

Postmodernism/Feminism/Law

Dennis Patterson

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POSTMODERNISM/FEMINISM/LAW

Dennis Patterson†

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Das heute baue sich auf das gestern auf, so wie sich das gestern auf das vorgestern aufgebaut hat.

Adolf Loos**

INTRODUCTION

Can feminism survive the postmodern critique of reason? Or are the emancipatory aspirations of feminists tied to the continuing viability of modernist forms of discourse? Recent feminist writing¹ indicates that this question is central to the future of feminism as an emancipatory enterprise: in short, feminism is unthinkable without philosophy.² Feminists seem to have two choices: stick with modernism or give up feminism. Are these the only choices available?

Some feminists fear that unless their arguments are clothed in the discourse of modernism³—objectivity, truth, and reason—feminist aspirations to break free of patriarchal shackles will be frustrated.⁴ These feminists believe that only by transcending our

** ADOLF LOOS, *Meine Bauschule*, in 1 SÄMTLICHE SCHRIFTEN 323 (1962) ("Let today build itself on yesterday, just as yesterday built itself on that which came before it.").

¹ See Sabina Lovibond, *Feminism and Postmodernism*, 178 NEW LEFT REV. 22 (1989); Nancy Fraser & Linda J. Nicholson, *Social Criticism Without Philosophy: An Encounter between Feminism and Postmodernism*, in FEMINISM/POSTMODERNISM 19-38 (Linda J. Nicholson ed., 1990).

² "Philosophy" refers to the enterprise that seeks, through the power of reason, right representation, moral knowledge, truth, and other modernist artifacts. For a discussion of the end of philosophy, and what will succeed it, see AFTER PHILOSOPHY: END OR TRANSFORMATION? (Kenneth Baynes et al. eds., 1987).

³ Modernity's staunchest defender, Jürgen Habermas, describes the project of modernity in the following terms:

[T]he project of modernity formulated in the 18th century by the philosophers of the Enlightenment consisted in their efforts to develop objective science, universal morality and law, and autonomous art according to their inner logic. At the same time, this project intended to release the cognitive potentials of each of these domains from their esoteric forms. The Enlightenment philosophers wanted to utilize this accumulation of specialized culture for the enrichment of everyday life—that is to say, for the rational organization of everyday social life.

Jürgen Habermas, *Modernity—An Incomplete Project*, in THE ANTI-AESTHETIC 9 (Hal Foster ed., 1983). For Habermas's critique of the critics of modernity, see JÜRGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY (Frederick Lawrence trans., 1987) (leveling a broad attack on recent Continental thought, in particular the work of Jacques Derrida, Michel Foucault, and George Bataille). For a discussion of Habermas's self-conception of his place in the German modernist tradition of philosophy, see Dennis M. Patterson, *Hegel and Postmodernity*, 10 CARDOZO L. REV. 1665 (1989).

⁴ See, e.g., Ruth Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry Into the Politics of Authenticity*, 68 B.U. L. REV. 217, 220 (1988) (book review).

Our journey toward authenticity, however, requires more than discovering our inner selves. We also need to work to create a world in which we can freely *experience* our authentic selves. Society has strongly influenced our gender, as well as our larger personhood. We need to struggle against limiting forces in our lives to move toward authenticity, which, in terms of our feminist work, means struggling against the forces of patri-

current perspective—be it linguistic, social, or political—can women be emancipated.⁵ In short, their contention is that women can only be liberated by getting their voice to a place it is not,⁶ or by speaking a language that is not yet their own.⁷

This Article argues that the choice between feminism⁸ and postmodernism⁹ is a false one. The claim that these purported in-

archy. Our glimpses of our authentic selves can provide us with the strength and direction necessary to struggle against the brokenness and subordination in our lives. Without a sense of our authentic selves, we would have no basis for selecting priorities in our feminist struggles.

Id. But see Jeanne Schroeder, *Abduction from the Seraglio: Peirce's Logic of Imagination and Feminist Methodologies*, 70 TEX. L. REV. 109 (1991) (arguing for the reconstruction of feminist jurisprudence by rethinking questions of scientific knowledge and hypothesis formation).

⁵ See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 867 (1990).

A point—perhaps *the* point—of legal methods is to reach answers that are legally defensible or in some sense “right.” Methods themselves imply a stance toward rightness. If being right means having discovered some final, objective truth based in a fixed physical or moral reality, for example, verification is possible and leaves no room for further perspectives or for doubt. On the other hand, if being right means that one has expressed one’s personal tastes or interests which have no greater claim to validity than those of anyone else, being right is a rhetorical device used to assert one’s own point of view, and verification is both impossible and pointless.

Id.

⁶ See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

⁷ See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 32-45 (1987).

⁸ In light of the many projects, aspirations, and theories that can be denominated “feminist,” it makes little sense to advance a definition of feminism. Like all notions, “feminism” has a grammar for its usage; this grammar, however, is contested. Hence, it seems silly to draw lines when no one is entirely reasonable. Better simply to notice and appreciate the multiplicity of meanings inherent in the term.

⁹ It is difficult to describe postmodernism in a sentence or two, for postmodernism “belongs to a network of ‘post’ concepts and thinking—post-industrial society, post-structuralism, post-empiricism, post-rationalism. . . .” ALBRECHT WELLMER, *ZUR DIALEKTIK VON MODERNE UND POSTMODERNE* 48 (1985). In discussing postmodernism, it is helpful to observe two dichotomies: modern-postmodern and modernity-postmodernity. The modern-postmodern dichotomy identifies philosophical positions. For example, if you believe that musical ideas have a nature that is expressed in the written score, and that composers work within musical traditions to give expression to musical ideas, then you are a modernist. If you believe that past musical traditions “exist” for the purposes of the composer, and that the tradition of understanding and developing musical ideas places no restrictions on what the composer can or ought to do, your attitude is postmodern. The connections between music, modernity, and postmodernism are spelled out in Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991) (providing a modernist, psycho-social explanation by resorting to the mechanism or causal process of (legal) cultural anxiety in the movement from modernity to postmodernity). See generally Robert P. Morgan, *Tradition, Anxiety and the Current Musical Scene*, in AUTHENTICITY AND EARLY MUSIC 57-83 (Nicholas Kenyon ed., 1988). Modernity and postmodernity are, of course, epochal notions. The epoch of Modernity is that period in human history which begins with the Enlightenment and

commensurables represent the only choices available to feminism is itself the product of a distorted conception of the relationship between reason and critique. Properly understood, postmodernism

continues to the present. It is marked by an increasing control of nature, the separation of the subject from tradition, and the growth of reason as the arbiter of human conflict. Postmodernity is that epoch in which the defining features of Modernity are no longer a part of the terrain of human existence. Postmodernity is exemplified in culture by the presence of "pastiche"—the juxtaposition of unrelated elements in various cultural forms. For a discussion of this phenomenon in the culture of television, see E. ANN KAPLAN, *ROCKING AROUND THE CLOCK: MUSIC TELEVISION, POSTMODERNISM, & CONSUMER CULTURE* (1987).

Whether or not we are in postmodernity is, of course, very much open to question. This Article is concerned with the first of the dichotomies set forth above. Its focus is limited to the question of whether ideas have a life apart from the practices in which they are embodied. From the perspective of philosophy, the modernist answer is affirmative and the postmodernist answer negative. Thus, the postmodernist denies that ideas are autonomous: rather, they "exist," "have a life," or are "viable" only to the extent they are embodied in practices.

In addition to these qualifications, one must be careful in identifying particular thinkers as "postmodern." One name often tied to postmodernism is that of Jean-François Lyotard, who associates postmodernism with the death of "the metanarrative." See JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* xxiv (Geoff Bennington & Brian Massumi trans., 1984) ("I define *postmodern* as incredulity toward metanarratives."). Lyotard's argument is nothing less than a wholesale rejection of the picture of knowledge and justification that has supported much of the discourse of the human and natural sciences for the last three hundred years. Precisely what does Lyotard reject? In a word, legitimation. "Legitimation is the process by which a legislator is authorized to promulgate . . . a law as a norm." *Id.* at 8. Thus, the question "is this law valid?" has no point, for the "knowledge" required to answer the question is a knowledge that can never exist. In postmodernity, legitimation of first-order discourses (e.g., law and science) by resort to second-order discourses of reason (e.g., philosophy) is replaced with a picture of knowledge as a move within a game, specifically a "language-game."

It is useful to make the following three observations about language-games. The first is that their rules do not carry within themselves their own legitimation, but are the object of a contract, explicit or not, between players (which is not to say that the players invent the rules). The second is that if there are no rules, there is no game, that even an infinitesimal modification of one rule alters the nature of the game, that a "move" or utterance that does not satisfy the rules does not belong to the game they define. The third remark is suggested by what has just been said: every utterance should be thought of as a "move" in a game.

Id. at 10 (citation omitted). Lyotard's principal focus in attacking the traditional conception of knowledge as rational scrutiny of claims to truth and validity is philosophy. What Lyotard seeks is the complete displacement (not replacement) of philosophy with knowledge of the pragmatics of interaction. He wants philosophy "forced to relinquish its legitimation duties." *Id.* at 41. Legitimation gives way to the agonistic play of the participants as they struggle with one another for control of the game.

Feminism aspires to a metanarrative about gender or patriarchy. For example, "different voice" feminism claims that women speak and think differently than do men, and that male forms of discourse and modes of understanding suppress their "voice." If Lyotard is right that the era of the totalizing and legitimating metanarrative is at an end, then feminism, at least in its totalizing forms, is impossible. Thus, postmodernism poses a threat to any form of feminist critique that issues from a perspective assuming or presupposing a position outside the (dominant) discourse of (gendered) law.

poses no threat to feminism.¹⁰ In fact, all that postmodernism threatens is a conception of reason (the modernist¹¹ conception) which may have reached the end of its useful life.¹²

After reviewing the broad contours of contemporary feminist jurisprudence, Part I provides a description of modernism and postmodernism. The move from modernity to postmodernity is not depicted as the replacement of one mode of thought with another; rather, postmodernism is viewed as the unwillingness to be captivated by certain questions that animate modernist habits of thought. Part II turns to contemporary feminist jurisprudence. Having made the argument that the status of postmodernism is central to recent debates in feminist jurisprudence, the focus is shifted to the work of three feminists in support of this claim. The work of each feminist represents a different perspective on the question of postmodernism. For one, feminism is not possible without the modernist project. The second is skeptical of modernism but cannot escape modernist forms of argumentation. The third openly embraces postmodernism and uses her stance to criticize the shortcomings of radical feminists making their arguments from within modernist rhetorical forms.

Part III considers what a feminist jurisprudence would look like from the postmodernist perspective. Having moved beyond the modernist conception of knowledge, the emphasis shifts to the themes of practice, critique, and localism. This focus leads to a description of feminist jurisprudence as a form of narrative, viewing it as an enterprise devoted to reconstructing juridical conventions by rereading them in ways that can be described as "postmodern."

¹⁰ The epigram with which this Article begins signals the sense in which postmodernism and the manifold claims made for it should be understood.

¹¹ I identify modernism with the spirit of the Enlightenment. "In the most general sense of progressive thought, the Enlightenment has always aimed at liberating men from fear and establishing their sovereignty." MAX HORKHEIMER & THEODOR W. ADORNO, *DIALECTIC OF ENLIGHTENMENT* 3 (John Cumming trans., 1972). Despite the broad tenor of Horkheimer and Adorno's language, the conception or aspect of modernism that is here identified by the term is quite specific (thus, extrapolation from this narrow focus is hazardous). The broadest way to frame the modernism with which I shall be concerned is this: freedom and rationality are ineluctably connected in some fashion. This idea, which stems from Kantian ethical philosophy, is given various expressions from the eighteenth century to the present. The most basic element in this view is that the relationship between ethics and reason is one of disclosure: the latter discloses the former. It is with this specific claim that I shall take issue.

¹² It is important to remember that the point of modernist thought, particularly political thought, was to emancipate *humanitas* from a non-secular mode of existence that itself had become obsolete. As the contradictions of modernism mount, modernism too may give way to a form of thought, the parameters of which have yet to be defined.

I

FEMINISM, MODERNITY, AND POSTMODERNITY

A. The State of Contemporary Feminist Jurisprudence

Are women different from men? This seemingly simple question is immediately rendered problematic by further questions. Given that there are differences, whence come the differences? How can we know the truth of those differences? These questions in turn give rise to others addressed in feminist jurisprudence. Is sex identical to gender? Do women have a different psychic constitution than men?; one that impels them toward care¹³ and compassion¹⁴ rather than argument, contest, and even violence? And where do our images of women come from? Is gender something with which we come into the world, or is it produced in our language or culture?¹⁵ These are important questions, and in attempting to answer them, all manner of contemporary feminist theory has become wedded to the "difference" issue.¹⁶

Another question presents itself—call it the question of critique. Underlying the difference question is a host of critique-based questions regarding epistemology, patriarchy, subordination, and power. For example, in her critique of rape law, Catharine MacKinnon accepts that men and women are different.¹⁷ What MacKinnon rejects is the elevation into law of the male view of sex. Rape law has nothing to do with protecting women: to accomplish that goal, the law would have to look at sex, and rape, from "women's point of view."¹⁸ This it refuses to do because the discourse of law is gendered, and its gender is male. Hence, critique, discourse, and liberation are inextricably woven together.

The project of providing a philosophical account of the differences between men and women has evolved into the "difference" question. If men and women are different, then what are the differences, and how should we take account of them? At this point, the

¹³ See NEL NODDINGS, *CARING* (1984).

¹⁴ See Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion and Wisdom*, 77 CAL. L. REV. 1011 (1989). For a discussion of the nineteenth century opposition between reason and feeling, see IRIS M. YOUNG, *Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory*, in *THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY* 92-113 (1990).

¹⁵ On this question, see ELIZABETH WILSON, *ADORNED IN DREAMS: FASHION AND MODERNITY* 117-33 (1985) (analyzing the role of fashion in the production of gender identity).

¹⁶ For an innovative effort to think through the implications of "difference" in the context of questions of social justice, see IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

¹⁷ See MACKINNON, *supra* note 7, at 40.

¹⁸ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644 (1983).

difference question and the question of critique converge, and the internal debate in feminism heats up. First comes essentialism. Women *are* different, and their differences *are* universal: they include the mothering impulse,¹⁹ biological differences,²⁰ and the capacity to nurture.²¹ Because of these differences, women should be treated differently than men. *Is* implies (or could be made to imply) *ought*.

Long feminism's torment, essentialism has fallen on hard times.²² As two feminist philosophers recently stated: "[V]estigial of essentialism have continued to plague feminist scholarship, even despite the decline of grand theorizing. In many cases . . . this represents the continuing subterranean influence of those very mainstream modes of thought and inquiry with which feminists have wished to break."²³ If, however, essentialism is abandoned, what will take its place?²⁴ One answer is this: a view of "woman" not as the instantiation of a universal category, but as the product of legal discourse.²⁵ Why not do away with the whole idea of the category "woman" altogether? Perhaps feminists would do better "to tolerate and interpret ambivalence, ambiguity, and multiplicity as well as

¹⁹ See NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

²⁰ See SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970).

²¹ See CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

²² See Helen Vendler, *Feminism and Literature*, N.Y. REV., May 31, 1990, at 19, 22.

Feminism's unacknowledged problem, visible from its inception, has been its ascription of special virtue to women. In its most sentimental form, feminism assumes that men, as a class, are base and women are moral; in its angry version, that men are oppressors and women are the oppressed. This is to ignore what some cooler feminist minds have suspected, that the possession of power, rather than whether one is a woman or a man, is what determines the act of oppression.

Id.

²³ Fraser & Nicholson, *supra* note 1, at 33.

²⁴ This question arises with great frequency with respect to projects that conceptualize feminism along poststructuralist lines. See, e.g., Teresa de Lauretis, *The Essence of the Triangle or, Taking the Risk of Essentialism Seriously: Feminist Theory in Italy, the U.S., and Britain*, 1 DIFFERENCES 3, 9 (1989) ("I would insist that the notion of experience in relation both to social-material practices and to the formation and processes of subjectivity is a feminist concept, not a poststructuralist one . . .").

²⁵ One feminist summarizes the problem this way:

If there is to be feminism at all, as a movement unique to women, we must rely on a feminine voice and a feminine "reality" that can be identified as such and correlated with the lives of actual women. Yet all accounts of the Feminine seem to reset the trap of rigid gender identities, deny the real differences among women (white women have certainly been reminded of this danger by women of color), and reflect the history of oppression and discrimination rather than an ideal to which we ought to aspire.

Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 644-45 (1990).

to expose the roots of our needs for imposing order and structure no matter how arbitrary and oppressive these needs may be."²⁶ But what would this change do to "feminism"? How can feminism be "something more than a reformist movement"²⁷ if it gives up the project of "calling the parish boundaries into question"?²⁸ In short, how can there *be* feminism without a systematic critique of gender relations?²⁹

Faced with these questions, contemporary feminist jurisprudence has developed a variety of projects, all of which are aimed at the development of the tools necessary to critique the gendered discourse of law. Much of this literature is devoted to the development of feminist methods for use in the critique of doctrine,³⁰ judging,³¹ and practical reasoning.³² In the course of this development, a good deal of attention has been focused on what feminist jurisprudence should "look like."³³ To answer this question, one must first ask what *any* jurisprudence should look like. This raises further questions about method, knowledge, and critique.³⁴ It is also to raise the question of postmodernism.³⁵

²⁶ Jane Flax, *Thinking Fragments*, in FEMINISM/POSTMODERNISM, *supra* note 1, at 56.

²⁷ Lovibond, *supra* note 1, at 22.

²⁸ *Id.*

²⁹ I owe this formulation of the question to Jack Balkin.

³⁰ See SUSAN ESTRICH, REAL RAPE (1987).

³¹ See Judith Resnik, *On The Bias: Feminist Reconsiderations Of The Aspirations For Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

³² See Bartlett, *supra* note 5, at 854-62. Professor Bartlett embraces method both as a substantive tool (it will get us closer to the "truth" of things) and as a legitimating device.

Method matters also because without an understanding of feminist methods, feminist claims in the law will not be perceived as legitimate or "correct." I suspect that many who dismiss feminism as trivial or inconsequential misunderstand it. Feminists have tended to focus on defending their various substantive positions or political agendas, even among themselves. Greater attention to issues of method may help to anchor these defenses, to explain why feminist agendas often appear so radical (or not radical enough), and even to establish some common ground among feminists.

As feminists articulate their methods, they can become more aware of the nature of what they do, and thus do it better. Thinking about method is empowering. When I require myself to explain what I do, I am likely to discover how to improve what I earlier may have taken for granted. In the process, I am likely to become more committed to what it is that I have improved.

Id. at 831.

³³ See, e.g., Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115 (suggesting that the validity of feminism need not be connected to its distinctiveness).

³⁴ It is also to raise the question of whether the notion of "ideology," so central to Marxist and Neo-Marxist critiques of political economy, is still viable. For a recent defense of critique's continuing viability in the realm of culturally produced objects, see JOHN B. THOMPSON, IDEOLOGY AND MODERN CULTURE 320-27 (1990).

³⁵ See *supra* text accompanying note 2. See generally CHARLES JENCKS, WHAT IS POST-MODERNISM? (1986).

Just as feminists began to develop sophisticated theories of law, creating a jurisprudence of their own, postmodernism raised the question of whether a systematic jurisprudence was possible. This question arose naturally from feminist explorations in the realm of postmodernity, where issues of gender, sex, and identity are endlessly debated.³⁶ These debates are important—even critical—for feminist jurisprudence. A jurisprudence is no better than the general philosophical positions it assumes.³⁷ Thus, there can be no jurisprudence if there are no answers to questions of truth, justification, critique, knowledge, and normativity. By challenging the modernist stance on these topics, postmodernism necessarily calls into question the modes, manners, and methods of jurisprudence.

The connection between postmodernism and feminist jurisprudence, then, is determined by whether and to what extent feminist jurisprudence can tie its future to the future of modernist assumptions about truth, reason, and normativity. With respect to postmodernism, the stakes for feminist jurisprudence are clear: if modernism is considered to be at an end, has feminism reached its terminus as well? This is the question with which this Article is concerned. Before considering this question, we must take a closer look at modernism and postmodernism.

B. Mapping Modernity

Modernism is the form of thought identified with the spirit of the Enlightenment,³⁸ whose familiar story is captured by Jeffrey Stout's felicitous phrase "the flight from authority."³⁹ Spurred on by the power of science and its control over nature, philosophy replaced the medieval emphasis on custom, ritual, authority, and cos-

³⁶ For a recent collection of papers on the social aspects of gender construction, see *THE SOCIAL CONSTRUCTION OF GENDER* (Judith Lorber & Susan A. Farrell eds., 1991).

³⁷ See CAROL SMART, *FEMINISM AND THE POWER OF LAW* 69 (1989) ("The concept of jurisprudence presumes an identifiable unity of law, hence basic principles of justice, rights, or equity are presumed to underpin all aspects of law.").

³⁸ As previously mentioned, the focus of this Article is on a small aspect of the vast picture of modernism. See *supra* note 11 and accompanying text.

³⁹ See JEFFREY STOUT, *THE FLIGHT FROM AUTHORITY: RELIGION, MORALITY, AND THE QUEST FOR AUTONOMY* 2-3 (1981).

[M]odern thought was born in a crisis of authority, took shape in flight from authority, and aspired from the start to autonomy from all traditional influence whatsoever; . . . the quest for autonomy was also an attempt to deny the historical reality of having been influenced by tradition; and . . . this quest therefore could not but fail.

mology with a self-conscious preoccupation with legitimacy,⁴⁰ progress, civility, rationality, and human emancipation.⁴¹

Modernism is exemplified by three axes which, together, provide a three-dimensional perspective.⁴²

1. Epistemological Foundationalism: the view that knowledge can only be justified to the extent it rests on indubitable foundations;
2. Theory of Language: language has one of two functions—it represents ideas or states of affairs, or it expresses the attitudes of the speaker;
3. Individual and Community: “society” is best understood as an aggregation of “social atoms.”⁴³

These three components of the modernist picture should not be viewed as simply parts of a whole. Each represents not merely an idea or element in a picture, but an axis which, considered with the others, enables one to see a broad range of theories as all of a piece.

As the label suggests, epistemological foundationalism is an epistemological axis, with foundationalism⁴⁴ at one end and skepticism⁴⁵ at the other. Perhaps the most representative rationalist

⁴⁰ See HANS BLUMENBERG, *THE LEGITIMACY OF THE MODERN AGE* (Robert M. Wallace trans., 1983) (defending the idea of progress as a secular notion).

⁴¹ If any single theme runs through the whole of modernity it is the idea of autonomy. In politics, the subject is free to decide her own conception of the good; in art, the work of art must be allowed to “speak for itself.” Literature has the same hopes for itself, as does law. When the tradition starts to slip away, and the autonomy of the text is thereby threatened, the anxiety may be expressed in terms of fetishization. For a discussion of this phenomenon in music, see Howard M. Brown, *Pedantry or Liberation? A Sketch of the Historical Performance Movement*, in *AUTHENTICITY AND EARLY MUSIC*, *supra* note 9, at 27-56.

⁴² See Nancey Murphy & James W. McClendon, Jr., *Distinguishing Modern and Postmodern Theologies*, 5 *MODERN THEOLOGY* 199 (1989) (describing modernity by reference to three axes). See also Nancey Murphy, *Scientific Realism and Postmodern Philosophy*, 41 *BRIT. J. PHIL. SCI.* 291 (1990) (describing postmodern philosophy of science). One could reasonably take issue with many aspects of this representation of modernism. The story of modernism is far more complex than this simple representation of its genealogy can depict. These difficulties notwithstanding, this representation is heuristically defensible in that important aspects of modernism are identified and isolated for study. In short, used with appropriate caution, this picture of modernist thought is useful.

⁴³ Murphy, *supra* note 42, at 292.

⁴⁴ See D.W. HAMLYN, *THE THEORY OF KNOWLEDGE* 10 (1970).

There is a tendency to think of the corpus of knowledge as a building that is rising upward and that those who increase the stock of knowledge are building additional stories on to the existing fabric. If the foundations are not secure the whole building will eventually come crashing to the ground.

Id.

⁴⁵ See *id.* at 7-8 (“Philosophical skepticism . . . raises fundamental doubts about the possibility of knowing anything at all.”). For a broad essay on skepticism in the tradition of analytic philosophy, see John Skorupski, *The Intelligibility of Skepticism*, in *THE ANALYTIC TRADITION* 1-29 (David Bell & Neil Cooper eds., 1990).

foundationalist⁴⁶ is René Descartes.⁴⁷ In essence, Descartes saw the problem of knowledge as a problem about certainty. Separating belief from illusion required a method, and in response to that need, Descartes invented the "method of doubt."⁴⁸ This process of validating a belief required that the belief be submitted to an inner (mental) tribunal wherein it was interrogated. An idea that survived this process of questioning earned the label "clear and distinct": that which could not be doubted—the indubitable—was valid and, thus, "knowledge."⁴⁹ Descartes' emphasis on method and validation led, not surprisingly, to the valorization of mathematics, science, and geometry, for it was in these areas that he found that which was most certain: axiom, system, and deduction.⁵⁰

The other foundationalist approach to knowledge is empiricism. This theory replaces the rationalist emphasis on the formal relations between ideas with an appeal to our ordinary, common-sense understanding of experience.⁵¹ When we see an object, we have a retinal impression of a thing that exists in space and time; to put it more colloquially, we have an experience of another body. Providing an explanation for such an experience (that is, demonstrating how it is possible and what having that experience involves)

⁴⁶ For the rationalist, the flux of experience cannot be understood without resort to ideas, for it is through ideas that experience is organized and knowledge achieved. But which ideas are correct and which illusory? Rationalists of all stripes take this question seriously; however, the way in which they take it seriously cannot go unnoticed. The rationalist has no need to consult other people in answering the question "How do I know my beliefs are true?" With introspection, such an individual can gain knowledge of the world through the methodological discernment of ideas. True beliefs are those that accord with clear and distinct ideas. In short, "one could define rationalism as the view that knowledge about the world is the development of what, in some sense, we already know in the form of clear, distinct, and mutually consistent ideas present to our consciousness." ROBERT ACKERMANN, *DATA, INSTRUMENTS AND THEORY* 7 (1985).

⁴⁷ For an interesting essay on Descartes' account of subjectivity and the relationship of his thought to modernity, see DALIA JUDOVITZ, *SUBJECTIVITY AND REPRESENTATION IN DESCARTES: THE ORIGINS OF MODERNITY* (1988).

⁴⁸ For an excellent discussion of the place of Descartes' method of doubt in modernist arguments over validity and belief, see ROBERT B. PIPPIN, *MODERNISM AS A PHILOSOPHICAL PROBLEM* 23-25 (1991).

⁴⁹ See ROY BOYNE, *FOUCAULT AND DERRIDA: THE OTHER SIDE OF REASON* 42 (1990).

For Descartes, when the understanding perceives something clearly and distinctly, we can be sure that it perceives truly, because God, who is not a deceiver, gave us the powers that we have, and it is inconceivable that where we perceive something clearly God intended that we should be deceived. It follows from this that corporeal things "possess all the properties which I clearly and distinctly understand."

Id. (citation omitted).

⁵⁰ See René Descartes, *Discourse on Method*, in *ESSENTIAL WORKS OF DESCARTES* 12 (Lowell Bair trans., 1961).

⁵¹ See HAMLYN, *supra* note 44, at 34.

without referring to anything "in" the mind is the gravamen of empiricism.⁵² Empiricism is foundationalist in that, for the empiricist,

verification and justification, telling whether something is true and backing up one's claims about what is true, must rely eventually upon the evidence of one's senses; not in the first instance, maybe, but at the end of the day. What else could we appeal to, to tell us whether something is true, than the evidence of our senses? This is a good sound empiricist question. So the evidence of our senses is what we start from when we need to construct a justification for our beliefs, on this approach.⁵³

Skepticism⁵⁴ is not necessarily tied to either the rationalist or the empiricist strand of foundationalism. It is therefore a mistake to characterize the skeptic as one who denies the rationalist or the empiricist account of knowledge. The skeptic does not deny that what is described *as* knowledge is *in fact* knowledge. Rather, the skeptic denies that we ever *have* knowledge. For example, David Hume believed that, although we had to assume its existence, we could not *prove* the existence of the external world.⁵⁵ All we have on which to base our knowledge of causation is a constant conjunction of sense impressions. These impressions—raw input from the outside world—are the only available bases for knowledge.⁵⁶

⁵² See DAVID HUME, *ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND THE PRINCIPLES OF MORALS* 49-50 (L.A. Selby-Bigge ed., 1975) (noting that ideas in the mind are generated by sense impressions).

⁵³ JONATHAN DANCY, *AN INTRODUCTION TO CONTEMPORARY EPISTEMOLOGY* 86 (1985).

⁵⁴ The great critic of skepticism is, of course, Immanuel Kant. Kant takes seriously the skeptical claim that we can never "know" the truth of any proposition, advancing a "critical philosophy" of transcendental idealism. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Norman Kemp Smith ed. & trans., 1929); IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (Lewis W. Beck trans., 1956); IMMANUEL KANT, *CRITIQUE OF JUDGMENT* (Werner S. Pluhar trans., 1987). A recent treatment of Kant's theory of knowledge is found in HUBERT SCHWYZER, *THE UNITY OF UNDERSTANDING* (1990). For a brilliant analysis of the aporias of judgment, and of Kant's solution to them, see HOWARD CAYGILL, *THE ART OF JUDGEMENT* (1989). For a breathtakingly quick run through the whole of Kantian critical philosophy, see GILLES DELEUZE, *KANT'S CRITICAL PHILOSOPHY* (Hugh Tomlinson & Barbara Habberjam trans., 1984).

⁵⁵ See DAVID HUME, *A TREATISE OF HUMAN NATURE* 187 (L.A. Selby-Bigge ed., 1888) (We may well ask, "What causes induce us to believe in the existence of body? but 'tis in vain to ask, *Whether there be body or not?* That is a point, which we must take for granted in all our reasonings.").

⁵⁶ Modern philosophy had wrestled with the relationship between epistemology and vision long before the Vienna Positivists turned their attention to the matter. See 2 ARTHUR SCHOPENHAUER, *THE WORLD AS WILL AND REPRESENTATION* (E.F.J. Payne trans., 1958) (criticizing Kant's aesthetics and epistemology for inattention to the physiology of apperception). For a discussion of vision as a theme in modernity, see JONATHAN CRARY, *TECHNIQUES OF THE OBSERVER: ON VISION AND MODERNITY IN THE NINETEENTH CENTURY* (1990). In our own century, the idea that knowledge is built up from simple elements in sensory experience was taken to new heights by the Vienna Circle. Led by the philosopher Rudolf Carnap, the Circle advanced a wide-ranging program for the consti-

In sum, knowledge on the modernist view is foundational, whether derived from rationalism or empiricism. For modernists, the only question is whether you believe in foundations or are dubious of the foundational enterprise. "Taking epistemology seriously" does not require a commitment to one end of the axis or the other: rather it merely requires that one be captivated by the questions that animate the poles of the axes.

The two poles of the language axis represent the two functions of language. Language either refers to objects in the world or is expressive of the attitudes, preferences, or emotions of the speaker. One pole, representationalism, is closely linked with epistemological foundationalism. If language is a medium for referring to objects in the world, then knowledge of what something is can be gleaned from that object's representation in language. The point of studying language is to study the ways in which words refer to things.

In their heyday, modernist philosophers advanced representational theories of language that viewed words as place holders or stand-ins for things.⁵⁷ In the twentieth century, the pre-1929 work of Ludwig Wittgenstein is the paradigmatic expression of such theories, establishing the program of "logical atomism," which empha-

tation of knowledge in fields as diverse as philosophy, sociology, architecture, and language studies. Underlying the subject-matter divisions of the Circle's broad program was a simple yet powerful approach to knowledge, one with philosophical, cultural and political dimensions. Peter Galison describes the details of the program in two seemingly disparate arenas: science and architecture. He notes that the Vienna Positivists' program

sought to instantiate a modernism emphasizing what I will call "transparent construction," a manifest building up from simple elements to all higher forms that would, by virtue of the systematic constructional program itself, guarantee the exclusion of the decorative, mystical, or metaphysical. There was a political dimension to this form of construction: by basing it on simple, accessible units, they hoped to banish incorporation of nationalist or historical features.

From simple observation reports ("protocol statements") and logical connectives (such as "if/then," "or," "and"), the logical positivists sought to ground a "scientific," antiphilosophical philosophy that would set all reliable knowledge on strong foundations and isolate it from the unreliable. Since all valid inferences would be built out of these basic statements, the sciences would be unified by their shared starting points. For their part, the Bauhäusler hoped to use scientific principles to combine primitive color relations and basic geometrical forms to eliminate the decorative and create a new antiaesthetic aesthetic that would prize functionality. So close had the two groups come in their shared vision of modernism that, when the Bauhaus reconvened as the New Bauhaus in Chicago after fleeing the Nazis, the New Bauhaus imported the Vienna Circle's logical positivism as a fundamental component of its basic design program.

Peter Galison, *Aufbau/Bauhaus: Logical Positivism and Architectural Modernism*, 16 CRITICAL INQUIRY 709, 710-11 (1990).

⁵⁷ See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 257-312 (1979).

sizes the reduction of sentence elements to their constituent parts in the world.⁵⁸ In describing Wittgenstein's theory, David Pears explains the method this way:

We evidently do succeed in using this language to describe the world, but how is this done? [Wittgenstein's] answer is that we succeed only because there is a fixed grid of possible combinations of objects to which the structure of our language conforms. The grid must exist and connections must be made with it if language is going to work. But it clearly does work and so the metaphysical conclusions follow.⁵⁹

Viewing language as the instantiation of some structure or grid is a way of answering the question, "How does language represent the world?" A related, and for law more important, question is, "How can one see a variety of situations as being the same thing?" This question focuses on the role language plays in connecting a variety of factual contexts which, despite their differences, can be said to be the same.⁶⁰

If language is not a means of referring, then what else can it be? If one accepts the representationalist claim that language does refer to things in the world, then what becomes of ethical discourse? The Vienna Circle recommended that ethics, together with the whole of continental philosophy, be dismissed as "bad poetry."⁶¹ On this view, the only alternative is to develop an account of language as a mode of expression. Thus, moral judgments are not "true," and do

⁵⁸ LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* (D.F. Pears & B.F. McGuinness trans., 1974).

⁵⁹ I DAVID PEARS, *THE FALSE PRISON: A STUDY OF THE DEVELOPMENT OF WITTGENSTEIN'S PHILOSOPHY* 6 (1987).

⁶⁰ For example, an offer can be accepted orally, in writing, by telegram, by smoke signal, and so on. What makes these different ways of acting "the same thing," that is, "acceptance"? Some modern philosophies of language unpack the idea that different contexts are "the same thing" by isolating those elements that are shared. There exists, it is argued, an "essence" that can be captured by language, mirrored in thought, and which reflects the external world. The following passage explicates this view:

The meaning of words like "death," therefore, is not to be found in some set of conventions; meaning is neither a set of standard examples, nor a set of properties conventionally assigned to a symbol. The meaning of a word like "death" is only to be found in the best scientific theory we can muster about the true nature of that kind of event. By assuming that there are such true natures of natural kinds of things, the theory of meaning presupposed by our usage is aptly termed a *realist* theory of meaning.

Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 300 (1985). For a similar view, consciously adopting a semantics of "natural kinds," see David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 111-12 (1988). For a critique of Brink's position, see Dennis M. Patterson, *Realist Semantics and Legal Theory*, 2 CANADIAN J.L. & JURISPRUDENCE 175 (1989).

⁶¹ For an entertaining summary of the tenets of the Vienna Circle and its program of logical positivism, see DONALD PALMER, *LOOKING AT PHILOSOPHY: THE UNBEARABLE HEAVINESS OF PHILOSOPHY MADE LIGHTER* 330-38 (1988).

not "represent" the world; rather, they are "expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character."⁶²

Finally, we address the third modernist axis, whose poles are individualism and collectivism. To the individualist, society is composed simply of "social atoms,"⁶³ each endowed with needs and desires the existence and identity of which are known (internally) to each.⁶⁴ Political economy is best understood from the perspective of individual motivation.⁶⁵ The individualist eschews all talk of public values, group norms, or "structures." Methodological individualism is the explanatory model for understanding.

The collectivist counters that the *class* to which a person belongs is far more foundational than the individual. Class is one of many constitutive social facts that shape the individual, making her what she is. At its most radical, collectivism maintains that the individual is not in control of her own fate, but is produced by forces beyond her control. Agents are individually capable of making free and rational decisions with respect to their preferences only to the extent they are able to become aware of and break free from the structures that shape their choices.⁶⁶

Together, these three axes yield the following picture of modern thought.⁶⁷

⁶² ALASDAIR MACINTYRE, *AFTER VIRTUE* 11 (1981).

⁶³ See generally ELIZABETH H. WOLGAST, *THE GRAMMAR OF JUSTICE* 1-27 (1987) (discussing the ontological and conceptual foundations of liberalism, and specifically, the theory of individuality as social atomism).

⁶⁴ There are two "spaces" that together compose the individual. The realm of right, which is created by reason, is divided into two spheres, the public and the private. The public sphere is one of right. In this realm, private action is restricted to the extent it impacts on the right of others to act similarly. The private sphere is the realm of individual choice in actions which, from the perspective of the individual, are good. This account of the relationship between reason, agency, and normativity was first established by Immanuel Kant. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (H.J. Paton trans., 1964). For a discussion of this perspective in the light of the postmodern critique of agent-centered reason, see JOHN MCGOWAN, *POSTMODERNISM AND ITS CRITICS* 31-43 (1991).

⁶⁵ See ADAM SMITH, *THE WEALTH OF NATIONS* 119 (1970).

It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own self interest. We address ourselves not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.

Id.

⁶⁶ For an application of argument to contract theory, see Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283 (1990).

⁶⁷ This diagram is taken from Murphy & McClendon, *supra* note 42, at 199. As mentioned above, our focus with respect to modernism is on the question "In what does knowledge consist?" This Article advances the position that knowledge is the demonstrable ability to move within a linguistic practice. This view represents both a substantive position on knowledge and an alternative to views of knowledge labeled as

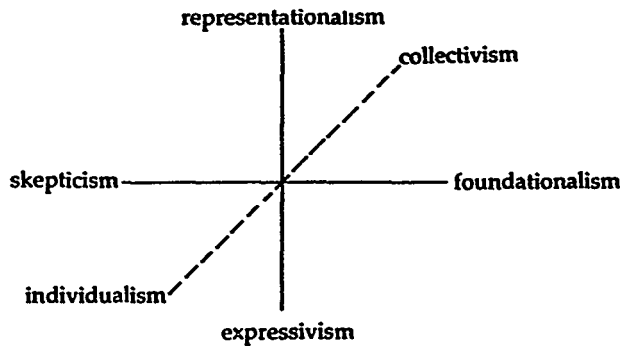


FIGURE 1

C. Postmodern Thought

Postmodern thought may be defined as “any mode of thought that departs from the three modern axes described above without reverting to premodern categories.”⁶⁸ It must be emphasized that postmodernism does not involve the reconstitution of any or all of these axes. Postmodern projects depart from these axes, seeking to rethink the problems from a perspective that is nonuniversalist or “local” in character, holistic, and discursive.⁶⁹ As we shall see, the movement from the modernist picture of knowledge to the postmodern view of the world took place through a gradual shift in perspective. Not surprisingly, the shift began on modernist terms.

The story of science from the seventeenth to the twentieth century is best told as the rise of experimentation as the central focus of philosophical debates over the ground of knowledge.⁷⁰ This em-

modernist or postmodernist. One can be skeptical of claims that we are in postmodernity without forsaking a position in the modern-postmodern debate about knowledge.

⁶⁸ Murphy & McClendon, *supra* note 42, at 199. These premodern categories are authority (specifically, religious authority) and cosmology—an understanding of the world that explains the existence of the universe by postulating the existence of a deity. See ANTHONY FLEW, *A DICTIONARY OF PHILOSOPHY* 77-79 (2d ed. 1979). For a broader version of the story of modernism, see STEPHEN TOULMIN, *COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY* (1990); MARSHALL BERMAN, *ALL THAT'S SOLID SELTS INTO AIR: THE EXPERIENCE OF MODERNITY* (1988). For a recent work concentrating on the cultural aspects of postmodernism, see FREDERIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1991). An excellent bibliography on postmodernism is found in *AFTER THE FUTURE: POSTMODERN TIMES AND PLACES* 333-50 (Gary Shapiro ed., 1990).

⁶⁹ I will argue in Part III that this position is best described as “narrational.”

⁷⁰ This is only a recent realization, first brought to light in ACKERMANN, *supra* note 46. See also PETER GALISON, *HOW EXPERIMENTS END* (1987) (reviewing experiments on gyromagnetic effects and the production of scientific knowledge). The usual story of the progress of scientific knowledge goes like this:

It has become usual in recent history of science to rehearse the shortcomings of standard textbook presentations of scientific progress: observations not in accord with previous conceptions of the world accumulate until they force a new set of theoretical views on the scientific community.

phasis is due to the empiricist basis of positivism, the most influential theory of scientific knowledge.⁷¹ During the 1950s and 1960s, the positivist picture of knowledge received close scrutiny and was found wanting. The first chink in the positivist armor resulted from a blow that came from within positivism's own ranks, dealt by the philosopher and logician W.V.O. Quine.⁷² In Quine's view, the idea of knowledge as a process of building from the simple to the complex, as well as the concomitant notion that knowledge is a matter of resonance between word (concept) and world, had to be scrapped. In their place, Quine substituted holism. This theory maintains that the truth of any one statement or proposition is a function not of its relationship to the world, but of the degree to which it "hangs together" with everything else we take to be true.⁷³

The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a man-made fabric which impinges on experience only along the edges. Or, to change the figure, total science is like a field of force whose boundary conditions are experience. A conflict with experience at the periphery occasions readjustments in the interior of the field. Truth values have to be redistributed over some of our statements. Reevaluation of some statements entails reevaluation of others, because of their logical interconnections—the logical laws being in turn simply certain further statements of the system, certain further elements of the field. Having reevaluated one statement we must reevaluate some others, which may be statements logically connected with the first or may be the statements of logi-

Even now it is not hard to find physics textbooks that recount the origins of special relativity in terms of the inexorable march of optical ether-drift experiments. According to these potted versions of history, Einstein "simply" generalized the clear observational fact that motion with respect to the ether could not be observed. In this way the strength of physical argumentation is rhetorically linked to its connection with observation (or experiment) and the historical sequence is described in such a way as to enhance the role of experience and denigrate the corresponding theoretical analysis.

Peter Galison, *History, Philosophy, and the Central Metaphor*, 2 SCI. CONTEXT 197, 198-99 (1988).

⁷¹ See DAVID OLDROYD, *THE ARCH OF KNOWLEDGE* 168-262 (1986) (tracing the origins of the positivist model of knowledge).

⁷² See WILLARD V.O. QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20-46 (1953) (arguing against the idea of a "basic" unit of knowledge and urging instead a view of knowledge as embedded in "the whole of science."). See also Galison, *supra* note 70, at 203 ("Quine strongly opposed the total separation of observation from other forms of knowledge; for him, all were up for evaluation."); Murphy, *supra* note 42, at 294 ("Quine not only replaced the foundationalist theory of knowledge with a holist account, but also provided a new picture or metaphor—that of a web or network of beliefs—to replace the 'layer-cake' model."). For a very quick tour through Quine's thought, see Hilary Putnam, *Misling*, LONDON REV. OF BOOKS, April 21, 1988, at 11-13.

⁷³ QUINE, *supra* note 72, at 42-43.

cal connections themselves. But the total field is so underdetermined by its boundary conditions, experience; that there is much latitude of choice as to what statements to reevaluate in the light of any single contrary experience. No particular experiences are linked with any particular statements in the interior of the field, except indirectly through considerations of equilibrium affecting the field as a whole.

If this view is right, it is misleading to speak of the empirical content of an individual statement—especially if it is a statement at all remote from the experiential periphery of the field. Furthermore it becomes folly to seek a boundary between synthetic statements, which hold contingently on experience, and analytic statements, which hold come what may. Any statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system.⁷⁴

Quine's picture of knowledge of the external world changed the way people thought about the construction of knowledge. His breakthrough was to see knowledge not as a matter of foundations—building up from bedrock—but as a function of one's ability to move about within a holistic web, be it a web of theory or of intersubjective practice. It is in this shift from simplicity, reductionism, and foundations to holism, network, and totality that Quine's epistemology earns the description "postmodern."⁷⁵ Quine's embrace of holism, together with his pragmatism on questions of truth,⁷⁶ invites comparison with the referential theory of language, the second of the three aspects of modernism displaced in postmodernity.

Language is the central preoccupation of contemporary philosophy.⁷⁷ But how does language work? Are we lost in the labyrinth of language, as Nietzsche thought,⁷⁸ or is language simply a medium through which the world is represented (or, to put the emphasis where it should be, *re* presented)? Does language have the power to represent nature as it is in itself, *sub specie aeternitatis*? That is, in language do words represent states of affairs in the world in such a way that the truth of any proposition may be discerned by comparing the proposition with the state of affairs it depicts?

⁷⁴ *Id.*

⁷⁵ See Murphy, *supra* note 42, at 294 ("As candidate for the title of postmodern epistemologist I nominate Willard V.O. Quine.").

⁷⁶ For a discussion of this aspect of Quine's thought, see CHRISTOPHER HOOKWAY, *QUINE: LANGUAGE, EXPERIENCE AND REALITY* 50-58 (1988).

⁷⁷ See RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* xiii-xlvii (1982) (providing a wide-ranging account of the function of language in philosophical discourse).

⁷⁸ See Friedrich Nietzsche, *On Truth and Lies in a Nonmoral Sense*, in *PHILOSOPHY AND TRUTH: SELECTIONS FROM NIETZSCHE'S NOTEBOOKS OF THE EARLY 1870'S* 79-100 (Daniel Breazeale ed. & trans., 1979).

Postmodern approaches to language⁷⁹ do not present arguments *against* the modern, representationalist view.⁸⁰ Rather, postmodernist conceptions of the word-world relation see the modernist picture of propositional, representational truth⁸¹ as unintelligible—as a project that never gets off the ground.⁸² The focus of

⁷⁹ For a discussion of the relationship between language and representation in modernism and postmodernism, see SCOTT LASH, *SOCIOLOGY OF POSTMODERNISM* 12 (1990) ("Modernism . . . had clearly differentiated and autonomized the roles of signifier, signified, and referent. Post-modernization on the contrary *problematizes* these distinctions, and especially the status and relationship of signifier and referent, or put another way, representation and reality.").

⁸⁰ Rather, the postmodern emphasis is on the question of what can be *done* with language. See 2 RICHARD RORTY, *PHILOSOPHICAL PAPERS (ESSAYS ON HEIDEGGER AND OTHERS)* 58 (1991).

[Donald] Davidson's account of human linguistic behavior takes for granted, as the later Wittgenstein also did, that there are no linguistic entities which are intrinsically relationless—none which, like the "simple names" of the *Tractatus*, are by nature *relata*. But Davidson's holism is more explicit and thoroughgoing than Wittgenstein's, and so its antiphilosophical consequences are more apparent. Whereas in the *Philosophical Investigations* Wittgenstein still toys with the idea of a distinction between the empirical and the grammatical, between nonphilosophical and philosophical inquiry, Davidson generalizes and extends Quine's refusal to countenance either a distinction between necessary and contingent truth or a distinction between philosophy and science. Davidson insists that we not think either of language in general or a particular language (say, English or German) as something which has distinct edges, something which forms a bounded whole and can thus become a distinct object of study or of philosophical theorizing.

Id. Rorty's claim that "Davidson's holism is more explicit and thoroughgoing than Wittgenstein's" is a red herring. Davidson's account of understanding is, in the vocabulary here in use, thoroughly modernist and empiricist—a far cry from the holist and pragmatist reading Rorty advances. The central reason Rorty's characterization of Davidson's position cannot be sustained is that, for Davidson, understanding is a matter of an empirical theory. See Donald Davidson, *A Nice Derangement of Epitaphs*, in *TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON* 433-446 (Ernest LePore ed., 1986).

[C]laims about what would constitute a satisfactory theory are not . . . claims about the propositional knowledge of an interpreter, nor are they claims about the details of the inner workings of some part of the brain. They are rather claims about what must be said to give a satisfactory description of the competence of the interpreter. We cannot describe what an interpreter can do except by appeal to a recursive theory of a certain sort.

Id. at 438. Thus, understanding another person is a matter of having a theory about the sounds that emanate from her mouth. These sounds are interpreted by reference to a grid which is recursively mapped onto the audible output of the interlocutor. This, Rorty, claims, is pragmatism! For a Wittgensteinian critique of the pretensions and shortfalls of Davidson's account of understanding, see STEPHEN MULHALL, *ON BEING IN THE WORLD: WITTGENSTEIN AND HEIDEGGER ON SEEING ASPECTS* 91-122 (1990).

⁸¹ For a discussion of modernity, representation, and reason, see Adam B. Seligman, *Towards a Reinterpretation of Modernity in an Age of Postmodernity*, in *THEORIES OF POSTMODERNITY* 117-35 (Bryan S. Turner ed., 1990).

⁸² See JOSEPH ROUSE, *KNOWLEDGE AND POWER* 154 (1987).

[The Realist] takes as already determined both the way the world is and our understanding of how our interpretations take it to be. The realist of

the dispute is the modernist theory of correspondence, specifically, the Sentence-Truth-World relation. To put it in a nutshell, the postmodern alternative replaces the modernist picture of Sentence-Truth-World with an account of understanding that emphasizes practice, warranted assertability, and pragmatism.⁸³

In synthesizing the work of Dewey, Wittgenstein, Heidegger, and Davidson, Richard Rorty has rethought American Pragmatism.⁸⁴ His work, which ranges across areas as divergent as philosophy of mind and political theory, repeatedly returns to the argument

course recognizes that we do not know in *advance* how the world is. But once we have some definite interpretations of the world, we can use them as the basis for our actions, which in turn test the adequacy of our interpretations. If our actions fail to achieve their aims, something must be wrong with the interpretations they were based on. If our actions succeed, this success of course does not entail that their underlying interpretations do accord with the reality they interpret. But if a wide variety of actions in differing circumstances generally succeed, the best explanation for their success is that those interpretations at least approximately accord with the way those objects really are. But where do we acquire our understanding of what our various interpretations do say about the world and of what would count as success in our actions? The realist needs to give some account of understanding such that we can understand how our interpretations take the world to be independent of how the world actually is. Otherwise the alleged independence of object and interpretation can never get off the ground. Sentences and practices do not have ready-made meanings, nor do they acquire meaning by convention. (How could the parties involved understand what they were agreeing to?) They acquire meaning only in their performance or use.

Id.

⁸³ The following summary of the cumulative effect of Quine, the later Wittgenstein, and like-minded philosophers speaks to this point.

When it comes to deciding between theories constructed within different conceptual schemes it is possible in Quine's view to have a situation of under-determination—that is, of there being no factually objective way to decide between them. Because ontology is relative to conceptual schemes there is no decisive fact of the matter. But Quine did wish to emphasize the importance of empirical enquiry to our understanding of the world. Empirical enquiry takes place at the boundaries of holistic networks or structures of theory—where they meet the world—and those boundaries gradually change, so altering the conceptual structure, but not in any sudden or pervasive way.

A corollary of this position was a radically different conception of epistemology: seeing it not as the reconstruction of first principles of all knowledge, being transcendent of particular discourses, but rather as *psychology*, being the study of particular acts or behavioural patterns of knowing.

This fundamental questioning of the nature of epistemology, associated also with the later work of Wittgenstein and to some extent with the later work of [Rudolf] Carnap, had a profound but unfortunate effect. In Quine's words, it "loosed a wave . . . of epistemological nihilism", reflected partly, as he says, in a tendency "to belittle the role of evidence and to accentuate cultural relativism."

CHRISTOPHER LLOYD, *EXPLANATION IN SOCIAL HISTORY* 73 (1986) (citation omitted).

⁸⁴ By "American Pragmatism" I refer to the thought of, among others, John Dewey, Charles S. Peirce, and William James.

that the modernist approach to truth is simply not worth the effort to keep it afloat. Rorty summarizes his position this way:

For the pragmatist, the notion of "truth" as something "objective" is just a confusion between

- (I) Most of the world is as it is whatever we think about it (that is, our beliefs have very limited causal efficacy)

and

- (II) There is something out there in addition to the world called "the truth about the world" (what [William] James sarcastically called "this tertium quid intermediate between the facts *per se*, on the one hand, and all knowledge of them, actual or potential, on the other").

The pragmatist wholeheartedly assents to (I)—not as an article of metaphysical faith but simply as a belief that we have never had any reason to doubt—and cannot make sense of (II). When the realist tries to explain (II) with

- (III) The truth about the world consists in a relation of "correspondence" between certain sentences (many of which, no doubt, have yet to be formulated) and the world itself

the pragmatist can only fall back on saying, once again, that many centuries of attempts to explain what "correspondence" is have failed⁸⁵

Risking repetition, it must be emphasized that the modernist picture of successful communication is not being *replaced* with another explanatory picture. The postmodern approach to language eschews advancing explanations in favor of describing localized linguistic practices. Wittgenstein's later approach to language⁸⁶ is revolutionary⁸⁷ because his attack on modernist philosophical methods breaks down the distinction between explanation and the phenomenon being explained. All understanding occurs *in language*.⁸⁸ Lan-

⁸⁵ RORTY, *supra* note 77, at xxvi.

⁸⁶ I have detailed the parameters of Wittgenstein's linguistic philosophy and its importance for law in Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335, 352-73 (1988); Dennis M. Patterson, *Good Faith, Lender Liability and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169 (1989).

⁸⁷ For a discussion of Wittgensteinian language philosophy in the context of modernism and postmodernism, see WELLMER, *supra* note 9, at 78 ("Wittgenstein's skeptical question is: 'How can I know what I am talking about? How can I know what I mean?' Language philosophy's critique destroys the subject as author and as the final judge of his meaning and intentions.").

⁸⁸ This view disclaims the notion that "understanding" can occur in any private sense. Owing to its character as a public medium, language—and, thus, meaning—can never be relegated to the private realm. For a discussion of this point in the context of the philosophy of consciousness, see ERNST TUGENDHAT, *SELF-CONSCIOUSNESS AND SELF-DETERMINATION 77-97* (Paul Stern trans., 1986) (discussing Wittgenstein on private language and its relationship to self-consciousness).

guage is the universal medium within which we think, act, and understand. The idea that language "corresponds" to something outside itself can never be fleshed out, because all talk about language itself remains *use of language*. No part of language can be torn from the whole and valorized as a meta-language, super-language, or "language about language." Wittgenstein addressed this matter in his first recorded thoughts about the language-world relation:

But is *language* the *only* language?

Why should there not be a mode of expression through which I can talk *about* language in such a way that it can appear to me in co-ordination with something else?

Suppose that music were such a mode of expression: then it is at any rate characteristic of *science* that *no* musical themes can occur in it.

I myself only write *sentences* down here. And why?

How is language unique?⁸⁹

So what does all of this mean for truth? If the modernist conception of truth is abandoned, are we not left with abject relativism?⁹⁰ Is not every claim to truth, every description of a state of

⁸⁹ LUDWIG WITTGENSTEIN, *NOTEBOOKS 1914-1916* 52e (G.H. von Wright ed., G.E.M. Anscombe ed. & trans., 1969).

⁹⁰ For a recent discussion of this theme, see Robert J. Lipkin, *Skepticism and the New Fuzziness*, 75 *CORNELL L. REV.* 811 (1990) (purporting to go "beyond fuzziness" in ethics and endorsing "moderate [healthy?] skepticism in normative discourse"). For a more partisan discussion of the relationship between epistemology, realism, and relativism in the light of recent debates in interpretive theory see Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 *STAN. L. REV.* 871 (1989). The "realist" ontology and epistemology Moore advocates is based on a model of science whose heyday was the nineteenth and early twentieth centuries. Its last gasp was uttered by Carl Hempel in the formation of the hypothetico-deductive model of truth. See CARL G. HEMPEL, *ASPECTS OF SCIENTIFIC EXPLANATION AND OTHER ESSAYS IN THE PHILOSOPHY OF SCIENCE* (1965). The empiricist proclivities of Hempelian method impel those blinded by its promise of objectivity and right representation to ignore the role of scientific practices and communities in the production of scientific knowledge. Of course, after Kuhn, few in the philosophy of science are as enthusiastic about realism in science as Moore is about realism in law or ethics. See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). For a recent, intelligent, and quite lively discussion of the current state of the philosophy of science, see LARRY LAUDAN, *SCIENCE AND RELATIVISM* (1990) (narrating an imaginary dialogue between representatives of key positions in twentieth century philosophy and science, including those of Kuhn and Hempel).

In normative discourse, the realist view that Moore advocates assumes the following critical posture when describing positions that, in this Article, would be described as postmodernist:

Telling us we must choose and that some choices will *seem* better than others, without giving any reasons why we should choose one way or the other or why the "seeming-better" should be taken to *be* better, does not engage us [read "does not engage me, (Moore)"]. Such suggestions are empty in the way that noncognitivist and existential ethics are always empty. For what it is worth, here in the realm of the noncognitivist, Rorty's world does not seem better to me. It seems a barren place in which all arguments are made only by pulling oneself out of deep existen-

affairs, as good or acceptable as any other? This is what the purveyors of "truth" would have us believe. The fact that we cannot demonstrate how language "cuts reality at the joints"⁹¹ does not mean that we cannot come up with better or worse ways of carrying on our practices. This, at least, is the claim to be sustained.⁹²

We saw earlier that in the modernist picture of knowledge, the individual controls her own fate. This picture presupposes "that any individual (given the basic sensory and intellectual equipment) is as competent as any other to form justified beliefs and speak the language."⁹³ To attain knowledge, the individual need not have contact with another self. Even when isolated from a community, an individual is capable of separating true from false beliefs. As Descartes demonstrated, all that is required is the right method, since truth and method are inextricably linked.

Postmodernism, on the contrary, challenges the primacy of the individual.⁹⁴ The postmodern conception of individuality casts the individual not as the subject in control of discourse, but as an arti-

tial nausea, itself possible only by bad-faith forgetfulness that all arguments are rhetorical substitutes for the bullets one either does not possess or is unwilling to use.

Moore, *supra* at 904.

Moore's critique of Rorty utterly fails to come to terms with the philosophical problems that lead to the characterization of truth Rorty advances. Moore wants to marry truth to something that is mind-independent (for Moore, essences), and then create an epistemology that explains things, objects, properties, or relations and their representation in language. This is a failed project, as such diverse philosophers as Quine, Davidson, Wittgenstein, Sellars, Heidegger, and Putnam have shown. (Query: Are they all then existentialists?) What Moore refuses to see is that "[t]rying to make meaning accessible [on realist terms] has made truth inaccessible." Donald Davidson, *A Coherence Theory of Truth and Knowledge*, in *TRUTH AND INTERPRETATION*, *supra* note 80, at 313. By tying meaning to "the given" ("moral essences" for example) and truth to justification (here, an unexplicated notion of "best theory"), Moore embraces skepticism. What is the solution?

[T]he thing to do is to marry truth and meaning to nothing and nobody but each other. The resulting marriage will be so intimate a relationship that a theory will *be* a theory of meaning, and conversely. But that theory will be of no use to a representationalist epistemology, nor to any other sort of epistemology. It will be an explanation of what people *do*, rather than of a non-causal, representing, relation in which they stand to non-human entities.

Richard Rorty, *Representation, Social Practice, and Truth*, 54 *PHIL. STUD.* 215, 219 (1988).

⁹¹ RICHARD RORTY, *Texts and Lumps*, in 1 *OBJECTIVITY, RELATIVISM AND TRUTH: PHILOSOPHICAL PAPERS* 80 (1991).

⁹² This claim is defended in Part III. See *infra* notes 231-91 and accompanying text.

⁹³ Murphy, *supra* note 42, at 295.

⁹⁴ See generally MANFRED FRANK, *WHAT IS NEOSTRUCTURALISM?* 362-454, *passim* (Sabine Wilke & Richard Gray trans., 1989) (reviewing the major theories and arguments of postmodernism); PAUL SMITH, *DISCERNING THE SUBJECT* (1988) (focusing on "the subject" as a product of discourse). For a piece that gets to the heart of what is and is not at stake in the debate over the subject, see John Smith, *The Transcendence of the Individual*, 19 *DIACRITICS* 80 (1989) (reviewing leading texts on the postmodern constitution of the subject). See also DAVID CARROLL, *THE SUBJECT IN QUESTION: THE LANGUAGES OF THE-*

fact produced by discourse. In applying this concept to feminism, Judith Butler makes the point this way:

My suggestion is that the presumed universality and unity of the subject of feminism is effectively undermined by the constraints of the representational discourse in which it functions. Indeed, the premature insistence on a stable subject of feminism, understood as a seamless category of women, inevitably generates multiple refusals to accept the category. These domains of exclusion reveal the coercive and regulatory consequences of that construction, even when the construction has been elaborated for emancipatory purposes. Indeed, the fragmentation within feminism and the paradoxical opposition to feminism from "women" whom feminism claims to represent suggest the necessary limits of identity politics.⁹⁵

But if identity, specifically sexual or gender identity, does not exist prior to practice, then from whence does identity issue? The answer, as we have seen, is "the community of discourse."⁹⁶ What does this mean? Butler explains:

The antifoundationalist approach to coalition politics assumes neither that "identity" is a premise nor that the shape of meaning of a coalitional assemblage can be known prior to its achievement. Because the articulation of an identity within available cultural terms instates a definition that forecloses in advance the emergence of new identity concepts in and through politically gauged actions, the foundationalist tactic cannot take the transformation of expansion of existing identity concepts as a normative goal. Moreover, when agreed-upon identities or agreed-upon dialogic structures, through which already established identities are communicated, no longer constitute the theme or subject of politics, then identities can come into being and dissolve depending on the concrete practices that constitute them. Certain political practices institute identities on a contingent basis in order to accomplish whatever aims are new. Coalitional politics requires neither an ex-

ORY AND THE STRATEGIES OF FICTION (1982) (essaying the constitution of the subject vis-a-vis critical theory).

⁹⁵ JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 4 (1990).

⁹⁶ See Murphy, *supra* note 42, at 295.

In postmodern thought . . . the community plays an indispensable role. It is the community that must decide when to take anomalous facts seriously, and where to make changes in the Quinian network of beliefs. The language games and conventions in which one participates precede individual speech and determine what can and cannot be said. In short, language and the search for knowledge are communal achievements. So escape from either of the modern epistemological or linguistic axes calls for a corresponding detachment from the individualist axis as well.

panded category of "women" nor an internally multiplicitous self that offers its complexity at once.⁹⁷

The postmodern critique of "the self," here expressed as a critique of gender identity, confirms the claim that ontology—what something is—is not a given but a construct. In the case of "woman," "[o]ne is not born, rather one becomes, a woman."⁹⁸ This point does not go far enough, as Butler's analysis of the discourse of "woman" demonstrates; for in every ongoing discursive practice involving the category "woman," that category is open to intervention and resignification.⁹⁹ The need to go further, then, leads us at last to consider the roles of sex and gender, and their constitution in law.

The effort to locate a sexed nature before the law seems to be rooted understandably in the more fundamental project to be able to think that the patriarchal law is not universally true and all-determining. Indeed, if constructed gender is all there is, then there appears to be no "outside," no epistemic anchor in a precultural "before" that might serve as an alternative epistemic point of departure for a critical assessment of existing gender relations. Locating the mechanism whereby sex is transformed into gender is meant to establish not only the constructedness of gender, its unnatural and nonnecessary status, but the cultural universality of oppression in nonbiologic terms.

...

Only when the mechanism of gender construction implies the *contingency* of that construction does "constructedness" *per se* prove useful to the political project to enlarge the scope of possible gender configurations. If, however, it is a life of the body beyond the law or a recovery of the body before the law which then emerges as the normative goal of feminist theory, such a norm effectively takes the focus of feminist theory away from the concrete terms of contemporary cultural struggle.¹⁰⁰

Butler here defines the postmodern project of feminism as nothing less than the subversion, at every turn, of modernist projections of "woman." The target of Butler's postmodern reconstruction of the relationship between gender and sex is the elevation of that relationship into a juridical category that takes the sexed body as gendered prior to its emergence from the order of discourse. Only after a break in this univocal link will the postmodern reconstruction of identity begin to be thought. Only through discourse will we know "woman": the unitary quality and character of

⁹⁷ BUTLER, *supra* note 95, at 15-16.

⁹⁸ SIMONE DE BEAUVOIR, *THE SECOND SEX* 267 (H.M. Parshley trans., 1953).

⁹⁹ BUTLER, *supra* note 95, at 33.

¹⁰⁰ *Id.* at 38.

“woman” will be deconstructed away. As Julia Kristeva puts it, “Strictly speaking ‘woman’ cannot be said to exist.”¹⁰¹

II

THE FEMINIST CRITIQUE OF LAW

We began by asking, “What is at stake for feminist jurisprudence in the debate over postmodernism?” That debate implicates one question that stands above all others: the question of critique. If the modernist project of truth, right representation, legitimation, correspondence, and critique is abandoned, will feminist jurisprudence be left with tools adequate for the task of criticism and transformation? As we have seen, the modernist argues that validity and rational critique are not possible without philosophy.¹⁰² On that view, then, feminism is not possible without philosophy. It is precisely this issue that divides contemporary feminist jurisprudence.

This Part considers the work of three contemporary feminist critics of the law.¹⁰³ Each scholar maintains a distinct perspective on the question of critique. One embraces the project of moderuity. The second criticizes that project, but remains ambivalent about the postmoderu option. The third embraces a thoroughly postmodern account of understanding and demonstrates the power of discourse to shape our understanding of the social world. Together, these critics illustrate the need for the current debate over the feminist critique of law to come to terms with the postmodern critique of reason.

¹⁰¹ *Id.* at 1 (quoting Julia Kristeva). This claim is not as radical as it may first appear. Kristeva sees different kinds of feminism as embodying different attitudes to the symbolic. Liberal, equal-rights feminism demands for women an equal rather than a marginal place in the symbolic. Radical feminism extols the distinctively feminine, which means it rejects the value placed on the symbolic altogether. A further stage, which Kristeva speaks of as the “third generation,” would reject the very opposition of male and female as metaphysical, and attack the whole notion of sexual, or even general, identity.

DEBORAH CAMERON, *FEMINISM & LINGUISTIC THEORY* 127 (1985).

¹⁰² See *supra* text accompanying notes 38-67.

¹⁰³ For a number of reasons, I have chosen to focus on individuals rather than themes. While it is true that everyone works within a more or less well-defined tradition or orientation in thought, a position's importance depends on the arguments made in its support. Arguments are developed in specific texts in support of specific points. It is useless to say that a given position makes certain assumptions that turn out to be false and then, on that basis, to impeach the position. Such “criticism” is often dismissed as superficial (I am reminded of the reception given Roberto Unger's critique of liberalism in ROBERTO UNGER, *KNOWLEDGE AND POLITICS* (1975)).

I also believe that all three of the feminist authors I critique advance arguments found in the work of others. In other words, the positions which I focus on are in no way out of the mainstream. They represent main currents of thought in feminist jurisprudence.

A. Robin West

The feminist struggle with law is a struggle over the categories used to organize legal experience and, thus, legal reality. Robin West extends the critique of legal categories to a critique of the jurisprudence of legal categorization. In *Jurisprudence and Gender*,¹⁰⁴ Professor West advocates a jurisprudence that avoids reduplicating the patriarchal categories of contemporary legalisms. Hers is "a truly feminist jurisprudence, . . . define[d] as a jurisprudence built upon feminist insights into women's true nature, rather than upon masculine insights into 'human' nature."¹⁰⁵ Startling as it may seem, West denies that women are "human beings."¹⁰⁶ This "philosophical fact," as she terms it, is the crux of her dispute with contemporary patriarchal jurisprudence.

We begin by reviewing Professor West's critique of patriarchal jurisprudence, and then turn to her alternative schema. The question to which our attention will ultimately be directed is, "Where does West's position fit on the divide between modern and postmodern?" Is hers a postmodern critique of patriarchal jurisprudence, or does her critique of patriarchy and development of a theoretical alternative simply assume the truth of the modernist conception of reason, thereby substituting one set of problems (modernity) for another (patriarchy)?

Is critical legal theory so different from the liberal legal theory it criticizes? Is the left-wing male "more sensitive to the political underpinnings of purportedly neutral legalistic constructs" than is a liberal legalist?¹⁰⁷ Professor West thinks not. In fact, she sees the struggle between the left and the right as a sort of schoolyard brawl—boys being boys. The differences between radical and mainstream politics are largely illusory, for they both represent "the paradigmatically male experience of the inevitability of separation of the self from the rest of the . . . natural world."¹⁰⁸ Both versions of experience are true, but each presents a different side of *the same experience*. Liberal legalists describe the life of the self as one of freedom and autonomy, a life of choices and assertion of individual personality.¹⁰⁹ The experience of the left is one of alienation and

¹⁰⁴ Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

¹⁰⁵ *Id.* at 3-4.

¹⁰⁶ *Id.* at 4 ("Women, though, are not human beings.").

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 5.

¹⁰⁹ The basic architecture of liberal thought was developed by Kant. See *supra* note 54. For the contemporary expression of this spirit in political theory, see JOHN RAWLS, A THEORY OF JUSTICE (1971). For the legal component of liberal legalism, see Ernest J. Weinrib, *Legal Formality*, 97 YALE L.J. 949 (1988); Ernest J. Weinrib, *Law As a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987).

isolation from the Other.¹¹⁰ The promise of liberation, so dear to the cheerleaders for democracy, rings hollow for critical theorists. Theirs is a perspective of despair and subjugation; they are crushed under the weight of legal categories.

But why are these two disparate views in fact views of the same thing, the same experience? The answer is that, unlike men, women are connected. Feminists disagree about exactly what this "connectedness" amounts to, or how best to characterize it. There are two principal views on the question. The first is cultural feminism, which emphasizes women's sense of "existential 'connection' to other human life,"¹¹¹ a connection not felt by men. This sense of connection is elevated into a *Weltanschauung* described as the "feminine perspective." Suzanna Sherry explains the perspective in the following passage:

[T]he feminine perspective views individuals primarily as interconnected members of a community. Nancy Chodorow and Carol Gilligan, in groundbreaking studies on the development of self and morality, have concluded that women tend to have a more intersubjective sense of self than men and that the feminine perspective is therefore more other-directed *The essential difference between the male and female perspectives [is that] . . . "the basic feminine sense of self is connected to the world, the basic masculine sense of self is separate."* Women thus tend to see others as extensions of themselves rather than as outsiders or competitors.¹¹²

Why, Professor West asks, are men and women different in this essential way?¹¹³ The cultural feminist explanation is that "women are more nurturant, caring, loving and responsible to others than are men."¹¹⁴ These differences from men are not merely differences (or deficiencies, for that matter) but are strengths to be positively valued. Carol Gilligan has not only valorized these traits, but has also elevated them to the level of an essential social constitution for women—a veritable moral identity. West summarizes this perspective:

[W]omen's potential for a material connection to life entails (either directly, as I have argued, or indirectly, through the reproduction of mothering) an experiential and psychological sense of connection with other human life, which in turn entails both women's concept of value, and women's concept of harm. Women's concept of value revolves not around the axis of autonomy, indi-

110 West, *supra* note 104, at 9-10.

111 *Id.* at 15.

112 *Id.* at 15-16 (quoting Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 584-85 (1986)).

113 West, *supra* note 104, at 16.

114 *Id.* at 17.

viduality, justice and rights, as does men's, but instead around the axis of intimacy, nurturance, community, responsibility and care. For women, the creation of value, and the living of a good life, therefore depend upon relational, contextual, nurturant and affective responses to the needs of those who are dependent and weak, while for men the creation of value, and the living of the good life, depend upon the ability to respect the rights of independent co-equals, and the deductive, cognitive ability to infer from those rights rules for safe living. Women's concept of harm revolves not around a fear of annihilation by the other but around a fear of separation and isolation from the human community on which she depends, and which is dependent upon her. If, as I have suggested, cultural feminism is our dominant feminist dogma, then this account of the nature of women's lives constitutes the "official text" of feminism, just as liberal legalism constitutes the official text of legalism.¹¹⁵

Alternatively, radical feminism takes a very different stance on the question of difference. Unlike the "official" story of cultural feminism, the radical account describes the essence of "woman" as invasion and torment. Radical feminism views women's connection to others—precisely that which is celebrated by cultural feminists—as "the source of women's debasement, powerlessness, subjugation, and misery."¹¹⁶ On this view, these debasing connections are the product of women's material constitution (e.g., its aspects of reproduction¹¹⁷ and intercourse¹¹⁸). West glosses these constitutive conditions this way:

The material, sporadic violation of a woman's body occasioned by pregnancy and intercourse implies an existential and pervasive violation of her privacy, integrity and life projects. According to radical feminists, women's longings for individuation, physical privacy, and independence go well beyond the desire to avoid the dangers of rape or unwanted pregnancy. Women also long for liberation from the oppression of intimacy (and its attendant values) which both cultural feminism and most women officially, and wrongly, overvalue. Intimacy, in short, is *intrusive*, even when it isn't life threatening (perhaps *especially* when it isn't life threatening). An unwanted pregnancy is disastrous, but even a *wanted* pregnancy and motherhood are intrusive. The child *intrudes*, just as the fetus invades.

Similarly, while unwanted heterosexual intercourse is disastrous, even wanted heterosexual intercourse is intrusive. The penis occupies the body and "divides the woman" internally, to use

115 *Id.* at 28.

116 *Id.* at 29.

117 *Id.*

118 *Id.* at 32-35.

Andrea Dworkin’s language, in consensual intercourse no less than in rape. It preempts, challenges, negates, and *renders impossible* the maintenance of physical integrity and the formation of a unified self. The deepest unofficial story of radical feminism may be that intimacy—the official value of cultural feminism—is itself oppressive. Women secretly, unofficially, and surreptitiously long for the very individuation that cultural feminism insists women fear: the freedom, the independence, the individuality, the sense of wholeness, the confidence, the self-esteem, and the security of identity which can only come from a life, a history, a path, a voice, a sexuality, a womb, and a body of one’s own.¹¹⁹

Just as there is an “official” and an “unofficial” story in legal theory, so too in feminist theory. West captures the contrasts in the following chart:

	THE OFFICIAL STORY (Liberal legalism and cultural feminism)		THE UNOFFICIAL STORY (Critical legalism and radical feminism)	
	Value	Harm	Longing	Dread
LEGAL THEORY (human beings)	Autonomy	Annihilation; Frustration	Attachment; Connection	Alienation
FEMINIST THEORY (women)	Intimacy	Separation	Individuation	Invasion; Intrusion

FIGURE 2

One might think that the unofficial stories in legal theory and feminism bear some relation to each other, but Professor West dismisses this suggestion as “the widespread and confused claim that critical legal studies already *is* feminist because the critical scholars’ description of subjectivity converges with the cultural feminists’ description of subjectivity, and the less widespread but equally confused claim that radical feminism is ‘just’ liberalism, for the parallel reason.”¹²¹ The reason such a view of the relationship between feminism and critical theory cannot be anything other than confused is that the very comparison presupposes that women’s and men’s subjectivities are somehow comparable. Professor West is eager to deny precisely this assumption.

The male Critical Legal theorist values love and intimacy for their liberating effect: they “hel[p us] overcome the distinction be-

119 *Id.* at 35.

120 *Id.* at 37.

121 *Id.* at 38-39.

tween self and nature."¹²² Women, however, do not want to overcome the distinction between self and nature: "women value love and intimacy because they express the unity of self and nature within [their] own selves."¹²³ Because "love, for men, is an acquired skill,"¹²⁴ men will naturally think that alienation is something to be overcome. For men, "separation (and therefore autonomy) is what comes naturally. The separation that endangers women, by contrast, is what is socially constructed—attachment is natural. Separation, and the dread of it, is the response to the natural (and pleasant) state of connection."¹²⁵

We now see that Professor West grounds her seemingly radical claim that women are not human beings¹²⁶ in her belief that, by virtue of their faith in a gender-neutral human subjectivity, male legal theorists have simply elevated their own preconceptions into a notion of subjectivity that fails to capture the true nature of women's subjectivity. As West summarizes the matter:

These, then, are the differences between the "human beings" assumed by legal theory and women, as their lives are now being articulated by feminist theory. The human being, according to legal theory, values autonomy and fears annihilation, while at the same time he subjectively dreads the alienation that his love of autonomy inevitably entails. Women, according to feminist theory, value intimacy and fear separation, while at the same time longing for the individuation which our fear of separation precludes, and dreading the invasion which our love of intimacy entails. The human being assumed or constituted by legal theory precludes the woman described by feminism.¹²⁷

Women and women's experience are not represented in modern jurisprudence because women are not recognized by the law. Not "until we have a legal doctrine that takes women's lives as seriously as it takes men's"¹²⁸ will there be any hope for a "genuinely ungendered jurisprudence (a jurisprudence "unmodified" so to speak)."¹²⁹ What must we do to make a place for women in legal discourse? How can women, and women's "distinctive existential and material state of being,"¹³⁰ be adequately reflected in and considered by legal discourse? Professor West has a distinctly modernist answer to this question.

¹²² UNGER, *supra* note 103, at 206.

¹²³ West, *supra* note 104, at 40.

¹²⁴ *Id.* at 41.

¹²⁵ *Id.*

¹²⁶ *Id.* at 4.

¹²⁷ *Id.* at 42.

¹²⁸ *Id.* at 60.

¹²⁹ *Id.*

¹³⁰ *Id.* at 61.

At no point in Professor West's analysis of the legal subordination of "women" does she view the concept of "woman" as anything other than a single, unitary construct. In the opening paragraphs of her essay, she states that women have a "true nature."¹³¹ Here she makes her key modernist assumption: there is a "true nature" to woman, which can then be represented or pictured in language—specifically, in the language of legal discourse. Because their essence is at present not represented in language, women are excluded from this discourse; hence, they cannot be part of the extension of the concept "human being."

Professor West also evinces distinct modernist sensibilities in considering the question of truth. She maintains that to solve the problem of women's exclusion from legal discourse, we must tell "true stories" of women's lives.¹³² West suggests a sort of public relations campaign: "We need to flood the market with our own stories until we get one simple point across: men's narrative story and phenomenological description of law is not women's story and phenomenology of law."¹³³ She believes that turning around legal discourse and forcing it to take account of the perspective of "woman," calls for a rewriting of legal discourse "in direct language that is true to our own [women's] experience and our own [women's] subjective lives."¹³⁴ To use the language and expression of modernism, the law must begin to mirror not only the male experience but the female experience as well. Notice, however, the nature of the proposed solution to the problem of exclusion: just widen the scope of the mirror. But what of "woman" or "women"? Where does she (do they) reside? In legal discourse? Not according to West. Yes, contemporary legal discourse includes something called "woman," but that is not "true woman." And this is the point: for West, "woman" exists *as a something* quite apart from what legal discourse makes her. In other words, "woman" exists prior to and apart from her treatment in legal discourse. On West's account, woman, whether gendered or sexed, exists prior to being taken up and constituted by legal discourse. This must be true, for were it not, then the idea of woman as a "unity of self and nature"¹³⁵ existing outside legal discourse would be unintelligible.¹³⁶

¹³¹ *Id.* at 4. See also Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 140-41 (1987) (strongly emphasizing the need to ground an account of female identity in biology).

¹³² West, *supra* note 104, at 64.

¹³³ *Id.* at 65.

¹³⁴ *Id.* at 70.

¹³⁵ *Id.* at 40.

¹³⁶ And intelligibility is the name of the game. See John H. Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435, 453 (1989) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)) ("But so long as intelligibility is the name of the

In examining the gendered nature of modern legal discourse, Professor West accepts without reservation the key modernist assumptions that underlie her critique. West claims there is a unitary experience of women which has been systematically excluded from legal discourse. In her view, altering the conditions for the possibility of jurisprudential discourse is not the solution to the problem of jurisprudence and gender—West does not advocate a new approach to jurisprudence. Hers is a much less ambitious project, requiring only that the net be widened to include “women.” But can feminist jurisprudence prescind from an uninterrogated modernism?¹³⁷ We now turn our attention to a feminist who has specifically addressed this problem.

B. Joan Williams

1. Epistemology

In 1987, Joan Williams published *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*.¹³⁸ Professor Williams argued that, in attempting to supplant the liberal account of legal rationality, members of the Critical Legal Studies school (“CLS”) had duplicated some central conceptual errors of the modernist program they were so eager to displace. What was their mistake? In short, the CLS scholars failed to hear the message of the new epistemology. What role does this failure play in the Critical critique of law, and what is this new epistemology? We turn first to the former question.

The attributes of that all-too-familiar cardboard character, “the liberal legalist,” are well-known. She stands for the rule of law, the principles of neutrality and fairness, the even-handed and objective application of rules, and the virtues of consistency and publicity.¹³⁹ Critical Legal scholars argue that this liberal message is a lie. In

game, epistemology, linguistics, and literary theory suggest that rendering the hermeneutic circle, understanding fully the culture of other thinkers’ doing and thinking, is the key to understanding an intellectual text.”). For an important discussion of the role of intelligibility in the narrative reconstruction of science, see Joseph Rouse, *The Narrative of Science*, 33 *INQUIRY* 179 (1990). For a discussion of narrative as a form of explanation, see Paul Roth, *How Narratives Explain*, 56 *Soc. Res.* 449 (1989).

¹³⁷ West’s unswerving commitment to modernism extends beyond gender to method. In her review of Barbara Herrnstein Smith’s book, *CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY* (1988), West rejects what she perceives as Herrnstein Smith’s relativism because that relativism contributes to domination and oppression. See Robin West, *Relativism, Objectivity, and Law*, 99 *YALE L.J.* 1473 (1990).

¹³⁸ Joan Williams, *Critical Legal Studies: The Death of Transcendence & The Rise of the New Langdells*, 62 *N.Y.U. L. REV.* 429 (1987).

¹³⁹ For a profound and moving account of liberalism in all its dimensions, see UNGER, *supra* note 103 (particularly chapters two and three).

their view, the law is fraught with contradiction and bias. It cannot, even on its best day, approach anything like "neutral application of rules." Liberal legalism is far from being able to articulate a coherent account of the subject capable of free will and the pursuit of an individual conception of the good, and the liberal individual is at best a fiction.

According to Professor Williams, not only does the CLS critique of liberal legalism fail, but it also fails for the same reason as liberalism. Duncan Kennedy's claim that embedded within liberal legalism is "a fundamental contradiction" between individual and community illustrates this failure.¹⁴⁰ Kennedy's claim implicates the old story of the self and the other: attaining individual freedom simultaneously requires and is threatened by other people. Kennedy makes his point this way:

[A]t the same time that it forms and protects us, the universe of others . . . threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. A friend can reduce me to misery with a single look. Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society.¹⁴¹

What could be wrong with this assessment? Professor Williams finds Kennedy's analysis problematic in that it posits an abstract structure underlying the entirety of social experience: a structure which purports to explain the multifarious social and political phenomena that are the everyday fare of life in civil liberal society. Worse yet, Kennedy's analysis of liberal legalism's discourse harbors "claims of privileged access to objective truth."¹⁴² What was originally liberalism's problem—the unjustified claim of access to objective truth—now surfaces in the metaphysics of Critical Legal theory. How did this happen? Professor Williams has a complex but familiar answer.

The members of CLS and their critics have failed to give due attention to what Professor Williams refers to as "the new epistemology."¹⁴³ New epistemology replaces the liberal-CLS metaphys-

¹⁴⁰ Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 205 (1979).

¹⁴¹ *Id.* at 211-12.

¹⁴² Williams, *supra* note 138, 474-75.

¹⁴³ In *Deconstructing Gender*, Professor Williams summarizes the new epistemology this way:

This critique, which I have elsewhere called the new epistemology, consists of a broad and diverse intellectual movement that rejects a range of long-standing Western verities, some dating to the Enlightenment, and others all the way back to Plato. Perhaps the core element of the new epistemology is its rejection of an absolute truth accessible through rigorous, logical manipulation of abstractions.

ics of structure, with its emphasis on the "Either/Or" of subjective-objective, self-other, determinate-indeterminate, with what we have described earlier as the first aspect of postmodernism—that is, linguistic holism. Like the liberal legalist, the Critical Legal critic remains "trapped in dreams of transcendence."¹⁴⁴ Professor Williams, following (early) Wittgenstein, labels the linguistic version of transcendence "the picture theory."¹⁴⁵ We encountered the picture theory in our earlier discussion of language and modernism.¹⁴⁶ Language functions as a medium of representation in which a non-linguistic edifice that exists outside of language is represented in language.¹⁴⁷ Truth, on this account, is the accurate representation of thing and structure through the medium of language.

By postulating a structure underlying the verbal play of linguistic reality, the CLS critique of liberal legalism evinces "a fundamental failure to abandon the universe shaped by the picture theory."¹⁴⁸ Thus, neither the liberal legal claim that law is determinate nor the CLS claim that law is indeterminate—though both are theoretically appealing—prove workable in practice. The reason is *precisely the same in each case*: the picture of "knowledge" each presupposes is essentialist. As mentioned earlier,¹⁴⁹ abandoning the idea of a fixed structure to which law "corresponds" obliges one to avoid "claim[ing] to have discovered *the* canonical, essential structure of thought."¹⁵⁰ But, if we give up essentialism, representationalism, and truth-as-correspondence, what are we left with?

Professor Williams's answer derives from the later work of Wittgenstein. When we give up the language of determinacy and

Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 805 (1989).

¹⁴⁴ Williams, *supra* note 138, at 432.

¹⁴⁵ *Id.* at 433.

¹⁴⁶ See *supra* notes 68-72 and accompanying text.

¹⁴⁷ In short, necessity is a function not of the nature of things (Aristotle) nor of mind (Kant) but of language. See Gordon E. Michalson, *Theology, Historical Knowledge, and the Contingency-Necessity Distinction*, 14 J. PHIL. OF RELIGION 87, 92 (1983).

The intelligibility of language does not rely upon its gaining purchase on a realm of static laws and immutable truths waiting to be discovered and articulated, but depends instead on how well language serves us as we go about making our way in the world. The correct response to the relativism that apparently results from this is not to worry about a missing stability anchored "in reality"; the correct response is simply that "there is as much stability as there is." Consequently, as one commentator has recently summarized the matter, "whereas once we thought with Aristotle, that necessity came from things, and later thought with Kant that it came from the structure of our minds, we now know that it comes from language."

Id. (citations omitted).

¹⁴⁸ Williams, *supra* note 138, at 489.

¹⁴⁹ See *supra* note 74 and accompanying text.

¹⁵⁰ James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 715 (1985).

indeterminacy, we replace truth conditions with assertability conditions. In other words, within a practice, we swap talk of truth for persuasion. When a dispute arises over the judicial application of a rule, for example, the critique will issue not from outside the bounds of language but from within the borders of practice. We make our appeals against the background of "a given cultural context."¹⁵¹ The question whether there is certainty¹⁵² in our legal practices of justification can only be answered from within particular cultural contexts, for it is only "[t]he context [that] determines what is required."¹⁵³ We remain always within our "form of life." We cannot break out of it. This is not a limitation, however, for to see it as a limitation is to play into the very picture of knowledge from which we seek to extricate ourselves.

2. *Feminism*

Where, then, does feminism fit into the picture of knowledge just articulated? To sharpen the question, how can feminism view itself as a liberating discourse if, as Williams urges, it abandons the effort to transcend our current perspective and assume a distanced position from which to criticize the current configuration of gender relations and the law's constitution of the feminine subject?¹⁵⁴ That is, need the following worry be taken seriously?

[H]ow are we to draw any principled distinction between the rejection of Enlightenment rationalism and the rejection of legiti-

¹⁵¹ Williams, *supra* note 138, at 494.

¹⁵² The most far-reaching study of the concept of certainty in the thought of the later Wittgenstein is THOMAS MORAWETZ, *WITTGENSTEIN AND KNOWLEDGE* (1978).

¹⁵³ Williams, *supra* note 138, at 493.

¹⁵⁴ The tradition of thought invoked by Professor Williams in her critique of CLS suggests the following answer:

[S]emantic analysis can provide no original information about the world or our knowledge of it. We can expect only an indirect reconstruction or reflection of what our own empirical science and common understanding already tell us, together with information about how this might be expressed within different systems of notation. Semantic analysis discovers notational rather than theoretical options. Given the full corpus of antecedently established truth as parameter, it seeks formal principles for constructing the truth, or for correlating it (or parts of it) with other truth. It seeks truths only about the forms and formal relations of true sentences. It is constrained at its borders not by observation or experience but by antecedently perceived truth. Semantic interpretation is shaped by the truth as seen from the vantage point of some accepted theory of the natural world, rather than by the evidence that shapes such a theory. The interpretational hypotheses of the interpreter or analyst have extralinguistic significance only relative to the already accepted doctrine of a background theory, but they provide *no independent basis* even for understanding that doctrine let alone believing it.

GEORGE D. ROMANOS, *QUINE AND ANALYTIC PHILOSOPHY* 184-85 (1983) (emphasis added).

mation as such? The concession is, after all, a very significant one; for having been told that intellectual traditions incorporate a capacity for critical reflection, we might well suppose that the forces of Enlightenment had captured the high ground in the current argument. If discursive communities are capable of self-criticism in principle, we might ask, then who is to dictate how far they shall take it? Won't there always be room for more, so long as any intelligible criticism can be addressed to the moral or cognitive order under which we live? And what is this limitless commitment to the dialectical revision of theory and practice, if not precisely the Enlightenment commitment to haul up everything in life before the tribunal of reason.¹⁵⁵

We have noted Professor Williams's rejection of this "Either/Or" dichotomy, which suggests that one either accepts that there is a tribunal of Reason in which claims to truth and falsity are interrogated,¹⁵⁶ or gives oneself over to the ill-defined and hopelessly vague contours of discursive practice. Having rejected that dichotomy in *The New Langdells*, however, Professor Williams goes on to consider the implications of this rejection in the specific context of feminism. In *Deconstructing Gender*,¹⁵⁷ she puts the new epistemology¹⁵⁸ to work by attacking the Enlightenment's celebration of "reason over emotion"¹⁵⁹ while simultaneously questioning feminist treatments of gender differences. As this analysis will reveal, Professor Williams is deeply ambivalent about the new epistemology's usefulness as a critical tool for the emancipation of women from the gendered structure of legal relations. Her ambivalence serves to confirm the claim that the modern-postmodern divide is a singularly important point of emphasis for feminist critics of law, for until the question of critique is settled, the status of feminism as a liberatory enterprise will be uncertain. Professor Williams's basic disagreement is with the "difference" feminism advocated by Carol Gilligan and her followers. She maintains that Gilligan's description of gender differences is "inaccurate and potentially destructive."¹⁶⁰ Williams has two specific disagreements with Gilligan. First, she believes that "it is incorrect as a matter of intellectual history to claim, as have Gilligan and others, that the twentieth century's shift to a more contextualizing, antiformalist, and relativizing form of discourse constitutes a rejection of absolutist 'male' epistemology in

¹⁵⁵ Lovibond, *supra* note 1, at 11-12.

¹⁵⁶ The metaphors of the "Tribunal of Reason" and the "Interrogation of Claims to Truth by Reason" figure prominently and powerfully in the first chapter of GILLIAN ROSE, *THE DIALECTIC OF NIHILISM: POST-STRUCTURALISM AND LAW* (1984).

¹⁵⁷ Williams, *supra* note 143, at 805.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 804.

¹⁶⁰ *Id.* at 801.

favor of 'women's voice.'"¹⁶¹ Second, Williams contends that Gilligan overlooks what is important in the critique of existing conceptions of gender. In her view, it is not enough to argue, as Gilligan does, that there is "a feminine voice."¹⁶² A feminist critique of "possessive individualism" is necessary;¹⁶³ without such a critique, Gilligan's relational discourse may be turned against women. These objections are connected, and may be considered together.

There is a fairly diverse range of opinion among feminists who believe that women have a distinct "voice." Nevertheless, there is basic agreement among them that feminism's contribution to the restructuring of gender relations should take place at the level of what Suzanne Lebsock refers to as "a more humane social order."¹⁶⁴ Williams describes this focus the following way:

For all these feminists, this "more humane social order" entails a new ethic of care based on a focus on relationships, not competition; on negotiation, not combat; on community, not individual self-interest. "What is needed," concludes the early and influential feminist of difference Elizabeth Wolgast, "is another model. . . . We need a model that acknowledges . . . other kinds of interest than self-interest." A more recent legal feminist echoes this thought, noting his aspiration "to transform our polity and its underlying assumptions from the alienated world of atomistic competition to an interconnected world of mutual cooperation."¹⁶⁵

There is, however, a downside to this social order. If we view men and women as truly different, then perhaps the two groups ought to receive different treatment.¹⁶⁶ As a strategy, such an approach can backfire, as it did in *EEOC v. Sears, Roebuck & Co.*¹⁶⁷ To

¹⁶¹ *Id.* at 800.

¹⁶² Professor Williams actually believes that Gilligan is ambivalent on this point. See Williams, *supra* note 143, at 813. ("Gilligan's inconsistent signals about whether she is talking about women or 'the feminine' have left relational feminism with the potential to be used as a weapon against women.")

¹⁶³ Professor Williams describes possessive individualism in this way:

The term refers to the liberal premises that society consists of market relations, and that freedom means freedom from any relations with others except those relations the individual enters voluntarily with a view to his own self-interest.

Id. at 810 n.40.

¹⁶⁴ SUZANNE LEBSOCK, *THE FREE WOMEN OF PETERSBURG: STATUS AND CULTURE IN A SOUTHERN TOWN, 1784-1860* (1984).

¹⁶⁵ Williams, *supra* note 143, at 811 (citations omitted).

¹⁶⁶ This is Elizabeth Wolgast's position: that equality and equal treatment need to take account of "real differences." See ELIZABETH H. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* 88 (1980) ("[W]omen should have some rights not applicable to men.")

¹⁶⁷ 628 F.2d 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). For a discussion of the expert testimony in the case, see Alice Kessler-Harris, *History On Trial*, 35

rebut the charge that the company had discriminated against women in filling its more lucrative commission sales positions, Sears's lawyers successfully argued that the absence of women from those positions was bound up with the nature of women. The lawyers argued that because women focus on family, relationships, care and mothering, they often will forsake high-paying but time-intensive positions in favor of other positions that do not compromise their (family) values.¹⁶⁸ As Professor Williams characterizes the Court's judgment, "Women's 'ethic of care' enables them to rise above the fray, so they are not truly hurt when they are excluded from high-powered, competitive jobs in commission sales."¹⁶⁹ Yes, women *are* different. They require different treatment—but they also make different choices. Women are more "focused on relationships, and averse to capitalist virtues such as competition."¹⁷⁰ Sears did not discriminate; rather, the women freely chose the ethic of care over big bucks.

The relational feminists' critique of gender differences does not take account of the particular economic choices facing both women and men. It is precisely this failure—the failure to offer an *economic* account of gender relations—that renders the relational account of gender differences a feeble approximation of their reality. It is not gender differences but "the gendered structure of American capitalism"¹⁷¹ that is the source of women's (and men's) oppression. Women do not choose family responsibilities over the fast track. "Women know that if *they* do not sacrifice *no one* will, whereas men assume that if *they* do not, *women* will."¹⁷² Women do not have the same choices as men. Williams goes on to note that

[t]he underlying point is a deeper one: that society is structured so that everyone, regardless of sex, is limited to two unacceptable choices—men's traditional life patterns or economic marginality. Under the current structure of wage labor, people are limited to being ideal workers, which leaves them with inadequate time to devote to parenting, and being primary parents condemned to relative poverty (if they are single parents) or economic vulnera-

RADICAL HIST. REV. 57 (1986); Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 TEX. L. REV. 1629 (1988); Alice Kessler-Harris, *Academic Freedom and Expert Witnessing: A Response to Haskell and Levinson*, 67 TEX. L. REV. 429 (1988); Thomas Haskell & Sanford Levinson, *On Academic Freedom and Hypothetical Pools: A Reply to Alice Kessler-Harris*, 67 TEX. L. REV. 1591 (1989).

¹⁶⁸ *Sears*, 628 F.2d at 320-21.

¹⁶⁹ Williams, *supra* note 143, at 814.

¹⁷⁰ *Id.* at 815. This short summary of the case fails to do justice to Professor Williams's brilliant demonstration of the manner in which the lawyers for Sears simply turned Gilligan's arguments against women.

¹⁷¹ *Id.* at 822.

¹⁷² *Id.* at 831.

bility (if they are currently married to an ideal worker). Wage labor does not have to be structured in this way.¹⁷³

So how did things get to be so bad? How is it that women, and especially feminists like Carol Gilligan,¹⁷⁴ have failed to see that not only are they oppressed by the system of wage labor, but they are, perhaps unwittingly, contributing to their own oppression?¹⁷⁵ Professor Williams's answer comes not from feminist theory but from political theory, and, in particular, from the work of the Italian Marxist philosopher Antonio Gramsci. According to Professor Williams, Gramsci's central notion, that of "cultural hegemony,"¹⁷⁶ demonstrates that although they believe they are making choices, in reality women

may be unwitting accomplices in the maintenance of existing inequalities. . . . Discovering nearly inexhaustible resources for resistance to domination, many social historians have been reluctant to acknowledge the possibility that their subjects may have been muddled by assimilation to the dominant culture — perhaps even to the point of believing and behaving against their own best interests.¹⁷⁷

The "language of domesticity"¹⁷⁸—that is, the notion that women speak "in a different voice" or are possessed of their own "ways of knowing"¹⁷⁹—has to be, as Professor Williams puts it, de-

¹⁷³ *Id.* at 831-32.

¹⁷⁴ I am reluctant to buttress Professor Williams's inevitably logical critique of relational feminism with specific reference to the work of Carol Gilligan. Gilligan's research deals with the psychic development of young children, not the socioeconomic parameters of late capitalist culture. While it is clear that her work is suggestive, there are limits to its extrapolation.

¹⁷⁵ See Kathryn Abrams, *Ideology and Women's Choice*, 24 GA. L. REV. 761, 767-68 (1990) ("Like the women discussed by MacKinnon, Williams' subjects contribute to their own subordination (this time, economic rather than sexual), with only limited understanding of the constraints on their choices and little sense of these choices as systematically self-destructive.").

¹⁷⁶ Professor Williams discusses the notion thus:

Gramsci painted a complex picture of how the dominant culture rules with the consent of the governed by shaping a "hegemony" of values, norms, perceptions, and beliefs that "helps mark the boundaries of permissible discourse, discourages the clarification of social alternatives, and makes it difficult for the dispossessed to locate the source of their unease, let alone remedy it."

Williams, *supra* note 143, at 828-29.

¹⁷⁷ T.J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 AM. HIST. REV. 567, 573 (1985).

¹⁷⁸ Williams, *supra* note 143, at 828.

¹⁷⁹ See MARY F. BELENKY ET AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE, AND MIND* (1986). An excellent vehicle for raising the question of women's way(s) of knowing is the Marlene Gorris 1984 Dutch film *A QUESTION OF SILENCE*. For a discussion of the film and its implications for this question, see Linda Williams, *A Jury of Their Peers: Marlene Gorris's A Question of Silence*, in *POSTMODERNISM AND ITS DISCONTENTS* 107-15 (E. Ann Kaplan ed., 1988).

coded.¹⁸⁰ Why is it that women fail to see that they are the victims of the dominant culture? Like Gramsci's proletariat,¹⁸¹ can it be that women suffer from false consciousness?¹⁸² Women do not make choices, for they are merely cogs in the capitalist wheel of commerce. Their mission is to keep home and hearth intact while the man stakes the family claim in the world of work. Women are not making "choices," for they have no choices to make. They are simply filling a role in the wage labor system.

This analysis is a powerful critique of both the wage labor system and the blindness inherent in relational feminism. But is this a critique Professor Williams, as a proponent of "the new epistemology," gets to make? I propose that, on her own terms, the answer to this question must be negative.¹⁸³ The new epistemology rejects the modernist dogma that knowledge can transcend the limits of language, and maintains that claims to truth and "right representation" must be given up in favor of assertion and persuasion within a discursive framework. The first casualty of the move to the new epistemology was the neutral grid of objectivity,¹⁸⁴ which was replaced by "the web of human agreements" as the foundation for cognition.¹⁸⁵ However, by invoking Gramsci's critical posture of cultural hegemony and resorting to words like "decode," "hegemony," and the like, Professor Williams places herself squarely within

¹⁸⁰ Williams, *supra* note 143, at 828.

¹⁸¹ See SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey N. Smith eds. & trans., 1971).

¹⁸² Professor Williams scrupulously avoids using this phrase; however, her invocation of Gramsci's name, as well as her use of cognate terms, commits her to the view that women, like the proletariat, suffer from this ideological disease.

¹⁸³ See SUSAN J. HERMAN, HERMENEUTICS AND THE SOCIOLOGY OF KNOWLEDGE 150 (1986).

[Consider] the Marxist concept of false consciousness. A Marxist social scientist, imposing the Marxist framework of interpretation on a sequence of action might be led to the conclusion that a particular group of social actors [e.g., women] in a particular situation exhibit false consciousness. Again, the Gadamerian would have no difficulty with such a conclusion. The 'text' of the action fused with the interpreter's Marxist horizon yields a particular, yet perfectly legitimate interpretation. It might even be argued that, given the influence of Marxist categories in the social sciences, it is difficult for contemporary interpreters to see past actions in anything *but* Marxist terms. That interpretive social science and especially the Wittgensteinian school has had a great deal of difficulty with the concept of false consciousness is, however, evident in the contemporary literature on this subject.

Id.

¹⁸⁴ Professor Williams has elsewhere indicated her reservations about giving up on truth. See Joan Williams, *Feminism and Post-Structuralism*, 88 MICH. L. REV. 1776, 1778 (1990) (book review) ("Once we as feminists reject Truth, and are left only with arguments in favor of our interpretations, we are brought face to face with the need to persuade others to see the world as we do.").

¹⁸⁵ Williams, *supra* note 138, at 453.

the framework of objectivity, truth, and knowledge which she so successfully deconstructed in *The New Langdells*. Considered together, *The New Langdells* and *Deconstructing Gender* demonstrate the importance of the problem of critique to a postmodernist critic of the law. The contradiction inherent in Williams's work, however, need not be a terminus, for in her critique of the relational feminists, she demonstrates the precise point at which the new epistemology breaks down. Thus, it would be foolish to view her failure to escape the bounds of modernist rhetoric as a sign of an inherent or unavoidable limit to postmodernist criticism. Indeed, a third feminist critic suggests a method for resolving that very contradiction.

C. Zillah Eisenstein

Postmodernism's singular contribution to feminism has been to raise the stakes in the sameness-difference debate. While feminists of the "different voice" stripe were consolidating their position and taking a respite from the arduous task of staking out a defensible theoretical position on the question of gender identity, arguments such as the following were being made:

There can be no guarantee of the nature of women's experience since, in so far as it is meaningful, this experience is discursively produced by the constitution of women as subjects within historically and socially specific discourses. . . . [W]omen's subjectivity will always be open to the plurality of meaning and the possibilities contained within this plurality will have different political implications.¹⁸⁶

Zillah Eisenstein introduces *The Female Body and the Law*¹⁸⁷ with this provocative remark: "There is no one body, only bodies, only differences, as well as pluralized conceptions of equality."¹⁸⁸ Eisenstein's target is the familiar reductionism of phallogocentric liberal discourse—the notion that women are the same as men (equal) except when the equality of women is being denied. In those instances, the argument goes, the cause of the inequality is women's "differences"—their natural biological constitution. Gender and sex (biology) are simultaneously irrelevant (to equality) and determinative (of inequality). For Eisenstein, the problem is not with the question of the "truth" of biological differences; rather, it lies in how those differences are discursively constructed. Thus, her inquiry is directed to the relationship between gender and power.

Let us begin with method. From the start, Eisenstein rejects the very terms that make traditional epistemology possible. She states

186 CHRIS WEEDON, *FEMINIST PRACTICE & POSTSTRUCTURALIST THEORY* 167 (1987).

187 ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988).

188 *Id.* at 5.

that "the dualism of the real and the ideal is overdrawn."¹⁸⁹ The realms of fact and idea, material and immaterial, and idea and essence must be replaced not with new dualisms, but with an entirely different way of thinking about the problems of meaning and understanding. To accomplish this, Eisenstein focuses on the concept of "discourse."¹⁹⁰ In this context, the point of the enterprise is not to look at the object (e.g., woman) and how it is represented in language (e.g., representations of "woman."). Rather, it is to look at how discourse—a "realm of thinking and acting"¹⁹¹—produces images of gender and sex.

So what does discourse have to do with the distinction between modernism and postmodernism? As we have seen, the project of right representation is the modernist project of knowledge. We have also seen that it is a belief in the power of truth that underwrites the project of modernist epistemology. Eisenstein's "discourse" approach rejects the project of modernist epistemology as not wrong but impossible. She junks categories like "ideology," which depend for their very existence on the dichotomous verities of truth-ideology, real-unreal, clear-distorted, as worn out and useless. Does not this view, then, lead to relativism?¹⁹² Eisenstein addresses this problem the following way:

¹⁸⁹ *Id.* at 7. Eisenstein has drawn criticism from proponents of essentialism. See, e.g., Marie Ashe, *Inventing Choreographies: Feminism and Deconstruction*, 90 COLUM. L. REV. 1123, 1138 (1990) (reviewing EISENSTEIN, *supra* note 187).

[H]ad Eisenstein engaged with comparative anthropological theory in the way that, for example, French feminist Julie Kristeva has done, she would have confronted the deep and apparently universal unconscious operations that may motivate constructions of gender. Kristeva has noted an apparent linkage between the universal tendency toward "abjection"—the naming of particular persons and practices as *absolutely other*—and a designation of certain processes of female bodies, such as birthing and menstruation, as polluted.

Id. (footnote omitted).

¹⁹⁰ See EISENSTEIN, *supra* note 187, at 10-12.

¹⁹¹ *Id.* at 11.

¹⁹² As Alan Hunt formulates the matter, the problem is one of paradox. See Alan Hunt, *The Big Fear: Law Confronts Postmodernism*, 35 MCGILL L.J. 507, 538-39 (1990).

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

It is only within a standpoint that privileges objectivity and absolutes that relativism and pluralism present a problem. Plurality does not mean that all truths are equal; it merely uncovers the role of power in defining truth. Once truth has been defined, we are free to argue in behalf of our interpretation, but we cannot use the claim to truth itself as our defense. . . . We must leave meanings open at the same time we act on them.¹⁹³

. . . .

If there is no place *outside* discourse, how can one establish its meaning? Is the body completely a construction in discourse, with no *outside*? Is the body sexed? Gendered? A mix?¹⁹⁴

. . . .

We need to recognize that differences exist within and between the sexes. There are a variety of kinds of female bodies: thin, fat, small-breasted, large-breasted, muscular, flabby, and so forth. These differences exist within other differences as well: sexual preference, economic class, race, age, and so on.¹⁹⁵

One must appreciate Eisenstein's sensitivity to the charge that, from the postmodernist perspective, all questions of difference are simply a matter of one's own view. It would be unfair to level such a charge at Eisenstein, because as the passages above demonstrate, her concern is not to dispute that "[s]ex and gender differences exist."¹⁹⁶ Instead, she urges the claim that "their significance must remain open-textured."¹⁹⁷ Here we come to the crux of the difference between the modern and postmodern approaches to the question(s) of feminism. If we give up the modernist view—embraced by Robin West—that the significance of gender differences can be settled by appeal to a totalizing structure that transcends discourse, what are our alternatives? Joan Williams sees the new epistemology's answer as critique proceeding from within the bounds of existing culture. *EEOC v. Sears*, however, prompted a re-evaluation of this strategy, and engendered a move back to modernist concepts like "cultural hegemony" and the "decoding" of experience.¹⁹⁸ Is Eisenstein's a truly postmodern approach—one that avoids the traps that caused Williams to fall back into the modernist framework?

193 EISENSTEIN, *supra* note 187, at 23-24.

194 *Id.* at 29.

195 *Id.* at 31-32.

196 *Id.* at 35.

197 *Id.*

198 This move is really just a shuffle, since Williams remains within a modernist framework. What happened in *EEOC v. Sears* is a perfect example of what is wrong with modernism; Sears's lawyers successfully sold "woman" as a universal category. Williams simply replicates this form of argument by insisting that another universal category—hegemony—is the true explanatory ground. The proper way to attack the logic of the case is at the level of the *form* of the argument itself.

We can assess the adequacy of Eisenstein's discourse-oriented¹⁹⁹ approach to law by analyzing her treatment of a specific topic: pornography. Among the most bizarre coalitions produced by the politics of the eighties, none could be more curious than that formed by the New Right and certain feminists on the issue of pornography. Seemingly, it was the shared purpose of eliminating pornography's subordination and oppression of women that engendered this unusual coalition. Eisenstein argues, however, that this is an erroneous description of what was at stake in the debate over pornography in the eighties.²⁰⁰ In fact, her analysis of the pornography debate suggests that by joining in the New Right's wholesale rejection of pornography, some feminists actually contributed to the continuing oppression of women.

Eisenstein notes that "[p]ornography is very much tied to the meaning of engendered sex: in it females are displayed as subjugated, objectified women."²⁰¹ But her argument is grounded in her claim that pornography is not just "one thing." Pornography has many meanings, including, but not limited to, "fantasy and rebellion."²⁰² These multiple meanings "coexist within pornography, and they crisscross the realms of the real and ideal."²⁰³ Further, "some females may feel pleasure in imagining both being subjugated and subjugating others. Because sexual pleasure can be experienced as a liberating feeling (liberation from inhibition), fantasies of subjugation may be emancipatory. Thus, pornography is not a homogenized discourse expressing only women's oppression."²⁰⁴

Is this also the New Right's reading of pornography? Hardly. For the New Right, the female is mother, Madonna with child—she needs protection (from pornographers), not emancipation. We must free her from the pornographer's subjugation so that we may enslave her to the role of wife and mother.²⁰⁵ The New Right chooses to address the evil of pornography on the level of its injurious effects on women. From this picture of pornography's impact on women flows the notion that pornography is something from

199 Professor Eisenstein explicitly invokes Foucault's "discourse" analysis in support of her view of legal knowledge. See EISENSTEIN, *supra* note 187, at 10-12. For a discussion of Foucault's thought and postmodernism, see DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* 45 (1989).

200 Her specific focus is the Attorney General's Commission on Pornography, which issued its final report in 1986. ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY: FINAL REPORT (1986).

201 EISENSTEIN, *supra* note 187, at 163.

202 *Id.*

203 *Id.*

204 *Id.* at 163-64.

205 *Id.* at 164.

which women need protection. Does this mean that, as Eisenstein asks, to argue against pornography is to "challeng[e] women's status as victims"?²⁰⁶ The New Right would have us believe that it is.²⁰⁷ Curiously, some feminists also take it to be the case.

The feminists Eisenstein has most in mind are Andrea Dworkin and Catharine MacKinnon. In their well-publicized promotion of antipornography statutes in Minneapolis and Indianapolis,²⁰⁸ Dworkin and MacKinnon took the position that pornography is "a practice of sex discrimination, a violation of women's civil rights, the opposite of sexual equality."²⁰⁹ Nothing could be wrong with opposing sex discrimination. But the problem is not whether one is for or against sex discrimination. Rather, the problem is the link between pornography and sex discrimination; "seeing pornography" from the perspective of (sex) discrimination. The problem concerns the clouding of motives and frames of reference. For the New Right, a desire to protect women fuels the antipornography campaign. Women are different from men, and need protection. Feminists do not share this motivation. Their interest in eliminating pornography is not in protecting women but in empowering them.²¹⁰ Again, what could be wrong with this agenda?

First, the New Right and feminists share the view that

pornography is something men enjoy and women do not, that it is something men do to women, that woman is the victim and man is the aggressor. And both feminists and the right wing assume that pornography is the same as violence, an assumption that makes it difficult to avoid thinking about sex in other than protective terms.²¹¹

Now comes the rub. By campaigning against pornography across the board, feminists in fact contribute to the subordination of women. They do so because the pornography against which they protest sends *more than one* message. It is true that some pornography contains messages of violence and oppression. However, "[p]ornography carries many messages other than woman-hating: it advocates sexual adventure, sex outside of marriage, sex for no reason other than pleasure, casual sex, anonymous sex, group sex,

²⁰⁶ *Id.* at 165.

²⁰⁷ Eisenstein presents an interesting critique of the New Right's political agenda and its relationship to the social-scientific conclusions of the Presidential Commission. She focuses in particular on the dubious nature of the claimed causal connection(s) between certain forms of pornography and violence against women. *See id.* at 168-70.

²⁰⁸ *See, e.g.*, Indianapolis City-County General Ordinance No. 35, 1984, Proposal No. 298, 1984.

²⁰⁹ MACKINNON, *supra* note 7, at 175.

²¹⁰ EISENSTEIN, *supra* note 187, at 171.

²¹¹ *Id.*

voyeuristic sex, illegal sex, public sex.”²¹² If this picture of the relationship between pornography and freedom is persuasive, then Eisenstein’s conclusion is inexorable: “If pornography is not universally victimizing, then a sweeping indictment of it can create a new problem—denial of the freedom to engage in multiple sexual practices.”²¹³

What does this analysis have to do with postmodernism?²¹⁴ A great deal. In fact, I believe that Eisenstein’s critique of Dworkin and MacKinnon shows how the failure to transcend modernist assumptions (in this instance, modernist assumptions about women, sex, and subordination)²¹⁵ contributes to the further denial of wo-

²¹² Lisa Duggan et al., *False Promises: Antipornography Feminist Legislation in the U.S.*, in *WOMEN AGAINST CENSORSHIP* 145 (Varda Burstyn ed., 1985).

²¹³ EISENSTEIN, *supra* note 187, at 171.

²¹⁴ For one thing, Eisenstein’s critique upsets the easy alliance between idea and image. It notes that the idea (of “woman” or “sexuality”), which is a function of image, can be changed at the same moment it is understood. See JACQUELINE ROSE, *SEXUALITY IN THE FIELD OF VISION* 231 (1986).

Artists engaged in sexual representation (representation *as* sexual) come in at precisely this point, calling up the sexual component of the image, drawing out an emphasis that exists *in potentia* in the various instances they inherit and of which they form a part. Their move is not therefore one of (moral) corrective. They draw on the tendencies they also seek to displace, and clearly belong, for example, within the context of that postmodernism which demands that reference, in its problematised form, re-enter the frame. But the emphasis on sexuality produces specific effects. First, it adds to the concept of cultural artefact or stereotype the political imperative of feminism which holds the image accountable for the reproduction of norms. Secondly, to this feminist demand for scrutiny of the image, it adds the idea of a sexuality which goes beyond the issue of content to take in the parameters of visual form (not just what we see but how we see—visual space as more than the domain of simple recognition). The image therefore submits to the sexual reference, but only in so far as reference itself is questioned by the work of the image.

Id.

²¹⁵ For a more ideological slant on the question of pornography’s relationship to phallic images, which nonetheless affirms that current practices are the best place to begin the rethinking of a gender relations, see JOAN COCKS, *THE OPPOSITIONAL IMAGINATION* 148 (1989).

[W]e can remain on ideological territory but take a different flight of the imagination than the one dictated to us. We can conjure up possibilities for eroticism not when the phallus is subject and force, but “merely” when the phallus is assigned by a hegemonic culture to the position of subject and force. Given the veil of secrecy over the actual bedroom, this is surely the more sympathetic course, and it is the one I mean to follow here. It *does* require that we exchange an empirical method for one that is partly literary. We cannot behave as if we were searching for facts when we really are looking for plots that are persuasive and characters that ring true. Yet neither are we free to fix on any erotic possibility that happens to please us. Instead, we must confine our imaginations within narrow, deductive bounds. We must look for plots and characters that are logically possible—given, first of all, the existence of a hegemonic culture of Masculine/feminine; given, second, our rejection of the idea that such a culture is totalitarian in its wielding of control or that it has a one-to-one

men's freedom.²¹⁶ I will begin with Dworkin and MacKinnon's position on the relationship between pornography and sexual subordination. Dworkin states that if part of what angers women

is that we're [Dworkin and MacKinnon] suggesting that there are things that are right and things that are wrong, and one of the things that is wrong is the sexual subordination of women, that's accurate. Politics is about making those kinds of distinctions.²¹⁷

As Eisenstein points out, "this view holds only if pornography treats women exclusively as victims."²¹⁸ With this observation, we return to postmodernism. Eisenstein's point is that there is no "truth"²¹⁹ to the female sexuality that is subordinated by the pornographer. To reduce "sex to its engendered form,"²²⁰ as MacKinnon does, "is to let the phallus win. It is like saying that the female body is one with the mother's body."²²¹

For MacKinnon, women's sexuality is not something that exists apart from its representation in discourse. There is, as MacKinnon puts it, "sexual reality."²²² That "reality" is the product of, and is consistent with, the vision of male sexuality. What is at stake is *not* the question of whether sexuality is real or unreal. Rather, what matters is whether or not one buys into what Eisenstein refers to as the "oppositional mode of thinking."²²³ There is a physical aspect to sex; call it "the real."²²⁴ There are also ideas about "the real"; call these "the ideal."²²⁵ Dworkin and MacKinnon complain that women are subordinated because men have reduced woman's sexuality to the male ideal. Here Eisenstein makes her postmodernist point: there is no (one) such thing as "female sexuality." On the contrary, there are many ways to think about female sexuality. Like

correspondence to actually lived and felt life; and given, third, our refusal to presume at the start any essential significances to the male and female bodies.

Id.

²¹⁶ The point is that by thinking about pornography in a totalizing, modernist form, Dworkin and MacKinnon throw out too much. By failing to interrogate specific objects, practices, or forms of depiction, they embrace a conception of pornography that sacrifices freedom on the mantel of totalization.

²¹⁷ Andrea Dworkin, *quoted in* Mara Math, *Andrea Dworkin Talks About Feminism and Pornography*, GAY COMMUNITY NEWS, Dec. 28, 1985, at 8. MacKinnon echoes this view. See MACKINNON, *supra* note 7, at 148 ("[P]ornography institutionalizes the sexuality of male supremacy . . .").

²¹⁸ EISENSTEIN, *supra* note 187, at 172.

²¹⁹ *Id.* at 223 ("Biology—as the body—is always mediated through its discourses.").

²²⁰ *Id.* at 172.

²²¹ *Id.*

²²² Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 326-27 (1984).

²²³ EISENSTEIN, *supra* note 187, at 172.

²²⁴ Eisenstein refers to this as "the actual picture." *Id.* at 173.

²²⁵ Eisenstein refers to these as "interpretation." *Id.*

pornography, "it has a multiplicity of meanings."²²⁶ "The anti-pornography position does not recognize this and therefore with uncomplicated simplicity can reduce sex to its engendered form: pornography is reduced to violence; sexual equality is reduced to a protectionist stance."²²⁷

The crux of the matter is that the way to increase the freedom of women is to free both sexes from the oppositional mode of modernist thinking. It is this mode that reduces sexual relations to a series of binary oppositions,²²⁸ enslaving political discourse to the production of unities that have the appearance of being part of the architecture of thought. For Eisenstein, it is a mistake to fight pornography by treating it "as a unity."²²⁹ Like sex, pornography can take a multitude of forms, some of which "have a positive effect in depicting sex as not necessarily tied to pregnancy, marriage, or heterosexuality. Pornography can help to create a multiplicity of sexual imagery that enhances women's equality by differentiating the female body from the mother's body."²³⁰ By reducing pornography's multiplicity of meanings, antipornography feminists risk denying women the very freedom they aspire to secure for them.

III

POSTMODERNISM/FEMINISM/LAW

A. Generalization

Owing to the universalistic nature of the prose, modernist forms of argumentation tend to suffer from the problem of "careless generalization."²³¹ Postmodernism holds open the possibility of breaking free from careless generalization, of renewing interest in the manifold properties of particular cases.²³² It notes that by eschewing the particular historical circumstances within which our conceptions of self and others are forged, we lose track of the path

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ For an insightful discussion of the entrenchment of oppositional thought, see J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990) (reviewing JOHN M. ELLIS, *AGAINST DECONSTRUCTION* (1989)).

²²⁹ EISENSTEIN, *supra* note 187, at 173.

²³⁰ *Id.*

²³¹ Gary Wickham, *The Political Possibilities of Postmodernism*, 19 ECON. & SOC'Y 121, 122 (1990) (describing the inductive and deductive manifestations of "careless generalization"). Of course, postmodernist modes of expression are themselves hardly free of this problem.

²³² For a discussion of the return to particularism in ethics, see ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY* (1988). The return to particulars in law began with American Legal Realism. See Dennis M. Patterson, *Law's Practice*, 90 COLUM. L. REV. 575 (1990) (book review).

from which we have come to be what we are.²³³ We fail to see the extent to which we are as much product as producer. In short, we fail to appreciate culture

not as some subjective or idealized world view that is to be distinguished from behavior but as a form of behavior itself and as the tangible results of that behavior. . . . The important point is that culture . . . is explicitly produced rather than simply being implicitly embedded in, or constitutive of, social arrangements.²³⁴

As a postmodernist would frame it, the problem with careless generalization is that it “not only ignores the specific voices of *particular political sites*, it effectively works to stop these specific voices being heard.”²³⁵ For example, the most egregious problem with Robin West’s critique of gender’s place in modern jurisprudence is not the lack of argument in support of the platitude “woman’s ‘true’ nature,” but the fact that she does nothing with it. In her critique of the Official and Unofficial versions of legalism, for example, Professor West never questions the empty generalizations (“autonomy,” “connection,” “alienation”) she seeks to criticize. Instead of showing why these context-independent categories have no explanatory value, West substitutes equally empty notions (e.g., “intimacy,” “separation,” “invasion”). Despite her claim of telling the story of “women’s subjectivity,”²³⁶ Professor West never tells any stories. Thus, her call for “direct language”²³⁷ rings hollow—she makes no effort to engage reality, being satisfied instead to dance across a universe of empty abstractions.

In her discussion of wage labor, Joan Williams demonstrates the gains to be reaped from careful attention to context. However, in her critique of the *Sears* decision, she mistakes the political downside of careless generalization for a substantive thesis about “wo-

²³³ A focus on historical circumstances does not foreclose critical analysis of tradition. See RICHARD SHUSTERMAN, *T.S. ELIOT AND THE PHILOSOPHY OF CRITICISM* 161 (1988).

[T]radition admits of immanent critique. Even the most unified tradition will contain inner tensions or gaps which in the face of new circumstances would yield conflicting responses or troubling indecision as to how to behave. Such situations compel tradition to reflect critically on itself and to adjust or redefine itself to resolve them, where competing reconstructive interpretations of tradition stimulate further critical reflection. To suppose that tradition contains no possibility for internal conflict or different future projections is to conceive of it as a fully programmed and uniformly closed system, rather than the roughly fashioned, open-structured scheme of divergent elements which we know it to be.

Id.

²³⁴ ROBERT WUTHNOW, *COMMUNITIES OF DISCOURSE* 15 (1989).

²³⁵ Wickham, *supra* note 231, at 132.

²³⁶ West, *supra* note 104, at 37.

²³⁷ *Id.* at 70.

men's nature." The reason Sears's attorneys were rhetorically successful is not that they convinced the court of the truth of an essentialist model of women; Sears's lawyers won because they were able to create a reality through the careful use of a generality *coupled with* a finite context. Williams makes this point herself (albeit unknowingly) when she notes that it is only within the framework of the wage labor system that the essentialist argument about women's true nature is successful. The critical counterfactual question is never asked: What if the reality of women's need to work became part of the context within which Sears's conduct was judged? Under the terms of Williams's own argument, by which I am persuaded, the relational feminists' conception of gender differences would not have been outcome-determinative.

This is the point at which Williams's return to modernist forms of explanation undercuts the power of her insight. Williams's argument regarding the structure of wage labor and its relationship to our cultural conceptions of women is in no way undermined if the veiled references to "false consciousness" are dropped. Professor Williams appears unwilling to take the leap into postmodernism and simply make her case on the merits of the facts as she constructs them. But she can, and she should. Her argument trips over the modernist props she would do well to jettison.

Is Professor Williams's worry justified? Does postmodernism in fact leave us without any critical standards? In untangling the pornography debate, Professor Eisenstein explicitly rejects the notion that gender is a product of nature (sex). Yet notice that, despite the seemingly radical nature of that rejection, her claim is not so radical after all.²³⁸ The trick is to see that the argument works backwards: pornography explains sex and, thus, gender. By examining the particulars of pornography, Eisenstein shows that the depiction of women in corporeal form carries no inherent meaning.²³⁹ Pornography is a (cultural-conceptual) manifestation of the physical form. The (cultural) meaning of pornography *can* be singular, but *need not be*. This is Eisenstein's argument against the Dworkin-MacKinnon position on pornography. By reducing "sex to its engendered form,"²⁴⁰ Dworkin and MacKinnon have foisted upon women an essentialist picture of subordination and, in the process, deprived women of a measure of freedom.

²³⁸ In fact, despite its references to postmodern forms of argument, Professor Eisenstein's argument succeeds not because it is "postmodern" but because it is persuasive.

²³⁹ Again, Eisenstein does not argue that there are no biological differences between men and women. Rather, her argument is that the *meaning* of those differences is a matter of culture.

²⁴⁰ EISENSTEIN, *supra* note 187, at 172.

B. Understanding and Narrative

If we agree with Judith Butler that "woman" is not a thing represented in language but is "an ongoing discursive practice . . . open to intervention and resignification,"²⁴¹ then we are inevitably brought face to face with the question of critique. If the law does not represent—accurately or inaccurately—some conception of "woman," then what is the role of critique?²⁴² From what perspective does critique issue? What is the *object* of critique? If there is no viable perspective from which to assess the moral and political inadequacies of the law, then how is criticism possible?

Answers to these questions begin to emerge in a reconsideration of Quine's holistic epistemology.²⁴³ If the truth or falsity of a belief is a function of other beliefs, then one intent on changing current understanding is best advised to begin with the network of existing beliefs.²⁴⁴ On this view, the dubitability or indubitability of a belief is a function neither of the belief itself nor of some transcendent web of understanding. There are infinite measures of a be-

²⁴¹ BUTLER, *supra* note 95, at 33.

²⁴² Peggy Radin summarizes this worry nicely:

But how can the pragmatist find a standpoint from which to argue that a system is coherent but bad, if pragmatism defines truth and good as coherence? Inattention to this problem is what makes pragmatism seem complacent, when it does. One answer to the problem of bad coherence, which the pragmatist will reject, is to bring back transcendence, natural law, or abstract idealism. Another answer, which the pragmatist can accept, is to take the commitment to embodied perspective very seriously indeed, and especially the commitment to the perspective of those who directly experience domination and oppression.

Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1710 (1990).

²⁴³ See *supra* notes 72-76 and accompanying text.

²⁴⁴ A "network" is a set of conventions used by participants in a certain activity to coordinate their shared endeavor. The following description of conventionalism in the art world applies equally well to law.

People who cooperate to produce a work of art usually do not decide things afresh. Instead, they rely on earlier agreements now become customary, agreements that have become part of the conventional way of doing things in that art. Artistic conventions cover all the decisions that must be made with respect to works produced, even though a particular convention may be revised for a given work. Conventions dictate the materials to be used . . . to convey particular ideas or experiences, as when painters use the laws of perspective to convey the illusion of three dimensions or photographers use black, white, and shades of gray to convey the interplay of light and mass. Conventions dictate the form in which materials and abstractions will be combined, as in music's sonata form or poetry's sonnet. Conventions suggest the appropriate dimensions of a work, the proper length of a performance, the proper size and shape of a painting or sculpture. Conventions regulate the relations between artists and audience, specifying the rights and obligations of both.

HOWARD S. BECKER, *ART WORLDS* 29 (1982). Thus, the way to begin the process of "rethinking" legal concepts is to question our conventions of understanding. For a further discussion of this point in the legal context, see Dennis M. Patterson, *An Introduction to Conventionalism*, 10 W. NEW ENG. L. REV. 43 (1988).

lief.²⁴⁵ The lesson is this: the question, "Is this belief true?" must be replaced with the question, "How is this belief to be understood (and can it be understood differently) within this story?"²⁴⁶

The reason postmodernism ultimately forces feminist jurisprudence to become narrational²⁴⁷ is tied to the lack of cognitive authority²⁴⁸ for our practices.²⁴⁹ In this regard, jurisprudence can take a lesson from contemporary philosophy of science. In *The Structure*

²⁴⁵ This view is expressed by Quine's thesis of "underdetermination": any data can be "explained" by a host of theories. See W.V. Quine, *On the Reasons for Indeterminacy of Translation*, 67 J. PHIL. 179-83 (1970). For a discussion of this theory, see ROGER F. GIBSON, JR., *THE PHILOSOPHY OF W.V. QUINE* 84-90 (1982).

²⁴⁶ On the importance of the storied character of legal understanding, see Robert M. Cover, *The Supreme Court 1982 Term: Foreword: NOMOS and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

²⁴⁷ As a reconstructive enterprise, narrative has close affinities to pragmatism. This Article is not the place to detail the differences, but at least one must be mentioned. American pragmatism emphasizes "communities of inquiry," the members of which work toward "convergence" in their beliefs. These beliefs they take to be true. In a narrative account of understanding, on the other hand, "truth" is at best a compliment paid to ways of understanding that are intersubjective—talk of "truth" muddies the water.

Despite these differences, I think it a mistake to say, as Richard Rorty does, that "pragmatism is banal in its application to law." Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1811 (1990). To take an example from my own field of commercial law, the number of converts to pseudo-scientific methodologies like rational choice theory and game theory is, if anything, on the rise. The dubious philosophical pretensions of these pseudo-scientific methodologies must be shown for what they are, and pragmatism seems well positioned to do that. Additionally, pragmatism is a sound posture for the critique of all forms of judicial pseudo-objectivism. See, e.g., Dennis M. Patterson, *A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 IOWA L. REV. 503 (1991) (critiquing judicial lapse into plain meaning, deductivism, and other sins of the nineteenth century).

²⁴⁸ It is the lack of cognitive authority that underwrites the conventionalist belief that understanding is not a matter of theory but is, as Wittgenstein says, "a way of acting." LUDWIG WITTGENSTEIN, *ON CERTAINTY* § 204 (G.E.M. Anscombe & G.H. Von Wright eds., G.E.M. Anscombe & Denis Paul trans., 1972). It is important to keep in mind that the idea of "knowledge" is not being rejected; rather, it is being reconstructed. The locus of knowledge is being transferred from the individual to the group.

²⁴⁹ See Mark Okrent, *The Metaphysical Consequences of Pragmatism*, in *THE INSTITUTION OF PHILOSOPHY: A DISCIPLINE IN CRISIS?* 187 (Avner Cohen & Marcelo Dascal eds., 1989).

Considered on its own grounds, pragmatism is a recommendation in regard to a way of speaking. It suggests that there is no point in searching for the essence of truth, mind, language, etc., and thus no point to the traditional philosophical game. Pragmatism is the application of the philosophical position of anti-essentialism to the objects of philosophical discourse themselves.

It is with respect to this last point—the application of antiessentialist positions to philosophical questions—that I think Richard Posner goes wrong when he describes the view advanced in these pages as "back to basics." See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 424 (1990). The whole point of the enterprise is not "back" to anything; rather, it is "away" from a set of methods and questions identified with traditional philosophy.

of *Scientific Revolutions*,²⁵⁰ Thomas Kuhn demonstrated that, contrary to common philosophical and scientific understanding of the enterprise, "the authority of science has no basis beyond the consensus of its practitioners, specifically, no basis in a privileged, truth-gaining method."²⁵¹ One might object that the practice of science is objective because it provides the best explanation of events in the physical world. But what is "best" is simply "the explanation which best suits the purpose of some given explainer."²⁵² There is no denying that scientific models or "pictures" of reality serve heuristic purposes.²⁵³ Again, however, it is the scientific community that judges the adequacy of these models, according to its own methods and purposes. Nothing validates one picture (or a picture about how to choose a picture) over another. "In the end all you have is what we all agree is self-evident or conceptually necessary or linguistically required."²⁵⁴

In this analysis lies a lesson about the relationship between noncognitivism, narrative,²⁵⁵ and critique. Like all emancipatory

²⁵⁰ KUHN, *supra* note 90.

²⁵¹ Gary Gutting, *Paradigms and Hermeneutics: A Dialogue on Kuhn, Rorty, and the Social Sciences*, 21 AM. PHIL. Q. 1, 4 (1984).

²⁵² Richard Rorty, *Is Natural Science a Natural Kind?*, in CONSTRUCTION AND CONSTRAINT 69 (Ernan McMullin ed., 1988).

²⁵³ See REPRESENTATION IN SCIENTIFIC PRACTICE 5-6 (Michael Lynch & Steve Woolgar eds., 1990) (describing multiple uses of representation). See also HILARY PUTNAM, REPRESENTATION AND REALITY 21-22 (1988).

[N]one of the methods of representation that we know about—speech, writing, painting, carving in stone, etc.—has the magical property that there *cannot be* different representations with the same meaning. None of the methods of representation that we know about has the property that the representations *intrinsically* refer to whatever it is that they are used to refer to. All of the representations we know have an association with their referent which is contingent, and capable of changing as the culture changes or as the world changes.

Id. For recent treatments of representation in the realm of disease, see DOUGLAS CRIMP & ADAM ROLSTON, AIDS/DEMO/GRAPHICS (1990); SANDER L. GILMAN, DISEASE AND REPRESENTATION: IMAGES OF ILLNESS FROM MADNESS TO AIDS (1988); LUDWIK FLECK, GENESIS AND DEVELOPMENT OF A SCIENTIFIC FACT (Thaddeus J. Trenn & Robert K. Merton eds., Fred Bradley & Thaddeus J. Trenn trans., 1979); AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM OCTOBER 43 (Douglas Crimp ed., 1987); KENNETH J. CARPENTER, THE HISTORY OF SCURVY & VITAMIN C (1986).

²⁵⁴ Gutting, *supra* note 251, at 6. See generally LAUDAN, *supra* note 90 (reviewing contemporary approaches to the relationship between theory, evidence, and judgment).

²⁵⁵ For an argument that objectivity is a condition for the possibility of an objective narrative, see TERRY F. GODLOVE, JR., RELIGION, INTERPRETATION, AND DIVERSITY OF BELIEF: THE FRAMEWORK MODEL FROM KANT TO DURKHEIM TO DAVIDSON 149 (1989).

[B]y divorcing objectivity and narrative, we mask a deep connection between them. At the empirical level, objectivity is a notion upon which religious (and other) narratives must rely, most obviously when they claim to be true (about the world we have not made). But this same objectivity depends, in turn, upon a narrative function operative at the formal or transcendental level. At stake in the reflexive connection between objectivity and narrative is the integrity of each notion: objectivity, be-

discourses, feminism aspires to alter our current practices of understanding.²⁵⁶ The inadequacy of modernist programs of reform suggests that the craving for a totalizing critique of gender relations is an illusion from which we have been freed.²⁵⁷ This freedom comes at a price; more importantly, it reveals certain limitations bounding feminist discourse. The most important of these limitations is the recognition that criticism of existing practices must issue from within those very practices. In other words, "going local" entails holding in place the very practices of understanding being challenged.²⁵⁸

This conception of critique forces feminist jurisprudence into a reflexive²⁵⁹ examination of the very practices of understanding that

cause the activity of relating lies at its base; narrative, because, as [Hilary] Putnam—and, as I read him, Kant before him—points out, unless we narrate about something, we cannot distinguish speech from noise.

Id.

²⁵⁶ The question is where to start—the answer, "From where we are." See DAVID KOLB, *POSTMODERN SOPHISTICATIONS: PHILOSOPHY, ARCHITECTURE AND TRADITION* (1990).

But where do we start? We start from where we are. We are always moving within and from current conventions, already on the move in projects we did not choose, in languages we did not create. We do not have to choose between architecture and revolution. It is always too late to start from scratch; there is always language and meaning ahead and behind. That is the condition the moderns tried to overcome, but the tabula cannot be razed, and the attempt to do so leaves what was to be denied present as resented.

But if we have no centered overview, if we are extending our languages and forms of life as we build, how do we know which moves to make? Only some new combinations and moves suggest themselves. We work in a disciplined way, judging what is appropriate, and neither the discipline nor the judgment are universally rational.

Id. at 162-63.

²⁵⁷ *But see* Bell Hooks, *Feminism: A Movement to End Sexist Oppression*, in *FEMINISM AND EQUALITY* 62 (Anne Phillips' ed., 1987) (arguing that the success of feminism as an emancipatory enterprise is tied to the advancement of a definition of "feminism").

²⁵⁸ This approach is antithetical to and skeptical of the modernist presupposition that the needs of women can be identified apart from some discourse. See Bartlett, *supra* note 5, at 887 ("I have argued that feminist methods *are means to feminist ends . . .*") (emphasis supplied). Such an approach to feminism creates two troublesome assumptions: the idea of "feminist ends" is an intelligible, context-free notion; and that there is a direct connection (in the sense that one leads to the other) between method and insight.

²⁵⁹ Reflexivity—the turning of a critique back onto itself—is a central problem for all forms of postmodern thought. The problem grown directly out of modernist conceptions of intelligibility. See HILARY LAWSON, *REFLEXIVITY: THE POST-MODERN PREDICAMENT* 43 (1985).

At the end of the turn of a century which has seen language become the central concern of philosophy there is a risk of reading Nietzsche in the light of modern debates. Nevertheless, Nietzsche was writing at a time when the role of the thinking subject was still perhaps the dominant theme of philosophy, he was no longer in a milieu that assumed language to be transparent. (Once Kant had linked concepts with intuitions, experience could no longer be regarded as independent of the concepts by

make gender relations intelligible. Like other practices of critical reflection, feminist jurisprudence will succeed only to the extent that it questions the vocabularies through which gender relations are understood.²⁶⁰ To force critical reflection on the juridical categories of gender relations, feminist jurisprudence must retell the stories of gender in ways that enable us both to see the old in new ways and to make sense of the new.²⁶¹ One myth of modernism is that there is only one method for accomplishing this task.

which it is described. Kant thus laid the ground for an increasing role for language.) However, in Nietzsche we see the clear expression of an outlook characteristic of our modern stance, namely the virtual elision of thought into language. In a modern form of Occam's razor, Nietzsche almost eliminated thought. Language, instead of representing thought, provided concepts directly. 'Every word immediately becomes a concept, inasmuch as it is not intended to serve as a reminder of the unique and wholly individualized experience to which it owes birth.' This is not to imply that Nietzsche denied the existence of thought . . . but to indicate that the character of language was for him equatable with the character of thought. For Nietzsche, therefore, to speak about language is to speak about thought.

Id. (quoting Nietzsche).

Narrational intelligibility addresses the problem of reflexivity not by *solving* the problem, but by *dissolving* it by showing how the problem lies within modernist forms of thought. See C.G. PRADO, *THE LIMITS OF PRAGMATISM* (1987).

The noumenal must be eradicated as an idea; no philosophical contrast should be tolerated if it allows room for skeptical doubts *within* the linguistic, which exhausts what there is though somehow not in an ontological sense Philosophical *theory* can only attempt to get beyond the linguistic through transcendental arguments. But if there is *nothing* beyond language—and we cannot even say nothing intelligible—then efforts at such theorizing must be pointless, and truth cannot be any sort of faithful mirroring. The last thing truth can be is correspondence between ideas or sentences and states of affairs as extralinguistic. To the tradition all of this naturally looks like idealism; the Kantian distinction, or something like it, persists.

Id. at 75.

²⁶⁰ See STEPHEN T. LEONARD, *CRITICAL THEORY IN POLITICAL PRACTICE* 247 (1990).

Against the modernists, feminists show that neither the self, nor knowledge, nor theory, nor emancipation itself can be apprehended *a priori*. To take seriously the fact that we are historical beings, that human life is a continuous process of making and remaking social life, is to recognize that the purported goal of critical theory, "a form of life free of domination in all of its forms," cannot be interpreted as a form of life that is free of all conflicts of interests. To take seriously our historicity is to see that it is neither possible nor desirable for critical theory to treat emancipation in universal terms.

Id.

²⁶¹ See JEREMY BARRIS, *GOD AND PLASTIC SURGERY: MARX, NIETZSCHE, FREUD AND THE OBVIOUS* 45 (1990) ("[Y]ou can only start off changing reality by changing your knowledge, by remembering what you know so that you can change it.").

Another modernist myth is that, with respect to "woman,"²⁶² there is only one story to tell.²⁶³ To dispel this myth, feminist jurisprudence must shift its focus to different questions—questions that are not "epistemological."²⁶⁴ Moving beyond the essentialist paradigm of looking at "woman" as something represented *in* law, we should produce genealogies of "woman" in all her manifestations.²⁶⁵ The lesson of postmodernism is that "woman" is not one thing but many; we know "woman" by knowing her multiple (discursive) manifestations. To rethink the idea of "woman" we must rethink the network(s) within which she is constructed.²⁶⁶ How are we to accomplish that?

With the abandonment of the modernist aspiration toward a master discourse—Habermas's second-order "discourse of discourses"²⁶⁷—comes the realization that progressive change in a discipline must be reconceived as coming not from without but from within. That is, change must come from the redesign of our tools.²⁶⁸ Of course, "tool" is here used metaphorically, for the only actual tools of the law are its concepts and linguistic practices.

²⁶² The lesson of hermeneutics is that there is not just "one story to tell." The past is always being understood anew. See generally HANS-GEORG GADAMER, *TRUTH AND METHOD* 306-7 (2d ed. 1989) (introducing the notion of "horizon fusion").

²⁶³ For a pioneering study of the importance of narrative in the understanding of cooperative practices, see BRUNO LATOUR & STEVE WOOLGAR, *LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS* (2d ed. 1986) (advocating the abandonment of epistemology as a way of understanding the production of scientific knowledge).

²⁶⁴ Foucault entreats with a similar message.

[I]t is a question of forming a different grid of historical decipherment by starting from a different theory of power; and, at the same time, of advancing little by little toward a different conception of power through a closer examination of an entire historical material. We must at the same time conceive of sex without the law, and power without the king.

MICHEL FOUCAULT, 1 *THE HISTORY OF SEXUALITY* 90-91 (Robert Hurley trans., 1978). See also Charles Taylor, *Overcoming Epistemology*, in *AFTER PHILOSOPHY: END OR TRANSFORMATION*, *supra* note 2, at 464-88.

²⁶⁵ For an effective demonstration of the power of the genealogical method in matters of the body, see Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 *YALE L.J.* 1073 (1988).

²⁶⁶ See WEEDON, *supra* note 186, at 168.

The task for feminist criticism is to demonstrate how texts constitute gender for the reader in class- and race-specific ways and how these modes of femininity and masculinity relate to the broader network of discourses on gender both in the past and in the present.

Id.

A fine example of the application of this method in the context of social welfare is found in NANCY FRASER, *Women, Welfare, and the Politics of Need Interpretation*, in *UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY* 144-60 (1989).

²⁶⁷ For a devastating critique of Habermas's claims for the power of philosophy as a second-order, legitimating enterprise, see James Tully, *Wittgenstein and Political Philosophy: Understanding Practices of Critical Reflection*, 17 *POL. THEORY* 172 (1989).

²⁶⁸ As Kenneth Gergen puts it:

Thus, to speak of "change," "transformation," or "reform" is to raise what is, at bottom, a pragmatic question: How is "woman" to be understood?²⁶⁹

To answer this, we must first note that our understanding of "woman" occurs within a horizon of fixed²⁷⁰ meaning. For example, the meaning of a sentence within which "woman" appears is a function of that sentence's position within an appropriate horizon. That is, the meaning of the sentence is not some *thing*, or intention or essence but is a function of the horizon within which the sentence is at home. Thus, meaning is a function of a system of interconnected language-games that together constitute a "horizon of understanding."²⁷¹ Once the horizon of understanding is delimited, the new and different can be integrated into it.²⁷² The new becomes

Any given set of tools both enables and constrains. It facilitates certain lines of action while restricting others. Advancement in understanding largely derives, then, from the development of new forms of discourse. With the emergence of new language frames, the potential for effective human action is augmented. To view social life as an exchange of reinforcements is both fascinating and rich in evocative potential—but ultimately delimited. Greater efficacy can be achieved if one has at one's disposal lenses through which social life may be seen as sets of rituals, theatrical presentations, economically determined patterns, power dynamics, dialectic transformations, and so on. In effect, the socio-behavioral sciences stand in an optimal position to contribute to the symbolic resources of the culture.

Kenneth Gergen, *Correspondence versus Autonomy in the Language of Understanding Human Action*, in *METATHEORY IN SOCIAL SCIENCE* 157 (Donald Fiske & Richard Shweder eds., 1986).

²⁶⁹ See Murphy & McClendon, *supra* note 42, at 200 ("Postmodern epistemology moves toward a new form of pragmatism in attempting to answer the question 'Why this network (this rearrangement) rather than another?'").

²⁷⁰ "Fixed" here means nothing more than "already in place": there is an established network of understanding, a practice.

²⁷¹ A "one-step hermeneutics," if you will. See ROBERT J. ACKERMANN, *WITTGENSTEIN'S CITY* 19 (1988).

²⁷² No one voices this sentiment better than the late Michael Oakshott:

The problem of historical thinking is to detect what modification a new discovery, a new experience produces in the world of history as a whole. And the weakness of many historians is due to their inability to understand, first, that a new discovery, a new experience produces in the world of history as whole. And the weakness of many historians is due to their inability to understand, first that a new discovery cannot be appeased by being fitted into an old world, but only by being allowed to transform the whole of that world; and secondly, that the character of a new discovery is not given and fixed, but is determined by its place in the world of history as a whole. The general scheme, the initial world of ideas, they imagine to have been given and to lie beyond the reach of criticism; and each new discovery is, for them, equally fixed, solid and independent. New knowledge may be used to illustrate or to extend the old world, but never to modify or transform it. But the fact is that this general scheme, with which the historian begins, is a world of ideas given only in order that it may be superseded. And to see the bearing of a new detail upon the world of history as a whole is at once the task and difficulty of historical thought. For each new discovery, whatever it may appear to be, is, in-

manageable, since the horizon of meaning is such that it can be altered to accommodate the novel.

In thinking of understanding this way, we see immediately that the point of interpretation is the reconstitution of understanding within a particular horizon.²⁷³ Owing to its status as a second-order, reflective enterprise, legal interpretation is necessarily reconstructive: it allows us to regain a coherence that has, for one reason or another, been lost.²⁷⁴ The process of reconstruction is best described as "narrative" because it is through the narrative reconstruction of the point of the practice that the coherence necessary to the intelligibility of law is maintained. Owing to its ongoing, developmental, and transformative character, law is described most conspicuously as a narrative discourse. If we are careful to delimit the proper sphere of its narrational character, we will gain a better understanding of its ways and our role in it.

deed, not the discovery of a fresh detail, but of a new world. Every experience is, by implication, a complete world of experience. And each new discovery must be seen in its place in that world, its effect must have been felt upon that world, before its meaning can be said to have been apprehended, before it is 'discovered'. The process in historical thinking is never a process of incorporation; it is always a process by which a given world of ideas is transformed into a world that is more of a world.

MICHAEL OAKESHOTT, *EXPERIENCE AND ITS MODES* 98-99 (1933).

²⁷³ This approach is not without its difficulties. For example, the story of women's emancipation from gender oppression is largely entangled with the story of racial oppression. See ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN* (1988); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1989). For a recent discussion of feminism in light of the relationships and semantic authority, see Richard Rorty, *Feminism and Pragmatism*, 30 *MICH. Q. REV.* 231 (1991).

²⁷⁴ See WILLIAM HUBBARD, *COMPLICITY AND CONVICTION: STEPS TOWARD AN ARCHITECTURE OF CONVENTION* 128-29 (1980).

The larger understanding that I speak of is aware not just of the particular case or law at issue but rather sees the whole context in which this particular instance is located. A judge with this understanding would see his task not as one of formulating a single, free-standing decision but rather as forging a new link in a chain—linking his decision to those that came before and making sure that later decisions will be able to link up with his. For this larger understanding would know that a legal decision cannot stand on its own, like a provable scientific statement. There is no real reason why any decision must be the way it is, and any skeptical prying—or conversely, any attempts at verification with data—would only reveal that unprovability. It is the judge's reasoning that serves as a scrim for us, which veils that unverifiability with reasoning that is just convincing enough so that our skepticism doesn't rise up in us. But the reasoning that makes a decision convincing consists almost wholly of a skillful demonstration of how that decision adheres to principles contained in earlier cases. That is why it is so important to keep the chain of cases intact. Unless those cases are there to point to—and unless they are held in esteem so that pointing to them means something—that reasoning will convince no one.

Narration is the analytical device through which we realize the aspirations of a practice-based, nonpropositional account of legal knowledge. The ability to solve conceptual problems in law means being able to narrate the point of a legal practice in a way that preserves the point for the practice at the same moment it is transformed. This mode of analysis enables a participant in the practice, at any point in its history, to see how the point of that practice got to where it is at present and to imagine possibilities of how it might be different. This process—rethinking the point of the practice—involves reconstructing the point of the practice in such a way that a new point can be seen to emerge from earlier stages of the practice.²⁷⁵

Through narrative reconstruction of the point of a practice, one can chart the transformation of that practice as it responds to internal criticism from its participants, unforeseen or anomalous cases, the integration of the practice with other practices, and a host of other aspects. Narrative is successful as an analytical device in capturing these many and varied aspects of legal knowledge because it enables us to see that understanding and interpretation stand in a dynamic relationship. On a narrative account of legal knowledge, understanding emerges not as a conservative notion but as the focus of interpretive activity. Without understanding, interpretation would simply bite on air. Without narration, understanding would be wooden, lifeless, robotic in character. Narration is the dynamic element in the understanding-interpretation dichotomy.

Narrative reconstruction steers a course between the Scylla of essentialism and the Charybdis of free-wheeling Deconstruction.²⁷⁶

²⁷⁵ See Noël Carroll, *Art, Practice and Narrative*, 71 *THE MONIST* 140, 151 (1988) (“At any point in the history of the practice (or practices) of art, the unity of the later stage of development is rendered intelligible or explained within the practice by filling in the narrative of its emergence from an earlier stage. . .”).

²⁷⁶ Here I would agree, although for different reasons, with Christopher Norris and Andrew Benjamin: Derrida is not postmodern. See CHRISTOPHER NORRIS & ANDREW BENJAMIN, *WHAT IS DECONSTRUCTION?* 30 (1988) (“[P]ost-modernism effectively collapses a whole series of distinctions that still play a vital (though problematic) role in Derrida’s thinking.”). See also CHRISTOPHER NORRIS, *Limited Think: How Not to Read Derrida*, in *WHAT’S WRONG WITH POSTMODERNISM?* 134-64 (1990). Because Deconstruction further atomizes the individual into discursive fragments, it represents the modernist spirit at its most excessive. See Murphy & McClendon, *supra* note 42, at 211-12 (critiquing Mark Taylor’s Deconstructionist A/Theology).

In the end, Derrida is just a skeptic—Hume in the cafe. Quentin Skinner makes the point nicely:

Consider [Derrida’s] much-discussed analysis in *Spurs* of the fragment, found among Nietzsche’s manuscripts, which reads “I have forgotten my umbrella.” Derrida concedes that there is no difficulty about understanding the meaning of the sentence. “Everyone knows what ‘I have forgotten my umbrella’ means. His only objection to the despised figure he labels “the hermeneut” is that such persons fail to recognize that this still

The idea of reforming our habits of understanding presupposes that certain practices of understanding are intelligible, and may therefore be criticized.²⁷⁷ By postulating that all understanding is interpretation,²⁷⁸ Deconstruction, and other versions of "hermeneutic holism," give us no place to start.²⁷⁹ Every place is as good as any other,²⁸⁰ so no particular set of terms can be taken as the appropriate place to begin.²⁸¹ From the perspective of juridical narrative, the world (of law) is neither a representation of essentialist forms nor a deconstructed disunity of discursive fragments. It is a web of linguistic relationships composed of vocabularies wherein and whereby individuals understand themselves and their social reality.²⁸² We can neither transcend these vocabularies nor remain

leaves us without any "infallible way" of recovering what Nietzsche may have meant. "We will never know *for sure* what Nietzsche wanted to say or do when he uttered these words."

...

If we insist, as Derrida does, on . . . an equation between establishing that something in the case and being able to demonstrate it "for sure," then admittedly it follows that we can never hope to establish the intentions with which a text may have been written. But equally it follows that we can never hope to establish that life is not a dream. The moral of this, however, is not that we have no reason to believe that life is not a dream. The moral is rather that the skeptic is insisting on far too stringent an account of what it means to have reasons for our beliefs. Haunted as Derrida seems to be by the ghost of Descartes, he has concentrated on attacking a position which no theorist of intentionality need defend.

Quentin Skinner, *A Reply to My Critics*, in *MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS* 280-81 (James Tully ed., 1988).

²⁷⁷ Wittgenstein's remarks on rule-following address this presupposition. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 201 (G.E.M. Anscombe trans., 2d ed. 1958) (following a rule is a practice).

²⁷⁸ See Jacques Derrida, *Differance*, in *JACQUES DERRIDA, SPEECH AND PHENOMENA AND OTHER ESSAYS ON HUSSERL'S THEORY OF SIGNS* 129-60 (David B. Allison trans., 1973).

²⁷⁹ See Richard Shusterman, *Beneath Interpretation: Against Hermeneutic Holism*, 73 *THE MONIST* 181, 196 (1990) (describing variations on the "it's all interpretation" orientation).

²⁸⁰ Thus, to Wittgenstein, "A doubt without an end is not even a doubt." WITTGENSTEIN, *supra* note 248, at § 625.

²⁸¹ See Richard Shusterman, *Organic Unity: Analysis and Deconstruction*, in *REDRAWING THE LINES: ANALYTIC PHILOSOPHY, DECONSTRUCTION, AND LITERARY THEORY* 110 (Reed W. Dasenbrock ed., 1989).

[Derrida] himself in maintaining that language excludes totalization characterizes its differential field as "a field of infinite substitutions in the closure of a finite ensemble." Moreover, even forgoing the question of totality, the very presumption that *all* the elements or objects in our languaged world are essentially differentially interconnected and reciprocally constitutive of each other (however untotaled or untotizable they may be) clearly seems in itself to constitute a metaphysical perspective predisposed to cosmic unity and coherence.

Id. (citation omitted).

²⁸² See Dennis M. Patterson, *Law's Pragmatism: Law as Practice and Narrative*, 76 *VA. L. REV.* 937 (1990) (for a full account of this perspective).

their obedient subjects.²⁸³ We must reconstitute them and, in the process, change our self-understanding.²⁸⁴

This, then, is the project of a postmodern feminist jurisprudence: to problematize and reconstruct the many vocabularies within which the law creates "woman."²⁸⁵ The promise of such a project is that "if we change language and practice together, and it [is successful], we have achieved a special kind of explanatory vantage point for the understanding of our past practice."²⁸⁶ What will the "success" of such a feminist project look like?²⁸⁷ To answer this question by prescribing a general criterion for success serves only to duplicate the mistakes of previous modes of criticism. Only in specific contexts, with particular problems and vocabularies, can "success" be given content. To acknowledge this fact is not to avoid the question, but to give it the answer it deserves.

And is not this issue of context, after all, the nagging element in everything that is associated with "postmodernism"? The promise of modernism is the forward march from darkness to enlightenment.²⁸⁸ We know we have made progress because we perceive the distance between where we are and the abyss from which we have escaped. Offering nothing comparable to the promises of Enlight-

²⁸³ In other words, we must always begin the process of reconstitution from where we are. See Taylor, *supra* note 264, at 475-76.

As those effectively engaged in the activities of getting to perceive and know the world, we are capable of identifying certain conditions without which our activity would fall apart into incoherence. The philosophical achievement is to define the issues properly. Once this is done, as Kant does so brilliantly in relation to Humean empiricism, we find there is only one rational answer. Plainly we couldn't have experience of the world at all if we had to start with a swirl of uninterpreted data. Indeed, these wouldn't even be "data," because even this minimal description depends on our distinguishing what is "given" by some objective source from what we merely supply ourselves.

Id.

²⁸⁴ The mode of reinterpretation is narrative in so far as the methodological inspiration is to render the present intelligible "by filling in the narrative of its emergence from an earlier stage." Carroll, *supra* note 275, at 151. See also Dennis M. Patterson, *Law, Practice, Interpretation and Argument: Toward a Narrative Conception of Legal Discourse*, 5 SOC. EPISTEMOLOGY 61 (1991).

²⁸⁵ In much the same way, postmodernism in art problematizes the meaning of "art." See Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1378 (1990) ("'Art,' by its nature, will call into question any definition that we ascribe to it. As soon as we put up a boundary, an artist will violate it, because that is what artists do.").

²⁸⁶ Stephen P. Turner, *Social Theory Without Wholes*, 7 HUM. STUD. 259, 265 (1984).

²⁸⁷ I have already provided a specific example in the discussion of Zillah Eisenstein's critique of Dworkin and MacKinnon on pornography. See *supra* notes 199-230 and accompanying text.

²⁸⁸ However, as events in the twentieth century have demonstrated, modernity has its own forms of barbarism. See ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* (1989) (demonstrating how the Holocaust is the outcome of modernity's unique triumvirate of hate, technology, and bureaucracy).

enment rationality, postmodernism seems to merit our skepticism.²⁸⁹ It is true that postmodernism has no program—it provides no blueprint. So why “go postmodern”?²⁹⁰ Again, this seems to be the wrong question. If modernism’s prospects no longer seem as great as they once did, does it make sense to replace modernism with an approach that only duplicates the problems of the past? A negative answer has been suggested.²⁹¹ The lesson of postmodernism is that the answers to our questions are not *already there* waiting to be found; instead they will have to be produced in the ways just described.

CONCLUSION

We began by asking whether feminism requires the trappings of modernity. This question is problematized by the uncertain status of modernity itself. We have seen that “modernism” takes many forms, and even in the context of the limited definition utilized here, the claim that we are “in postmodernity”²⁹² is a dubious one. Like the criticism of yesterday, the critical methods of contemporary social and political theory will simultaneously draw their strength from available forms of discourse and seek to break the bounds of existing modes of criticism.²⁹³ When critics assert that theirs is an entirely new vision of the human condition, we must remind ourselves of this humble lesson.²⁹⁴

²⁸⁹ In the final analysis, this skepticism seems unwarranted. See Zygmunt Bauman, *Is There a Postmodern Sociology?*, 5 THEORY, CULTURE & SOC’Y 217, 233 (1988) (“[T]he faith in a historical agent waiting in the wings to take over and to complete the promise of modernity using the levers of the political state—this faith has all but vanished.”).

²⁹⁰ For an ambivalent answer, see Steve Fuller, *Does It Pay to Go Postmodern If Your Neighbors Do Not?*, in AFTER THE FUTURE: POSTMODERN TIMES AND PLACES, *supra* note 68, at 273-84. For the midlife crisis version, see Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990) (Due to the influence of postmodernism, law teaching is now just a form of training people to become glorified insurance adjusters.).

²⁹¹ For a more positive answer, see WILLIAM CORLETT, COMMUNITY WITHOUT UNITY: A POLITICS OF DERRIDIAN EXTRAVAGANCE 201-02 (1989) (“Perhaps more concentration on tactics at the level of the municipality (where common ground is usually taken literally instead of metaphorically) in addition to but alongside strategies on the high frontier of the individual/collective tension is the most radical politics of community available.”).

²⁹² See, e.g., Charles Jencks, *Death For Rebirth*, in POST-MODERNISM ON TRIAL 6-9 (Andreas C. Papadakis ed., 1990) (trumpeting the triumph of postmodern architectural style).

²⁹³ For an application of this process in social theory, see ROBERTO M. UNGER, POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY (1987).

²⁹⁴ I have in mind contemporary intellectuals like Richard Rorty, whose claims for contingency and irony fail to heed the lessons of Wittgenstein, of whose thought Rorty is so enamored. See RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989). There is no reason in *general* why contingency is to be favored over its opposite. There are differences *and* similarities. This mistake is made at a more general level by contemporary social theorists who argue for one or another version of a “philosophy of differ-

At this juncture, feminist jurisprudence is struggling with the implications of the postmodern critique of reason. This state of affairs is both exciting and troubling. The excitement stems from the knowledge that we are in the midst of rethinking ideas that are so firmly embedded in our cultural psyche that we can hardly imagine what it is to be without them. On the other hand, the failures and shortcomings of these notions have become too numerous to overlook.²⁹⁵ Feminist jurisprudence ignores them at its peril.

ence." See, e.g., Alex M. Johnson Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991) (advancing the claim that scholarly "voice" is distinct by virtue of one's speaking from one's own experience as a person of color). The irony here is that in their efforts to argue for the priority of "difference," these theorists duplicate the fundamental mistake of past philosophers—the reification of one aspect of a thing or person.

²⁹⁵ See generally GIANNI VATTIMO, *THE END OF MODERNITY: NIHILISM AND HERMENEUTICS IN POSTMODERN CULTURE* (Jon R. Snyder trans., 1988) (surveying the roots of modernism and philosophical efforts to theorize postmodernity).