. Not entirely consistently, however, she at once retains the traditional distinction of theory and practice, one which is at least minimally intrinsic rather than purely mimetic or communitarian.

211 *Philosophical Investigations, supra*, note 140, par. 201.

212 *Law as Fact, supra*, note 13, at 181.

213 *Blue and Brown, supra*, note 201, at 13 (emphasis in original).

214 *Id.*

215 *Id.*

216 *Cf.* 'It is not possible that there should have been only one occasion on which someone obeyed a rule. It is not possible that there should have been only one occasion on which a report was made, an order given or understood; and so

on. — To obey a rule, to make a report, to give an order, to play a game of chess, are *customs* (uses, institutions).' *Philosophical Investigations, supra*, note 140, par. 199.

217 See, the text accompanying, *supra*, notes 3-15.

218 *Allegories, supra*, note 6, at 268.

219 *Philosophical Investigations, supra*, note 140, par. 201.

220 *Id.* (emphasis added).

221 *Id.* par. 198. *Cf.* Olivecrona on legal reading as sign-post reading, the present study, the text accompanying, *supra*, notes 175-177.

222 *Philosophical Investigations, supra*, note 140, par. 198.

223 *Id.*

224 See, *supra*, note 216.

225 *Philosophical Investigations, supra*, note 140.

226 A characteristic expression of the traditional opposition between that which is right by law and that which is right by the interpreter is in Lord Scarman's words in *Duport Steels Ltd. v Sirs*, [1980] 1 All ER 529, at 551; if the judge were to apply his own 'sense of what is right,' accordingly '...confidence in the judicial system [would] be replaced by fear of it becoming uncertain and arbitrary in its application.'

Conclusion: The Same and The Similar

1 See, 2.4, the text accompanying notes 221-226.

2 'If there is no god, then I am a god.'

'I could never understand that particular point of yours: why are you a god?'

'If there is a God, then it is always His will, and I can do nothing against His will. If there isn't, then it is my will, and I am bound to express my self-will.'

'Self-will? And why are you bound?'

'Because all will has become mine. Is there no man on this planet who, having finished with god and believing in his own will, will have enough courage to express his self-will in its most important point?...

'I'm bound to shoot myself, because the most important point of my self-will is to kill myself.' F. Dostoyevsky, *The Devils* 612 (transl. D. Magarshack, 1971).

3 S. Levinson, 'Law as Literature' 60 *Texas Law Review* 373 (1982). 'It is

tempting to paraphrase Dostoyevski by saying that if there is no science, there is no truth, and if there is no truth, then anything is permitted' (*id.* at 388). *Cf. supra*, note 2.

4 'While most CLS [Critical Legal Studies] writers have undoubtedly emphasized the inherent ambiguity of language [just as realists did]... the more coherent CLS position has moved *away* from the tendency of certain Legal Realists to focus on the limitlessness of interpretations of each verbal command.' M. Kelman, *A Guide to Critical Legal Studies* 45 (1987) (emphasis in original). See, for realism, the present study, 2.4; and for critical legal studies, *infra*, note 79.

5 In his comment on Levinson's essay Graff, a literary critic, indicates that 'Levinson actually makes the same mistake committed by those whom he is attacking.' G. Graff, "Keep off the Grass,' 'Drop Dead,' and Other Indeterminacies: A Response to Sanford Levinson' 60 *Texas Law Review* 405, 406 (1982). His rejection of the authority of reading as pursued by individual jurists is to do with his expectations for reading to 'have *the unchallenged authority of divine commandments'* in the first place (*id.* at 410, emphasis added). Some of the views Levinson invokes in his essay, particularly those of 'his mentors, Richard Rorty and Stanley Fish,' according to Graff, are also responsible for the confusion on the part of the essay (*id.* at 413, footnote omitted). 'He supposes either that interpretations have the unchallenged authority of divine commandments, or else that they have *no authority whatsoever except the coercive authority of institutional force'* (*id.* at 410, emphasis added). The *institutional* presumably signifies part of the confusion Levinson owes to Fish. It is dubious, however, that the latter, who quickly disowns Levinson's conclusions in his comment (see, S. Fish, 'Interpretation and the Pluralist Vision' 60 *Texas Law Review* 495 [1982]) would readily go along with an opposition of the divine and the institutional. The idea of the 'unchallenged authority of divine commandments,' namely that the divine is read in ways radically different from the legal (or the literary), curiously, is Graff's. I repeatedly point out in the present study the symbolic significance of references by a variety of writers to (suppress) the divine: to exclude (or distinguish) the divine is to exclude the primordiality of positions of prejudice not only in reading the divine but in reading generally. Graff's notion of the divine seems to reiterate the pattern: catechismic reading is a paradigm merely in reading the commandments of faith. Conversely, assuming Graff were right and law, by its nature, were devoid of a catechismic structure, if reading on the basis of an 'unchallenged authority' is a *possibility* at all (which it *is*,

according to Graff), why should Levinson not seek or expect a similar authority for the reading of law? Graff in fact appeals to a Kirilov-like reasoning exactly the way Levinson, 'whom he is attacking,' does. He not only entertains the dichotomy of the divine and the institutional, which he reads in Levinson's essay and which makes possible in the first place a Kirilov-like shift, but he also clearly seeks and expects an authority for the reading of the law just as Levinson, as he equates with a *semantic apocalypse* the state of reading where 'no authority [other than] the coercive authority of institutional force' exists.

Commenting on Levinson and Fish, G.E. White identifies the crucial question as that of whether or not objectivity is possible. It *is* possible, according to him; yet it does not necessarily contradict a Kuhnian sort of relativism. The view he opposes and which 'leads very rapidly to nihilism' is that 'no answers that do not flow from one's prejudices are ever possible.' G.E. White, 'The Text, Interpretation, and Critical Standards' 60 *Texas Law Review* 569, 579 (1982). Fiss also appeals to a notion of objectivity and at once a Kuhnian emphasis on the *exemplary,* rather than absolute, character of practice. He charges with nihilism, in turn, writers who pursue 'a romance with politics' (his footnote refers to Brest and Levinson) and from whose viewpoint '[i]t is impossible to speak of law with the objectivity required by the idea of justice.' O.M. Fiss, 'Objectivity and Interpretation' 34 *Stanford Law Review* 739, 740, 742 (1982). Brest indicates in a rejoinder that an awareness of the political dimension does not necessarily signify nihilism; 'the line separating law from politics is not all that distinct... its very location is a question of politics,' as indeed the 'interpretive community' Fiss himself invokes for the objectivity of adjudication (see, the text accompanying, *infra*, notes 26-39) will always be a *political* community in terms of the distinctive backgrounds and experiences of its members. P. Brest, 'Interpretation and Interest' 34 *Stanford Law Review* 765, 771-773 (1982). 'The charge of nihilism,' writes an author, who argues with extensive references to Rorty's analysis of traditional philosophy for a concept of adjudication without the traditional notions of determinacy, objectivity, neutrality and certainty, 'is the most superficially plausible — and therefore the most rhetorically powerful — complaint against those of us who maintain that law is a kind of politics.' J.W. Singer, 'The Player and the Cards: Nihilism and Legal Theory' 94 *Yale Law Journal* 1, 6 (1984). His combination of an epistemological nihilism with the Rortian pragmatism is found problematic in J. Stick, 'Can Nihilism Be Pragmatic?' 100 *Harvard Law Review* 332 (1986). See, for an essay on legal

indeterminacy ('Indeterminacy matters because legitimacy matters'), K. Kress, 'Legal Indeterminacy and Legitimacy' in *Legal Hermeneutics: History, Theory, and Practice* 200, 203 (ed. G. Leyh, 1992). The author distinguishes between 'moderate' and 'radical' statements of indeterminacy; while moderate indeterminacy can be maintained, its consequences for legitimacy are negligible. The lack of faith in law and its institutions is argued to be a good reason to consider disassociating from its academic teaching in P. Carrington, 'Of Law and the River' 34 *Journal of Legal Education* 222 (1984). Responses to this essay are to be found in "Of Law and the River,' and of Nihilism and Academic Freedom' 35 *Journal of Legal Education* 1(1985). The two significant offshoots of hermeneutic theory, according to Hoy, a philosopher, are Habermas' 'transcendental hermeneutics' and Derrida's deconstruction. The former supplements the traditional theory with a somewhat autonomous, progressive concept of reason which, unlike the circularity of the Gadamerian theory, makes radical change conceivable. What it also does is to provide a basis for genuine disagreement — a *measure* for meaning. Derrida, on the other hand, 'exaggerates' the elementary hermeneutic insights to come up with a notion of 'undecidability' whose legal use may well mean nihilism. D.C. Hoy, 'Interpreting the Law: Hermeneutical and Poststructuralist Perspectives' in *Interpreting Law and Literature: A Hermeneutic Reader* 319 (eds. S. Levinson and S. Mailloux, 1988).

In a study centred around the 'antinomy' that characterizes law, the contradiction between the private and the public, choice and force, theory and practice, one dissolved by Kant on a moral and yet ultimately problematic basis and pointed out by both Hegel and Marx as 'the paradox of civil society,' the author contrasts the 'nihilism' of philosophers such as Nietzsche, Heidegger, Derrida, and Foucault, writers who implicitly promise to solve the antinomy or at least surpass the metaphysics that defines the traditional solutions to it, with what is termed 'the Hegelian and Marxist dialectic.' G. Rose, *Dialectic of Nihilism: Post-Structuralism and Law* (1987). Rose aims to demonstrate (a) that the nihilist approaches to the antinomy hardly form an entirely original concept (in the detective-work part of her essay Rose establishes that the dissolution of the antinomy by neo-Kantian legal philosophers Stammler, Cohen and Lask on the basis of a concept of 'time' or 'power,' a category inspired by the *Critique of Pure Reason*, is reproduced by philosophers such as Weber, Lukács, and Heidegger in the respective concepts of 'rationality,' 'mode of production,' and 'Being and time,' a solution redeveloped in turn by Foucault, Deleuze, Derrida, and others), (b) that, just

as the liberal lawyers failed to dissolve the antinomy in the face of the critical expositions of it by the Hegelian and Marxist dialectic, the post-structuralist nihilism which misunderstands the nature of the dichotomy and thus ends up rejecting (legal) knowledge altogether is no match for the dialectic: the post-structuralist nihilism fails to achieve its aim of surpassing metaphysics (Rose describes the post-structuralist discourse in terms of a dichotomy of metaphysics and science) and, more important still, lacks the consistency and rigour that defines the Hegelian and Marxist dialectic. Rose's essay is such an assemblage of consistent mis(s)readings of some of the texts it seeks to counter, it almost becomes *ethically* questionable. She attributes to Derrida, for instance, a series of binary oppositions which even a casual browsing of the latter's work might resist: deconstruction and reconstruction, opening and closing ('Derrida reconstructs while claiming he is deconstructing and closes questions while claiming he is opening them,' *id.* at 131); speech and writing, history and misology, hierarchy and misarchism ('By focusing on the contrary *logos/graphos* Derrida reconstructs the 'history' of the metaphor of writing to produce a tale of misology and misarchism,' *id.* at 135); literal and metaphorical — the wild surmise that deconstruction does not simply redefine the literal in terms of a greater category of the metaphorical, but it *bans* the word altogether — ('Derrida makes a grave mistake when he says 'Hegel's formula must be taken literally...' For a thinker who denies that meaning is literal this exception is particularly interesting,' *id.* at 147); the moral and the non-moral ('Derrida's move beyond good and evil...' *id.* at 149); metaphysics and science ('[C]laims... that metaphysics has been surpassed have turned out to be rhetorical... Metaphysics... has not been overturned by its transmogrification into positive science,' *id.* at 208), and so on. What stands out in Rose's 'reading' of Derrida as particularly bizarre is her notion that 'Derrida turns law and knowledge into writing' (*id.* at 171) — writing in its 'literal meaning' (*id.* at 169). According to Rose, by 'writing' Derrida has in mind none other than its literal meaning. 'Writing cannot be picked out as definitive of metaphor by stipulating that it is to be understood as 'what gives rise to an inscription in general', since this is its literal meaning' (*id.*). Hence: 'Derrida replaces the old imperialism of the *Logos*, the old law table, by the imperialism of the *grapheme*, as a new law table...' (*id.* at 170). In fact, where Rose refers in Derrida for the definition of writing and yet for some reason fails to quote in full, Derrida's meaning is anything but ambigious. 'Now we tend to say 'writing '...' notes Derrida, 'to designate not only physical gestures of literal pictographic or ideographic inscriptions, but also the totality of what

makes it possible; and... thus we say 'writing' for all that gives rise to an inscription in general...' J. Derrida, *Of Grammatology* 9 (transl. G.C. Spivak, 1976). (*Cf.* Derrida on writing, the present study, 2.2, the text accompanying notes 1-10.) A fine critique of the nihilistic trend in legal theory as based on a confusion between anti-foundationalism and meaninglessness, a confusion wrongly attributed to Derrida's work, is to be found in D. Cornell, 'From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation' in *Legal Hermeneutics, supra*, at 147. See also, for a criticism of Fish's work for overemphasizing politics and for the lack of concern displayed in his anti-foundationalism 'to provide a role for justice,' P. Bobbitt, *Constitutional Interpretation* 41-42 (1991). And see, for the 'crisis' of liberal jurisprudence under the 'deconstructionist' criticisms of its traditional notions, and the need to take stock, C.A.D. Husson, 'Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law' 95 *Yale Law Journal* 969 (1986).

6 'Objectivity,' *supra*, note 5, at 763.

7 'Of Law and the River,' *supra,* note 5.

8 'Law as Literature,' *supra,* note 3, at 385.

9 *Id.* at 386 (emphasis added).

10 *Id.* at 373. 'Ultimately, man finds in things nothing but what he himself has imported into them: the finding is called science, the importing — art, religion, love, pride.' F. Nietzsche, *The Will to Power* par. 606 (transl. W. Kaufmann and R.J. Hollingdale, 1968).

11 F. Nietzsche, *Ecce Homo* 70 (transl. R.J. Hollingdale, 1988).

12 F. Nietzsche, *Beyond Good and Evil* par. 192 (transl. R.J. Hollingdale, 1990).

13 *Cf.* M. Heidegger, *Being and Time* 207-208 (transl. J. Macquarrie and E. Robinson, 1990): 'What we 'first' hear is never noises or complexes of sounds, but the creaking waggon, the motor-cycle. We hear the column on the march, the north wind, the woodpecker tapping, the fire crackling.

'It requires a very artificial and complicated frame of mind to 'hear' a 'pure noise'. The fact that motor-cycles and waggons are what we proximally hear is the phenomenal evidence that in every case Dasein [There-being, man], as Being-in-the-world, already dwells *alongside* what is ready-to-hand within-the-world... Dasein, as essentially understanding, is proximally alongside what is understood.

'...Only he who already understands can listen.'

14 *Beyond, supra,* note 12, par. 192.

15 *Cf.* Derrida on J.L. Austin, 1.4, the text accompanying notes 55-61; and 2.2,

the text accompanying notes 51-58. And *cf.* realism and stage-setting, 2.4, the text accompanying notes 177-207.

16 *Beyond, supra,* note 12, par. 192.

17 *Cf.* the Kantian transcendence, 1.4, the text accompanying notes 7-10.

18 But see, for what might mildly be termed an *unorthodox* reading of Nietzsche's work, R.H. Weisberg, 'On the Use and Abuse of Nietzsche for Modern Constitutional Theory' in *Interpreting Law and Literature, supra,* note 5, at 181. 'There is nothing less radical today than the position that textual meanings are indeterminate,' the author reproaches Levinson. 'As a Nietzschean, I say this not only because indeterminacy has become so popular; rather, I contend that the position itself is fundamentally conservative, if not reactionary' (*id.* at 181). A grasp of Nietzsche's true stance on interpretation, accordingly, depends on three assumptions that are never questioned in his actual work; first, 'the independent existence of [the text] outside the reader' (*id.* at 182), a notion which signifies a clear break with the work of such 'ultramodernists' as Derrida and Rorty (*id.* at 188); secondly, a disinterested, non-passionate, approach on the part of the reader, a Nietzschean vein well reflected in the hermeneutic work by Heidegger and Gadamer (*id.* at 185-186); and finally, the crucial concepts of *truth*, 'antecedent to all reflection and combination' (*id.* at 191, the actual words are Hamilton's, who, according to Weisberg, 'anticipated' Nietzsche in *The Federalist*), *justice* ('Nietzsche suggests that a sound idea of justice does indeed exist,' *id.* at 183), and *origin* ('only the ressentiment-imbued nineteenth century has perverted [the idea of justice] so as to forget completely its origin,' *id.*). The interwoven character of all three assumptions is expressed in the earlier work by Weisberg, *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (1984), as follows: 'Nietzsche on justice is Nietzsche at his least 'modern' and most Judeo-classical. In this marvelous aphorism [2nd essay, par. 11 in *Genealogy*: 'only after a corpus of laws has been established can there be any talk of 'right' and 'wrong"], he reminds us that justice does exist. It exists because an objective notion of *textuality* also exists. Indeed, justice derives from an unchanging, impersonal text rather than from a private and idiosyncratic urge for revenge' (at 18, in the endnote omitted here Weisberg stresses the significance, in Nietzschean terms, of a self-conscious and disinterested attitude on the part of the reader with references, again, to Heidegger and Gadamer). The section to which Weisberg refers in Gadamer's *Truth and Method* (1988) in support of the concept of disinterested reading is uncannily entitled 'The Hermeneutic Circle and the

Problem of Prejudices' (*id.* at 235). What Gadamer in fact investigates under that title is the Heidggerian notion of the circularity of understanding as a primordial condition, an idea which I have already discussed in the present work (see, 2.3, the text accompanying notes 188-197; *cf.* its formulation by Nietzsche, the text accompanying, *supra,* notes 10-17) and which *postulates* prejudiced reading as the only conceivable way of reading rather than suggest a way *out* of it. Interpretation, accordingly, is a project not possible without a *forestructure* which prejudices, and only prejudices, provide. To be sure, Heidegger does imply a binary opposition of 'understanding' (which is based, phenomenologically put, on 'things themselves') and 'fancies' (*Being and Time, supra,* note 13, at 195) — a dichotomy that is more famously reproduced between the notions of authenticity and inauthenticity in *Being and Time* (namely that some possibilities of Dasein are simply *more equal* than others), even though the work as a whole clearly precludes the concept of a transcendental criterion to distinguish the marks of understanding from fancies — other than, that is, the criteria of simply *more* fancies. Gadamer, in turn, refers to 'arbitrary fancies' that may spoil the hermeneutic process if the reader is not constantly alert and self-conscious (*Truth and Method,* at 236). (Of the aporia Gadamer faithfully reiterates, Heidegger himself is in fact only too well aware; every time he invokes the dichotomy he goes to great lengths to justify the immediately striking contradiction: '*Authentic Being-one's Self* does not rest upon an exceptional condition of the subject, a condition that has been detached from the 'they [das Man]', *it is rather an existentiell modification of the 'they' — of the 'they' as an essential existentiale,' Being and Time, supra,* note 13, at 168, emphasis in original.) Nevertheless, just as the circularity brought about by the primordiality of the learned, *staged,* quality of experience, namely the part played by prejudices, is absolutely central to Heidegger's work as a whole, so is it to Gadamer's. As he famously puts it in the very section to which Weisberg refers, 'the fundamental prejudice of enlightenment is the prejudice against prejudice itself' (*Truth and Method,* at 239-240). The *Enlightenment,* indeed, is what seems far more accurately to define the frame of reference on whose basis Weisberg conducts his reading; a feature which betrays itself at the very outset as he produces an opposition of the progressive and the reactionary. *Cf.* Nietzsche on 'progress' ("Mankind' does not advance, it does not even exist'), *Will to Power, supra,* note 10, par. 90; on the concept of 'origin' ("Essence,' the 'essential nature,' is something perspective and already presupposes a multiplicity') and persuasion as the sole criterion ('the essence of a thing is

only an *opinion* about the 'thing.' Or rather: 'it is considered' is the real 'it is,' the sole 'this is''), *id.* par. 556 (emphasis in original) (*cf.* the Aristotelian *phronesis,* the present study, 1.3, the text accompanying note 37, and W. James on 'truth,' *id.* note 37); on unmediated perception ('Something unconditioned cannot be known; otherwise it would not be unconditioned'), *Will to Power, supra,* note 10, par. 555; on disinterested attitude ("contemplation without interest'... a nonsensical absurdity'), F. Nietzsche, *On the Genealogy of Morals* 3rd essay, par. 12 (transl. W. Kaufmann and R.J. Hollingdale, 1969): '[L]et us be on guard against the dangerous old conceptual fiction that posited a 'pure, will-less, painless, timeless knowing subject'... There is *only* a perspective seeing, *only* a perspective 'knowing'... [T]o eliminate the will altogether, to suspend each and every effect, supposing we were capable of this — what would that mean but to *castrate* the intellect? —' (emphasis in original).

19 See, *Will to Power, supra,* note 10, Book One *passim.*

20 *Id.* par. 12 (emphasis in original).

21 As well-known, in *Theaetetus* Plato cites from Protagoras that 'man is the measure of all things: of those which are, that they are, and of those which are not, that they are not.' Plato, *Theaetetus* 152a (transl. J. McDowell, 1987). The *'fundamental ontology,* from which alone all other ontologies can take their rise,' declares Heidegger at the very outset of the ontological inquiry of *Being and Time,* 'must be sought in the *existential analytic of Dasein.*' *Being and Time, supra,* note 13, at 34 (emphasis in original). Again, the view of language held by the later Wittgenstein as a tool-box, rather than a logically analyzeable picture of the world, and the very emphasis on the performance of the player in language-games have suggested to many a form of anthropologism. Finally, the Derridean notion of reading has often been thought to imply, notoriously, that the reader is the 'measure of all things' — hence the notion of a free play associated with his work. Nothing, of course, could be more deceptive. Heidegger does not even *name* man in *Being and Time*; man is merely a There-being (*Dasein*), humbly a part and artefact of that without which she, as *homo,* is unthinkeable — the world, the *humus.* With Wittgenstein, again, forms of life are constitutive of man's being; training, as opposed to a free-floating privacy, is the distinctive mark of man. And for Derrida, what a dissolution of the dichotomy between the text and history ('there is no outside-text [*il n'y a pas de hors-texte*],' J. Derrida, *Of Grammatology* 158 [transl. G.C. Spivak, 1976]) signifies first and foremost is the *vanishing* of the reader as one who dictates and oversees borderlines, the

subiectum. Nietzsche himself, in fact, as I quote him in, *supra,* note 18, invokes *opinion* as the sole possible criterion of truth, even though he at once states it to be 'the *hyperbolic naiveté* of man: positing himself as the meaning and measure of the value of things' (*supra*, note 20). The *naiveté* to which he refers, therefore, is hardly to do with the meaning of Protagoras' statement. Protagoras merely expresses what Nietzsche himself points out in appealing to opinion; man as *narrator*, as opposed to the autonomous *subject* of traditional metaphysics. See, for a typically Heideggerian analysis of the contrast between the Cartesian subjectivism and the apparent 'subjectivism' of Protagoras' statement, M. Heidegger, *Nietzsche, Volume IV: Nihilism* 91-95, 119-122 (ed. D.F. Krell, transl. F.A. Capuzzi, 1982).

22 'A nihilist is a man who judges of the world as it is that it ought *not* to be, and of the world as it ought to be that it does not exist. According to this view, our existence (action, suffering, willing feeling) has no meaning...' *Will to Power, supra,* note 10, par. 585 (emphasis in original).

23 See, *supra,* note 2.

24 *Will to Power, supra,* note 10, par. 590: 'Our values are interpreted *into* things.

'Is there then any *meaning* in the in-itself?!

'Is meaning not necessarily relative meaning and perspective?

'All meaning is will to power (all relative meaning resolves itself into it' (emphasis in original).

25 'Law and Literature,' *supra*, note 3, at 373.

26 'Objectivity,' *supra*, note 5, at 740-741. *Cf.* J. Derrida, *Limited Inc* 148 (transl. S. Weber and J. Mehlman, 1990): 'I do not believe I have ever spoken of 'indeterminacy,' whether in regard to 'meaning' or anything else. Undecidability is something else... I want to recall that undecidability is always a *determinate* oscillation between possibilities (for example, of meaning, but also of acts). These possibilities are themselves highly *determined* in strictly *defined* situations (for example, discursive — syntactical or rhetorical — but also political, ethical, etc.). They are *pragmatically* determined' (emphasis in original, endnote omitted). *Cf.* Kelman on meaning, *supra,* note 4.

27 F. Gény, *Method of Interpretation and Sources of Private Positive Law: Critical Essay* par. 97. *Cf.* the present study, 2.4, the text accompanying notes 44-48. And see, for the 'hazards' of a formal concept of law, *id.*, the text accompanying notes 24-35.

28 'Objectivity,' *supra*, note 5, at 739.

29 *Id.*

30 See, 2.4 the text accompanying note 105.

31 See, for objectivity as the basis of free search, *Method*, *supra*, note 27, par. 156; the present study, 2.4, the text accompanying note 49.

32 'Objectivity,' *supra*, note 5, at 745.

33 *Id.* at 746. 'If we consider law as literature,' writes Levinson in the essay Fiss attacks, 'then we might better understand the malaise that afflicts all contemporary legal analysis, nowhere more severely than in constitutional theory.' 'Law as Literature,' *supra*, note 3, at 377. The essay comes at a symposium on law and literature. Jurists seem to have always been conscious of a particular kinship between legal and literary rhetorics. The latest affinity with literature, however, has provoked *uneasy* responses — hardly surprising, given the mixed responses the latest trends in literary criticism have received in the literary community itself. A fine example of the classical vein in exploring the literature in law, the legal stylistics, is N. Cardozo, 'Law and Literature' in *Selected Writings of Benjamin Nathan Cardozo* 339 (ed. M.E. Hall, 1947). J.B. White's work on legal rhetoric has been an attempt to continue the tradition with an added flavour that blends, if not altogether happily, a textual positivism that perceives language as self-referential with a hermeneutic commitment to the forestructuring quality of *culture*. For him, law can best be understood as a 'language,' a notion that embraces all that can be put under the rubric of culture (J.B. White, *The Legal Imagination* xii-xiii [abridged ed., 1985]). Law as language is how law was understood in classical times; refusing, in turn, a sharp demarcation line between law and literature (J.B. White, *When Words Lose Their Meaning* xii [1984]). The ancient concept linked 'the fields of law and literature and perhaps classics and anthropology as well' (*id.* at xiii). Meaning, within that concept, is an artefact of the creative relationship the reader establishes with the text (*id.* at 17). It is not, therefore, an uncovering of the authorial intention as sometimes falsely assumed (J.B. White, 'Law as Language: Reading Law and Reading Literature' 60 *Texas Law Review* 415, 440 [1982]). That, however, does not make the reader the source of meaning. Rather, meaning 'resides in the life of reading itself, to which both text and [the] reader contribute' (*When Words, supra,* at 19). In *Heracles' Bow* (1985) White refers to a 'condition of radical uncertainty' which defines the process of signification (at 40). Neither the creative part played by the reader nor a hermeneutic uncertainty, however, is to be confused with a view of reading that recognizes no constraints in achieving meaning. Such view, he warns, would be 'to propose the destruction of an existing community, established by our laws and constitution, extending

from 'we' who are alive to those who have given us the materials of our cultural world, and to substitute for it another, the identity of which is most uncertain indeed' ('Law as Language,' *supra*, at 442). New Criticism seems to form the literary horizons of White's vision, and his hermeneutics goes only as far as the turn-of-the-century ideas of *Geisteswissenschaften* go (odd couple those two, you may think; unprecedented it is not: consider Weber's project, or if he can somehow find his way out, T. Parsons').

The new trends in literary theory and hermeneutics are sketched for the benefit of American jurists in D.H.J. Hermann, 'Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena' 36 *University of Miami Law Review* 379 (1982) — impressive title. The essay is particularly interesting for reflecting the amazing gluttony that almost characterized 1980s in American legal scholarship for magic, all-at-the-touch-of-a-button, ideas. They are all bite-size, yet overwhelming in sheer number, and typically piled up in a mystery order, to defy any system of digestion. Not surprisingly, only few of the ideas get represented with some accuracy. Consider the following. 'Jacques Derrida, best known for his work on the critical activity of deconstruction, focuses on the activities of speaking and reading' (*id.* at 401, n. 124). 'Michel Foucault is now associated with the view that there are important social and political dimensions implicit in the form of discourse' (*id.*, n. 125). 'Louis Althusser is perhaps best known for his development of an interpretive approach to the work of Karl Marx. He denied the alleged radical break in Marx's early and later theoretical writings' (*id.*, n. 126). The idea of a legal hermeneutics that inspires not 'arbitrariness' but validity, a notion the author is unable to collect in the mainstream hermeneutics (along the Gadamerian lines, accordingly, '[t]he law would be whatever a judge takes it to mean at any time'), is to be found in S.C.R. McIntosh, 'Legal Hermeneutics: A Philosophical Critique' 35 *Oklahoma Law Review* 1 (1982) (the Gadamerian view of reading as 'solipsistic' at 36). A rough guide to mainstream hermeneutics with a view to acquire tips for the Anglo-American interpretive controversy, which, unlike McIntosh, does not infer an ensuing 'anarchy' ('Phenomenological hermeneutics explains a changing Constitution without surrendering to the notion of judicial anarchy'), is pursued in T.G. Phelps and J.A. Pitts, 'Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation' 29 *Saint Louis University Law Journal* 353 (1985) (the 'anarchy' remark at 382). See, for a view of hermeneutics to ensure a *principled practice* as opposed to the 'cynical' and 'political' elements

nurtured by an abstract formalism — a dangerous state, according to the author, equally risked by non-formalist views such as those of Fish which find superfluous the idea of providing practice with principles, F.J. Mootz, III, 'The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur' 68 *Boston University Law Review* 523 (1988). See, for a fine essay that repudiates the alleged contradiction between hermeneutics and commitment to a concept of the rule of law (for hermeneutics, notably that of Gadamer, 'insist[s] on the cultivation of shared meanings and a shared public space as a premise of interpretive praxis'), F. Dallmayr, 'Hermeneutics and the Rule of Law' in *Legal Hermeneutics, supra,* note 5, at 3, 18. The classic work in English on legal hermeneutics is F. Lieber, *Legal and Political Hermeneutics* [1839] (1963). A brief account of the method, object, and principal works of juristic phenomenology is to be found in D. Schiff, 'Phenomenology and Jurisprudence' 4 *Liverpool Law Review* 5 (1982). See, for three authoritative essays on the subject, M. Natanson (ed), *Phenomenology and the Social Sciences* Vol. 2 (1973) (W. Friedmann, 'Phenomenology and Legal Science,' at 343; P. Amselek, 'The Phenomenological Description of Law,' at 367; and M. Franklin, 'The Mandarinism of Phenomenological Philosophy of Law,' at 451).

Another major attraction in the interpretive controversy has been philosophy of language. The part it ought to play as umpire is emphasized in F. Schauer, 'An Essay on Constitutional Language' 29 *Ucla Law Review* 797 (1982). 'Philosophers commonly argue,' the author notes, 'that if a speaker says p, and p logically entails q, then the speaker is committed to q even if he had never thought of q and never would have intended to say q' (*id.* at 825, footnote omitted). So that's what philosophy of language teaches. The involvement between the two put as *logical*, it is mystifying that the author should contemplate anyone objecting to it in the first place, or that anyone's *intention* when uttering a statement should be in such contradiction with what is a *logical* involvement on the part of the statement after all — where would that person have to be from, out of space? Nevertheless, the significance of *context* for the performances of language happily to function is in turn indicated. Accompanying it are two fundamental oppositions. One is between the parasitic instances of language (when the language has a technical sense in law yet primarily belongs to ordinary language, as in 'real property' and 'wrongful') and instances where the language is fully autonomous (as in 'habeas corpus') (*id.* at 804) — it is revealing that the author should

intrinsically connect two different uses of the term 'real property,' one legal the other non-legal, and as such it should differ from 'habeas corpus,' a term whose ordinary meaning either resides abroad or is dead (i.e., *you do not have to mouth its sound pattern for a non-legal sign*) and which, therefore, is purely legal: what the frame of reference on whose basis the distinction is drawn precludes first and foremost is a notion of the primordiality of *context*; a vacuum-like environment, rather than a regulating and dictating context, is what ethereally surrounds the intrinsically linked (again: only because you employ the 'same' pattern of sounds when uttering them, or the 'same' graphic signs when writing), yet *alienated,* uses of the term 'real property,' hence the notion of *a problematic instance* in performances of language. The second opposition which accompanies the author's idea of context is between the law and its specific applications (*id.* at 806), a dichotomy, again, aborting the idea of the primordiality of context: a thing is more than its applications. See, for a Wittgenstein-inspired view of legal language as a form of life to be understood in its own right, and the meaning of a word as hinged on its 'movements,' C.D. Stone, 'From a Language Perspective' 90 *Yale Law Journal* 1149 (1981). And see, for a criticism of this essay for its 'reactionary retreat' into 'law as an independent, closed conceptual system,' M. Shapiro, 'On the Regrettable Decline of Law French: Or Shapiro Jettet Le Brickbat' 90 *Yale Law Journal* 1198 (1981). 'Law as language is aimed principally at reasserting the autonomy of law — at returning law to lawyers by claiming that law is a specialized language that only lawyers can speak' (*id.* at 1200). (*Cf.* Gellner on philosophy of language, notably that of Wittgenstein, as an ultimately 'reactionary' enterprise for creating autonomous research units [forms of life, language-games] within the meaning of which all possible criticisms of the practice are effectively pre-empted, E. Gellner, *Words and Things: An Examination of, and an Attack on, Linguistic Philosophy* esp. chs. 8 and 9 [1979].) On the history of English language as a medium of law, with remarks on its current use, see, D. Mellinkoff, *The Language of the Law* (1963). And see, for a well arranged, useful collection of extracts from key texts on a range of subjects in philosophy, including meaning, language, and the language of law, with elucidatory notes and questions, W.R. Bishin and C.R. Stone, *Law, Language, and Ethics: An Introduction to Law and Legal Method* (1972).

The idea of a syntax, a grammar, for a particular system of signs, on whose basis to disclose the constituent units at work within the system and uncover the underlying texture, the generative logic, the deep structure, permeated the bulk of the studies of literary criticism and cultural analysis in the late '60s and

'70s. Semiotics, the so-called *science of signs* (the rhetoric of that which cannot be seen in the graphic sign but which can be *heard*, to contra-phrase Derrida on *différance*, namely the repression of the graphic dichotomy between *science* and *signs* — the archi-science) sought in its mainstream in literature to establish the notion of a pre-destined, yet self-referential, text, as opposed to a semantic invasion of it from *outside*. A dichotomy of inside and outside the text, and an ensuing concept of *meta-language*, allowing the critic a *detached* position where the text has definite, circumscribeable borders, are consequently the obvious assumptions of the project of mainstream semiotics. One representative of mainstream semiotics in legal studies is B.S. Jackson. See, for his study for a syntax of the Anglo-American legal rhetoric, based on the work of A.J. Greimas and E. Landowski for a *grammaire juridique*, B.S. Jackson, *Semiotics and Legal Theory* (1987). The grammar, accordingly, 'is itself part of the message of the text; it does not represent any mechanism separate from that of narrative grammar, by which the text itself is produced' (*id.* at 299). See, for an excellent critique of this book for 'den[ying] the relevance of genealogy, tradition, and discourse, [and] disawow[ing] the hermeneutic and rhetorical characteristics of its own text, in favour of a transcendent or self-evident reason,' P. Goodrich, 'Simulation and the Semiotics of Law' 2 *Textual Practice* 180, 187 (1988). *Cf.* B.S. Jackson, *Law, Fact and Narrative Coherence* 180 (1989): 'If one were to construct a set of 'families' of legal theory, Semiotics, Deconstruction and Critical Legal Studies, would, in my view, form a single family group. The metaphor is not entirely arbitrary. Family quarrels are known for their intensity, and it often appears that more effort is expended, within this group, on internal family quarrels than on opposition to the opposed family group, represented by positivism and natural law in their various guises' (footnote omitted). See, for an exposition of the influence of Peirce's notion of inquiry on the studies of law, notably realism (alongside the American and Scandinavian versions of realism, the author detects direct influence in Holmes, who had the good fortune to be a fellow club member but who probably would have been slightly surprised to hear the nucleus of his ideas, which is so very general, being as new as Peirce, and in Gény's *Method*, who, on the other hand, quite possibly did not even speak English at the time of the composition of the *Method*, a work, incidentally, Peirce could hardly inspire if he at once inspired Holmes), with an unhelpful attitude of repeatedly *mentioning* the particular Peircean influences as opposed to showing them, R. Kevelson, *The Law as a System of Signs* (1988). A brief, yet informative, introduction to legal

semiotics, is R. Carrión-Wam's 'Semiotica Juridica' in D. Carzo and B.S. Jackson (eds), *Semiotics, Law and Social Science* 11 (1985), a collection of essays on the subject. See also R. Kevelson (ed) *Law and Semiotics* 3 Vols. (1987-1989). The classic essay on law as a system of signs is F.E. Oppenheim, 'Outline of a Logical Analysis of Law' 11 *Philosophy of Science* 142 (1944). A fine example, on the other hand, of the narrowing of the margin in recent theory between (a) a semantics based on a closed notion of the text and (b) a post-semiotic dissolution of the distinction between the text and its outside, precluding thereby the concept of a meta-discourse, is to be found in C. Douzinas and R. Warrington, with S. McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (1990), an enrichingly venturesome work and a brilliant introduction to the studies of law and literature. See also, for the perverse dialectic of a semiotic textualism and a post-semiotic seeing through of the text in Goodrich's work, the text accompanying, *infra*, notes 72-177.

The literary trend in legal criticism is discussed in various essays in 'A Symposium on Law and Literature' 60 *Texas Law Review* 373 (1982). A collection of essays to reflect the diversity of views in contributions to the literary controversy is presented in *Interpreting Law and Literature, supra,* note 5. The essays by J.A. Smith and A. Axelrod in 'Law and Literature: A Symposium' 26 *Rutgers Law Review* 223 (1976) deliberate on the subject of law and humanities, notably literature. In 'Symposium: Law and Literature' 32 *Rutgers Law Review* 603 (1979), H. Suretsky provides a useful, annotated bibliography of writings on the subject of law and literature. In these two special issues of *Rutgers Law Review* Dante, Balzac, Dickens, Dostoyevski, and Joyce are the literary figures discussed from a 'legal' perspective. See, for an analysis of the legal in the literary, B. Thomas, *Cross-examinations of Law and Literature: Cooper, Hawthorne, Stowe, and Melville* (1987). A reading of some of the works by Dostoyevski, Flaubert, Melville, and Camus on the basis of a concept of *ressentiment*, a borrowing from Nietzsche (whose notion of Christianity as the 'denial of natural,' as ressentiment, is supplanted by legalistic 'wordiness'), is pursued in *The Failure of the Word, supra,* note 18. The author expresses his views on law and literature as an interdisciplinary enterprise in R. Weisberg, *Poethics and Other Strategies of Law and Literature* (1992). Wallace Stevens is the literary personality who provides inspiration for a form of legal pragmatism in T.C. Grey, *The Wallace Stevens Case: Law and the Practice of Poetry* (1991). In R.A. Posner, *Law and Literature: A Misunderstood Relation* (1988), 'the first to attempt a general

survey and evaluation of the field of law and literature,' the Judge Posner inquires what all the fuss is about. Literature, he finds out, has little to offer to the lawyer in his profession, notably in interpreting the law; but it can help for an improved understanding of judicial opinions and a better quality of the language thereof. Posner's work is criticized for its 'scientific' discourse, as opposed to a hermeneutic, or humanistic, one, in J.B. White, 'What can a Lawyer Learn from Literature?' 102 *Harvard Law Review* 2014 (1989).

Fish teases Posner's opposition of law and literature in S. Fish, 'Don't Know Much About the Middle Ages: Posner on Law and Literature' 97 *Yale Law Journal* 777 (1988), reprinted in his *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* ch. 13 (1989). (His review of Posner's *The Problems of Jurisprudence* [1990] is in S. Fish, 'Almost Pragmatism: Richard Posner's Jurisprudence' 57 *University of Chicago Law Review* 1447 [1990].) See also his (and *indeed* Dworkin's) essays in the Dworkin-Fish exchange, discussed in the present study, 2.3, the text accompanying notes 91 *et seq.*; and, again, Fish's and W.B. Michaels' examination of formalism in literature and law with particular emphasis on parol evidence rule, discussed, once more, in the present study, 2.1, the text accompanying notes 134-149. In an insightful critique of the textualist and the extratextualist arguments in *Riggs v Palmer,* 115 NY 506, 22 NE 188 (1889), Abraham finds both approaches essentially belief-governed, discipline-guided, and the 'facts' of the case *interpretive* in a way which resists a radical opposition of objectivity and subjectivity; the constitutive part of the *community* in the interpretive act emphasized, '[t]he differences between statutory and literary interpretation, then,' he notes, 'are *differences in communities of interpretation.*' K.S. Abraham, 'Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair' in *Interpreting Law and Literature, supra*, note 5, at 115, 126 (emphasis added). Finally, see, for a view of legal language as persuasion, Ch. Perelman, *The Idea of Justice and the Problem of Argument* (transl. J. Petrie, 1963).

34 'Objectivity,' *supra*, note 5, at 34.

35 In response to Fiss Levinson reminds him of Fiss' simultaneous criticisms of the Rehnquist Court for 'fall[ing] radically short of the ideals of the profession' (O. Fiss and C. Krauthammer, 'The Rehnquist Court,' *New Republic,* Mar. 10, 1982; cited in 'Law as Literature,' *supra*, note 3, at 396-402). And he asks, referring to Fiss' comparison of the judge's authority within the meaning of the notion of an interpretive community with the authority of the Pope, 'will Professor Fiss argue that the interpretive community has been taken over by a

false pope, a usurper, against whom the truly faithful must rally?' (*id.* at 399). He concludes: 'The united interpretive community that is necessary to Fiss' own argument simply does not exist' (*id.* at 401, footnote omitted).

36 'Objectivity,' *supra*, note 5, at 751.

37 *Will to Power, supra,* note 10, par. 481: 'Against positivism, which halts at phenomena — 'There are only *facts*' — I would say: No, *facts is precisely what there is not, only interpretations.* We cannot establish any fact 'in itself': perhaps it is folly to want to do such a thing.

'Everything is subjective,' you say; but even this is interpretation. The 'subject' is not something given, it is something added and invented and projected behind what there is. — Finally, *is it necessary to posit an interpreter behind the interpretation?* Even this is invention, hypothesis.

'In so far as the word 'knowledge' has any meaning, the world is knowable; but it is *interpretable* otherwise, it has no meaning behind it, but countless meanings. — 'Perspectivism.'

'It is our needs that interpret the world; our drives and their For and Against. Every drive is a kind of lust to rule; each one has its perspective that it would like to compel all the other drives to accept as a norm' (the 'facts' and the 'interpretable' emphasized in original).

See, for a life and difference affirming concept of constitutional law, R.M. Cover, 'Foreword: *Nomos* and Narrative' 97 *Harvard Law Review* 4 (1983). 'No set of legal institutions or prescriptions exists,' writes Cover, 'apart from the narratives that locate it and give it meaning' (*id.* footnote omitted). The primordially *attached* quality of experience, the 'normative world' as he terms it, is constitutive of the workings of the law, the *nomos*. In a revealing contrast to formulations of rights with a distinctively homogenous character, such as that of Dworkin, Cover lays emphasis on individual life-forms, on diversity and difference, which ultimately makes a far more convincing rhetoric for minority rights than the former's. (*Cf.* Dworkin on rights, present study, 2.3, the text accompanying notes 136-146; and Holmes [reading Gény] on the rhetoric of homogeneity, *id.*, the text accompanying notes 210-213.) The multiplicity of narratives within one legal domain, rather than one grand narrative, signifies the mechanism behind what Cover calls the 'jurisgenerative principle' in reading the law — the 'legal DNA' ('Foreword,' *supra,* Part 2). It accounts for the diversity of interpretations in reading one and the same text. 'All Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance' (*id.* at 17, footnote omitted). It is, however, neither possible nor

desirable to dispense with it: getting rid of the principle is getting rid of meaning altogether. The difficulty for the Court, of course, is often to have to choose between different and conflicting narratives. Nevertheless 'whichever story the Court chooses, alternative stories [will] still provide normative bases for the growth of distinct constitutional worlds' (*id.* at 19). An affirmation of distinct 'constitutional worlds,' distinct life-forms, the life-energy, lies at the heart of Cover's view of the Constitution (his essay is centred around *Bob Jones University v United States*, 461 U.S. 574 [1982], whose opinion denies the fundamentalist Christian educational institution tax-exempt status for its overtly racist policies — the dramatic victimization of one life-form by another that is itself often in the periphery and victimized). He concludes, '[w]e ought to stop circumscribing the *nomos*; we ought to invite new worlds' (*id.* at 68).

38 *Doing What Comes Naturally*, *supra*, note 33, at 141-142: 'The notion of 'interpretive communities' was originally introduced as an answer to a question that had long seemed crucial to literary studies. What is the source of interpretive authority: the text or the reader? Those who answered 'the text' were embarrassed by the fact of disagreement... Those who answered 'the reader' were embarrassed by the fact of agreement... What was required was an explanation that could account for both agreement and disagreement, and that explanation was found in the idea of an interpretive community, not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community's enterprise, community property... In this new vision both texts and readers lose the independence that would be necessary for either of them to claim the honour of being the source of interpretive authority; both are absorbed by the interpretive community which, because it is responsible for all acts interpreters can possibly perform, is finally responsible for the texts those performances bring into the world.' The concept is originally formulated in S. Fish, *Is There a Text in This Class: The Authority of Interpretive Communities* (1980). Fish reads Fiss' essay in S. Fish, 'Fish v. Fiss' 36 *Stanford Law Review* 1325 (1984), reprinted in *Doing What Comes Naturally*, *supra*, note 33, ch. 6. *Cf.* Fish on Dworkin, the present study, 2.3, the text accompanying notes 91 *et seq*.

39 Just as one is reminded of Kuhn's concept of scientific community, as well as

Fish's interpretive communities, at the mere sound of the notion Fiss invokes for legal interpretation; with his *disciplining rules* (see, *supra* note 34) Kuhn's 'disciplinary matrix' springs to mind. Ironically, however, Kuhn elucidates that he was led to the idea of a disciplinary matrix in the first place precisely because he had been unable to find *rules*, written or unwritten, to account for the specific choices and performances of scientific community. See, T.S. Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change* 298-319 (1977). See also his 'Postscript' in the second edition of *The Structure of Scientific Revolutions* (1970). An attempt to do with legal meaning and scholarship what Kuhn does in *Scientific Revolutions* with history of science and scientific knowledge is pursued in W.E. Nelson, 'Standards of Criticism' 60 *Texas Law Review* 447 (1982), where, concluding, the author suggests, in a manner that is not strictly Kuhnian, to distinguish critical standards shared by the community of scholars 'from their own aesthetic and ideological values' (*id.* at 491). According to the author, some such consensus with recognizeable standards existed until 1950s in American legal scholarship. Presently, however, '[t]he old consensus has broken down and a new one has failed to emerge' (*id.* at 470). Not unlike Fiss, the standards he is after seem to be standards to *discipline* a free-wheeling legal scholarship, rather than standards, in the Kuhnian fashion, *of* the prevailing discipline.

40 *Nietzsche: Nihilism*, *supra*, note 21.

41 *Id.* at 59.

42 *Will to Power*, *supra*, note 10, par. 2 (emphasis added).

43 *Id.* par. 111.

44 *Id.* par. 112 (emphasis in original).

45 *Nietzsche: Nihilism*, *supra*, note 21, at 28.

46 *Id.* at 136.

47 See, the text accompanying, *supra*, note 11.

48 *Ecce Homo*, *supra*, note 11, at 70.

49 *Cf.* audience and authorship, the present study, 1.1, the text accompanying notes 1-16.

50 See, 1.2, note 39.

51 See, *id.*, the text accompanying notes 7-13; and 2.4, the text accompanying notes 95-100.

52 *Cf.* Llewellyn, Gény, Lyotard on 'conscious seeking,' *id.*, the text accompanying notes 41-69.

53 See, 1.4, the text accompanying notes 2-28.

54 See, 2.4, the text accompanying notes 58-69.

55 *Nietzsche: Nihilism*, *supra*, note 21, at 147 (the whole sentence emphasized in original).

56 *Id.* at 28.

57 *Id.*

58 *Id.* (emphasis in original).

59 See, for Heidegger's statement of the characteristics of modern metaphysics, M. Heidegger, 'The Age of the World View,' transl. M. Grene, in *Martin Heidegger and the Question of Literature: Toward a Postmodern Literary Hermeneutics* 1 (ed. W.V. Spanos, 1979).

60 *Nietzsche: Nihilism*, *supra*, note 21, at 138.

61 *Id.* at 204.

62 *Supra*, note 44.

63 *Id.*

64 *Being and Time*, *supra*, note 13, at 233.

65 *Id.*

66 *Cf.* the present study, 1.3, the text accompanying notes 76-77.

67 *Being and Time*, *supra*, note 13, at 235.

68 *Cf.* the Heideggerian dichotomy between 'understanding' and 'fancies' in reading, *supra*, note 18. *Cf.* Heidegger's simultaneous *negation* of the concept of metalanguage; whether interpretation is pursued by attending to the manner in which an entity reveals itself ('phenomenology') or a specific interpretation is *forced* upon the entity (such as in Cartesianism), '[i]n either case, the interpretation has already decided for a defined way of conceiving it... it is grounded... in a *fore-conception*,' *Being and Time, supra,* note 13, at 191; 'the manner in which it, Being, gives itself, is itself determined by the way in which it clears itself,' M. Heidegger, *Identity and Difference* 67 (transl. J. Stambaugh, 1969).

69 'Age of the World View,' *supra*, note 59.

70 'Poetry,' according to Heidegger, who seems to understand by it all that is mimetic ('Language itself is poetry in the essential sense'), 'is the saying of the unconcealedness of what is.' M. Heidegger, *Poetry, Language, Thought* 74 (transl. A. Hofstadter, 1975).

71 See, the text accompanying, *supra*, notes 15-16.

72 P. Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* 213-214 (1986).

73 *Id.* at 214.

74 *Id.* at 217-218.

75 P. Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks*

282 and *id.* n.3 (1990).

76 C. Norris, 'Law, Deconstruction, and the Resistance to Theory' 15 *Journal of Law and Society* 166, 185 (1988).

77 *Id.* at 184.

78 *Id.* (emphasis added).

79 'Here's one account of the technique that we in Critical Legal Studies often use in analyzing legal texts,' writes Kelman, 'a technique I call 'Trashing': Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-*comic*); and then look for some (external observer's) *order* (*not* the germ of truth) in the internally contradictory, incoherent chaos we've exposed.' M. Kelman, 'Trashing' 36 *Stanford Law Review* 293 (1984) (emphases, square brackets in original). In his essay, Norris refers to a 'vulgarised account of deconstruction put about by those who wish to represent it as a species of feckless intellectual nihilism.' 'Law, Deconstruction,' *supra*, note 76, at 169. He has in mind literary critics with an opinion of deconstruction as a blank cheque for free play. Yet deconstruction can hardly be said to have found better employment in the hands of lawyers. Although Kelman makes no specific mention of it in the above essay, 'deconstruction' has been the banner of the group of writers of whom he speaks 'we.' Goodrich expresses the deconstructionist adventure of the critical legal studies writers as follows: '[T]he various forms and expressions of modernism have been misunderstood by (critical) legal studies and misapplied to the analysis of law... [M]etaphors, images and fashionable expressions of mood and lifestyle have been uncritically transposed on to legal studies and used as therapeutic consolation for a somewhat neurotic dissatisfaction with the state of the legal discipline. The catchphrases of a superficial eclecticism can all too easily stand in the place of historical consciousness and political argumentation.' *Reading the Law, supra,* note 72, at 212. See, for an official account of critical legal studies, M. Kelman, *A Guide to Critical Legal Studies* (1987). The strategy and principal themes are explored in R.M. Unger, 'The Critical Legal Studies Movement' 96 *Harvard Law Review* 561 (1983); and D. Kairys (ed), *The Politics of Law: A Progressive Critique* (1982). See, for further references, the critical legal studies special issue, 36 *Stanford Law Review* 1 (1984); D. Kennedy and K. Klare, 'A Bibliography of Critical Legal Studies' 94 *Yale Law Journal* 461 (1984).

80 See, S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* ch. 15 (1989). *Cf.* A. Hunt, 'The Critique of Law' 14 *Journal of Law and Society* 5, 18 (1987), on critical

legal studies and 'the challenge of elaborating a distinctive theory of law.' A response to Fish on the charges of theory is to be found in M.J. Perry, 'Why Constitutional Theory Matters to Constitutional Practice' in *Legal Hermeneutics: History, Theory, and Practice* 241 (ed. G. Leyh, 1992).

81 'Law, Deconstruction,' *supra,* note 76, at 184.

82 *Cf.* Culler on metalanguage as simply 'more language' ('a theory of repression involves repression'), J. Culler, *Framing the Sign: Criticism and its Institutions* 139-140 (1988). *Cf.* Derrida, *Limited Inc, supra*, note 26, at 60, 152, 150 (emphasis in original): 'Context is always, and always has been, at work *within* the place, and not only *around* it.' '[T]he limit of the frame or the border of the context always entails a clause of nonclosure.' 'The repression at the origin of meaning is an irreducible violence.

83 'Law, Deconstruction,' *supra*, note 76, at 184.

84 C. Norris, *Paul de Man: Deconstruction and the Critique of Aesthetic Ideology* (1988); C. Norris, *Derrida* (1987).

85 P. de Man, *Allegories of Reading* 131 (1979) (the 'text' emphasized in original).

86 'Law, Deconstruction,' *supra,* note 76, at 184.

87 *Id.*

88 See, 2.4, the text accompanying notes 170-177.

89 P. de Man, 'The Resistance to Theory' 63 *Yale French Studies* 3 (1983).

90 P. Goodrich, *Legal Discourse: Studies In Linguistics, Rhetoric and Legal Analysis* 206 (1987).

91 'Law, Deconstruction,' *supra,* note 76, at 177.

92 'Resistance,' *supra,* note 89, at 5.

93 'I reserve that word for an abstract or algorithmic formulation that guides or governs practice from a position outside any particular conception of practice. A theory, in short, is something a practitioner consults when he wishes to perform correctly, with the term 'correctly' here understood as meaning independently of his preconceptions, biases, or personal preferences... When I assert the lack of a relationship between theory and practice I refer to the kind of relationship (of precedence and priority) implied by the strongest notion of theory; the relationships that *do* exist between theory and practice (and there are many) are no different from the relationships between any form of talk and the practice of which it is a component.' *Doing What Comes Naturally, supra,* note 80, at 378.

94 *Cf.* 'Resistance,' *supra*, note 89, at 11: 'Those who reproach literary theory for being oblivious to social and historical (that is to say ideological) reality are

merely stating their fear at having their own ideological mystifications exposed by the tool they are trying to discredit. They are, in short, very poor readers of Marx's *German Ideology*.'

95 *Id.* at 19.

96 *Id.* (emphasis in original).

97 See, 2.2, the text accompanying note 37.

98 'Law, Deconstruction,' *supra*, note 76, at 183.

99 J. Habermas, 'Modernity — An Incomplete Project' [1980] in *Postmodern Culture* 14 (ed. H. Foster, transl. S. Ben-Habib, 1989). See, for an assessment of Derrida's work, J. Habermas, *The Philosophical Discourse of Modernity* lec. 7 (transl. F. Lawrence, 1990). In an endnote to a letter to G. Graff, Derrida cites Habermas' evaluation as an instance of the obvious lack of the 'ethics of discussion,' — a 'nonreading.' In an entire chapter (one of the two) devoted to his ideas texts by Derrida are not once consulted (Habermas uses second-hand accounts by J. Culler and others). J. Derrida, *Limited Inc.* 156-157 (1990). See, for Fish on Habermas, 'a thinker whose widespread influence is testimony to the durability of the tradition that began (at least) with Plato,' *Doing What Comes Naturally, supra,* note 80, at 450-457, 498-499.

100 *Derrida, supra,* note 84, at 169.

101 *Id.* (emphasis in original).

102 See, *Framing the Sign, supra,* note 82, at 185-200.

103 See, *supra*, note 99.

104 *Framing the Sign*, *supra*, note 82, at 190 (footnote omitted).

105 'Modernity — An Incomplete Project,' *supra*, note 99.

106 See, for two distinct approaches to the Marxist concept of ideology, one as false consciousness, a notion which makes the very rhetoric of Marxism ultimately self-repudiating, M. Seliger, *The Marxist Conception of Ideology* (1977); and one, from a more orthodox perspective, as a concept with two coherent, mutually complementary aspects, as false representation, rationalization, and at once as a device that is capable of genuine criticism, J. Larrain, *Marxism and Ideology* (1984). A concise account of the contemporary theories of ideology, Marxist and otherwise, is to be found in H. Williams, *Concepts of Ideology* (1988).

107 V. Kerruish, *Jurisprudence as Ideology* 22 (1991). *Cf.* Kerruish on 'rights fetishism,' *infra*, note 113.

108 *Legal Discourse, supra,* note 90, at 208. *Cf.* D.M. Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' 36 *Stanford Law Review* 575, 597 (1984): '[C]ritical studies research seeks to discover the false but legitimating

world views hidden in complex bodies of rules and doctrines and in legal consciousness in general.'

109 *Legal Discourse, supra,* note 90, at 208.

110 G. Lukács, *History and Class Consciousness* 50 (transl. R. Livingstone, 1971); see, for the text, *infra*, note 112. Engels' letter (to Mehring) goes, 'ideology is a process which is indeed accomplished consciously by the so-called thinker, but it is the wrong kind of consciousness.' Cited in *Marxism and Ideology, supra,* note 106, at 103.

111 K. Marx and F. Engels, *Selected Works* 181 (1970). *Cf.* K. Marx and F. Engels, *The German Ideology* 42 (ed. S. Ryazanskaya, transl. W. Lough, 1965): 'Consciousness is, therefore, from the very beginning a social product, and remains so as long as men exist at all.'

112 'It is true that the conscious reflexes of the different stages of economic growth remain historical facts of great importance; it is true that while dialectical materialism is itself the product of this process, it does not deny that men perform their historical deeds themselves and they do so consciously. But as Engels emphasizes in a letter to Mehring, this consciousness is false. However, the dialectical method does not permit us simply to proclaim the 'falseness' of this consciousness and to persist in an inflexible confrontation of true and false. On the contrary, it requires us to investigate this 'false consciousness' concretely as an aspect of the historical totality and as a stage in the historical process.' *History and Class, supra,* note 110, at 49-50 (footnote omitted). *Cf.* on the problematic exemption, by dialectical materialism, of itself from the consequences of its own relativist rhetoric, K. Mannheim, *Ideology and Utopia* 66 (1972).

113 See, for the hegemonic consciousness as a *second* theoretical consciousness, A. Gramsci, *Selections from the Prison Notebooks* 333 (ed. and transl. Q. Hoare and G.N. Smith, 1971). See also on the function of intellectuals, *id.* at 5 *et seq.* And see, for an account of law as constitutive consciousness, and the 'relative autonomy' of legal system, *Guide to Critical Studies, supra*, note 79, at 243-263. See also, R. Gordon, 'Critical Legal Histories' 36 *Stanford Law Review* 57 (1984); and D. Kennedy, 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities' 34 *American University Law Review* 939 (1985). Kennedy makes the sociologism of Marx's concept of commodity fetishism a notion that is specifically *capitalist* and therefore irrelevant to formations within the meaning of pre-capitalist or advanced-capitalist societies. Hirst, on the other hand, who regards the concept as paradigmatic of Marx's thought as a whole contrasts it with the Althusserean epistemology

(see, for the Althusserean epistemology, the text accompanying, *infra*, notes 114 *et seq.*) Through a dichotomy of science and ideology, accordingly, Althusser seeks to transcend the mimetic ineluctability invoked in the concept of commodity fetishism. P. Hirst, *On Law and Ideology* 10 (1979). The idea of critical autonomy, explains Hirst, invites whole-sale approaches, as opposed to a heterogenous notion of social relations. And there lies the fundamental weakness of contemporary Marxist theory. It becomes incompetent to grasp new formations within society and fails to address pressing political problems. Hirst designates Marxism as a 'means of calculation,' rather than an epistemological device that somehow survives the relativism it preaches. Marxism as a means of calculation at a specific instance is 'conditioned and limited by [that which it] construct[s] in calculation' (*id.* at 3). This, however, Hirst points out, by no means amounts to a nihilistic sterility. 'Nietzsche long ago showed that the effect of the decomposition of absolutes (or rather the fictional substitutes for them, for such there cannot be) is not nihilism. The recognition that everything is permissible was for him the foundation of a new sort of morality' (*id.* at 11-12). (*Cf.* nihilism as de-presencing and re-presencing, the text accompanying, *supra*, notes 42 *et seq.*) And finally, an interesting solution is introduced in Kerruish's concept of 'rights fetishism.' *Jurisprudence as Ideology, supra*, note 107. Rights fetishism, a concept inspired by Marx's commodity fetishism, according to Kerruish, is law's defining characteristic. Just as commodity is thought independently of the relations in which it really acquires its significance in industrial society, rights in jurisprudence assume a false autonomy once the dynamics through which they become possible are ignored. Rights fetishism opposes the individual (the private) to the society (the public), and posits law as a system of norms to reconcile the two. It is formed, writes Kerruish, 'by legal practices... But jurisprudence justifies legal practices in terms of values constructed by legal practices' (*id.* at 6). (*Cf.* Kerruish on the 'neutral' and 'negative' senses of ideology, the text accompanying, *supra*, note 107.) In the term 'legal practices' she accommodates two distinct positions without committing herself to either; it signifies neither Kennedy's relatively autonomous law nor Hirst's ineluctable, dictating practice. 'Legal practices' is a concept that tells more about the deadlock that is the contemporary Marxist theory than about jurisprudence.

114 '[E]very state is ethical,' writes Gramsci, 'in as much as one of its most important functions is to raise the great mass of the population to a particular cultural and moral level, a level (or type) which corresponds to the needs of

the productive forces for development, and hence to the interests of the ruling classes. The school as a positive educative function, and the courts as a repressive and negative educative function, are the most important State activities in this sense: but, in reality, a multitude of other so-called private initiatives and activities tend to the same end — initiatives and activities which form the apparatus of the political and cultural hegemony of the ruling classes.' *Prison Notebooks, supra,* note 113, at 258. An elaboration of the Gramscian concept of ideology as reproduction is pursued by Althusser in his 'ideological State apparatuses,' the conceptual means responsible for 'the reproduction of the conditions of production.' L. Althusser, *Essays on Ideology* 1 *et seq.* (1984). 'Who has *really* attempted to follow up the explorations of Marx and Engels?' asks Althusser in *For Marx* 114 (B. Brewster, 1969). 'I can only think of Gramsci.' Lukács, Althusser points out in a footnote, is to be omitted on account of 'a guilty Hegelianism' which contaminates his attempts (*id.*). An articulate theory of the State along the Gramscian-Althusserean lines is to be found in N. Poulantzas, *Political Power and Social Classes* (1973) ('ideology has the precise function of hiding the real contradictions and of *reconstituting* on an imaginary level a relatively coherent discourse which serves as the horizon of agents' experience,' at 207). And see, for a fine study of Althusser's work, S.B. Smith, *Reading Althusser: An Essay on Structural Marxism* (1984).

115 The idea of the *inevitability* of the so-called bias stands uncomfortably with the idea of *falsehood. Cf.* '[L]anguage, typically, is immersed in the ongoing life of a society, as the practical consciousness of that society. This consciousness is inevitably a partial and false consciousness. We can call it ideology, defining 'ideology' as a systematic body of ideas, organized from a particular point of view. Ideology is thus a subsuming category which includes sciences and metaphysics, as well as political ideologies of various kinds, without implying anything about their status and reliability as guides to reality.' G. Kress and R. Hodge, *Language as Ideology* 6 (1981).

116 *Essays on Ideology, supra*, note 114, at 9.

117 *Id.* at 39.

118 *Id.* at 33-34.

119 Althusser calls the vulgar version of positivism simply the 'positivist conception' of history, a history without ideology or philosophy ('the end of all philosophy'). And the latter he terms the 'individualist-humanist conception (the subjects of history are 'real, concrete man').' *For Marx, supra*, note 114, at 36-37. And see, on humanism as 'the philosophical (theoretical) myth of man,'

id. at 229.

120 *Essays on Ideology, supra,* note 114, at 35.

121 *Id.* at 33.

122 *Id.* at 32.

123 *Id.* at 35

124 *Id.* at 45.

125 *Id.* at 35 (emphasis in original).

126 *For Marx, supra,* note 114, at 34-36.

127 *Id.* at 34.

128 *Id.* at 167-168. The difference from the standard Marxean concept of critical reflection is dramatic. In *The German Ideology, supra,* note 111, at 50, 'not criticism but revolution is the driving force of history, also of religion, of philosophy and all other types of theory.' Marx contrasts one's *attachments* with the notion of one's 'self-consciousness.' According to him, 'the real intellectual wealth of the individual depends entirely on the wealth of his real connections' (*id.* at 49). In this respect Marx is closer to Fish than Althusser. See, for a fine study which explores Marx's work from this particular point of view, D. Rubinstein, *Marx and Wittgenstein: Social Praxis and Social Explanation* (1981).

129 *Cf. For Marx, supra,* note 114, at 63, 127.

130 See, particularly, P. Goodrich, 'Simulation and the Semiotics of Law' 2 *Textual Practice* 180, 183 (1988).

131 See, the text accompanying, *supra,* note 78.

132 M. Pêcheux, *Language, Semantics and Ideology: Stating the Obvious* (transl. H. Nagpal, 1982).

133 *Languages of Law, supra,* note 75, at 153 (emphasis in original); see, for the 'contract,' the text accompanying, *infra,* notes 163-167.

134 *Cf.* the text accompanying, *supra,* note 105. *Cf.* also Lyotard on the dichotomy between classicism and modernity, 1.1.

135 *Languages of Law, supra,* note 75, at 296 (emphasis added, footnote — referring to Nietzsche — omitted).

136 *Id.* at 210.

137 *Id.* at 16, 70.

138 M. Foucault, *The Order of Things: An Archaeology of the Human Sciences* xi (1989).

139 S. Freud, 'The Unconscious' [1915] in his *Collected Papers* Vol. 4, at 98, 101 (transl. J. Riviere *et al.*, 1956). *Cf.* Wittgenstein's reservations of the Freudean project for the dichotomy Freud consistently assumes between discovering and

inventing ('he cheats the patient') in L. Wittgenstein, *Lectures and Conversations on Aesthetics, Psychology and Religious Belief* 24, 27-29, 42-48, 52 (ed. C. Barrett, 1987). Fish reads psychoanalysis in this vein in *Doing What Comes Naturally, supra,* note 80, ch. 22.

140 *Id.* at 104. *Cf.* J. Kristeva, 'Psychoanalysis and the Polis,' transl. M. Waller, 9 *Critical Inquiry* 77, 80 (1982): 'Two great intellectual ventures of our time, those of Marx and Freud, have broken through the hermeneutic tautology to make of it a *revolution* in one instance and, in the other, a *cure*. We must recognize that all contemporary political thought which does not deal with technocratic administration — although technocratic purity is perhaps only a dream — uses interpretation in Marx's and Freud's sense: as transformation and as cure' (emphasis in original).

141 *Supra,* note 124.

142 *Languages of Law, supra*, note 75, at 50-52. *Cf.* Llewellyn on the dichotomy between the common law and the German juristic traditions, 2.4, the text accompanying note 98.

143 *Id.* at 51.

144 *Cf.* 1.2; 2.1, the text accompanying notes 54-63; 2.4, the text accompanying note 147; the text accompanying, *supra*, notes 50-51; and, *supra*, note 5.

145 *Languages of Law, supra*, note 75, at 50.

146 *Id.* at 52.

147 A. Hamilton in J. Madison *et al.*, *The Federalist Papers* No. 1, at 88 (ed. I. Kramnick, 1987). *Cf.* Feyerabend on science 'run by slaves, slaves of institutions,' as opposed to science 'run by free agents,' P. Feyerabend, 'How to Defend Society Against Science' in *Scientific Revolutions* 156, 165 (ed. I. Hacking, 1987). See also by Feyerabend, *Against Method: Outline of an Anarchistic Theory of Knowledge* (1975), and *Science in a Free Society* (1978). (*Cf.* Kuhn on choice in science, *The Structure of Scientific Revolutions, supra*, note 39; see also, the present study, 2.4, note 140.) Institutionalism in education and medicine is condemned in the essays by I. Illich, *Deschooling Society* (1971), and *Medical Nemesis: The Expropriation of Health* (1975). An archetypal attack on institutionalism in humanities is E.W. Said, 'Opponents, Audiences, Constituencies and Community' in *Postmodern Culture* 135 (ed. H. Foster, 1989). *Cf.* Fish on the anti-institutionalist — anti-professionalist — discourse, *Doing What Comes Naturally, supra*, note 33, esp. chs. 8, 10 and 11.

148 *Legal Discourse, supra*, note 90, at 51. *Cf. supra* notes 94 and 128.

149 *Supra*, note 98.

150 *Supra*, note 99.

151 *Legal Discourse*, *supra*, note 90, at 52, 78.

152 *Id.* at 78.

153 *Id.*

154 *Supra*, note 78.

155 *Legal Discourse*, *supra*, note 90, at 78.

156 See, *supra*, note 21.

157 M. Heidegger, *Identity and Difference*, *supra*, note 68, at 36. *Cf.* Derrida, *Limited Inc*, *supra*, note 26, at 102: 'Iterability is precisely that which — once its consequences have been unfolded — can no longer be dominated by the opposition nature/convention. It dislocates, subverts, and constantly displaces the dividing-line between the two terms.'

158 See, 2.4, the text accompanying notes 210 *et seq.*

159 *Legal Discourse*, *supra*, note 90, at 79.

160 *Languages of Law*, *supra*, note 75, at 3.

161 In a response to Goodrich's criticism of his work for being textualist (see, 2.1, note 134; and *supra*, note 33), Jackson correctly observes: 'It is Goodrich's own approach — which privileges the discovery of rhetorical tropes within legal texts, and pays only lip-service to the need to study the social conditions of the production of these texts (other than through a quasi-traditional historiography) — which comes closer to privileging the text.' B.S. Jackson, *Law, Fact and Narrative Coherence* 178 (1989) (footnote omitted).

162 *Legal Discourse*, *supra*, note 90, at 206. *Cf.* J. Derrida, *Of Grammatology* 158 (transl. G.C. Spivak, 1976).

163 *Languages of Law*, *supra*, note 75, at 149-150.

164 *Id.* at 149.

165 See, for Lacan's reading of E.A. Poe's short story 'The Purloined Letter' as a metaphor for psychoanalytic disclosure, J. Lacan, 'Seminar on "The Purloined Letter,"' transl. J. Mehlman, 48 *Yale French Studies* 38 (1972). Derrida's reading of Lacan which deconstructs the presumed dichotomy of disclosure and concealment, of discovering and inventing ('Psychoanalysis, supposedly, is found'), is in J. Derrida, 'Le facteur de la vérité' in his *The Postcard: From Socrates to Freud and Beyond* 413 (transl. A. Bass, 1987). The Derridean mode of disclosure (which emerges in the dissolution of the distinction between disclosure and concealment) is in turn questioned in B. Johnson, 'The Frame of Reference: Poe, Lacan, Derrida' in *Psychoanalysis and the Question of the Text* 149 (ed. G. Hartman, 1978).

166 *Languages of Law*, *supra*, note 75, at 149-150.

167 See, 2.4, the text accompanying notes 6-16 and 217.

168 See, 2.4, note 194.

169 *Cf.* C. Butler, *Interpretation, Deconstruction, and Ideology* 47 (1984): '[The] hostility to the mimetic function of literature as traditionally conceived, stems largely from the Derridan redevelopment of Saussure — the conception of the text as a 'play' amongst 'differences' within language, rather than as reflecting reality.'

170 See, the text accompanying, *supra*, note 69.

171 J. Derrida, 'Sending: On Representation,' transl. P. Caws and M.A. Caws, 49 *Social Research* 294, 304 (1982).

172 *Id.* at 311. *Cf.* J. Derrida, *Speech and Phenomena* 45 (transl. D.B. Allison, 1989): '*...perception does not exist* or... what is called perception is not primordial... somehow everything 'begins' by 're-presentation' (a proposition which can only be maintained by the elimination of these last two concepts: it means that there is no 'beginning' and that the 're-presentation' we were talking about is not the modification of a 're-' that has *befallen* a primordial presentation)' (emphasis in original).

173 See, 2.2, the text accompanying notes 1-10.

174 *Languages of Law, supra*, note 75, at 284.

175 *Grammatology, supra*, note 162, at 159.

176 *Cf.* Heidegger on the Parmenidean 'sameness' of being and seeing, 1.3, the text accompanying notes 31-33.

177 See, 2.2, the text accompanying notes 11-18.

178 *Method, supra*, note 27, par. 57, n. 135; *cf.* the present study, 2.1, the text accompanying note 59.

179 J.F. Lyotard and J.L. Thébaud, *Just Gaming* 31-40 (1985); *cf.* the present study, 1.2.

180 See, K.N. Llewellyn and E.A. Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* 311-312 (1967); *cf.* the present study, 2.4, the text accompanying notes 95-100; and see, for Goodrich, the text accompanying, *supra*, notes 133 and 143.

181 S. Levinson, *Constitutional Faith* (1988).

BIBLIOGRAPHY

Abraham, H.J. *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France* (New York and Oxford: Oxford University Press, 1986).

Abraham, K.S. 'Three Fallacies of Interpretation: A Comment on Precedent and Judicial Decision' 23 *Arizona Law Review* 771 (1981).

Abraham, K.S. 'Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair' in Levinson and Mailloux (eds) 115 (1988).

Abû Dâwud. *Sunan Abû Dâwud* Vol. 3, transl. by A. Hasan (Lahore: Ashraf Press, 1984).

Ackerman, B.A. *Social Justice in the Liberal State* (New Haven and London: Yale University Press, 1980).

Adorno, T.W. *The Jargon of Authenticity*, transl. by K. Tarnowski and F. Will (London and Henley: Routledge and Kegan Paul, 1986).

Aleinikoff, T.A. 'Updating Statutory Interpretation' 87 *Michigan Law Review* 20 (1988).

Allen, W. 'Yes, But Can the Steam Engine Do This?' in his *Complete Prose* 175 (London: Pan Books Limited, 1992).

Althusser, L. *Essays on Ideology*, (translator not cited) (London: Verso, 1984).

Althusser, L. *For Marx*, transl. by B. Brewster (London: Allen Lane The Penguin Press, 1969).

Amselek, P. 'The Phenomenological Description of Law,' transl. by R. Mortley, in M. Natanson (ed) *Phenomenology and the Social Sciences* Vol. 2, at 367 (Evanston: Northwestern University Press, 1973).

Aniskovich, W.A. 'In Defense of the Framers' Intent: Civic Virtue, the Bill of Rights, and the Framers' Science of Politics' 75 *Virginia Law Review* 1311 (1989).

Antieau, C.J. *Constitutional Construction* (New York: Oceana Publications, 1982).

Arac, J. 'Introduction' to his (ed) *Postmodernism and Politics* ix (Minneapolis: University of Minnesota Press, 1986).

Arendt, H. *Crises of the Republic* (New York: Harcourt Brace, 1972).

Aristotle. 'Politics' in E. Barker (ed) *The Politics of Aristotle*, transl. by E. Barker (Oxford: Clarendon Press, 1946).

Aristotle. 'Poetics,' transl. by L. Golden, in *Aristotle's Poetics* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1968).

Aristotle. 'Nicomachean Ethics,' transl. by W.D. Ross, revised by J.O. Urmson, in J. Barnes (ed) *The Complete Works of Aristotle* Vol. 2 (Princeton: Princeton University Press, 1984).

Aristotle. 'Rhetoric,' transl. by W.R. Roberts, *ibid.*

Asch, S.H. *The Supreme Court and its Great Justices* (New York: Arco Publishing Company, Inc., 1972).

Ataay, A. *Medeni Hukukun Genel Teorisi* [The General Theory of Civil [= Private Positive] Law] (Istanbul: Istanbul University Press, 1980).

Austin, J. *Lectures on Jurisprudence or the Philosophy of Positive Law*, edited by R. Campbell, Vol. 1 (London: John Murray, 1879).

Austin, J.L. 'Other Minds' in C. Landesman (ed) *The Foundations of Knowledge* 124 (Englewood Cliffs, N.J.: Prentice Hall, Inc., 1970).

Austin, J.L. 'Performative - Constative,' transl. by G.J. Warnock, in J.R. Searle (ed) *The Philosophy of Language* 13 (Oxford: Oxford Readings in Philosophy, 1979).

Austin, J.L. *How to Do Things with Words*, edited by J.O. Urmson and M. Sbisà (Oxford: Oxford University Press, 1989).

Ayer, A.J. *Language, Truth and Logic* (Middlesex: Penguin, 1980).

Ayer, A.J. (ed) *Logical Positivism* (New York: Free Press, 1959).

Ayer, A.J. 'I think, therefore I am' in W. Doney (ed) *Descartes: A Collection of Critical Essays* (New York: Anchor Books, 1967).

Ayers, M.R. 'Berkeley: His Immaterialism and Kant's Transcendental Idealism' in T. Honderich (ed) *Philosophy Through its Past* 229 (London: Penguin, 1984).

Baker, G.P. and Hacker, P.M.S. *Wittgenstein: Rules, Grammar and Necessity* Vol. 2 of an Analytical Commentary on the Philosophical Investigations (Oxford: Blackwell, 1988).

Baker, G.P. and Hacker, P.M.S. *Scepticism, Rules and Language* (Oxford: Blackwell, 1984).

Ball, T. 'Constitutional Interpretation and Conceptual Change' in Leyh (ed) 129 (1992).

Bankowski, Z. and Mungham, G. *Images of Law* (London: Routledge Direct Editions, 1976).

Bankowski, Z. *et al.* 'On Method and Methodology' in MacCormick and Summers (eds) 9 (1991).

Barker, E. 'Introduction' to his (ed) *The Politics of Aristotle* xi (Oxford: Clarendon Press, 1946).

Barnes, B. *T.S. Kuhn and Social Science* (London: Macmillan, 1982).

Baudrillard, J. *Simulations*, transl. by P. Foss *et al.* (New York: Semiotext(e), 1983).

Beard, C.A. *An Economic Interpretation of the Constitution of the United States* (New York: Free Press, 1965).

Beardsley, J.E. 'The Constitutional Council and Constitutional Liberties in France' 20 *American Journal of Comparative Law* 431 (1972).

Beardsley, J.E. 'Constitutional Review in France' *The Supreme Court Review* 189 (1975).

Bell, J. *French Constitutional Law* (Oxford: Clarendon Press, 1992).

Benditt, T.M. *Law as Rule and Principle* (Sussex: The Harvester Press, 1978).

Bennington, G. *Lyotard: Writing the Event* (Manchester: Manchester University Press, 1988).

Bennion, F.A.R. *Bennion on Statute Law* (London: Longman, 1990).

Bennion, F.A.R. *Statutory Interpretation: A Code* (London: Butterworth, 1992).

Bentham, J. *Of Laws in General*, edited by H.L.A. Hart (London: University of London Athlone Press, 1970).

Bentham, J. *A Fragment on Government*, edited by F.C. Montague (Westport, Connecticut: Greenwood Press, 1980).

Berger, R. *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass.: Harvard University Press, 1977).

Berger, R. 'Lawyering vs. Philosophizing: Facts or Fancies' 9 *University of Dayton Law Review* 171 (1984).

Berkeley, G. *The Principles of Human Knowledge* (London and New York: George Routledge and Sons Limited, 1878).

Bernstein, R.J. *Beyond Objectivism and Relativism* (Oxford: Blackwell, 1989).

The Bible, King James Version.

Bickel, A.M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962).

Bickel, A.M. *Politics and the Warren Court* (New York: Harper and Row, 1965).

Biemel, W. *Martin Heidegger*, transl. by J.L. Mehta (London: Routledge and Kegan Paul, 1977).

Bishin, W.R. and Stone, C.D. *Law, Language, and Ethics: An Introduction to Law and Legal Method* (Mineola, NY: Foundation Press, 1972).

Bittker, B.I. 'The Bicentennial of the Jurisprudence of Original Intent: The Recent Past' 77 *California Law Review* 235 (1989).

Black, Jr., C.L. 'The Lawfulness of the Segregation Decisions' 69 *Yale Law Journal* 421 (1960).

Blackstone, Sir W. *The Sovereignty of the Law: Selections from Blackstone's 'Commentaries on the Laws of England,'* edited by G. Jones (London: Macmillan, 1973).

Bloor, D. *Wittgenstein: A Social Theory of Knowledge* (London: Macmillan, 1984).

Bloor, D. 'A Sociological Theory of Objectivity' in S.C. Brown (ed) *Objectivity and Cultural Divergence* 229 (Cambridge: Cambridge University Press, 1984).

Bobbitt, P. *Constitutional Fate: Theory of the Constitution* (Oxford: Oxford University Press, 1982).

Bobbitt, P. *Constitutional Interpretation* (Oxford: Blackwell, 1991).

Bodenheimer, E. *Power, Law, and Society: A Study of the Will to Power and the Will to Law* (New York: Crane, 1973).

Bolton, D. *An Approach to Wittgenstein's Philosophy* (London: Macmillan, 1979).

Borges, J.L. 'Pierre Menard, Author of the *Quixote*,' transl. by J.E. Irby, in his *Labyrinths* 62 (London: Penguin, 1970).

Bork, R.H. *The Tempting of America* (London: Sinclair-Stevenson Limited, 1990).

Bozell, L.B. *The Warren Revolution* (New York: Arlington House, 1969).

Brennan, Jr., W.J. 'The Constitution of the United States: Contemporary Ratification' in Levinson and Mailloux (eds) 13 (1988).

Brest, P. 'The Misconceived Quest for the Original Understanding' 60 *Boston Univ. Law Review* 204 (1980).

Brest, P. 'Interpretation and Interest' 34 *Stanford Law Review* 765 (1982).

Brewer-Carias, A.R. *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989).

Brink, D.O. 'Legal Theory, Legal Interpretation, and Judicial Review' 17 *Philosophy and Public Affairs* 105 (1988).

Brissaud, J. *A History of French Public Law*, transl. by J.W. Garner (London: John Murray, 1915).

Brock, W. 'Introduction' to M. Heidegger, *Existence and Being* 13 (London: Vision Press, 1968).

Brown; R.E. Charles *Beard and the Constitution: A Critical Analysis of "An Economic Interpretation of the Constitution"* (Princeton, NJ: Princeton University Press, 1956).

Bruns, G.L. 'Law and Language: A Hermeneutics of the Legal Text' in Leyh (ed) 23 (1992).

Buber, M. *Tales of the Hassidim: The Early Masters*, transl. by O. Marx (New York: Schocken Books, 1972).

Burt, R.A. *The Constitution in Conflict* (Cambridge, Mass.: Harvard University Press, 1992).

Butler, C. *Interpretation, Deconstruction, and Ideology* (Oxford: Clarendon Press, 1984).

Cahn, E.N. 'Authority and Responsibility' 51 *Columbia Law Review* 838 (1951).

Campbell, T. *Justice* (London: Macmillan, 1988).

Cappelletti, M. and Cohen, W. *Comparative Constitutional Law: Cases and Materials* (Indianapolis: Bobbs-Merrill, 1979).

Cappelletti, M. *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989).

Cardozo, B. 'Law and Literature' in *Selected Writings of Benjamin Nathan Cardozo*, edited by M.E. Hall, at 339 (New York: Fallon Publications, 1947).

Carrington, P. 'Of Law and the River' 34 *Journal of Legal Education* 222 (1984).

Carroll, D. 'Rephrasing the Political with Kant and Lyotard: From Aesthetic to Political Judgements' 14 *Diacritics* 3/74 (1984).

Carrión-Wam, R. 'Semiotica Juridica' in Carzo and Jackson 11 (1985).

Carter, S.L. 'Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle' 94 *Yale Law Journal* 821 (1985).

Carty, A. (ed) *Postmodern Law* (Edinburgh: Edinburgh University Press, 1990).

Carzo, D. and Jackson, B.S. (eds) *Semiotics, Law and Social Science* (Rome: Gangemi Editore and Liverpool Law Review, 1985).

Caton, H. *The Origin of Subjectivity: An Essay on Descartes* (New Haven and London: Yale University Press, 1973).

Chomsky, N. *Language and Mind* (New York: Harcourt, Brace and World, Inc., 1968).

Clammer, J. 'Wittgensteinianism and the Social Sciences' 6 *Sociological Analysis and Theory* 241 (1976).

Clinton, R.L. *Marbury v. Madison and Judicial Review* (Lawrence, KS: The University of Kansas Press, 1989).

Cohen, F.S. *The Legal Conscience: Selected Papers of Felix S. Cohen*, edited by L.K. Cohen ([place of publication not specified] U.S.A.: Archon Books, 1970).

Cornell, D. 'From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation' in Leyh (ed) 147 (1992).

Cotterrell, R. *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (London and Edinburgh: Butterworths, 1989).

Cottingham, J. *Rationalism* (London: Paladin Books, 1984).

Coulson, N.J. *A History of Islamic Law* (Edinburgh: University of Edinburgh Press, 1991).

Cover, R.M. 'Foreword: *Nomos* and Narrative' 97 *Harvard Law Review* 4 (1983).

Cox, A. *The Warren Court: Constitutional Decision as an Instrument of Reform* (Cambridge, Mass.: Harvard University Press, 1968).

Craig, P. *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford: Clarendon Press, 1990).

Cross, R. *Statutory Interpretation*, edited by J. Bell and G. Engle (London: Butterworths, 1987).

Cuhruk, M.C. 'Türk Anayasa Mahkemesi' [The Address by its Vice (later *the*) President on the Constitutional Court of Turkey at its 25th Anniversary Symposium] 4 *Anayasa Yargisi* 5 (1987).

Culler, J. *On Deconstruction: Theory and Criticism After Structuralism* (London: Routledge, 1989).

Culler, J. *Framing the Sign: Criticism and its Institutions* (Oxford: Blackwell, 1988).

Cummins, R.J. 'Constitutional Protection of Civil Liberties in France' 33 *American Journal of Comparative Law* 721 (1985).

Cummins, R.J. 'The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France' 35 *International and Comparative Law Quarterly* 594 (1986).

Dadomo, C. and Farran, S. *The French Legal System* (London: Sweet and Maxwell, 1993).

Dale, Sir W. *Legislative Drafting: A New Approach* (London: Butterworths, 1977).

Dale, Sir W. (ed) *British and French Statuary Drafting: The Proceedings of the Franco-British Conference of 7 and 8 April 1986* (London: University of London, Institute of Advanced Legal Studies,1986).

Dallmayr, F. 'Hermeneutics and the Rule of Law' in Leyh (ed) 3 (1992).

Dalton, C. 'An Essay in the Deconstruction of Contract Doctrine' in Levinson and Mailloux (eds) 285 (1988).

David, R. and de Vries, H.P. *The French Legal System: An Introduction to Civil Law Systems* (New York: Oceana Publications, 1958).

David, R. *French Law: Its Structure, Sources, and Methodology*, transl. by M. Kindred (Baton Rouge: Louisiana State University Press, 1972).

David, R. *English Law and French Law* (London: Stevens and Sons, 1980).

Davis, M.H. 'The Law / Politics Distinction, the French Conseil Constitutionnel, and the U.S. Supreme Court' 34 *American Journal of Comparative Law* 45 (1986).

Davis, W.A. 'The Fisher King: *Wille zur Macht* in Baltimore' 10 *Critical Inquiry* 668 (1984).

Dawson, J.P. *The Oracles of the Law* (Ann Arbor: Michigan University Press, 1968).

de Man, P. *Allegories of Reading* (New Haven and London: Yale University Press, 1979).

de Man, P. 'The Resistance to Theory' 63 *Yale French Studies* 3 (1983).

de Vries, H.P. *Civil Law and the Anglo-American Lawyer* (New York: Oceana Publications, 1976).

Derrida, J. *Of Grammatology*, transl. by G.C. Spivak (Baltimore and London: The Johns Hopkins University Press, 1976).

Derrida, J. *Writing and Difference*, transl. by A. Bass (London and Henley: Routledge and Kegan Paul, 1978).

Derrida, J. *Speech and Phenomena*, transl. by D.B. Allison (Evanston: Northwestern University Press, 1989).

Derrida, J. *Margins of Philosophy*, transl. by A. Bass (Sussex: The Harvester Press, 1986).

Derrida, J. *Positions*, transl. by A. Bass (London: The Athlone Press, 1987).

Derrida, J. *Dissemination*, transl. by B. Johnson (Chicago: Chicago University Press, 1981).

Derrida, J. *Limited Inc*, transl. by S. Weber and J. Mehlman (Evanston: Northwestern University Press, 1990).

Derrida, J. *The Ear of the Other: Texts and Discussions with Jacques Derrida*, edited by C.V. McDonald (New York: Schocken Books, 1985).

Derrida, J. 'Declarations of Independence,' transl. by T. Keenan and T. Pepper, 15 *New Political Science* 7 (1986).

Derrida, J. 'The Law of Genre,' transl. by A. Ronell, 7 *Glyph* 202 (1980).

Derrida, J. 'Title (to be specified),' transl. by T. Conley, 31 *Sub-Stance* 5 (1981).

Derrida, J. 'Devant la loi,' transl. by A. Ronell, in A. Udoff (ed) *Kafka and the Contemporary Critical Performance* 128 (Bloomington and Indianapolis: Indiana University Press, 1987).

Derrida, J. *The Truth in Painting*, transl. by G. Bennington and I. McLeod (Chicago and London: The University of Chicago Press, 1987).

Derrida, J. *The Postcard: From Socrates to Freud and Beyond*, transl. by A. Bass (Chicago and London: The University of Chicago Press, 1987).

Derrida, J. *Spurs: Nietzsche's Styles*, transl. by B. Harlow (Chicago and London: The University of Chicago Press, 1979).

Derrida, J. 'Sending: On Representation,' transl. by P. Caws and M.A. Caws, 49 *Social Research* 294 (1982).

Derrida, J. *Of Spirit: Heidegger and the Question*, transl. by G. Bennington and R. Bowlby (Chicago and London: The University of Chicago Press, 1991).

Derrida, J. Interviewed by R. Kearney in his *Dialogues with Contemporary Continental Thinkers* (Manchester: Manchester University Press, 1986).

Descombes, V. *Objects of All Sorts: A Philosophical Grammar*, transl. by L. Scott-Fox and J. Harding (Oxford: Blackwell, 1986).

Descartes, R. 'Rules for the Direction of the Mind' in *The Philosophical Writings of Descartes*, transl. by J. Cottingham *et al.*, Vol. 1 at 9 (Cambridge: Cambridge University Press, 1984).

Descartes, R. 'Discourse on the Method' *ibid* at 111.

Descartes, R. 'Principles of Philosophy' *ibid* at 179.

Descartes, R. 'The Passions of the Soul' *ibid* at 328.

Descartes, R. 'Meditations on First Philosophy' *ibid* Vol. 2 at 3 (1985).

Descartes, R. 'Objections and Replies' *ibid* at 66.

Descartes, R. Letter Dated June 28, 1643, to the Princess Elisabeth of Bohemia, transl. E. Wilson, in M.D. Wilson (ed) *The Essential Descartes* 377 (New York: Meridian Books, 1983).

Dews, P. 'The Letter and the Line: Discourse and Its Other in Lyotard' 14 *Diacritics* 14/40 (1984).

Dicey, A.V. *Introduction to the Study of the Law of the Constitution*, 10th edition (London: Macmillan, 1964).

Dickinson, J. 'The Problem of the Unprovided Case' in Lambert (ed) Vol. 2 at 503 (1935).

Dobson, C. and Payne, R. *The Terrorists* (New York: Facts on File, Inc., 1982).

Doi, A.R.I. *Sharî'ah: The Islamic Law* (London: Ta Ha Publishers, 1984).

Donagan, A. 'Wittgenstein on Sensation' in G. Pitcher (ed) *Wittgenstein: The Philosophical Investigations* (London: Macmillan, 1970).

Dostoyevsky, F. *The Devils* transl. by D. Magarshack (London: Penguin, 1971).

Douglass, F. 'The Constitution and Slavery' [1849] in P.S. Foner (ed) *The Life and Writings of Frederick Douglass* Vol. 1 at 361 (New York: International Publishers, 1950).

Douzinas, C. and Warrington, R. with McVeigh, S. *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London: Routledge, 1990).

Drago, R. 'The General Principles of Law in the Jurisprudence of the French Conseil d'Etat' 11 *American University Law Review* 126 (1962).

Dreyfus, H.L. *Being-in-the-World: A Commentary on Heidegger's Being and Time Division 1* (Cambridge, Mass. and London: The MIT Press, 1992).

Driedger, E.A. 'Statutes: The Mischievous Literal Golden Rule' 59 *Canadian Bar Review* 780 (1981).

Durfee, H.A. (ed) *Analytic Philosophy and Phenomenology* (The Hague: Martinus Nijhoff, 1976).

Dworkin, R. *Taking Rights Seriously*, 2nd edition (London: Duckworth, 1978).

Dworkin, R. 'No Right Answer?' in P.M.S. Hacker and J. Raz (eds) *Law, Morality, and Science* 58 (Oxford: Clarendon Press, 1979).

Dworkin, R. 'Law as Interpretation' 60 *Texas Law Review* 527 (1982).

Dworkin, R. 'My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More' in W.J.T. Mitchell (ed) *The Politics of Interpretation* 287 (Chicago: University of Chicago Press, 1983).

Dworkin, R. *Law's Empire* (London: Fontana, 1986).

Dworkin, R. 'Liberal Community' 77 *California Law Review* 479 (1989).

Dworkin, R. 'The Great Abortion Case' *The New York Review* 49 (June 29, 1989).

Dworkin, R. 'The Future of Abortion' *The New York Review* 47 (Sept. 28, 1989).

Dworkin, R. *A Bill of Rights for Britain: Why British Liberty Needs Protecting* (London: Chatto and Windus Ltd. 1990).

Dworkin, R. 'The Center Holds!' *The New York Review* 29 (Aug. 13, 1992).

Eagleton, T. *Criticism and Ideology: A Study in Marxist Literary Theory* (London: Verso, 1978).

Eagleton, T. *The Ideology of the Aesthetic* (Oxford: Blackwell, 1990).

Eagleton, T. *Ideology: An Introduction* (London: Verso, 1991).

Easterbrook, F.H. 'Statues' Domains' 50 *University of Chicago Law Review* 533 (1983).

Ebulula [Mardin] and Samin, A. 'Le passage des anciennes sources aux nouvelles sources en droit privé turc' in E. Lambert (ed) Vol 1 at 126 (1935).

Ebulula Mardin. 'Development of the Sharî'a under the Ottoman Empire' in M. Khadduri and H.J. Liebesny (eds) *Law in the Middle East* Vol. 1 (Origin and Development of Islamic Law) at 279 (Washington, DC: The Middle East Institute, 1955).

Eco, U. *The Open Work*, transl. by A Cancogni ([place of publication not specified] U.K.: Hutchinson Radius, 1989).

Eco, U. 'After Secret Knowledge' *The Times Literary Supplement* 666 (June 22-28, 1990).

Edgar, S.G.G. *Craies on Statute Law* (London: Sweet and Maxwell, 1971).

Edis, S. *Medeni Hukuka Giris ve Baslangiç Hükümleri* [An Introduction to Civil [=Private Positive] Law and Commentary upon the Preliminary Provisions of its Code] (Ankara: Ankara University Faculty of Law Press, 1979).

Egerton, Sir T. *A Discourse upon the Exposicion & Understandinge of Statutes* [1557-1567], edited by S.E. Thorne (San Marino, Ca.: Huntington Library, 1942).

Egger, A. *Isviçre Medeni Kanunu Serhi* [Commentary upon the Swiss Civil Code] Vol. 1, transl. by V. Çernis (Ankara: Ankara University Faculty of Law Press, 1947).

Ehrlich, E. 'Judicial Freedom of Decision: Its Principles and Objects,' transl. by E. Bruncken, in the Modern Legal Philosophy Series of Association of

American Law Schools *The Science of Legal Method* 47 (New York: Augustus M. Kelly, 1969).

Ellis, J.M. *Against Deconstruction* (Princeton: Princeton University Press, 1989).

Ely, J.H. 'The Wages of Crying Wolf: A Comment on *Roe v. Wade*' 82 *Yale Law Journal* 920 (1973).

Ely, J.H. *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

Engel, S. 'Judicial Review and Political Preview of Legislation in Post-War France' 6 *Inter-American Law Review* 53 (1964).

Engelmann, P. *Letters from Ludwig Wittgenstein, with a Memoir* (Oxford: Blackwell, 1967).

Esen, B.N. *Anayasa Mahkemesine Göre Türk Anayasa Hukuku Anlayisi* [The Turkish Conception of Constitutional Law in the Decisions of the Turkish Constitutional Court] (Ankara: Ankara University Faculty of Law Press, 1966).

Eskridge, Jr., W.N. 'Politics Without Romance' 74 *Virginia Law Review* 275 (1988).

Eskridge, Jr., W.N. 'Gadamer / Statutory Interpretation' 90 *Columbia Law Review* 609 (1990).

Eskridge, Jr., W.N. and Frickey, P.P. 'Statutory Interpretation as Practical Reasoning' 42 *Stanford Law Review* 321 (1990).

Ewald, W. 'Unger's Philosophy: A Critical Legal Study' 97 *Yale Law Journal* 665 (1988).

Ewing, K.D. and Gearty, C.A. *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford: Clarendon Press, 1990).

Fallon, R.H. 'A Constructivist - Coherence Theory of Constitutional Interpretation' 100 *Harvard Law Review* 1189 (1987).

Farrell, F.B. 'Iterability and Meaning: The Searle-Derrida Debate' 19 *Metaphilosophy* 53 (1988).

Favoreu, L. and Philip, L. *Les grandes décisions du Conseil constitutionnel*, 5th edition (Paris: Editions Sirey, 1989).

Fehrenbacher, D.E. *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978).

Feyerabend, P. 'Problems of Microphysics' in S. Morgenbesser (ed) *Philosophy of Science Today* 136 (1967).

Feyerabend, P. 'How to Defend Society Against Science' in I. Hacking (ed) *Scientific Revolutions* 156 (Oxford: Oxford Readings in Philosophy, 1987).

Feyerabend, P.K. *Against Method: Outline of an Anarchistic Theory of Knowledge* (London: New Left Books, 1975).

Feyerabend, P.K. *Science in a Free Society* (London: New Left Books, 1978).

Finch, H.L.R. *Wittgenstein: The Later Philosophy* (Altantic Highlands: Humanities Press, 1977).

Finnis, J. *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

Finnis, J. 'On Reason and Authority in *Law's Empire*' 6 *Law and Philosophy* 357 (1987).

Fish, S. *Is There a Text in This Class: The Authority of Interpretive Communities* (Cambridge, Mass.: Harvard University Press, 1980).

Fish, S. 'Interpretation and the Pluralist Vision' 60 *Texas Law Review* 495 (1982).

Fish, S. 'Fear of Fish: A Reply to Walter Davis' 10 *Critical Inquiry* 695 (1984).

Fish, S. *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Oxford: Clarendon Press, 1989).

Fish, S. 'Almost Pragmatism: Richard Posner's Jurisprudence' 57 *University of Chicago Law Review* 1447 (1990).

Fish, S. 'The Law Wishes to Have a Formal Existence,' in A. Sarat and T.R. Kearns (eds) *The Fate of Law* 159 (Ann Arbor: University of Michigan Press, 1991).

Fish, S. 'Play of Surfaces: Theory and the Law' in Leyh (ed) 297 (1992).

Fiss, O.M. 'Objectivity and Interpretation' 34 *Stanford Law Review* 739 (1982).

Fogelin, R. *Wittgenstein* (London: Routledge and Kegan Paul, 1976).

Forde, M. 'Liability in Damages for Strikes: A French Counter-Revolution' 33 *American Journal of Comparative Law* 447 (1985).

Foucault, M. *The Order of Things: An Archaeology of the Human Sciences*, (translator not cited) (London and New York: Tavistock and Routledge, 1989).

Foucault, M. *The Archaeology of Knowledge*, transl. by A.M.S. Smith (London and New York: Tavistock Publications, 1986).

Foucault, M. 'The Subject and Power,' half written in English and half transl. by L. Sawyer, 8 *Critical Inquiry* 777 (1982).

Frank, J.N. *Law and the Modern Mind* (New York: Doubleday, 1963).

Frank, J.N. *Courts on Trial: Myth and Reality in American Justice* (Princeton: Princeton University Press, 1949).

Frank, J.N. "Short of Sickness and Death': A Study of Moral Responsibility in Legal Criticism' 26 *New York University Law Review* 545 (1951).

Frank, J.P. and Munro, R.F. 'The Original Understanding of "Equal Protection of the Laws" ' 50 *Columbia Law Review* 131 (1950).

Franklin, M. 'M. Gény and Juristic Ideals and Method in the United States' in Lambert (ed) Vol. 2 at 30 (1935).

Franklin, M. 'A Study of Interpretation in the Civil Law' 3 *Vanderbilt Law Review* 557 (1950).

Franklin, M. 'Legal Method in the Philosophies of Hegel and Savigny' 44 *Tulane Law Review* 766 (1970).

Franklin, M. 'The Mandarinism of Phenomenological Philosophy of Law' in M. Natanson (ed) *Phenomenology and the Social Sciences* Vol. 2, at 451 (Evanston: Northwestern University Press, 1973).

Franklin, M[ark]. 'Whatever Happened to the English Constitution?' 2 *Talking Politics* 59 (Winter 1989-'90).

Freud, S. 'The Unconscious' [1915], transl. under the supervision of J. Riviere, in his *Collected Papers* Vol. 4 at 98 (London: The Hogarth Press, 1956).

Fried, C. 'Sonnet LXV and the "Black Ink" of the Framers' Intention' in Levinson and Mailloux (eds) 45 (1988).

Friedmann, W. 'Phenomenology and Legal Science' in M. Natanson (ed) *Phenomenology and the Social Sciences* Vol. 2, at 343 (Evanston: Northwestern University Press, 1973).

Frug, G.E. 'The Ideology of Bureaucracy in American Law' 97 *Harvard Law Review* 1276 (1984).

Frye, N. *Anatomy of Criticism* (Princeton: Princeton University Press, 1957).

Fuchs, W.W. *Phenomenology and the Methaphysics of Presence* (The Hague: Martinus Nijhoff, 1976).

Fuller, L.L. 'What Motives Give Rise to the Historical Legal Fiction?' in Lambert (ed) Vol. 2 at 157 (1935).

Fuller, L.L. 'Positivism and Fidelity to Law' 71 *Harvard Law Review* 630 (1958).

Fuller, L.L. *The Morality of Law* (New Haven: Yale University Press, 1969).

Gadamer, H.G. *Truth and Method* (London: Sheed and Ward, 1988).

Gallagher, C. 'Re-Covering the Social in Recent Literary Theory' 12 *Diacritics* 4/40 (1982).

Garver, N. 'Rules' in P. Edwards (ed) *Encyclopedia of Philosophy* (London: Macmillan, 1967).

Garver, N. 'Preface' to J. Derrida, *Speech and Phenomena* ix (Evanston: Northwestern University Press, 1973).

Gasché, R. *The Tain of the Mirror: Derrida and the Philosophy of Reflection* (Cambridge, Mass.: Harvard University Press, 1986).

Gasché, R. 'Reading Chiasms: An Introduction' to Warminski ix (1987).

Gellner, E. *Words and Things: An Examination of, and an Attack on, Linguistic Philosophy* (London: Routledge and Kegan Paul, 1979).

Gény, F. *Method of Interpretation and Sources of Private Positive Law: Critical Essay*, transl. by J. Mayda (Louisiana: Louisiana State Law Institute, 1963).

Gény, F. 'The Critical System (Idealistic and Formal) of R. Stammler,' transl. by I. Husik, in Stammler 493 (1969).

Gény, F. 'The Legislative Technic of Modern Civil Codes,' transl. by E. Bruncken, in the Modern Legal Philosophy Series of Association of American Law Schools *The Science of Legal Method* 498 (New York: Augustus M. Kelly, 1969).

Gerland, H.B. 'The Operation of the Judicial Function in English Law,' transl. by E. Bruncken, *ibid* at 229.

Gilmore, G. 'Legal Realism: Its Cause and Cure' 70 *Yale Law Journal* 1037 (1961).

Ginsberg, M. 'Stammler's Philosophy of Law' in W.I. Jennings (ed) *Modern Theories of Law* 38 (London: Oxford University Press, 1933).

Goodell, W. 'Views of American Constitutional Law in Its Bearing upon American Slavery' [1844] in *The Influence of the Slave Power with Other Anti-Slavery Pamphlets* (Westport, Connecticut: Negro Universities Press, 1970).

Goodrich, P. *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Oxford: Blackwell, 1986).

Goodrich, P. *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London: Macmillan, 1987).

Goodrich, P. 'Traditions of Interpretation and the Status of the Legal Text' 6 *Legal Studies* 53 (1986).

Goodrich, P. 'Simulation and the Semiotics of Law' 2 *Textual Practice* 180 (1988).

Goodrich, P. *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld and Nicolson, 1990).

Gordon, R. 'Critical Legal Histories' 36 *Stanford Law Review* 57 (1984).

Goutal, J. 'Characteristics of Judicial Style in France, Britain and the USA' 24 *American Journal of Comparative Law* 43 (1976).

Graff, G. '"Keep off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson' 60 *Texas Law Review* 405 (1982).

Gramsci, A. *Selections from the Prison Notebooks*, edited and transl. by Q. Hoare and G.N. Smith (London: Lawrence and Wishart, 1971).

Grey, T.C. 'Do We Have an Unwritten Constitution?' 27 *Stanford Law Review* 703 (1974-75).

Grey, T.C. 'The Constitution as Scripture' 37 *Stanford Law Review* 1 (1984).

Grey, T.C. *The Wallace Stevens Case: Law and the Practice of Poetry* (Cambridge, Mass.: Harvard University Press, 1991).

Guest, S. *Ronald Dworkin* (Edinburgh: University of Edinburgh Press, 1992).

Gutteridge, H.C. 'A Comparative View of the Interpretation of Statute Law' 8 *Tulane Law Review* 1 (1933).

Gutting, G. (ed) *Paradigms and Revolutions: Appraisals and Applications of Thomas Kuhn's Philosophy of Science* (Notre Dame and London: University of Notre Dame Press, 1980).

Habermas, J. *Legitimation Crisis*, transl. by T. McCarthy (Boston: Beacon Press, 1975).

Habermas, J. 'Modernity — An Incomplete Project,' transl. by S. Ben-Habib, in H. Foster (ed) *Postmodern Culture* 3 (London: Pluto Press, 1989).

Habermas, J. *The Philosophical Discourse of Modernity*, transl. by F.G. Lawrence (Cambridge: Polity Press, 1990).

Hägerström, A. *Inquiries into the Nature of Law and Morals*, edited by K. Olivecrona, transl. by C.D. Broad (Stockholm: Almqvist and Wiksell, 1953).

Haimbaugh, Jr., G.D. 'Was It France's Marbury v. Madison?' 35 *Ohio State Law Journal* 910 (1974).

Hamson; C.J. *Executive Discretion and Judicial Control: An Aspect of the French Conseil d'Etat* (London: Stevents and Sons Ltd., 1954).

Hand, L. *The Bill of Rights* (Cambridge, Mass.: Harvard University Press, 1958).

Hanfling, O. *Logical Positivism* (Oxford: Blackwell, 1981).

Harden, I. and Lewis, N. *The Noble Lie: The British Constitution and the Rule of Law* (London: Hutchinson, 1986).

Hare, R.M. *Freedom and Reason* (Oxford: Clarendon Press, 1962).

Hare, R.M. 'Rawls' Theory of Justice' 23 *Philosophical Quarterly* (1973).

Harper, F.W. 'The Forces Behind and Beyond Juristic Pragmatism in America' in Lambert (ed) Vol. 2 at 243 (1935).

Harrison, J.L. and Mashburn, A.R. 'Jean-Luc Godard and Critical Legal Studies (Because We Need the Eggs)' 87 *Michigan Law Review* 1924 (1989).

Hart, H.L.A. 'Positivism and the Separation of Law and Morals' 71 *Harvard Law Review* 593 (1958).

Hart, H.L.A. *The Concept of Law* (Oxford: Clarendon Press, 1988).

Hart, H.L.A. *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983).

Hayek, F.A. *The Mirage of Justice* (London: Routledge and Kegan Paul, 1976).

Hegel, G.W.F. *Philosophy of Right*, transl. by T.M. Knox (Oxford: Oxford University Press, 1969).

Hegel, G.W.F. 'The English Reform Bill' in *Hegel's Political Writings*, transl. by T.M. Knox (Oxford: Clarendon Press, 1964).

Heidegger, M. *Being and Time*, transl. by J. Macquarrie and E. Robinson (Oxford: Blackwell, 1990).

Heidegger, M. 'The Age of the World View,' transl. by M. Grene, in W.V. Spanos (ed) *Martin Heidegger and the Question of Literature: Toward a Postmodern Literary Hermeneutics* 1 (Bloomington and London: Indiana University Press, 1979).

Heidegger, M. *An Introduction to Metaphysics*, transl. by R. Manheim (New Haven and London: Yale University Press, 1987).

Heidegger, M. *Existence and Being*, transl. by D. Scott, R.F.C. Hull and A Crick (London: Vision Press, 1968).

Heidegger, M. *Poetry, Language, Thought*, transl. by A. Hofstadter (New York: Harper and Row, 1975).

Heidegger, M. *Nietzsche, Volume IV: Nihilism*, transl. by F.A. Capuzzi, edited by D.F. Krell (San Fransisco: Harper and Row, 1982).

Heidegger, M. *The Question of Being*, transl. by W. Kluback and J.T. Wilde (New York: Twayne Publishers, Inc., 1958).

Heidegger, M. *What is Philosophy?* (translator not cited) (Plymouth: Vision Press, 1989).

Heidegger, M. *Identity and Difference*, transl. by J. Stambaugh (New York: Harper and Row, 1969).

Heidegger, M. *On the Way to Language*, transl. by P.D. Hertz (New York: Harper and Row, 1982).

Heidegger, M. *On Time and Being*, transl. by J. Stambaugh (New York: Harper and Row, 1972).

Held, D. *Introduction to Critical Theory: Horkheimer to Habermas* (Berkeley, Los Angeles: University of California Press, 1980).

Herman, S. Review of 'François Gény and Modern Jurisprudence' 27 *American Journal of Comparative Law* 730 (1979).

Hermann, D.H.J. 'Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena' 36 *University of Miami Law Review* 379 (1982).

Hintikka, J. 'Cogito, Ergo, Sum: Inference or Performance?' in W. Doney (ed) *Descartes: A Collection of Critical Essays* (New York: Anchor Books, 1967).

Hirsch, Jr., E.D. *Validity in Interpretation* (New Haven and London: Yale University Press, 1967).

Hirsch, Jr., E.D. *The Aims of Interpretation* (Chicago and London: The University of Chicago Press, 1978).

Hirsch, Jr., E.D. 'The Politics of Theories of Interpretation' 9 *Critical Inquiry* 235 (1982).

Hirst, P. *On Law and Ideology* (London: Macmillan, 1979).

Hobbes, T. *Leviathan* (London: Everyman's Library, 1940).

Holquist, M. 'Answering as Authoring: Mikhail Bakhtin's Trans-Linguistics' 10 *Critical Inquiry* 307 (1983).

Holmes, O.W. *The Common Law* (Boston: Little, Brown and Co., 1946).

Holmes, O.W. 'The Path of Law' 10 *Harvard Law Review* 457 (1897).

Holmes, O.W. 'Theory of Legal Interpretation' 12 *Harvard Law Review* 417 (1899).

Holmes, O.W. 'Natural Law' 32 *Harvard Law Review* 40 (1918).

Honig, B. 'Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic' 85 *American Political Science Review* 97 (1991).

Hoy, D.C. 'Interpreting the Law: Hermeneutical and Poststructuralist Perspectives' in Levinson and Mailloux (eds) 319 (1988).

Hoy, D.C. 'Intentions and the Law: Defending Hermeneutics' in Leyh (ed) 173 (1992).

Hunt, A. 'The Theory of Critical Legal Studies' 6 *Oxford Journal of Legal Studies* 1 (1986).

Hunt, A. 'The Critique of Law' 14 *Journal of Law and Society* 5 (1987).

Hurst, J.W. *Dealing with Statutes* (New York: Columbia University Press,1982).

Husson, C.A.D. 'Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law' 95 *Yale Law Journal* 969 (1986).

Hutcheson, J.C. 'The Judgement Intuitive: The Function of 'Hunch' in Judicial Process' 14 *Cornell Law Quarterly* 274 (1929).

Hutchinson, A.C. *Dwelling on the Threshold* (London: Sweet and Maxwell, 1988).

Illich, I. *Deschooling Society* (London: Calder and Boyars, 1971).

Illich, I. *Medical Nemesis: The Expropriation of Health* (London: Calder and Boyars, 1975).

Imam Muslim. *Sahîh Muslim* Vol. 3, transl. by A.H. Siddîqî (New Delhi: Kitab Bhavan, 1982).

The Interpretation of Statutes, Law Com. No. 21, Scott. Law Com. No. 11 (1969).

Jackson, B.S. *Semiotics and Legal Theory* (London: Routledge and Kegan Paul, 1987).

Jackson, B.S. *Law, Fact and Narrative Coherence* (Merseyside: D. Charles, 1989).

James, W. *Pragmatism: A New Name for Some Old Ways of Thinking*, published together with 'The Meaning of Truth' (Cambridge, Mass.: Harvard University Press, 1978).

Jameson, F. *The Political Unconscious* (London: Methuen, 1981).

Jennings, Sir I. *Parliament* (Cambridge: Cambridge University Press, 1957).

Jennings, Sir I. *The British Constitution* (Cambridge: Cambridge University Press, 1962).

Joergensen, J. *The Development of Logical Empiricism* (Chicago: University of Chicago Press, 1951).

Johnson, B. 'The Frame of Reference: Poe, Lacan, Derrida' in G. Hartman (ed) *Psychoanalysis and the Question of the Text* 149 (Baltimore: Johns Hopkins University Press, 1978).

Johnson, B. 'Mallarmé and Austin' in her *The Critical Difference: Essays in the Rhetoric of Contemporary Reading* 52 (Baltimore: Johns Hopkins University Press, 1980).

Johnson, P. 'Do You Sincerely Want to Be Radical?' 36 *Stanford Law Review* 247 (1984).

Jordan, W.D. *White Over Black: American Attitudes Toward the Negro, 1550-1812* (Williamsburg, Va: University of North Carolina Press, 1968).

Judovitz, D. 'Derrida and Descartes: Economizing Thought' in H.J. Silverman (ed) *Derrida and Deconstruction* 40 (New York and London: Routledge, 1989).

Kahn-Freund, O. *et al. A Source Book on French Law*, edited by B. Rudden (Oxford: Clarendon Press, 1991).

Kairys, D. (ed) *The Politics of Law: A Progressive Critique* (New York: Pantheon Books, 1982).

Kamali, M.H. *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991).

Kant, I. *Critique of Pure Reason*, transl. by N.K. Smith (London: Macmillan, 1968).

Kant, I. *Critique of Judgement*, transl. by J.C. Meredith (Oxford: Clarendon Press, 1952).

Kant, I. *Foundations of the Metaphysics of Morals*, transl. by L.W. Beck (Indianapolis: Bobbs-Merrill, 1959).

Kantorowicz, H. 'Legal Science - The Summary of its Methodology' 28 *Columbia Law Review* 679 (1928).

Kantorowicz, H. 'Some Rationalism About Realism' 43 *Yale Law Journal* 1240 (1934).

Kantorowicz, H. 'Savigny and the Historical School' 53 *Law Quarterly Review* 326 (1937).

Kantorowicz, H. *The Definition of Law*, edited by A.H. Campbell (Cambridge: Cambridge University press, 1958).

Kay, R.S. 'Substance and Structure as Constitutional Protections: Centennial Comparisons' *Public Law* 428 (1989).

Kelman, M. 'Trashing' 36 *Stanford Law Review* 293 (1984).

Kelman, M. *A Guide to Critical Legal Studies* (Cambridge, Mass. and London: Harvard University Press, 1987).

Kelsen, H. *Introduction to the Problems of Legal Theory* [The First Edition of the 'Pure Theory of Law'], transl. by B.L. Paulson and S.L. Paulson (Oxford: Clarendon Press, 1992).

Kennedy, D. and Klare, K. 'A Bibliography of Critical Legal Studies' 94 *Yale Law Journal* 461 (1984).

Kennedy, D. 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities' 34 *American University Law Review* 939 (1985).

Kennedy, D. 'Toward a Critical Phenomenology of Judging' in A.C. Hutchinson and P. Monahan (eds) *The Rule of Law: Ideal or Ideology* 141 (Toronto: Carswell, 1987).

Kenny, A. 'Cartesian Privacy' in G. Pitcher (ed) *Wittgenstein: The Philosophical Investigations* 352 (London: Macmillan, 1970).

Kerferd, G.B. *The Sophistic Movement* (Cambridge: Cambridge University Press, 1981).

Kerruish, V. *Jurisprudence as Ideology* (London: Routledge, 1991).

Kevelson, R. *The Law as a System of Signs* (New York: Plenum Press, 1988).

Kevelson, R. (ed) *Law and Semiotics*, 3 volumes (New York: Plenum Press, 1987-89).

King, J.B. 'Constitutionalism and the Judiciary in France' 80 *Political Science Quarterly* 62 (1965).

King, M. *Heidegger's Philosophy* (Oxford: Blackwell, 1964).

Knapp, S. and Michaels, W.B. 'Against Theory' 8 *Critical Inquiry* 723 (1982).

Knapp, S. and Michaels, W.B. 'A Reply to our Critics' 9 *Critical Inquiry* 790 (1983).

Knapp, S. and Michaels, W.B. 'A Reply to Richard Rorty: What is Pragmatism?' 11 *Critical Inquiry* 466 (1985).

Knapp, S. and Michaels, W.B. 'Against Theory 2: Hermeneutics and Deconstruction' 14 *Critical Inquiry* 49 (1987).

Knapp, S. and Michaels, W.B. 'Intention, Identity, and the Constitution: A Response to David Hoy' in Leyh (ed) 187 (1992).

Knoppers, B.M. *et al.* 'Abortion Law in Francophone Countries' 38 *American Journal of Comparative Law* 889 (1990).

Kocourek, A. 'Libre Recherche in America' in Lambert (ed) Vol. 2 at 459 (1935).

Kohler, J. 'Judicial Interpretation of Enacted Law,' transl. by E. Bruncken, in the Modern Legal Philosophy Series of Association of American Law Schools *The Science of Legal Method* 187 (New York: Augustus M. Kelly, 1969).

Kress, G. and Hodge, R. *Language as Ideology* (London, Boston and Henley: Routledge and Kegan Paul, 1981).

Kress, K. 'The Interpretive Turn' 97 *Ethics* 834 (1987).

Kress, K. and Anderson, S.W. 'Dworkin in Transition' 37 *American Journal of Comparative Law* 337 (1989).

Kress, K. 'Legal Indeterminacy and Legitimacy' in Leyh (ed) 200 (1992).

Kripke, S.A. *Wittgenstein on Rules and Private Language* (Oxford: Blackwell, 1989).

Kristeva, J. 'Psychoanalysis and the Polis,' transl. by M. Waller, 9 *Critical Inquiry* 77 (1982).

Kuhn, T.S. *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970).

Kuhn, T.S. *The Essential Tension: Selected Studies in Scientific Tradition and Change* (Chicago and London: University of Chicago Press, 1977).

Lacan, J. 'Seminar on "The Purloined Letter," transl. by J. Mehlman, 48 *Yale French Studies* 38 (1972).

Laing, R.D. *The Politics of Experience* (London: Penguin, 1990) [the edition also contains 'The Birds of Paradise'].

Lakatos, I. and Musgrave, A. (eds) *Criticism and the Growth of Knowledge* (Cambridge: Cambridge University Press, 1970).

Lambert, E. (ed) *Recueil d'études sur les sources du droit en l'honneur de François Gény* 3 Volumes (Paris: Librairie du Recueil Sirey, 1935).

Lambert, E. 'Codified Law and Case-Law: Their Part in Shaping the Policies of Justice,' transl. by L.B. Register, in the Modern Legal Philosophy Series of Association of American Law Schools *The Science of Legal Method* 251 (New York: Augustus M. Kelly, 1969).

Landis, J.M. 'A Note on Statutory Interpretation' 43 *Harvard Law Review* 886 (1930).

Lang, B. 'The Politics of Interpretation: Spinoza's Modernist Turn' 43 *Review of Metaphysics* 327 (1989).

Larrain, J. *Marxism and Ideology* (London: Macmillan, 1984).

Lear, J. 'Moral Objectivity' in S.C. Brown (ed) *Objectivity and Cultural Divergence* 135 (Cambridge: Cambridge University Press, 1984).

Lester, A. *et al. A British Bill of Rights* (London: Insitute for Public Policy Research, 1990).

Le Sueur, A.P. 'The Judges and the Intention of Parliament: Is Judicial Review Undemocratic?' 44 *Parliamentary Affairs* 283 (1991).

Leubsdorf, J. 'Deconstructing the Constitution' 40 *Stanford Law Review* 181 (1987).

Levinson, S. 'Law as Literature' 60 *Texas Law Review* 373 (1982).

Levinson, S. *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988).

Levinson, S. and Mailloux, S. (eds) *Interpreting Law and Literature: A Hermeneutic Reader* (Evanston, Illinois: Northwestern University Press, 1988).

Leyh, G. (ed) *Legal Hermeneutics; History, Theory, and Practice* (Berkeley: University of California Press, 1992).

Lieber, F. *Legal and Political Hermeneutics* [1839] (St. Louis: G.I. Jones, 1963).

Lindsay, C. 'Experiments in Postmodern Dialogue' 14 *Diacritics* 3/52 (1984).

Llewellyn, K.N. *The Bramble Bush: On Our Law and its Study* (New York: Oceana Publications, 1960).

Llewellyn, K.N. *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962).

Llewellyn, K.N. and Hoebel, E.A. *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Oklahoma: University of Oklahoma Press, 1967).

Llewellyn, K.N. *The Common Law Tradition: Deciding Appeals* (Boston and Toronto: Little, Brown and Company, 1960).

Locke, J. *Two Treatises of Government* (New York: Mentor Books, 1965).

Locke, J. *An Essay Concerning Human Understanding*, edited by P.H. Nidditch (Oxford: Clarendon Press, 1975).

Loewenstein, K. 'Reconstruction of the Administration of Justice in American Occupied Germany' 61 *Harvard Law Review* 419 (1948).

Loewenstein, K. 'Reflections on the Value of Constitutions in Our Revolutionary Age' in H. Eckstein and D.A. Apter (eds) *Comparative Politics: A Reader* 149 (New York: Free Press, 1965).

Lord Hailsham. *The Dilemma of Democracy* (London: Collins, 1978).

Lord Radcliffe. *The Law and its Compass* (London: Faber and Faber, 1960)

Lord Scarman. 'Why Britain Needs a Written Constitution' *The Charter 88 Trust 4th Sovereignity Lecture* (London: Charter 88 Trust Publications Ltd., 1992).

Lukács, G. *History and Class Consciousness,* transl. by R. Livingstone (London: Merlin Press, 1971).

Lundstedt, A.V. *Legal Thinking Revised* (Stockholm: Almqvist and Wiksell, 1956).

Lyons, D. 'Constitutional Interpretation and Original Meaning' in J. Coleman and E.F. Paul (eds) *Philosophy and Law* (Oxford: Blackwell, 1987).

Lyons, D. 'Reconstructing Legal Theory' 16 *Philosophy and Public Affairs* 379 (1987).

Lyotard, J.F. and Thébaud, J.L. *Just Gaming*, transl. by W. Godzich (Minneapolis: University of Minnesota Press, 1985).

Lyotard, J.F. *The Postmodern Condition: A Report on Knowledge*, transl. by G. Bennington and B. Massumi (Manchester: Manchester University Press, 1989).

Lyotard, J.F. Interviewed by G. Van Den Abeele, 14 *Diacritics* 3/16 (1984).

MacCallum, Jr., G.J. 'Legislative Intent' in R.S. Summers (ed) *Essays in Legal Philosophy* 237 (Oxford: Blackwell, 1970).

MacCormick, D.N. 'A Moralistic Case for A-Moralistic Law' 20 *Valparaiso Law Review* 1 (1985).

MacCormick, D.N. and Summers, R.S. (eds) *Interpreting Statutes: A Comparative Study* (Aldershot: Dartmouth Publishing Co., 1991).

MacCormick, D.N. and Summers, R.S. 'Interpretation and Justification,' *ibid*, at 511.

MacIntyre, A. *Whose Justice? Which Rationality?* (London: Duckworth, 1988).

Madison, J. *et al. The Federalist Papers*, edited by I. Kramnick (London: Penguin Books, 1987).

Malcolm, N. *Ludwig Wittgenstein: A Memoir* (Oxford: Oxford University Press, 1989).

Malcolm, N. *Problems of Mind* (London: George Allen and Unwin Ltd., 1972).

Malcolm, N. 'Wittgenstein on Language and Rules' 64 *Philosophy* 5 (1989).

Maltz, E.M. 'Statutory Interpretation and Legislative Power: The Case of a Modified Intentionalist Approach' 63 *Tulane Law Review* I (1988).

Mannheim, K. *Ideology and Utopia* (London: Routledge and Kegan Paul, 1972).

Marsh, N.S. *Interpretation in a National and International Context* (Brussels: Uga, 1974).

Marx, K. *Economic and Philosophic Manuscripts of 1844*, (translator not cited) (London: Lawrence and Wishart, 1981).

Marx, K. and Engels, F. *The German Ideology*, edited by S. Ryazanskaya, transl. by W. Lough (London: Lawrence and Wishart, 1965).

Marx, K. and Engels, F. *The Communist Manifesto*, edited by D. Ryazanoff, transl. by M. Lawrence (New York: Russell and Russell, 1963).

Marx, K. and Engels, F. *Selected Works*, (translator not cited) (London: Lawrence and Wishart, 1970).

Mayda, J. 'Gény's *Méthode* After 60 Years: A Critical Introduction' to his translation of Gény V (1963).

Mayda, J. *François Gény and Modern Jurisprudence* (Baton Rouge and London: Louisiana State University Press, 1978).

McConnel, M.W. 'The Role of Democratic Politics in Transforming Moral Convinctions into Law' 98 *Yale Law Journal* 1501 (1989).

McCoubrey, H. *The Development of Naturalist Legal Theory* (London: Croom Helm, 1987).

McDougal, M.S. 'Fuller v. the American Legal Realists: An Intervention' 50 *Yale Law Journal* 827 (1941).

McGinn, C. *Wittgenstein on Meaning* (Oxford: Blackwell, 1989).

McIlwain, C.H. *Constitutionalism: Ancient and Modern* (Ithaca, New York: Cornell University Press, 1947).

McIntosh, S.C.R. 'Legal Hermeneutics: A Philosophical Critique' 35 *Oklahoma Law Review* 1 (1982).

McLuhan, M. *The Medium is the Massage*, contributed by Q. Fiore (Middlesex: Penguin, 1967).

McWhinney, E. *Supreme Courts and Judicial Law Making: Constitutional Tribunals and Constitutional Review* (Dordrecht: Martinus Nijhoff, 1986).

Meese III, E. 'Address Before the D.C. Chapter of the Federalist Society Lawyers Division' in Levinson and Mailloux (eds) 25 (1988).

Mellinkoff, D. *The Language of the Law* (Boston: Little Brown, 1963).

Merryman, J.H. *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Palo Alto, CA: Stanford University Press, 1985).

Michaels, W.B. 'Against Formalism: The Autonomous Text in Legal and Literary Interpretation' 1 *Poetics Today* 23 (1979).

Michaels, W.B. 'Is There a Politics of Interpretation?' 9 *Critical Inquiry* 248 (1982).

Michaels, W.B. 'Response to Perry and Simon' 58 *Southern California Law Review* 673 (1985).

Michelfelder, D.P. and Palmer, R.E. *Dialogue and Deconstruction: The Gadamer-Derrida Encounter* (Albany: State University of New York Press, 1989).

Miers, D. 'Citing Hansard as an Aid to Interpretation' *Statute Law Review* 98 (1983).

Miers, D. 'Legal Theory and the Interpretation of Statutes' in W. Twining (ed) *Legal Theory and Common Law* 115 (Oxford: Blackwell, 1986).

Mill, J.S. *On Liberty* [1859] (London: Penguin Classics, 1985).

Miller, D. 'Recent Theories of Social Justice' 21 *British Journal of Political Science* 371 (1991).

Moles, R.N. *Definition and Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Positivist Tradition* (Oxford: Blackwell, 1987).

Monaghan, H.P. 'Our Perfect Constitution' 56 *New York University Law Review* 353 (1981).

Montesquieu, Baron de. *The Spirit of Laws*, transl. by T. Nugent, edited and revised by J.V. Prichard, 2 volumes (London: G. Bell and Sons, Ltd., 1914).

Moore, G.E. 'Proof of an External World' [1939] in his *Philosophical Papers* 127 (London: George Allen and Unwin Ltd., 1970).

Moore, M.S. 'The Semantics of Judging' 54 *S. California Law Review* 151 (1981).

Moore, M.S. 'A Natural Law Theory of Interpretation' 58 *S. California Law Review* 277 (1985).

Moore, M.S. 'The Interpretive Turn in Modern Theory: A Turn for the Worse?' 41 *Stanford Law Review* 871 (1989).

Mootz, III, F.J. 'The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur' 68 *Boston University Law Review* 523 (1988).

Morawetz, T. *The Philosophy of Law: and Introduction* (New York: Macmillan, 1980).

Mosher, M.A. 'Boundary Revisions: The Deconstruction of Moral Personality in Rawls, Nozick, Sandel and Parfit' 39 *Political Studies* 287 (1991).

Mount, F. *The British Constitution Now* (London: Heinemann, 1992).

Munz, P. 'Bloor's Wittgenstein or the Fly in the Bottle' 17 *Philosophy of the Social Sciences* 67 (1987).

Munzer, S.R. and Nickel, J.W. 'Does the Constitution Mean What It Always Meant?' 77 *Columbia Law Review* 1029 (1977).

Murray, M. (ed) *Heidegger and Modern Philosophy* (New Haven and London: Yale University Press, 1978).

Nairn, T. *The Enchanted Glass, Britain and its Monarchy* (London: Radius, 1988).

Nelson, W.E. 'Standards of Criticism' 60 *Texas Law Review* 447 (1982).

Neuborne, B. 'Judicial Review and Separation of Powers in France and the United States' 57 *New York University Law Review* 363 (1982).

Newell, R.W. *Objectivity, Empiricism and Truth* (London and New York: Routledge and Kegan Paul, 1986).

Nietzsche, F. *Beyond Good and Evil,* transl. by R.J. Hollingdale (London: Penguin Classics, 1990).

Nietzsche, F. *On the Genealogy of Morals*, transl. by W. Kaufmann and R.J. Hollingdale (New York: Vintage Books, 1969) [the edition also contains a translation, by Kaufmann, of 'Ecce Homo'].

Nietzsche, F. *The Anti-Christ*, transl. by R.J. Hollingdale (London: Penguin Classics, 1990) [the edition also contains 'Twilight of the Idols'].

Nietzsche, F. *Ecce Homo*, transl. by R.J. Hollingdale (London: Penguin Classics, 1988).

Nietzsche, F. *The Will to Power,* transl. by W. Kaufmann and R.J. Hollingdale (London: Weidenfeld and Nicolson, 1968).

Norris, C. *The Deconstructive Turn: Essays in the Rhetoric of Philosophy* (London and New York: Routledge, 1989).

Norris, C. *Derrida* (London: Fontana Modern Masters, 1987).

Norris, C. 'Law, Deconstruction, and the Resistance to Theory' 15 *Journal of Law and Society* 166 (1988).

Norris, C. *Paul de Man: Deconstruction and the Critique of Aesthetic Ideology* (New York: Routledge, 1988).

Norton, P. 'Should Britain Have a Written Constitution?' 1 *Talking Politics* 8 (1988).

Nozick, R. *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974).

Oakeshott, M. *On History and Other Essays* (Oxford: Blackwell, 1983).

Oguzman, M.K. *Medeni Hukuk Dersleri: Giris, Kaynaklar, Temel Kavramlar* [Course in Civil [Private Positive] Law: Introduction, Sources, Fundamental Notions] (Istanbul: Istanbul University Press, 1971).

Olivecrona, K. *Law as Fact* (London: Stevens and Sons, 1971).

Onar, S.S. 'The *Majalla*' in M. Khadduri and H.J. Liebesny (eds) *Law in the Middle East* Vol. 1 (Origin and Development of Islamic Law), at 292 (Washington, DC: The Middle East Institute, 1955).

Oppenheim, F.E. 'Outline of a Logical Analysis of Law' 11 *Philosophy of Science* 142 (1944).

Ostrorog, C.L. *The Angora Reform: Three Lectures Delievered at the Centenary Celebrations of University College on June 27, 28, and 29, 1927* (London: University of London Press, 1927).

O'Toole, T.J. 'Jurisprudence of François Gény' 3 *Villanova Law Review* 455 (1958).

Özsunay, E. *Medeni Hukuka Giris* [An Introduction to Civil [=Private Positive] Law] (Istanbul: Istanbul University Press, 1970).

Palmer, R.E. 'The Postmodernity of Heidegger' in W.V. Spanos (ed) *Martin Heidegger and the Question of Literature: Toward a Postmodern Literary Hermeneutics* 71 (Bloomington and London: Indiana University Press, 1979).

Pappe, H.O. 'On the Validity of Judicial Decisions in the Nazi Era' 23 *Modern Law Review* 260 (1960).

Parsons, T. 'Natural and Social Science' in D. Wrong (ed) *Max Weber* 90 (Englewood Cliffs, NJ: Prentice Hall, Inc., 1970).

Patterson, D.M. 'Interpretation in Law: Toward a Reconstruction of the Current Debate' 29 *Villanova Law Review* 671 (1984).

Patterson, D.M. 'Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine' 137 *University of Pennsylvania Law Review* 335 (1988).

Patterson, D.M. 'Law's Pragmatism: Law as Practice and Narrative' 76 *Virginia Law Review* 937 (1990).

Patterson, E.W. 'Judicial Freedom of Implying Conditions in Contracts' in Lambert (ed) Vol. 2 at 379 (1935).

Paul, J. *The Legal Realism of Jerome N. Frank: A Study of Fact-Skepticism and the Judicial Process* (The Hague: Nijhoff, 1959).

Payne, D.'The Intention of the Legislature in the Interpretation of Statutes' 9 *Current Legal Problems* 96 (1956).

Peacocke, C. 'Rule-Following: The Nature of Wittgenstein's Arguments' in S.H. Holtzman and C.M. Leich (eds) *Wittgenstein: To Follow a Rule* 72 (London: Routledge and Kegan Paul, 1976).

Pears, D. *Ludwig Wittgenstein* (New York: Viking Press, 1970).

Pêcheux, M. *Language, Semantics and Ideology: Stating the Obvious*, transl. by H. Nagpal (London: Macmillan, 1982).

Peller, G. 'The Metaphysics of American Law' 73 *California Law Review* 1152 (1985).

Perelman, Ch. *The Idea of Justice and the Problem of Argument*, transl. by J. Petrie (London: Routledge and Kegan Paul, 1963).

Perry, M.J. *The Constitution, the Courts, and Human Rights* (New Haven and London: Yale University Press, 1982).

Perry, M.J. *Morality, Politics, and Law: A Bicentennial Essay* (Oxford: Oxford University Press, 1988).

Perry, M.J. 'Why Constitutional Theory Matters to Constitutional Practice (And Vice Versa)' in Leyh (ed) 241 (1992).

Phillips, O.H. *Reform of the Constitution* (London: Chatto and Windus, 1970).

Phelps, T.G. and Pitts, J.A. 'Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation' 29 *Saint Louis University Law Journal* 353 (1985).

Pitcher, G. *The Philosophy of Wittgenstein* (Englewood Cliffs: Prentice-Hall, 1964).

Pitkin, H.F. *Wittgenstein and Justice* (Berkeley: University of California Press, 1972).

Plato. *The Republic*, transl. by A.D. Lindsay (London: Everyman's Library, 1950).

Plato. *Theaetetus*, transl. by J. McDowell (Oxford: Clarendon Press, 1987).

Popkin, R.H. 'Cartesianism and Biblical Criticism' in T.M. Lennon *et al.* (eds) *Problems of Cartesianism* 61 (Kingston and Montreal: McGill-Queen's University Press, 1982).

Popper, K.R. *Objective Knowledge: An Evolutionary Approach* (Oxford: Clarendon Press, 1972).

Popper, K.R. 'The Rationality of Scientific Revolutions' in I. Hacking (ed) *Scientific Revolutions* 80 (Oxford: Oxford Readings in Philosophy, 1987).

Posner, R.A. 'Statutory Interpretation - in the Classroom and in the Courtroom' 50 *University of Chicago Law Review* 800 (1983).

Posner, R.A. *Law and Literature: A Misunderstood Relation* (Cambridge, Mass.: Harvard University Press, 1988).

Post, R. 'Tradition, the Self, and Substantive Due Process: A Comment on Michael Sandel' 77 *California Law Review* 553 (1989).

Poster, M. 'Semiology and Critical Theory: From Marx to Baudrillard' in W.V. Spanos *et al.* (eds) *The Question of Textuality: Strategies of Reading in Contemporary American Criticism* 275 (Bloomington: Indiana University Press, 1982).

Poulantzas, N. *Political Power and Social Classes* (London: New Left Books and Sheed and Ward, 1973).

Powell, H.J. 'The Original Understanding of Original Intent' 98 *Harvard Law Review* 885 (1985).

Powell, H.J. 'Rules for Originalists' 73 *Virginia Law Review* 659 (1987).

Radin, M. 'Statutory Interpretation' 43 *Harvard Law Review* 863 (1930).

Radin, M.J. 'Reconsidering the Rule of Law' 69 *Boston University Law Review* 781 (1989).

Rapaport, H. *Heidegger and Derrida* (Nebraska: Nebraska University Press, 1989).

Rawls, J. *A Theory of Justice* (Oxford: Oxford University Press, 1973).

Rawls, J. 'Kantian Constructivism in Moral Theory' 77 *Journal of Philosophy* (1980).

Raz, J. *The Authority of Law* (Oxford: Clarendon Press, 1979).

Raz, J. *The Concept of a Legal System* (Oxford: Clarendon Press, 1980).

Raz, J. 'Right-Based Moralities' in J. Waldron (ed) *Theories of Rights* 182 (Oxford: Oxford Readings in Philosophy, 1989).

Regan, D.H. 'Law's Halo' in J. Coleman and E.F. Paul (eds) *Philosophy and Law* 15 (Oxford: Blackwell, 1987).

Rehnquist, W. 'The Notion of a Living Constitution' 54 *Texas Law Review* 693 (1976).

Reiman, J. *Justice and Modern Moral Philosophy* (New Haven: Yale University Press, 1990).

Rendall, S. 'Fish vs Fish' 12 *Diacritics* 4/49 (1982).

Rendel, M. *The Administrative Functions of the French Conseil d'Etat* (London: London School of Economics Research Monographs, 1970).

Richards, D.A.J. 'The Aims of Constitutional Theory' 8 *University of Dayton Law Review* 723 (1983).

Richardson, J. *Existential Epistemology: A Heideggerian Critique of the Cartesian Project* (Oxford: Clarendon Press, 1986).

Richardson, S.J., W.J. *Heidegger: Through Phenomenology to Thought* (The Hague: Martinus Nijhoff, 1963).

Ricoeur, P. *The Conflict of Interpretations: Essays in Hermeneutics*, edited by D. Ihde, (multiple translators) (Evanston: Northwestern University Press, 1974).

Ricoeur, P. *Time and Narrative* Volume 1, transl. by K. McLaughlin and D. Pellauer (Chicago and London: University of Chicago Press, 1984).

Ricoeur, P. Interviewed by R. Kearney in his *Dialogues with Contemporary Continental Thinkers* (Manchester, Manchester University Press, 1986).

Rodell, F. *Woe Unto You, Lawyers!* (New York: Pageant Press, 1957).

Rogers, J.G. 'A Scientific Approach to Free Judicial Decision' in Lambert (ed) Vol. 2 at 552 (1935).

Rorty, R. *Philosophy and the Mirror of Nature* (Oxford: Blackwell, 1988).

Rorty, R. *Consequences of Pragmatism* (Minneapolis: University of Minnesota Press, 1986).

Rorty, R. 'Deconstruction and Circumvention' 11 *Critical Inquiry* 1 (1984).

Rorty, R. 'Philosophy Without Principles' 11 *Critical Inquiry* 459 (1985).

Rorty, R. 'The Higher Nominalism in a Nutshell: A Reply to Henry Staten' 12 *Critical Inquiry* 462 (1986).

Rorty, R. *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989).

Rose, G. *Dialectic of Nihilism: Post-Structuralism and Law* (Oxford: Blackwell, 1987).

Ross, A. *Towards a Realistic Jurisprudence: A Criticism of the Dualism in Law*, transl. by A.I. Fausbøll (Copenhagen: Ernar Munksgaard, 1946).

Ross, A. 'Tû-Tû' 70 *Harvard Law Review* 812 (1957).

Ross, A. *On Law and Justice*, transl. by M. Dutton (London: Stevens and Sons Ltd., 1958).

Ross, A. Reviewing 'The Concept of Law' by H.L.A. Hart 71 *Yale Law Journal* 1185 (1962).

Ross, A. *Directives and Norms* (London: Routledge and Kegan Paul, 1968).

Rousseau, J.J. *The Social Contract and Discourses*, transl. by G.D.H. Cole, revised by J.H. Brumfitt and J.C. Hall (London: Everyman's Library, 1986).

Rubinstein, D. *Marx and Wittgenstein: Social Praxis and Social Explanation* (London: Routledge and Kegan Paul, 1981).

Rudden, B. 'Courts and Codes in England, France and Soviet Russia' 48 *Tulane Law Review* 1010 (1974).

Rumble, Jr., W.E. *American Legal Realism* (New York: Cornell University Press, 1968).

Rutgers Law Review. *Law and Literature: A Symposium* Vol. 29 at 223 (1976).

Rutgers Law Review. *Symposium: Law and Literature* Vol. 32 at 603 (1979).

Ryle, G. *The Concept of Mind* (London: Hutchinson's University Library, 1949).

Sacks, V. 'Towards Discovering Parliamentary Intent' *Statute Law Review* 143 (1982).

Sadurski, W. *Giving Desert its Due* (Dordrecht: D. Reidel, 1985).

Said, E.W. *et al.* 'An Exchange on Deconstruction and History' in W.V. Spanos *et al.* (eds) *The Question of Textuality: Strategies of Reading in Contemporary American Criticism* 65 (Bloomington: Indiana University Press, 1982).

Said, E.W. 'Opponents, Audiences, Constituencies and Community' in H. Foster (ed) *Postmodern Culture* 135 (London: Pluto Press, 1989).

Saleilles, R. 'Preface' to Gény LXXVII (1963).

Salmon, N.U. *Reference and Essence* (Oxford: Blackwell, 1982).

Sandalow, T. 'Constitutional Interpretation' 79 *Michigan Law Review* 1033 (1981).

Sandel, M.J. *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

Sandel, M.J. 'Moral Argument and Liberal Toleration: Abortion and Homosexuality' 77 *California Law Review* 521 (1989).

Sartre, J.P. *Existentialism and Humanism*, transl. by P. Mairet (London: Methuen, 1948).

Savigny, F.C. von. *Of the Vocation of Our Age for Legislation and Jurisprudence*, transl. by A. Hayward (New York: Arno Press, 1975).

Schauer, F. 'An Essay on Constitutional Language' 29 *Ucla Law Review* 797 (1982).

Schauer, F. *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991).

Schelly, J.M. 'Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer Amongst the Gahuku-Gama)' 73 *California Law Review* 158 (1985).

Schiff, D. 'Phenomenology and Jurisprudence' 4 *Liverpool Law Review* 5 (1982).

Schlesinger, R.B. *et al. Comparative Law: Cases, Texts, Materials* (Mineola, NY: Foundation Press, 1988).

Schroeder, T. 'The Psychologic Study of Judicial Opinions' 6 *California Law Review* 89 (1918).

Schwartz, B. *French Administrative Law and the Common-Law World* (New York: New York University Press, 1954).

Schwartz, L.B. 'With Gun and Camera Through Darkest CLS-Land' 36 *Stanford Law Review* 413 (1984).

Schwarz, A.B. *Medeni Hukuka Giris* [An Introduction to Civil [=Private Positive] Law], transl. by H.V. [Velidedeoglu] (Istanbul: Istanbul University Press, 1942).

Searle, J.R. *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1980).

Searle, J.R. 'Reiterating the Differences: A Reply to Derrida' 1 *Glyph* 198 (1977).

Searle, J.R. 'Literal Meaning' 13 *Erkenntnis* 207 (1978).

Seliger, M. *The Marxist Conception of Ideology* (Cambridge: Cambridge University Press, 1977).

Sener, E. *Açiklamali Içtihatli Türk Medeni Kanunu* [The Turkish Civil Code, Elucidated and Decisional Law Supported] (Ankara: Seçkin Press, 1991).

Seung, T.K. *Structuralism and Hermeneutics* (New York: Columbia University Press, 1982).

Shapiro, M. 'On the Regrettable Decline of Law French: or Shapiro Jettet Le Brickbat' 90 *Yale Law Journal* 1198 (1981).

Sher, G. *Desert* (Princeton, NJ: Princeton University Press, 1987).

Silverman, H.J. *Inscriptions: Between Phenomenology and Structuralism* (New York and London: Routledge and Kegan Paul, 1987).

Silverman, H.J. 'Derrida, Heidegger, and the Time of the Line' in his (ed) *Derrida and Deconstruction* 154 (New York and London: Routledge, 1989).

Simon, L.G. 'The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?' 73 *California Law Review* 1482 (1985).

Singer, J.W. 'The Player and the Cards: Nihilism and Legal Theory' 94 *Yale Law Journal* 1 (1984).

Smith, S.B. *Reading Althusser: An Essay on Structural Marxism* (Ithaca and London: Cornell University Press, 1984).

Smith, S.D. 'Idolatry in Constitutional Interpretation' 79 *Virginia Law Review* 583 (1993).

Soper, P. 'Legal Theory and the Obligation of a Judge: The Hart/Dworking Dispute' 75 *Michigan Laww Review* 473 (1977).

Soper, P. 'Choosing a Legal Theory on Moral Grounds' in J. Coleman and E.F. Paul (eds) *Philosophy and Law* 31 (Oxford: Blackwell, 1987).

S. California Law Review. *Interpretation Symposium* Vol. 58 at 1 (1985).

Spanos, W.V. 'Heidegger, Kierkegaard, and the Hermeneutic Circle: Towards a Postmodern Theory of Interpretation as Dis-closure' in his (ed) *Martin Heidegger and the Question of Literature: Toward a Postmodern Literary Hermeneutics* 115 (Bloomington and London: Indiana University Press, 1979).

Sparer, E. 'Fundamental Human Rigths, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement' 36 *Stanford Law Review* 509 (1984).

Spivak, G. 'Revolutions That as Yet Have no Model' 8 *Diacritics* 29 (1980).

Stafford-Clark, D. *et al. Psychiatry for Students* (London: George Allen and Unwin, 1964).

Stammler, R. *The Theory of Justice*, transl. by I. Husik, in the Modern Legal Philosophy Series of Association of American Law Schools (New York: Augustus M. Kelly, 1969).

Stanford Law Review. *Critical Legal Studies* Vol. 36 at 1 (1984).

Starr, J. *Law as Metaphor: From Islamic Courts to the Palace of Justice* (Albany, NY: State University of New York Press, 1992).

Staten, H. *Wittgenstein and Derrida* (Oxford: Blackwell, 1985).

Staten, H. 'Rorty's Circumvention of Derrida' 12 *Critical Inquiry* 453 (1986).

Steiner, G. *Heidegger* (London: Fontana Modern Masters, 1989).

Stick, J. 'Can Nihilism Be Pragmatic?' 100 *Harvard Law Review* 332 (1986).

Stone, C.D. 'From a Language Perspective' 90 *Yale Law Journal* 1149 (1981).

Sugarman, D. (ed) *Legality, Ideology and the State* (London: Academic Press, 1983).

Summers, R.S. 'Introduction' to MacCormick and Summers (eds) 1 (1991).

Summers, R.S. and Taruffo, M. 'Interpretation and Comparative Analysis,' *ibid* at 461.

The Swiss Civil Code, edited by I. Williams (Oxford: Oxford University Press, 1925).

Tallon, D. 'The Constitution and the Courts in France' 27 *American Journal of Comparative Law* 567 (1979).

Taylor, R. 'Law and Morality' 43 *New York U.L.R.* 611 (1968).

Tekinay, S.S. *Medeni Hukuka Giris Dersleri* [Introductory Course in Civil [=Private Positive] Law] (Istanbul: Istanbul University Press, 1978).

Texas Law Review. *A Symposium on Law and Literature* Vol. 60 at 373 (1982).

Texas Law Review. *Colloquy: Does Constitutional Theory Matter*? Vol. 65 at 766 (1987).

Thayer, J. 'The Origin and Scope of the American Doctrine of Constitutional Law' 7 *Harvard Law Review* 129 (1893).

Thomas, B. *Cross-examinations of Law and Literature: Cooper, Hawthorne, Stowe, and Melville* (Cambridge: Cambridge University Press, 1987).

Thorne, S.E. 'Introduction' to Egerton (1942).

Tocqueville, A. de. *Democracy in America*, edited by J.P. Mayer and M. Lerner, transl. by G. Lawrence, 2 volumes (London: Collins, 1968).

Toulmin, S. 'The Construal of Reality: Criticism in Modern and Postmodern Science' 9 *Critical Inquiry* 93 (1982).

Troper, M. *et al.* 'Statutory Interpretation in France' in MacCormick and Summers (eds) 171 (1991).

Trubek, D.M. 'Where the Action Is: Critical Legal Studies and Empiricism' 36 *Stanford Law Review* 575 (1984).

Tully, J. 'Wittgenstein and Political Philosophy' 17 *Political Theory* 172 (1989).

Tushnet, M.V. 'Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles' in Levinson and Mailloux (eds) 193 (1988).

Twining, W. *Karl Llewellyn and the Realist Movement* (London: Weidenfeld and Nicolson, 1973).

Twining, W. and Miers, D. *How to Do Things with Rules* (London: Weidenfeld and Nicolson, 1991).

Unger, R.M. *Knowledge and Politics* (New York: Free Press, 1975).

Unger, R.M. 'The Critical Legal Studies Movement' 96 *Harvard Law Review* 561 (1983).

University of Pittsburgh Law Review. *Statutory and Constitutional Interpretation Symposium* Vol. 48 at 663 (1987).

Valente, J. 'Hall of Mirrors: Baudrillard on Marx' 15 *Diacritics* 2/54 (1985).

Velidedeoglu, H.V. 'The Reception of the Swiss Civil Code in Turkey' 9 *International Social Science Bulletin: The Reception of Foreign Law in Turkey* 60 (1957).

Versênyi, L. *Heidegger, Being and Truth* (New Haven and London: Yale University Press, 1965).

Virginia Law Review. *The Theory of Public Choice Symposium* Vol. 74 at 167 (1988).

von Wright, G.H. *Norm and Action: A Logical Inquiry* (London: Routledge and Kegan Paul, 1963).

Vroom, C. 'Constitutional Protection of Individual Liberties in France: The *Conseil constitutionnel* Since 1971' 63 *Tulane Law Review* 265 (1988).

Waismann, F. *Wittgenstein and the Vienna Circle*, edited by B. McGuinness, transl. by J. Schulte and B. McGuinness (Oxford: Blackwell, 1979).

Warminski, A. *Readings in Interpretation: Hölderlin, Hegel, Heidegger* (Minneapolis: University of Minnesota Press, 1987).

Warnke, G. *Gadamer: Hermeneutics, Tradition and Reason* (Cambridge: Polity Press, 1987).

Warren, M. 'Liberal Constitutionalism as Ideology: Marx and Habermas' 17 *Political Theory* 511 (1989).

Watson, A. *The Civil Law Tradition* (Cambridge, Mass.: Harvard University Press, 1981).

Watson, A. *Sources of Law, Legal Change and Ambiguity* (Philadelphia: Pennsylvania University Press, 1984).

Weber, M. *The Methodology of the Social Sciences*, edited and transl. by E.A. Shils and H.A. Finch (New York: Free Press, 1949).

Weber, M. *Critique of Stammler*, transl. by G. Oakes (New York: Free Press, 1977).

Wechsler, H. 'Toward Neutral Principles of Constitutional Law' 73 *Harvard Law Review* 1 (1959).

Weisberg, R.H. *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* (New Haven and London: Yale University Press, 1984).

Weisberg, R.H. 'Law and Rhetoric' 85 *Michigan Law Review* 920 (1987).

Weisberg, R.H. 'Entering with a Vengeance: Posner on Law and Literature' 41 *Stanford Law Review* 1597 (1989).

Weisberg, R.H. 'On the Use and Abuse of Nietzsche for Modern Constitutional Theory' in Levinson and Mailloux (eds) 181 (1988).

Weisberg, R. *Poethics and Other Strategies of Law and Literature* (New York: Columbia University Press, 1992).

Weiss, B. 'Interpretation in Islamic Law: The Theory of *Ijtihàd*' 26 *American Journal of Comparative Law Review* 199 (1978).

Werhane, P.H. 'Some Paradoxes in Kripke's Interpretation of Wittgenstein' 73 *Synthese* 253 (1987).

West, A. *et al. The French Legal System: An Introduction* (London: Fourmat Publishing, 1992).

Weyrauch, W.O. 'Law as Mask - Legal Ritual and Relevance' 66 *California Law Review* 699 (1978).

White, A.R. *Truth* (London: Macmillan, 1970).

White, G.E. 'The Text, Interpretation, and Critical Standards' 60 *Texas Law Review* 569 (1982).

White, J.B. *The Legal Imagination*, abridged edition (Chicago: University of Chicago Press, 1985).

White, J.B. 'Law as Language: Reading Law and Reading Literature' 60 *Texas Law Review* 415 (1982).

White, J.B. *When Words Lose Their Meaning* (Chicago: University of Chicago Press, 1984).

White, J.B. *Heracles' Bow* (Madison: University of Wisconsin Press, 1985).

White, J.B. 'What Can a Lawyer Learn From Literature?' 102 *Harvard Law Review* 2014 (1989).

Williams, B. *Descartes: The Project of Pure Enquiry* (Harmondsworth: Penguin, 1978).

Williams, H. *Concepts of Ideology* (Sussex: Wheatsheaf Books, 1988).

Willis, J. 'Statute Interpretation in a Nutshell' 16 *Canadian Bar Review* 1 (1938).

Wilson, B.A. (ed) *About Interpretation: From Plato to Dilthey - A Hermeneutic Anthology* (New York: Peter Lang, 1989).

Wimsatt, W.K. and Beardsley, M. 'The Intentional Fallacy' 54 *Sewanee Review* 468 (1946).

Winch, P. *The Idea of a Social Science* (London: Routledge and Kegan Paul, 1965).

Wittgenstein, L. *Tractatus Logico-Philosophicus*, transl. by D.F. Pears and B. McGuinness (London: Routledge and Kegan Paul, 1988).

Wittgenstein, L. *The Blue and Brown Books* (Oxford: Blackwell, 1989).

Wittgenstein, L. *Philosophical Investigations*, transl. by G.E.M. Anscombe (Oxford: Blackwell, 1988).

Wittgenstein, L. *Lectures and Conversations on Aesthetics, Psychology and Religious Belief*, edited by C. Barrett (Oxford: Blackwell, 1987).

Wittgenstein, L. *Zettel*, edited by G.E.M. Anscombe and G.H. von Wright, transl. by G.E.M. Anscombe (Oxford: Blackwell, 1988).

Wittgenstein, L. *On Certainty*, edited by G.E.M. Anscombe and G.H. von Wrigth, transl. by D. Paul and G.E.M. Anscombe (Oxford: Blackwell, 1989).

Wittgenstein, L. *Culture and Value* [1914 - 1951], edited by G.H. von Wright, transl. by P. Winch (Oxford: Blackwell, 1989).

Wittgenstein, L. *Notes sur l'expérience privée et les "sense data"* (bilingual, English and French), edited by R. Rhees (Mauvezin: Trans-Europ-Repress, 1989).

Wittgenstein, L. *Lectures on the Foundations of Mathematics: Cambridge, 1939*, edited by C. Diamond (Harvester, 1976).

Wood, D. *Philosophy at the Limit* (London: Unwin Hyman, 1990).

Wortley, B.A. 'François Gény' in W.I. Jennings (ed) *Modern Theories of Law* 139 (London: Oxford University Press, 1933).

Wright, C. 'Rule-Following, Objectivity, and the Theory of Meaning' in S.H. Holzman and C.M. Leich (eds) *Wittgenstein: To Follow A Rule* 99 (London: Routledge and Kegan Paul, 1981).

Wu, J.C.H. 'Stammler and His Critics' in Stammler 558 (1969).

Yablon, C.M. 'Law and Metaphysics' 96 *Yale Law Journal* 613 (1987).

Zweigert, K. and Puttfarken, H.J. 'Statutory Interpretation - Civilian Style' 44 *Tulane Law Review* 704 (1970).