

**POSTMODERNISM
AND THE
RATIONALIZATION OF LIBERAL LEGAL CULTURE**

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TABLE OF CONTENTS

ABBREVIATIONS.....	2
INTRODUCTION: PHILOSOPHICAL PROBLEMS AS LEGAL ONES	5
I: POSTMODERNISM AS PROBLEMATIC	8
II: NIETZSCHE ON VALUE	17
III: RECOVERING NIETZSCHE.....	31
IV: POSTMODERNISTS ON VALUE.....	36
V: WEBER ON VALUE	43
VI: NIHILISM AND THE RATIONALIZATION OF LAW.....	55
CONCLUSION: NIETZSCHE’S LESSONS	60

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Abbreviations

Nietzsche's Works

All citations are to section numbers, not page numbers. Roman Numerals denote chapter or essays, numbers denote sections.

- BT** *Birth of Tragedy*. in *The Basic Writings of Nietzsche*. W. Kaufmann trans. New York: Modern Library, 1968 [1872].
- UM** *Untimely Meditations*. R.J. Hollingdale trans. Cambridge: Cambridge University Press, 1983 [1873-6].
- HAH** *Human, All-too-Human*. R.J. Hollingdale trans. Cambridge: Cambridge University Press, 1986 [1878-80].
- D** *Daybreak: Thoughts on the Prejudices of Morality*. R.J. Hollingdale. Cambridge: Cambridge University Press, 1982 [1881].
- GS** *The Gay Science*. W. Kaufmann trans. New York: Vintage, 1974 [1882].
- Z** *Thus Spoke Zarathustra*. in *The Portable Nietzsche*. W. Kaufmann trans. New York: Penguin, 1982 [1884].
- BGE** *Beyond Good and Evil: A Prelude to a Philosophy of the Future*. R.J. Hollingdale trans. Harmondsworth: Penguin, 1973 [1886].
- GM** *On The Genealogy of Morals*. W. Kaufmann trans. New York: Vintage Books, 1967 [1887].
- TI** *Twilight of the Idols: How to Philosophize with a Hammer / The Antichrist*. R.J. Hollingdale trans. Harmondsworth: Penguin, 1968 [1888].
- A** *The Antichrist*. R.J. Hollingdale trans. Harmondsworth: Penguin, 1968 [1888].
- EH** *Ecce Homo: How one becomes what one is*. R.J. Hollingdale trans. Harmondsworth: Penguin, 1979 [1888].
- WP** *The Will to Power*. W. Kaufmann & R.J. Hollingdale trans. New York: Vintage, 1967 [1901].

Weber's Works

All citations are to page numbers.

- ES** *Economy & Society*. 2 vols. . G. Roth & C. Wittich eds. Berkeley: University of California Press, 1968.
- PE** *The Protestant Ethic and the Spirit of Capitalism*. T. Parsons trans. New York: Charles Scribners, 1958.
- SV** "Science as a Vocation" in *Sociological Writings*. H.H. Gerth & C. Wright Mills trans. Wolf Heydebrand ed. New York: Continuum Books, 1994.
- PV** "Politics as a Vocation" in *From Max Weber: Essays in Sociology*. H.H. Gerth & C. Wright Mills trans. eds. London: Routledge & Kegan Paul, 1948.



OSS “‘Objectivity’ in Social Science” in *Sociological Writings*. E.A. Shils and H.A. Finch trans. Wolf Heydebrand ed. New York: Continuum Books, 1994.

How far we too are still pious. – In science, convictions have no rights of citizenship, as is said with good reason... But does this not mean, more precisely considered, that a conviction may obtain admission to science only when it ceases to be a conviction?... But one must still ask whether it is not the case that, in order that this discipline could begin, a conviction must have been there already, and even such a commanding and unconditional one that it sacrificed all other convictions for its own sake. It is clear that science too rests on a faith... The question whether truth is needed must not only have been affirmed in advance, but affirmed to the extent that the principle, the faith, the conviction is expressed: “nothing is needed more than truth, and in relation to it everything else has only second-rate value.”

This unconditional will to truth: what is it? ... What do you know in advance of the character of existence, to be able to decide whether the greater advantage is on the side of the unconditionally mistrustful or of the unconditionally trusting? ...

Consequently, “will to truth” does not mean “I will not let myself be deceived” but – there is no choice – “I will not deceive, not even myself”: and with this we are on the ground of morality. For one should ask oneself carefully: “Why don’t you want to deceive?” especially if it should appear – and it certainly does appear – that life depends on appearance; I mean, on error, simulation, deception, self-deception; and when life has, as a matter of fact, always shown itself to be on the side of the most unscrupulous *polytropoi*. Such an intent, charitably interpreted, could perhaps be a quixotism, a little enthusiastic impudence; but it could also be something worse, namely, a destructive principle, hostile to life. “Will to truth” – that might be a concealed will to death.

Thus the question “Why science?” leads back to the moral problem, “For what end any morality at all” if life, nature, and history are “not moral”? ... But one will have gathered what I am driving at, namely, that it always remains a *metaphysical faith* upon which our faith in science rests – that even we devotees of knowledge today, we godless ones and anti-metaphysicians, still take our fire from the flame which a faith thousands of years old has kindled: that Christian faith, which was also Plato’s faith, that God is truth, that truth is divine...

- Friedrich Nietzsche, *The Gay Science*, § 344



Introduction: Philosophical problems as legal ones

Changes in the metaphysical understanding of a culture also affect the legal culture; indeed, the law is founded upon an idea of reflecting social change. As such, grasping that philosophical problems are also legal ones is necessary to any appreciation of the dynamics at work in our legal culture, and consequently the way in which legal culture affects and defines not simply what we do but who we are. Postmodernism is therefore not only a philosophical problem: it is also a legal challenge.

The importance of philosophical questions to legal theory is evident; consequently, the particular challenge that postmodernists present liberal legal theorists is indeed a profound one, with many people finding the need to retreat to a clearer articulation of foundations² or simply trying to ground the challenge in a new kind of pragmatism.³ Oddly, there have been little if any profound attempts to get into the kind of challenge that postmodernism presents to liberal legal orders, and consequently there is little understanding of what is happening to liberalism and its critics.⁴ Delving into postmodernism demonstrates more clearly that it is necessary to understand its motives, its relationship to that which it criticizes, and the ultimate aim it implicitly endorses. And by digging into postmodernism's closet, the philosophy of Friedrich Nietzsche becomes ever more apparent as a precursor, ever more demanding as a key to unraveling what postmodernism intends, and ever more needed as a path to confronting the challenge that postmodernism represents:

² Some theorists have tried to follow Habermas' construction of the project of the Enlightenment, arguing as well that the consequences of reason have not been exhausted. See Jurgen Habermas, *The Philosophical Discourse of Modernity*. Frederick Lawrence trans. (Cambridge, Massachusetts: M.I.T. Press, 1987). Other theorists have resorted to older arguments concerning natural law. See J.M. Finnis, *Natural Law and Natural Rights*. (Oxford: Clarendon Press, 1980).

³ Rorty and Posner are prime examples here. See Richard Rorty, *Contingency, Irony, and Solidarity*. (Cambridge: Cambridge University Press, 1989), and *Philosophy and the Mirror of Nature*. (Princeton: Princeton University Press, 1979). And see Richard Posner, *The Problems of Jurisprudence*. (Cambridge, Massachusetts: Harvard University Press, 1990). One may ask: if Posner is a postmodern pragmatist, is then Rorty an economist?

⁴ For example, look at the way in which "truth" is analyzed in the context of liberal legal culture by theorists who feel they are doing postmodern analysis. In each case its definition is assumed to be something that simultaneously does not exist and is something which lies in the background. Similarly, the understanding of liberalism as a hegemonic order of domination is taken too literally without looking at its nuances. J.M. Balkin teaches us nothing of truth or freedom in society, nor do we learn about the law or the postmodern mind. Instead we are confronted with the metaphor of 'cultural software' to describe interchangeable beliefs, which apparently exist in a web of underlying assumptions about the world, the state, the community and the individual: J.M. Balkin, "Ideology as Cultural Software (Law and the Postmodern Mind)" (1995) 16 *Cardozo Law Review* 1221. Similarly, Douzinas and Warrington give us a rather simplistic vision of what law in liberal society is by referring to it solely as "text" in an attempt to demonstrate its hegemony: Costas Douzinas and Ronnie Warrington with Shaun McVeigh. *Postmodern Jurisprudence: The law of text in the texts of law*. (New York: Routledge, 1991). Allan Hutchinson's attempt to bring CLS into the postmodern age unfortunately comes off as CLS redescribed rather than a concerted attempt to dig into the roots of liberalism in a way different and more philosophically sustained than CLS has done: Allan C. Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought*. (Toronto: Carswell, 1988), especially chapter 9, at 261ff. Finally, Gary Minda's work on postmodernism is helpful as an introduction to the history of legal thought, but does not address the content of much postmodern criticism. Instead he chronicles the main names and bare theoretical ideas rather than to look deeply into the relationship of truth and liberalism to the broader issue of values and meaning: Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End*. (New York: New York University Press, 1995), especially the last chapter.

because postmodernism represents a challenge that is quite different from what it espouses. The challenge posed is in ascertaining why and to what extent postmodernism is a *symptom* of a more general philosophical and cultural malaise. Therefore: by studying Nietzsche's words carefully we will understand that postmodernism is nothing more than a stepping-stone on the path to a particular crisis in Western thinking that is slowly becoming evident in all aspects of society. The law is not immune.

It is therefore important to be clear on what postmodernism really means or represents. But it is also important to recognize that postmodern criticism is highly effective and enlightening because it takes conceptions we hold dear and questions them. The power of such analysis should not be underestimated: this paper is based upon the presumption that postmodernist criticism and deconstructionist practices are good at what they proclaim, which is, baldly stated, to unmask power moves as they hide themselves in concepts, language, and legal institutions.⁵ This paper focuses on the presuppositions that postmodernists bring to their task, how that task is formed, and what motives are present in it.

In doing such a study, it is clearly necessary to return to (one of) the roots of postmodernism: Nietzsche. Nietzsche is often characterized as being one of the founders and / or precursors to postmodernism because he used a style of analysis which focussed on the way in which claims to truth become established as truth.⁶ He illustrated the context in which a concept called "truth" arises, what purposes it is used for, and the consequences of doing so.⁷

Postmodernists have emphasized only the bare meaning of Nietzsche's ideas, or have represented some and not others, consequently misrepresenting them (which is not a problem for many postmodernists, as they don't want to have roots, and are troubled by them).⁸ This is not objectionable *per se* since they are postmodern philosophers rather than scholars of Nietzsche. So what are postmodernists saying that Nietzsche is not? And why is it so important to reflect on postmodernism through Nietzsche's eyes?

Postmodernists describe the insidious nature of power and the social constructs that arise, problematizing it in such a way as to imply that such power moves are unjust. By focussing on the injustice of domination, postmodernism places itself at the end of a long line of liberal philosophy concerning the nature of freedom and its relationship to authority. Nietzsche, on the other hand, never addresses the

⁵ For good surveys of the main currents in this area, see W.T. Anderson ed., *The Truth about the Truth*. (New York: G.P. Putnam, 1995) and Thomas Docherty *A Postmodern Reader*. (New York: Columbia University Press, 1993). For a view that dissects the trends within postmodernism in a very literate way, see Christopher Norris, *The Truth About Postmodernism*. (Oxford: Basil Blackwell, 1993).

⁶ This method of analysis varied, but is known as *genealogy*. See "Preface" GM.

⁷ A couple of theorists have recently attempted to discuss Nietzsche's conception of truth in a way other than the perspectival one. See Ted Sadler, *Nietzsche: truth and redemption: critique of the postmodern Nietzsche*. (London: Athlone Press, 1995); and Peter Berkowitz, *Nietzsche: The Ethics of an Immoralist*. (Cambridge, Massachusetts: Harvard University Press, 1995).

⁸ There are people who have come to represent Nietzsche as endorsing a perspectival view. See Alexander Nehamas, *Nietzsche: Life as Literature*. (Cambridge, Massachusetts: Harvard University Press, 1985); Richard Rorty, *Contingency, Irony, and Solidarity*, *supra* note 2. Though Derrida is thought to also endorse this reading, it is important to understand that he has a specific purpose in mind when approaching his thought, which is to unveil things within it. See Jacques Derrida, *The Ear of the Other*. Avital Ronell trans. (Lincoln: University of Nebraska Press, 1985).



justice of the use of power, he simply identifies it. However, he identifies it in order to come to demonstrate that “morality must be shot at.”⁹

Nietzsche asks us: under what conditions do moral codes arise? His answer: when a culture is in decline.¹⁰ Unable to withstand the way things rise and fall in life, the continual suffering and “falling away” of all things present and future into the past is met with resentment.¹¹ This resentment takes a stand and creates a world beyond the one that is continually before us. The suffering of the world as a manifestation of what life is all about receives a negative judgment – life as it stands is not worthwhile if such suffering has no meaning.¹² Truth and free will are concepts which arise out of morality and are required by it: a negative judgment on the world needs a referent point (truth) and it needs to find someone to blame (free will).

Morality is constructed as a way to work against the perceived suffering in the world by seeing such suffering as “wrong” and “unjust.” Once created, it is necessary to ensure (i) that suffering is redeemed through a reference to that implicit utopia which underlies the moral indictment, and (ii) that humans are considered “free willing,” since sin is possible only among the free. “The real world” becomes that essential world which sits beneath all of our perceptions; truth then is also the construction of that which is as it exists continually, out there safe from the passage of time, dormant beneath *mere* appearance. This true world, then, is sought not because there is a natural will-to-truth, but rather out of a particular disposition toward the suffering and decay evident in the passage of time. The result is not merely a credo of life-despising, but more seriously the creation of a concept: truth.

The pursuit of truth loses its religious and mythical significance (Know thy God) and becomes the secular pursuit of truth for its own sake. However, the pursuit of truth produces an atrophy of meaning because it becomes clear that such values and moral formula have no basis in truth. Having held values to this standard, meaning melts away from social relations that fall under the scrutiny of a reasoning process which estimates the value of things based on their truth. Dissolved meaning to social relations means that the affiliations and associations one has in the world are rationalized in the sense of becoming based on immediate transaction rather than any moral bond or obligation. Life, then, becomes a barren place where we smilingly trot from transaction to transaction without ever knowing any deeper meaning or significance to that which happens to us. Liberal legal culture, with its intentional focus on “truth” as a value, thus speeds up the process of nihilism by encouraging the scrutiny of our values according to a yardstick of truth, which it never finds.¹³ The historical movement of values to their devaluing draws consequences in the daily action of culture.¹⁴

⁹ TI 1:36.

¹⁰ UM III; D “Preface”; WP I.

¹¹ This is the theme of GM.

¹² Weber argued that human beings give meaning to their suffering through the creation of religion, an insight he surely owes to Nietzsche. ES 450-51.

¹³ One of the key works on liberalism which sees liberal society as the place which allows truth to arise best is John Locke, *A Letter Concerning Toleration*. James Tully ed. (Indianapolis: Hackett Publishing Company, 1983).

¹⁴ See Allan Bloom’s very thorough and erudite examination of this in *The Closing of the American Mind*. (New York: Simon & Schuster, 1987).

The postmodernist is directly engaged in the process that Nietzsche was trying to “warn” us about, or rather, prepare us for. By actively engaging our values and social structures out of a desire to “expose” them, the postmodernist is unwittingly a servant of the larger process of rationalizing culture. In order to understand how this happens, we need to understand the way in which postmodernism arrives in its liberal context. Thus, in the first section I discuss the liberal heritage with a view to problematizing postmodernism’s implicit emancipatory ethic, especially with respect to postmodern legal movements. At that point, I discuss Nietzsche’s understanding of values and truth in order to demonstrate that the postmodern project is not radical but is another step on the ladder of nihilism because it is essentially a “moral” one, that is, a modern one. After filling in Nietzsche’s description of the straightjacket that morality and truth impose on our philosophy and culture, I move on in section three to discuss how Nietzsche understands morality’s overcoming. In section four I scrutinize the motives underlying the postmodern project to show that it is indeed a type of moralizing that Nietzsche describes. Since it is then clear that postmodernism and nihilism are related, the way this rationalizes law and legal culture is described via Nietzsche’s intellectual heir, Max Weber. Weber’s ideas demonstrate the sociological bases and descriptions of the philosophical occurrence of nihilism. In the last section I discuss how nihilism thus brings on the rationalization of our political and legal culture through postmodernism, only to conclude that actual postmodernism *per se* is probably impossible. My apparent criticism of postmodernism is descriptive of its procedure and place in our philosophical and legal culture rather than an indictment or judgment on it. Such “judgments” will be saved until the very end. At that point we will be in a position to reflect, in an unfortunately despairing way, on the seriousness with which we face the prospect of nihilism, and the renewed importance for encouraging the study of Nietzsche and Weber with respect to law.

I: Postmodernism as problematic

Liberalism is rooted in a history of truth and anti-authoritarianism that emerged from the Enlightenment. Any analysis of the Enlightenment focuses on the way in which the concern for a particular vision of truth was allied with a particular vision of what it was to be a human being.¹⁵ No longer the sole domain of Church officials and Kings, “truth” was associated with a brand of reason which anyone could use to “discover” its secrets. And its secrets were no longer held to be hidden in mystical logarithms,¹⁶ but rather empirically based: anyone should be able to ascertain it, its propositions demonstrable. Since reason was open to all, and truth open to all, the exercise of authority, as an extension of the age old idea of “right reason exercised in relation to nature” took on a new meaning. Suddenly authority was questioned, and substantiated, by thinkers.¹⁷

¹⁵ Peter Gay, *The Enlightenment: An Interpretation*. (New York: Norton, 1977).

¹⁶ Aquinas and Augustine both understood that the “truth” came to those with “right reason” and that such truth was hidden to those who could not find a way to allow their right reason to be put in accord with reason.

¹⁷ It is interesting to note the interesting switch from the conception of reason and the law from the time of Blackstone and Coke to the time of Hobbes and Hale. The latter two were concerned with justifying a particular conception of the state and law, which one could argue demands different questions and answers than the ones posed by Blackstone and Coke. See J.S. Baker, *An Introduction to English Legal History*.



The understanding of “authority” added a humanist element: all humans, by virtue of their endowment with reason, are equal in nature. As such, any exercise of authority by humans over humans is subject to limits.¹⁸

The values of freedom and equality that we derive from this period have largely been defined as negative freedom (freedom from) and as equality of treatment. Following J.S. Mill,¹⁹ individuals should be allowed to pursue their individualized understandings of what the good life is all about.²⁰ All individuals should be treated equally²¹ by a law that treats like cases alike – avoiding the arbitrary exercise of power.²² Freedom and equality form the backbone of liberty because of the central belief in the inherent worth and dignity of every human being *qua* human being, and not *qua* one’s “station.”²³ This dignity is related to the fundamental freedom of the individual to choose the means of fulfillment in life.²⁴

“Truth” and “Free will” are central concepts to the liberal mind, and form the backbone against which all other institutions and values issue. The idea of truth seems in the background, but is really quite in the forefront.²⁵ The metaphysical basis of the world changes during the Enlightenment to one which lends itself to apprehension through reason.²⁶ The world, its properties, and the balance of right and wrong are all available to us as human beings. Hence, the idea of “truth” is related to an understanding of the human’s separation from the world and yet concomitant with her ability to apprehend it through reason. Free will substantiates this understanding of reason.

From these values we come to understand oppression or domination as unjustified. If domination is exercised for the social good we do not call it domination as such, rather we consider in terms of its safeguarding of liberty.²⁷ It is a domination that

(London: Butterworths, 1990), 234-52; and D.E.C. Yale, “Hobbes and Hale on Law, Legislation and the Sovereign” (1972) *B Cambridge Law Journal* 121.

¹⁸ *Ibid.* See C.B. Macpherson’s description of the way in which such limits translate into particular conceptions of social relationships: *The Political Theory of Possessive Individualism, Hobbes to Locke*. (Oxford: Oxford University Press, 1962).

¹⁹ Mill was not only a philosopher, but a member of Parliament with some clout. J.S. Mill, *On Liberty*. Gertrude Himmelfarb ed. (Harmondsworth: Penguin, 1974).

²⁰ A hand-me-down from the positivism underlying Mill’s utilitarian background: the content of the good life remains open whereas the form for securing its conditions is closed.

²¹ The law applies to all equally, thus neither the rich nor the poor will be allowed to sleep under the bridge.

²² This is also rooted in the development of casuistry in the common law, a theme to be taken up later.

²³ John Rawls, *A Theory of Justice*. (Cambridge, Massachusetts: Harvard University Press, 1971), at 511.

²⁴ See Peter Gay, *The Enlightenment*, *supra* note 14; and Charles Taylor, *Sources of the Self: The Making of the Modern Identity*. (Cambridge, Massachusetts: Harvard University Press, 1989), at 307-08.

²⁵ J.S. Mill, *On Liberty*, *supra* note 18, at ch. 2.

²⁶ This may seem like it something that is not new. Aristotle and Plato both discussed the relation of reason to *arete*; Cicero was known for his pragmatic vision of seeing right reason in accord with nature in order to “know” it; and Augustine and Aquinas both seated reason as that central capacity which distinguishes the light of the mind of humans from animals: it makes them capable of sin. However, it is not until the Enlightenment that we see the particular formulation of reason and truth together with the radical individualist conception of the “free will.” See Peter Gay, *supra* note 14; Taylor, *Sources of the Self*; *supra* note 23; Alasdair MacIntyre, *After Virtue*. 2nd ed. (Notre Dame: University of Notre Dame Press, 1984).

²⁷ For the classic vision of the limits to liberal freedom, see Isaiah Berlin, “The idea of Pluralism” in W.T. Anderson ed. *The Truth About the Truth*, *supra* note 4; John Dunn, *Interpreting Political Responsibility: Essays 1981-1989*. (Oxford: Polity Press, 1990), at 123-41; John Rawls, *Political Liberalism*. (New York: Columbia University Press, 1996), at 339ff; and Judith Shklar, *Legalism*. (Cambridge, Massachusetts: Harvard University Press, 1964), at 116ff. For a more contemporary vision, see James Tully,

provides the background against which the individual can exercise her capacities *qua* citizen and human being. Oppression becomes the unjustified constraining of the autonomy of free wills in their quest to know the world, to apprehend its dangers, to understand the difference between right and wrong. Thus we come to see liberty in terms of the conditions which foster the full manifestation of the individual.

Thus we understand that to respect the individual *qua* individual of a particular community is tantamount. However, in seeking to do so we easily lose sight of the original grounds of liberal theory because we begin to focus on the conditions of freedom and fulfillment of the individual without keeping the original ideas of truth and negative freedom clearly in view. The way in which this occurs is as follows.

Through an understanding of dignity and what it requires, we also come to understand why pluralism is a fundamental aspect of liberal societies. Since an individual's ancestry and community are largely tied up with her identity, respecting a person's dignity and autonomy require respecting that person as a member of a particular community.²⁸ If we were to avoid forwarding such respect, we would be oppressing the individual and making it difficult for her to exercise her free will in pursuit of the ends of life. Now, in saying this, "truth" and "knowledge" become more than simply the basis of free will and all things moral, they also become absorbed into the processes of living. Thus, in the pluralist society the original inertia behind truth and free will as organizing concepts of a liberal ethic fall away to produced contextualized subjects who go forth into the world to define their own vision of the good.²⁹

In this way liberal society is one which, *in principle*, thrives on giving the means of self-definition to the individual, to in all circumstances prevent unjust domination, harm, and cruelty, and to ensure that such an allowance is for each member of the society.³⁰ Therefore, toleration can be seen as a logical consequence of a system which seeks to diversify the experiences of life in order to produce a vision of truth out of it all,³¹ or alternatively to simply allow diversity of opinions and lifestyles in order to foster the respect for difference required in a pluralistic society.³² In all these ways and many others, then, we can see that modern liberal society grows out of a particular vision of truth and freedom that slowly evolves to account for the best way to respect the individual as an individual attempting to lead a fulfilling life.³³

Strange Multiplicity: Constitutionalism in an Age of Diversity. (Cambridge: Cambridge University Press, 1995), at 56-7.

²⁸ Charles Taylor, "The Politics of Recognition" in Amy Gutman ed. *Multiculturalism and the Politics of Recognition.* (Princeton: Princeton University Press, 1992).

²⁹ On the way a conception of difference can be brought into a liberal model, see generally Iris Marion Young, *Justice and the Politics of Difference.* (Princeton: Princeton University Press, 1990).

³⁰ This coheres with Richard Rorty's postmodern formulation of the liberal ethic. See *Contingency, Irony, and Solidarity*, *supra* note 2, especially the first three chapters.

³¹ J.S. Mill, *On Liberty*, *supra* note 18, at ch. 2.

³² Young, *supra* note 28.

³³ Fill this up: John Rawls, *A Theory of Justice*, *supra* note 22, at ch. 1; also Rawls, "The Idea of a Political Conception of Justice" in *Political Liberalism*, *supra* note 26, at I:1:2; Charles Taylor, "The Politics of Recognition" *supra* note 27, at 25-37; Richard Rorty, "The Contingency of Selfhood" in *Contingency, Irony, and Solidarity*, *supra* note 2, at ch. 2.



Into this arena struts the postmodern critic, the one who doesn't believe in "knowledge," in centred subjects, in definitions, or in a conception of truth that exists independently of the interest that puts it forth.³⁴ The postmodern critic is street-wise³⁵ and understands that power is exerted over the individual in countless ways that she does not understand.³⁶ She recognizes that her sexuality, the words she finds to describe it, and indeed the act of expression itself are "disciplined" into ways of expression which forge the individual herself.³⁷ The postmodern critic recognizes that power works in such subtle ways to control and manipulate the subject that it is meaningless to say that the personal is the political since all aspects of the human are touched by the exercise of external power. Such distinctions only serve to shed light on further attempts to classify the subject, to make her suppliant to its categories, and hence to become something else.³⁸

Liberalism becomes an obvious place to look for oppression because it is the dominant paradigm and the dominant system. The idea of "truth" is attacked by the postmodern community,³⁹ just as the conception of a centred self is attacked, for attempting foist a particular vision of "what is the case" on the individual that does not respect his or her own autonomy. Now this is a source of tension because if, as postmodern critics claim, there is no ultimate ground within the individual we can point to, why do we need to respect autonomy since it is a creation anyway? Richard Rorty, among others, argues that we need to respect individuals for what they have become, and to do this we need to be extremely sensitive to the way in which power exerts influence over them.⁴⁰ Our attention necessarily shifts to sources of domination.

³⁴ There are a few theorists and sources of postmodernism: one tells that they are a source for this particular "brand" of thought because these are the names, and associated works and concepts, one always finds there. See for example Jacques Derrida, *Of Grammatology*. Gayatri Chakravorty Spivak trans. (Baltimore: Johns Hopkins University Press, 1997 [1967]); Michel Foucault, *The Order of Things: An Archeology of the Human Sciences*. (New York: Vintage, 1973), and *The Archeology of Knowledge*. A.M. Sheridan Smith trans. (London: Tavistock, 1972); Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*. Geoff Bennington & Brian Massumi trans. (Minneapolis: University of Minnesota Press, 1984); as well: Gilles Deleuze and Félix Guattari, *What is Philosophy?* Hugh Tomlinson & Graham Burchell trans. (New York: Columbia University Press, 1994). Some disagree with the classification of Richard Rorty as a postmodern thinker, but enough agree: see *Contingency, Irony, and Solidarity*, *supra* note 2, and *Philosophy and the Mirror of Nature*, *supra* note 2.

³⁵ See Paul Virilio, *Speed and Politics*. trans. Mark Polizzotti (New York: Semiotext(e), 1986 [1977]), at ch. 1.

³⁶ This fundamental "insight," though commonly associated to Foucault, (especially to *Discipline and Punish: The Birth of the Prison*. Alan Sheridan trans. (New York: Vintage, 1977)), is originally put forth by Nietzsche. See D 112; GM I:8.

³⁷ See Michel Foucault, *The History of Sexuality* (3 vols.) (New York: Vintage, 1980). Derrida, *Of Grammatology*, *supra* note 33, at 141-2ff.

³⁸ Such words may seem rather indistinct, but we need to cast our minds further. For instance, we can all think of examples where subtle occurrences change the way in which we refer to a person, be it good grades they've received, a car accident they've suffered, or charges brought against them. In each case the identity of the individual undergoes a transformation for us because the context in which they operate, that is, the system of signifiers which denote different aspects of a person's identity in our culture, has changed. Thus, in this simple way, we take part in this disciplining process of changing the identity of people we associate with. For a discussion of how this works, see Foucault's discussion of categories and the way in which we deploy them in *The Order of Things*, *supra* note 33, at ch. 5.

³⁹ See Derrida's, *Dissemination*. B. Johnson trans. (Chicago: University of Chicago Press, 1981). The entire book is an attack on the idea of "book." Hence, to succeed in disseminating his "disseminations" would in fact be failure: the project itself is set out to demonstrate the impossibility of centralized meaning in a concept of truth.

⁴⁰ See *Contingency, Irony, and Solidarity*, *supra* note 2, at ch. 4.

“Values” in this context become sources of domination and discipline rather than expressions of the true and natural proclivities of beings. Values are seen as expressions of what kinds of things are worthy, and as such the postmodernist sees these as varying from context to context, from individual to individual. The reason that they vary is not because individuals are the creators of their own values, but on the contrary are the receivers of them.⁴¹ Since humanity has shown a rather diverse array of values according to different societies, we can understand that individuals have differing systems of values according to the various contexts in which they live. However, the fact that one has a certain set of values is not simply a reason to respect them, as her conception of herself may be (and probably is) an expression of a whole set of power defined structures that are quite alien to what she might otherwise have as values.⁴² Implicitly, then, the reason such values become suspect for their disciplining and dominating (read “oppressive”) effect on the individual is that they preclude the individual from being something she might otherwise be, something somehow better and “truer” to what she might find fulfilling.⁴³

But as is becoming clear, language poses problems. Language is a source of domination for postmodernists because meaning is.⁴⁴ Discarding representational theories of language,⁴⁵ postmodernists deny that language portrays reality, that it is

⁴¹ To be sure, there are some really effective postmodern critics, and they perform their analysis with precision. Theorists generally continue to cover the idea that the lack of a centralized perspective affects the legitimacy of the law to be a single arbiter and creator of values. Theorists appear quite committed to the idea that such a move is problematic because it is so flagrantly authoritarian if such assertions of truth are mere power moves. See Alan Hunt’s survey “The Big Fear: Law Confronts Postmodernism” (1990) 35 *McGill Law Journal* 507; Dragan Milovanovic, “The postmodernist turn: Lacan, psychoanalytic semiotics, and the construction of subjectivity in law” (1994) 8 *Emory International Law Review* 67. Some literature is a bit more esoteric: J.W. Mohr, “From Saussure to Derrida: margins of law” (1993) 18 *Queen’s Law Journal* 343. Other literature prefers to try to categorize what postmodernism does by asking whether it is useful to the study of law. In deciding that it is, the old idea of liberalism as a forum of truth raises its head. See Michael S. Moore, “The interpretive turn in modern theory: a turn for the worse?” (1989) 41 *Stanford Law Review* 871; Francis J. Mootz III, “Law and philosophy, philosophy and law” (1994) 26 *University of Toledo Law Review* 127, and “Is the rule of law possible in a postmodern world?” (1993) 68 *Washington Law Review* 249. A couple of theorists have taken the begun to look at the problem of postmodernism and the collapse of centralized meaning from the perspective values, but with all the awkwardness that “areas” of thought have as they embark in a new field: see Martha C. Nussbaum, “Valuing Values: a case for reasoned commitment” (1994) 6 *Yale Journal of Law and the Humanities* 197; Gillian Rose, *Dialectic of Nihilism: Post-Structuralism and Law*. (Oxford: Basil Blackwell, 1984); Pierre Schlag, “Values” (1994) 6 *Yale Journal of Law and the Humanities* 219; Dennis J. Schmidt, “Can Law Survive? On incommensurability and the idea of law” (1994) 26 *University of Toledo Law Review* 147.

⁴² This is a source of tension for the postmodernist feminist. For on the one hand it is important to be able to assert that values are social constructions and that therefore women are oppressed by value structures that are not their own, while on the other they need to assert a countervailing vision of feminist values which cannot be so glibly dismissed as “social constructions.” Hence the difficulty with calling something a “social construction” as a proof of its untenability forces the relativist paradox of not being able to hold anything that is not a social construction as one’s ultimate basis for reality. For an interesting interplay of the way such metaphors play out, see Luce Irigaray, “The power of discourse and the subordination of the feminine” in *The Irigaray Reader*. M. Whitford ed. (Cambridge, Massachusetts: Basil Blackwell, 1991). For a less philosophically sophisticated but more legally directed piece, see also Dennis Patterson, “Postmodernism / Feminism / Law” (1992) 77 *Cornell Law Review* 254.

⁴³ This appears to have been a critical contradiction in the relationship of Foucault’s writings to the way in which he lived his life: he is known for taking the stand of *j’accuse*, pointing to figures (not necessarily in ‘official’ authority) to accuse them of oppression. With no way to ground meaningful discourse, Foucault is forced to endorse ‘something else’ as the basis of his resistance – a passion or an ‘anti-reason.’

⁴⁴ See Derrida, *Of Grammatology*, *supra* note 33, at 44-65; see also Jean Baudrillard, *For a Critique of the Political Economy of the Sign*. Charles Levin trans. (St. Louis, MO: Telos, 1981), at 28-62, and *The System of Objects*. James Benedict trans. (London: Verso, 1996).

⁴⁵ See Rorty, *Philosophy and the Mirror of Nature*, *supra* note 2.



a medium which conveys the essence of what is, that it somehow imitates reality or our thoughts.⁴⁶ Language and meaning are not separate from an identification of what reality is: reality is created through the deployment of meaning. Hence, signs and images as well as language are all sources of meaning: the difference between the medium and message completely disintegrates.⁴⁷ Thus, the record of tradition as expressed through the archive, as expressed through *law*, is really no more than a variegated creation of reality through the assertion of a particular vision as authoritative.⁴⁸ The asserting of that tradition and the tradition itself do not exist independently of the entire act of making an assertion. The common law, in this sense, is a self-perpetuating expression of power because it simultaneously creates the reality it wants to have accepted by stating it as true while creating the mechanisms which ensure that such a vision will be understood *qua* truth and reality. Again, the underlying theme of such critique is to expose the multifarious and insidious ways that power works to dominate us in our daily lives.

In all these ways, therefore, postmodernism, in relation to liberalism, seeks to widen the scope of our freedom by serving to demonstrate areas of domination and oppression, to demonstrate the way our value horizons operate to confine us. It begins with the “truth” that there are no set categories, no representations which are ultimately true, and hence all relations are subjectively based expressions relating to the use and abuse of power. Power is unmasked in order to aid in the project of resistance against its corrupting and entrapping hold. The postmodern project is thus, at bottom, an emancipatory one.

Postmodernism confronts (and accuses) law in liberal societies as being an emanation of (and source for) the oppressive discourses at work in the various spheres of our lives.⁴⁹ Being extremely influenced by Marxist and neo-Marxist criticism, as well as by much feminist theory, postmodernism has an easy target in the field of law: law is about ruling. Hence much work calling itself “postmodern” in legal theory develops a multitude of ways of looking at how power is expressed through law to construct social identities and relationships.⁵⁰

Postmodernist critics also recognize that straight criticism implies some sort of vision that needs to emerge, and they resist this. Hence an element of “play” allows and encourages new forms to be created that are more inclusive by creating space for them, forms that accord with the critic’s sense of history and of being lost

⁴⁶ For example, Derrida, *Of Grammatology*, *supra* note 33.

⁴⁷ Baudrillard, *For a Critique of the Political Economy of the Sign*, *supra* note 43, at 185-203.

⁴⁸ See Michel Foucault, *The Archeology of Knowledge*, *supra* note 33, at 162-65; Lyotard, *Peregrinations: Law, Form, Event*. (New York: Columbia University Press, 1988), at 38ff.

⁴⁹ Gary Minda’s book is a good case in point as an example of a work which skims over the main themes with all of their emancipatory pomp and zeal without looking into the deeper issue, which we will canvass here. For instance, see Minda’s division of the discipline into its condition, its theory, its history, and its division, in each case never substantiating the claims of truth and value that are ostensibly where the movement arose. An example of this is found at Gary Minda, *Postmodern Legal Movements*, *supra* note 3, at 224-26, 229-32 for the discussion of postmodernist philosophy themes, and 226-28, 232-34 for the juxtaposed examples from television programs. Discussions of the pop culture themes, as impacting on law, do not seem to *prima facie* address the seriousness of the problem of nihilism for law. I could be way off, but then so are Nietzsche, Weber, Heidegger, and to a certain extent Foucault, Derrida, Habermas, and Taylor. For jurisprudential themes, see Alan Hunt, “The Big Fear: Law Confronts Postmodernism” *supra* note 40, at 512-17.

⁵⁰ To see the way in which ‘power’ is discussed and approached from completely different perspectives, compare its use in Derrida’s *Of Grammatology*, *supra* note 33, in Foucault’s *Discipline and Punish*, *supra* note 35, in Lyotard’s *Peregrinations*, *supra* note 47, and the rather pan-historical vision and more disparate use of power in Edward Said’s *Orientalism*. (New York: Vintage, 1979).

in a world of irony among meaningless signs.⁵¹ The postmodernist digs through these meaningless signs to “deconstruct” the meaning we have assumed and the structures of identity they have given rise to.⁵² In law, the “text” can be the actual statute, it can be the legal decision, or it can be the various ways law finds expression in society. Hence Alan Hunt and Joe Hermer have looked at actual traffic signs as expressions of the way in which society constructs the relations of individuals in society by coordinating their efforts along distinct lines.⁵³ Likewise, the “text” of the law can be the series of practices that the police officer is to go through in arresting someone.⁵⁴ The postmodernist interprets these according to the various forces at work on the face of the text, as well as beneath it.

However the problem with postmodern criticism in legal literature is that it is often approached simplistically as an approach to law which sees diverse voices being silenced by the heavy hand of the law. Law is seen as a disciplining force in the world. It is often confused with literary Marxism by many insiders, or with the strange nihilism of Turgenev, Dostoevsky, or Nietzsche by outsiders.⁵⁵ Rather than possessing its own distinct flavour of postmodernism, as such flavours exist in philosophy, literary criticism, political theory, anthropology, and elsewhere, postmodernism as it has arrived in legal theory often takes the names of well-known postmodernists to be symbols for the cause of finding ever new sources of oppression, a theme common enough throughout the history of legal theory.⁵⁶

Some find postmodernism annoying for its academic pretension and even dangerous for the lack of rigour it may seem to induce.⁵⁷ But if postmodernism is,

⁵¹ Derrida uses the word “play” in a particular way, to denote the possibilities and potentialities which emerge once we have broken down such linguistic distinctions, those which emerge rather spontaneously. See Derrida, *Of Grammatology*, *supra* note 33, at 307-13.

⁵² Deconstruction is a practice of approaching a “text” to ascertain what sorts of dualities have been created to mask the expression of power, to mask the creation of identities. The first work to seriously take up deconstruction as a method is Derrida’s *Of Grammatology* where he discusses, largely, Rousseau: See *Grammatology*, *supra* note 33, at 97-100ff.

⁵³ Alan Hunt and Joe Hermer, “Official graffiti of the everyday” (1996) 30 *Law and Society Review* 455. Though the analysis of street signs and of signs in general is simplistic, if unconvincing, Paul Virilio’s work on the importance of the street and the passageway (and who controls it) does describe the way in which the implicit power structure of the street sign controls social conduct: *Speed and Politics*, *supra* note 34.

⁵⁴ See Dragan Milovanovic and Stuart Henry, *Constitutive Criminology: Beyond Postmodernism*. (London: Sage, 1996), especially at 45-74. To see how the criminal is a constructed phenomenon at law from Foucault’s perspective, see Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance*. (Boulder, Colorado: Pluto Press, 1994), at 127-32. The theme of law as an overarching structure without an under-arching base (which insinuates that it is oppressive) is taken up by J.D. Whyte, “Normative Order and Legalism” (1990) 40 *University of Toronto Law Journal* 491; and Stephen L. Winter, “Human Values in a Postmodern World” (1994) 6 *Yale Journal of Law & the Humanities* 233.

⁵⁵ See the discussion *infra* note 56.

⁵⁶ In ascertaining what some of these “symbols” represent, we need to look back through the French “tradition” of postmodernism, going backward through Virilio, Baudrillard, Deleuze, Derrida, Lacan, Kristeva, Lyotard, Foucault, then back to Lefebvre and Bachelard, and back to Bergson. The United States has a distinct style of postmodernism which has come to be championed, if not defined, by Richard Rorty as “neo-pragmatism.” Interestingly, in response to these variegated trends of thinking that are simultaneously impacting on our conception of legal theory, many Anglo-American legal theorists are expressing a renewed interest in Habermas to find ways to counter the “postmodern scourge” that seems to be able to sap meaning from every act and thought brought forth.

⁵⁷ There is the perennial problem of “term-dropping” in all fields, however. The particular problem with postmodern scholarship is that one finds “fields” like anthropology where the entire idea of cross-cultural criticism and research is thrown into question. The result of such confusion attracts bandwagon jumpers who ride the coattails of such criticism as a method for career advancement rather than out of any concern for the discipline *per se*. This then attracts those who despise postmodernism as a scourge on the tradition itself. It is toward the work of these latter bitter scholars that legal postmodernism enjoys some key successes. See the



at bottom, an extension of an emancipatory ethic of some kind, and if its one task is to debunk meaning and authority, one may ask, as others have done and are doing, is there anything serious about postmodernism?⁵⁸ More precisely, if postmodernism “threatens” liberal legalism, what is the nature of this threat and how serious is it to liberalism as we know it? I would argue that it is very serious.

The fundamental position of the legal postmodernist is that we are locked into our individual perspectives on the world, and that (i) we cannot do anything except be who we are as a function of the contingency (and practical arbitrariness) of history, and (ii) we cannot justify foisting our *weltanschauung* upon those with ones different from ours. The postmodern challenge is to direct liberal societies, those protectors of freedom, to take seriously the problem of oppression and be sure that it is not occurring. However, even in this view there is a further challenge being put forth by postmodernism, and it is one which is not considered by postmodernist literature. This challenge has its roots somewhat deeper in the history of postmodernism, deeper in the history of the idea of “truth” and its demise.

This fundamental idea of postmodernism, that all meaning is contextual and identity is perspectival, is one originally put forth by Nietzsche. And yet we would do wrong to think that he would be a postmodernist. Nietzsche stands to postmodernism as a generally recognized “founder” or “origin” of some of Postmodernism’s⁵⁹ primary credos. Of these, the idea that “truth” is rooted in perspective and not in reality is the primary insight. Couple this with an understanding of “power” as a means to express subjective conceptions of truth, and postmodernism is born.⁶⁰ Why then would Nietzsche not be postmodern?

Nietzsche would argue that postmodernism is not “post” “modernism,” but rather that it is logically advanced liberalism by virtue of the animating emancipatory ethic it brings to bear on everything it analyzes. It is thus caught by its own tail, analyzing the dynamic of morality from an essentially moral vantage point. As the Buddhist saying warns, one must ensure that one does not take pride in not taking pride. Postmodernism is not radical because it does not go to the root of what it criticizes, and is unaware of that which it does: destroy visions by creating empty ones. Rather than examine the fundamental bases of what “truth” is, it simply

indignant tones of: O. Fiss, “The Death of the Law?” (1986) 72 *Cornell Law Review* 1; A.B. Rubin, “Does the Law Matter? A Judge’s Response to the CLS Movement” (1987) 37 *Journal of Legal Education* 307.

⁵⁸ See the way in which Stanley Fish circumnavigates this question in “Almost Pragmatism: Richard Posner’s Jurisprudence” (1990) 57 *University of Chicago Law Review* 1447.

⁵⁹ I capitalize here to denote postmodernism in its largest and yet most general (generic) sense, from the literary critic to the anthropologist. Nietzsche enters the scene at various points, sometimes through Heidegger’s influence on more recent writers, and sometimes on his own. Nietzsche scholarship is quite regional, with the French identifying with a very loose and perspectival Nietzscheanism: see David Allison ed. *The New Nietzsche: Contemporary Styles of Interpretation*. Cambridge, Massachusetts: M.I.T. Press, 1977. Scholarship on Nietzsche in America reflects the over-emphasis on the interpretation put forth by Walter Kaufmann in his editorializing of Nietzsche’s work, and in *Nietzsche: Philosopher, Psychologist, Antichrist*. 4th ed. (Princeton: Princeton University Press, 1974), and of his student Alexander Nehamas. Nehamas’ book and interpretation have been widely accepted among scholars of Nietzsche and among postmodernists as an authoritative interpretation: *Nietzsche: Life as Literature*, *supra* note 7. For a great qualifying of this looser style, see Luc Ferry ed. *Why We are Not Nietzscheans*. (Chicago: University of Chicago Press, 1995). For a more critical and encompassing but alternative view, see Peter Berkowitz’s *Nietzsche*, *supra* note 6.

⁶⁰ It would be deceiving to state that Nietzsche originates such ideas into philosophy. Rather, it is more correct to say that Nietzsche simply amplified certain elements of contemporary philosophy that were seized upon by later theorists.

accepts that truth is subjectively based and then proceeds to look for assertions of truth-claims. Unwittingly then postmodernism is actually a legitimizing force in liberal society because it authorizes a fundamentally liberal ethic without being able to question it, other than the way in which it might be illiberal, i.e. inconsistent.

In its critique (and subsequent legitimization) of a liberal ethic, a deeper trauma is occurring to liberal values. This trauma concerns the uncritical eye with which liberal institutions and practices are carried out by postmodern critics in contemporary liberal thinking and as this is expressed in society at large. As will become clear through the rest of this paper, postmodernists fail to understand the consequences of the particular moral vision that they espouse, namely: the need for emancipation. It is in precisely this sense that postmodernists misunderstand (and perpetuate the misunderstanding of) Nietzsche's ideas on truth, morality, and perspective.

In an analysis of contemporary ideas, Nietzsche argues against "morality," and would suspect that postmodernism rides at least as high on the horse as all previous forms of morality. The root of emancipation that lies as a latent agenda within philosophical thinking, postmodern criticism and theorizing being a form of this, is where Nietzsche finds morality to exist. Wherever we find an implicit "thou shalt" or "thou shalt not" is where we find morality.

For the real issue for Nietzsche is not about where the oppression is, but where morality is. Nietzsche does not attack morality because it is oppressive, or at least not solely for that. Rather, Nietzsche's concern with morality is based in his evaluation of what it does to culture.⁶¹ He identifies the particular role of morality in the formation of philosophical ideas of truth not to identify the moralistic bias in philosophical thinking, but to demonstrate a particular phenomenon that is occurring, and has been occurring, in Western philosophy from the beginning.⁶² Thus, on a reading of Nietzsche, the hidden agenda of postmodern critics is problematic not because they attack the oppressiveness of systems of morality, but because of the way they do: as moralists.

In this section I have shown that the history and theoretical background to liberalism is important to understand in order to place the occurrence of postmodern criticism in context. The history of the idea of freedom and the conception of agency it implies is one which operates in a rather deep manner. What is needed is to subject postmodernism to a genealogy of its own, to sort out what factors are at work in it. As I have noted above, the best way to do this is to return to the thinking of one of postmodernism's precursors: Nietzsche. A look at his ideas on "value" and "truth" will demonstrate some of the factors at work in the theoretical forays of postmodernism, hopefully putting us in a less precarious

⁶¹ For an excellent and precise, yet general, discussion of Nietzsche's purposes, see Peter Berkowitz's "Introduction" to *Nietzsche*, *supra* note 6.

⁶² This is the view taken up by Heidegger in his compendious *Nietzsche* 4 vols. David Farrell Krell trans. (San Francisco: Harper Collins, 1987). For excellent and thorough discussions on the same theme, see Karl Löwith, *From Hegel to Nietzsche*. David Green trans. (New York: Anchor, 1967); see also Gianni Vattimo, *The End of Modernity: nihilism and hermeneutics in postmodern culture*. Jon Snyder trans. (Baltimore: Johns Hopkins University Press, 1988), and Vattimo, "Nihilism: Active and Reactive" in T. Darby, B. Egged and B. Jones eds. *Nietzsche and the Rhetoric of Nihilism*. (Ottawa: Carleton University Press, 1989).



position from which to see the relationship between postmodern thought, law in liberal society, and nihilism.

II: Nietzsche on Value

Objective and subjective truth distinctions in philosophy form the basis of Nietzsche's arguments on truth and value. In this section I will show that Nietzsche's work is more than a declaration about the oppressiveness of truth-claims made from particular perspectives which assert a universalistic stance.

This concern regarding the "oppressiveness of perspectives" that is latent within postmodernism is commonly admitted to have roots in Nietzsche. However, Nietzsche's original discussion of "perspective" is linked to the more fundamental question of truth and its relation to / embeddedness in the concept of "value."

The idea of "value" was central to Nietzsche's understanding of culture because it provides the fulcrum for the action that takes place within cultures. Nietzsche was concerned about what was happening to culture generally in Europe, and to German culture specifically.⁶³ He felt that there was a dangerous trend asserting itself in modern culture, one with consequences that were not being contemplated. In the (in)famous section 125 of *The Gay Science* Nietzsche asks if we have heard the tale of the madman who ran into town looking for God. The madman is taunted by those who are there, asking him if he (that is, God) has lost his way or has gone on a trip. The madman chastises those around him as the murderers of God, asking them who gave them the power to wipe the horizon away with a sponge. He asks who among them was brave enough to unchain the earth from the sun, and who would accept responsibility for burying God.

God is dead. God remains dead. And we have killed him... What was holiest and most powerful of all that the world has yet owned has bled to death under our knives... Is the greatness of this deed too great for us? Must not we ourselves become gods simply to seem worthy of it? There has never been a greater deed; and whoever will be born after us – for the sake of this deed he will be part of a higher history than all history hitherto.⁶⁴

The relationship between values and culture is contemplated by the words of the madman. In previous times the mad were consulted as oracles, described as seers, respected as sources of wisdom. It is only at the onset of the "age of reason" that the mad become clinically thought of as "mad."⁶⁵ It is telling that he is ridiculed by those in the marketplace, and it is telling that he speaks of a tomorrow where we feel the vacuousness of values in our own cultural practices. The central place where the impact of values, and their changes, are felt is in culture. And this

⁶³ See Berkowitz, *Nietzsche*, *supra* note 6; and also Eric Blondel's understanding on how Nietzsche metaphorically describes culture in *Nietzsche, the Body, and Culture: Philosophy as a Philological Genealogy*. Sean Hand trans. (Stanford: Stanford University Press, 1991).

⁶⁴ GS 125.

⁶⁵ Though Nietzsche first suggests it, Foucault follows up on it: see Michel Foucault, *Madness and Civilization*. (New York: Vintage, 1974).

means, as the madman indicates, that a change in values such as the “death” of a “god” is an ultimate change – a change that is of the most fundamental kind.⁶⁶

“Values” provide the framework of what is valuable. They not only guide action, they form its origin. Nietzsche claims “If we have our own *why* of life, we shall get along with almost any *how*.”⁶⁷ When we value something, we esteem it and hold it out as something worthy in life. If we value truth, beauty and goodness,⁶⁸ then we would formulate our actions in accordance with them by ensuring honesty, cultivating art, and promoting justice. As guides for action in this way, values create a web of meaning because of which we form our ultimate purposes in life. As well, the way in which values are imparted affects the substance of them. If I am told of stories about what it is to be a human being with greatness in this world, and I admire the beings for their greatness, then I receive values which imply meanings rich with purpose.⁶⁹

Thus, a value imparts meaning by imparting a goal.⁷⁰ By defining what things are worthy in life, values construct a series of possibilities and impossibilities for action.⁷¹ The “horizon” of which the madman speaks is a horizon of values. The metaphor is apt: we orient ourselves, our up and our down, according to the horizon, and as such we continually refer to it in our maneuvering. It is the backdrop and source of our orienting, for there can be no orienting without a horizon to guide it. Indeed, motion without horizons becomes a sort of a sensory deprivation chamber.

Heidegger explains the use of the concept of “value” in Nietzsche a little more subtly.⁷² Just as the eye necessarily rests on something, so too is it necessary for the human to have that which drives it. This is because the eye must necessarily have something upon which to rest, otherwise the idea of “eye” is thwarted – it becomes strangely disassociated from its realm of purposes. Similarly, the will requires willing. As such, the finding of purpose is built into its nature such that not willing is not the same as willing nothing: “man [sic] would rather will nothingness than to not will at all.”⁷³

⁶⁶ We will return continually to this passage as a referent point to various aspects of Nietzsche’s thought. Heidegger claims that this passage is one of the more fundamental and revealing ones of Nietzsche’s philosophy: see Martin Heidegger, “The Word of Nietzsche, ‘God is Dead’” in *The Question Concerning Technology and Other Essays*, trans. W. Lovitt. (New York: Harper Collins, 1977), at 53-59.

⁶⁷ TI I:12

⁶⁸ These are the three categories of values esteemed by Plato in *Gorgias*.

⁶⁹ However, it is important to note that there are qualitative differences in the strength of such stories to attract allegiance depending upon the context in which they are cast. On the one hand, I may understand that there is no better task than to perish in the service of my people. On the other hand, I may understand that there is no better purpose in life than to make tons of cash so I can drive a fast car and go to parties with well-dressed people. The qualitative difference that Nietzsche draws with respect to such values concerns the value’s ability to create a *profound* sense of meaning. Such a distinction is important, given the ultimate claim that there is no “truth” to values. See Peter Berkowitz’s discussion of how this distinction is resolved in *Nietzsche*, *supra*, note 6, at 231-37. Compare this version with the highly contextualized account given by Alexander Nehamas in *Nietzsche*, *supra* note 7, at 170-99.

⁷⁰ See Heidegger, “The Word of Nietzsche” *supra*, note 65, at 72ff.

⁷¹ This is not the same as the construction of a “right and a wrong” as guides for action, rather it is a guide for action based on those things which inspire – which is different from the capacity of judgment: GM I.

⁷² Heidegger, “The Word of Nietzsche” *supra*, note 65, at 72-83; also Heidegger, *Nietzsche*, *supra* note 61, vol. 4, at 58-68.

⁷³ GM “Preface” 5.



Since one would rather will nothingness than not at all, it is clear that one wills of necessity. This idea is central to Nietzsche's conception of the "will to power" – which is how he conceives of the fundamental aspect of what constitutes relations in the world.⁷⁴ To will of necessity means that willing is not volitional, which means that it is not based in judgment.⁷⁵ Willing according to values means willing according to a horizon – it is a necessary orienting and ordering that occurs both outside of the individual in culture (where the action of values and their creation take place) as well as inside the individual through the process of having values inculcated.

“There is thinking; consequently there is that which thinks” – that is what Descartes' argument comes to. Yet this means positing our faith in the concept of *substance* as “*a priori* true.” When there is thinking, something must be there which thinks – that is merely a formulation of our grammatical habit, which posits a doer for what is done....

.... Rational thought is interpretation according to a scheme which we cannot escape.⁷⁶

Rather than being subject to standards of knowledge, Nietzsche notes that we are actually just caught up in cultural beliefs which have become cemented in language.⁷⁷ Simply because we can explain things in a way that demonstrates free will is not proof of it, hence when we rationalize something we are not doing it according to standards of truth that exist in the world, but according to a logical lexicon that is internal to the rationalizer. The nature of values dictates that they essentially define and control the form and function of the will because they are the describers of it, establishing the limits imposed on the will concerning the conditions for willing: values focus the will.⁷⁸ The will must will.

If willing is contextualized in culture, then how does culture relate to values? Culture is a unity of style in expressing that which is important and wonderful in life.⁷⁹ How is it expressed? In the practice of daily life, through the manifesting of those values which mark cultural style, culture is revealed as the constitutive elements of social relationships and personal action which express those things of unquestionable importance.⁸⁰ When these values come into question and evolve,

⁷⁴ Heidegger focuses on this at length, and for good reason. It would appear that all of Nietzsche's anti-metaphysical diatribes are undone by a concession that there is a "nature" to "reality" that we could call "will to power." However, the statement was not simply a concession. And one would do well to look at what is actually being said with respect to the so-called fundamental aspect of the will to power in Nietzsche's thought because it is an anti-metaphysical idea similar to the more benign Taoist idea of "change is the ultimate reality." It is for this reason that Heidegger refers to Nietzsche enigmatically as the last metaphysician. See Heidegger, *Nietzsche*, *supra* note 61, vol. 4, at 197-250.

⁷⁵ TI:VI. In this chapter, Nietzsche notes that the key to understanding the problem of "willing" is beset by the grammatical problem that accompanies the word: the word is a verb, and as such expresses the ability to have a subject perform it through an act of volition: I will. As well, the word is transitive, which means there must be a direct object upon which the subject acts through the performance of the verb: I will (i.e. bring about) my well-being.

⁷⁶ WP 484, 522.

⁷⁷ GS 354.

⁷⁸ WP 784.

⁷⁹ UM III.

⁸⁰ HAH 224, and ch. 5 generally.

cultural practices evolve. As cultural practices evolve, values come into question. Hence culture is ever evolving according to the dictates of values, and values are ever changing according to the dictates of culture. In this way there is a dialectical relationship between values and culture, the one working on the other. However, this dynamic works through a specific apparatus: the individual. For the individual is the mouthpiece of cultural practice, and hence a very particular individual is the agent for both cultural and value change.⁸¹

Values provide the *ground* against which all other meaning is abstracted. The importance of that which “grounds” is the real insight of Kantian philosophy. Kant’s project was essentially to provide such a ground for reason and for morality. *The Critique of Pure Reason* is a tantamount project with a single purpose: to establish the bases for what is knowable by finding foundations for truth. It will be objected that this is quite a different project than one which sees values as foundational, but as will become clear, these are connected at a fundamental level because the idea of “truth” is itself a value which dominates the Western landscape of values. This grounding of knowledge in truth provides the framework through which we understand our relationships with each other and the purposes we pursue, which is to say that it grounds our cultural practices in an understanding of values. And as we will see with Kant, this “lens” focuses our philosophical inquiry on certain questions automatically. That is, since our values condition practice, the practice of philosophy is itself conditioned by a particular understanding of values and of what is important.

Because of this, Nietzsche argues that values precede our metaphysical longing to find structure and purpose in the world: we find it necessary to understand and explain the *why* animating culture. The question of what the grounding arguments of philosophy are only arise in a particular cultural milieu, and as Kant suggests, the understanding of truth and morality have been thrown into a state of potential⁸² disarray by Scottish skepticism.⁸³ The question of what is knowable and what is true arise because there is some doubt as to what these things mean, some question as to the necessity of them. In this sense, it is believed that there is a necessity to grounding morality, especially at a time when morality and truth are being celebrated as the liberating forces for human kind.⁸⁴ Nietzsche’s insight here regards the motive for searching for grounds for truth and knowledge, and he concludes that such motives are, at base, moral ones: morality requires a particular base in a conception of “truth.”⁸⁵

⁸¹ This discussion immerses us into the questions of what the artist is, what the genius is, and what the philosopher is: questions too broad for this paper. See “Schopenhauer as Educator” UM III. As well, it is important to realize that this understanding of culture and values, and the way in which they impact on the individual, is latent within our own understanding of culture and creates a spectrum of differing degrees. On the far extremes we have B.F. Skinner on one end and Hayek and Nozick on the other. But for more mainstream views of how we understand the individual in our culture see Taylor, *Sources of the Self*, *supra* note 23, at 91-107; Rawls, *Political Liberalism*, *supra* note 26, at 368-71; and Rorty, *Contingency, Irony, and Solidarity*, *supra* note 2, at ch. 2 & 4.

⁸² I say potential because we must remember the context in which Kant is writing: the heart of the Enlightenment just before the French Revolution, often celebrated as a *cause celebre* for “Reason” over authority.

⁸³ Kant remarks that Hume awoke him from his dogmatic slumbers by forcing the question of truth and knowledge into his view. See Antony Flew, “Notes” to Hume’s *On Human Nature and the Understanding*. A. Flew ed. (New York: Macmillan, 1962), at 317.

⁸⁴ See Gay, *The Enlightenment*, *supra* note 14, vol. 2, at 24-55.

⁸⁵ BGE ch 1.



As Nietzsche is looking to the conditions under which values arise and come to form the basis of morality, his indictment of morality is not that it is “merely” perspectival.⁸⁶ Rather than look at addressing the perspectival nature of knowledge and hence of morality – the can of worms opened by Kant – Nietzsche asks: in what is our love of, and faith in, truth based? This, as he notes, is where we too are still pious.⁸⁷

Here is where Kant and the history of philosophy are extremely important: Kant’s express purpose was to ground reason and morality in a conception of a fundamental truth.⁸⁸ Responding to Hume’s skepticism, Kant attempted to find out just what the conditions of knowledge were. A devout man, he wanted to establish the parameters of belief and of knowledge, to demonstrate what we could be certain of, to ascertain just what conditions of “truth” were necessary to substantiate belief in the traditional categories of morality.

He began by distinguishing between the kinds of knowledge we can know from experience and that which requires no experience to be demonstrated as true.⁸⁹ He separated truths into their *a priori* and *a posteriori* categories. Then he created a cross-section of analytic propositions, statements where demonstrating the truth of them requires no outside truth, and synthetic propositions, statements where demonstrating the truth of them requires an outside truth to substantiate it; these propositions fit into both *a priori* and *a posteriori* categories. Hence, analytic *a priori* propositions are ones that could be shown to be true within the propositions themselves independently of any experiential base;⁹⁰ analytic *a posteriori* truths were experientially demonstrable truths that again required no outside knowledge; synthetic *a posteriori* truths were considered the basic kind of assertion, one which is based in experience but require another proposition exterior to it to substantiate it. Kant agreed that most knowledge was of the synthetic *a posteriori* kind. However, the synthetic *a priori* presented a difficulty. For, by definition, it concerns propositions which are true prior to experience, but which contain a referent point outside the statement itself. Here we are talking about the age old questions of the experience of time, of space, of the existence of and perception of “free will” and, by association, of a deity.

Kant used the objective / subjective split to highlight how it is that we cannot know things as they exist objectively as noumena, that is, as things-in-themselves.⁹¹ But we can understand that they exist necessarily, even if we cannot understand the existence itself. Similarly, synthetic *a priori* propositions are possible by virtue of our faculty of reason in that one can understand the necessity of their truth even if

⁸⁶ As Nehamas would argue. See Nehamas, *supra* note 7, at 30.

⁸⁷ GS 344.

⁸⁸ See Immanuel Kant, “The Foundations of the Metaphysics of Morals” in *Philosophical Writings*. Lewis White Beck trans. Ernst Behler ed. (New York: Continuum, 1986).

⁸⁹ *Ibid*, at 56.

⁹⁰ Mathematical truths were thought to fall into this realm. Since Kant’s time there have been assaults even on this. Einstein, Poincare, and notably Lobachevsky have developed mathematics in the area to show that the primary assumption of, say, parallel lines never meet (Euclid’s fifth postulate) are rules which need postulation before being demonstrably true. Lobachevsky constructed a completely rational system of geometry without basing it on Euclid’s fifth postulate.

⁹¹ Kant, “The Critique of Pure Reason” in *Philosophical Writings*. L.W. Beck trans. (New York: Continuum, 1986), at 20-9.

it cannot be demonstrated.⁹² Kant describes this as a type of judgment which synthesizes or combines an assertion yet which is understandable as true *a priori*; such propositions and their attendant judgments are simply something that we see as necessary if we are to understand the nature of our reasoning capacity to be essentially different from mere accumulators of experience.⁹³

Kant noted that the synthetic *a priori* was the foundational type of truth-claim, the one which grounded assertions about the real world's existence, about the nature of the free will, and about the existence of the moral law.⁹⁴ These things require knowledge which we cannot prove but which we must accept on the faith that their necessity is actual: the existence of free will, which in turn is predicated on the existence of God. For as Kant noted, the existence of the free will cannot be proven by virtue of examples of it. Rather, we understand that it is something that exists because we understand its necessity. The reason we understand the necessity of the free will is because we can understand the necessity of the moral law, and the moral law's existence requires judgment – another reason why we can understand the necessity of the free will. Knowledge is possible only if we have faith that the world is constructed in such a way that makes knowledge through experience possible: the “true world” is thus maintained by necessity in that it supports the phenomenal.

Hence reason searches unceasingly for the unconditionally necessary and finds itself forced to assume it without any means of making it comprehensible to itself; reason is fortunate if it can discover a concept which suits this assumption.⁹⁵

The existence of the thing-in-itself, *das-in-sich*, is another aspect of this mode of understanding: we can understand that our subjectively limited way of perceiving the world prevents us from ever knowing the noumenal world in an objective way, but we can understand its necessity. How do we understand its necessity? By virtue of our capacity to reason and to hence comprehend the incomprehensibility of it. Morality is grounded in reason because we understand that we must, at some point, accept *on faith* that such things exist. Indeed, Kant himself described his project as describing the bases of knowledge by making room for faith – a task that has not been done with such circumspection and critical insight since.⁹⁶ However, we are left with a state of knowledge that is unsatisfactory:

And so we do not indeed comprehend the practical unconditional necessity of the moral imperative; yet we do comprehend its incomprehensibility, which is all that can be fairly demanded of a philosophy which in its principles strives to reach the limit of human reason.⁹⁷

⁹² This is a tricky argument, one that has taken up thousands if not millions of dissertation and journal pages, let alone books. I certainly will not attempt to take apart the intricacies of Kant's argument, to demonstrate fully the nuances of how he arrives at this. I bring it up only because the veritable truth of the conclusion is taken as a starting point for Nietzsche as a place to assess the meaning of truth in the Western philosophical tradition. For instance, see BGE ch 1.

⁹³ Kant, “Critique of Pure Reason,” *supra* note 90, at 31, 33.

⁹⁴ *Ibid*, at 30-33.

⁹⁵ Kant, “Foundations,” *supra* note 87, at 125.

⁹⁶ Kant, “Critique of Pure Reason,” *supra* note 90, at 13.

⁹⁷ Kant, “Foundations,” *supra* note 87, at 125.



Truth then arises not because we can look hard and see it, but because we understand that a conception of it is needed if we are going to have moral validity.

This understanding of truth lies in the background of all of our assertions regarding morality, our values, and our culture. There is always this latent aspect of universality to our discourse surrounding the philosophical understanding of what values mean. Indeed, so many theorists become tripped up in the relativist paradox, that is, of asserting that truth is untenable, but yet believing this to be an accurate representation of the truth.⁹⁸ Hence, as Nietzsche remarks with respect to the death of God, we have not yet begun to fully feel the weight of this: the death of God is not simply the end of religiosity. Rather, it is the end of a particular conception of truth, one which has lingered into our discussions today and has certainly made our theorizing around these issues no more stable.⁹⁹

On Kant's view truth is something that "inheres" in reality. It is "out there." The existence of the noumenal world, the reality which exists in things that we can never know and never show, is postulated. It is the old Platonic "being" that is there beyond the shadows on the wall of the cave. It is the "being" that underlies all becoming and change.¹⁰⁰ Even though we cannot comprehend what it means for something to have "being," apparently we understand that it is necessary for the existence of ourselves as moral agents. Nietzsche's response to this view is that it demonstrates the limits of our particular understanding of truth, and it exposes the moral motives we have when we question what truth is.¹⁰¹

But let us be clear: Nietzsche is not out to prove Kant wrong, but rather to show what is required if we are to believe that there is such a thing as "truth."¹⁰² He asks us to reflect on the problem of the existence of a world which we cannot know but are asked to trust exists as something separate and away from the world we experience. Further, he asks what conditions are required for us to need an external world, a reality called being, to *justify* the world we experience.¹⁰³ With this question, Nietzsche directs our attention at the real issue of necessity: why is belief in a true world, in a world of concepts, in a moral world separate from the world of experience, necessary?¹⁰⁴ The "true" world demands our allegiance in order to redeem the suffering of the present and the injustice of the past. By serving as an external referent point which allows the construction of moral ideas, the "true" world is that realm which stands in opposition to the world of becoming, of change, of life as it is lived, of the daily experience of suffering and injustice. Thus, to believe in "truth" requires a particular disposition toward life and living. This forms the backbone of Nietzsche's attack on morality.¹⁰⁵ Let us look at it in more detail.

⁹⁸ See "Preface" *Contingency, Irony, and Solidarity*, *supra* note 2.

⁹⁹ D "Preface."

¹⁰⁰ TI ch. 5.

¹⁰¹ See TI "Preface" for an explanation of the process for looking at truth, as "sounding out false idols."

¹⁰² Ahmed Baig, Interview. Montreal: February, 1994.

¹⁰³ WP 12A; BGE 23.

¹⁰⁴ TI:III, IV; WP 12-17; and most importantly, see the questions posed in GM "Preface" 3.

¹⁰⁵ This is the theme of GM; WP I:I; GS III, IV.

Nietzsche highlights the ungroundedness of truth by unveiling the circularity of Kant's synthetic *a priori*.

Kant asked himself: how are synthetic judgments a priori *possible*? - and what, really, did he answer *By means of a faculty*.... But is that - an answer? An explanation? Or is it merely a repetition of the question?.... But answers like that belong in comedy, and it is high time to replace the Kantian question "how are synthetic judgments a priori possible?" with another question: "why is belief in such judgments *necessary*?"¹⁰⁶

In this way, Nietzsche demonstrates that the fundamental action going on in the Kantian construction of morality is not an understanding of necessity but an understanding of the kinds of things which have to be accepted on faith.

Heinrich von Kleist, an artist of the early 1800's, had a particularly interesting reaction to Kant's philosophy – the kind one would have if the matters concerning faith and necessity were found to be simply unbelievable.¹⁰⁷

Lately, I have become acquainted with the so-called Kantian philosophy... we cannot determine whether what we call truth really is truth, or merely seems so to us.... The thought that here on earth we know nothing of the truth, absolutely nothing ... has shaken me in the very sanctuary of my soul - my *only* purpose, my *supreme* purpose has collapsed; I have none left.¹⁰⁸

This response is often called the "existential" response to Kant's philosophy – an over-reaction to a consequence he clearly did not intend. However, Nietzsche's words are illuminating: the will to truth-at-any-cost may actually be a concealed will to death,¹⁰⁹ especially when one considers that Kleist's ultimate response to the Kantian schism introduced into the world was suicide.¹¹⁰ In the early 1870's Nietzsche recorded in his notebooks: "The altered position of philosophy since Kant. Metaphysics impossible. Self-castration. Tragic resignation, the end of philosophy. Only art has the capacity to save us."¹¹¹ The essential idea here is that Kant's devotion to the truth actually clarified the nature of its subjective basis to such an extent as to render its objective dimension no longer tenable.

The pursuit of truth, therefore, is a process which leads to its uprooting. Since it is true that our knowledge of the moral law, and its existence, is not possible and is contingent in our belief in it, then ultimate foundations come crashing down. However, rather than delve into the consequences of this, philosophers and

¹⁰⁶ BGE 11.

¹⁰⁷ Indeed, Hannah Arendt remarks that it takes an act of heroism to live in the world as Kant left it: Hannah Arendt, "What is Existenz Philosophy?" (1946) 13:1 *Partisan Review* 34, at 41. See her more developed arguments in "Truth and Politics" in Peter Laslett and W.G. Runciman eds. *Philosophy, Politics and Society*. 3rd series. (Oxford: Basil Blackwell, 1969).

¹⁰⁸ Cited in David Luke and Nigel Reeves "Introduction" in Heinrich von Kleist, *The Marquise of O- and other Stories*. D. Luke & N. Reeves trans. (London: Penguin Books, 1978), at 9-10.

¹⁰⁹ GS 344.

¹¹⁰ Luke and Reeves, "Introduction," *supra* note 106, at 9-10.

¹¹¹ Cited in Keith Ansell-Pearson, "Nietzsche's Overcoming of Kant and Metaphysics" *Nietzsche-Studien* Band 16, at 310. See also Nietzsche, *Philosophy and Truth: Selections from Nietzsche's Notebooks of the Early 1870's*. Daniel Breazeale trans. & ed. (New Jersey: Humanities Press, 1979), at ch.1.



thinkers have traditionally avoided the question. Positivism and utilitarianism arise as responses to a world where the ultimate truth of anything lies in question.¹¹² Rather than worry about whether the values I choose or the cultural background I bring is “correct,” we become concerned with simply weighing the different processes for achieving those ends rather than the ends themselves. This purely procedural approach underlies the entire modern economic theory of utility curves, one that enjoys considerable success.¹¹³ The understanding of “truth” as we have inherited it has remained largely unquestioned, and when it has been questioned, theorizing and philosophizing are carried on within the limits of the older way of conceiving truth.¹¹⁴

The concern for truth-at-all-costs leads to a place where moral right is impossible to defend on absolutist or universal grounds.¹¹⁵ What drives the idea of truth as it exists in Western concepts of Morality is the religious heritage of understanding “truth” as “universal” in singular terms reflecting the Judeo-Christian belief in a single God. When Moses asks the burning bush who shall he tell his people has sent him, God replies, “I AM THAT I AM, Thus shalt thou say unto the children of Israel, I AM hath sent me unto you.”¹¹⁶ He continues to state that he is also Lord God of their fathers. The inference to be drawn here is that God is Himself a metaphor for that singularity, the “am” that underlies experience: the real world, the noumena, the objective spirit, truth.¹¹⁷ The love of God becomes transposed into a love of truth such that we find Kant, in “What is Enlightenment”, telling us *sapere aude*, or “dare to know” or “have courage to use your own reason.”¹¹⁸ Love of God has become love of truth without religio-cultural underpinning.

Nietzsche’s critique of our understanding of truth is two-pronged. First, Nietzsche wants to *expose* the moral undertones which drive the creation of categories such as truth. The desire for truth does not arise on its own.¹¹⁹ In doing this, Nietzsche digs into the motives for creating this “other world” of truth and morality and indicts Christianity for doing so at the expense of “this one,” i.e. the world of experience.¹²⁰ Thus, the first prong of Nietzsche’s critique ascertains that that which we call truth is created because it is needed to sustain a vision of morality; it is also needed to sustain an understanding of individuals as culpable for suffering

¹¹² TI V.

¹¹³ See Richard Posner’s interesting use of the philosophy of neo-pragmatism as a way of grounding the economic vision of law in *The Problems of Jurisprudence*, *supra* note 2, especially his introduction. For interpretations of Posner’s pragmatism see the brilliant response by Stanley Fish, “Almost Pragmatism: Richard Posner’s Jurisprudence” *supra* note 57; Tibor R. Machan, “Posner’s Rortyite (pragmatic) jurisprudence” (1995) 40 *American Journal of Jurisprudence* 361; and Michel Rosenfeld, “Pragmatism, pluralism and legal interpretation: Posner’s and Rorty’s justice without metaphysics meets hate speech” (1996) 18 *Cardozo Law Review* 97.

¹¹⁴ An exception to this may be the distinctive philosophies of both Wittgenstein and Heidegger, both of whom claim to be operating at a different level of “philosophy,” that is, one which is non-metaphysical.

¹¹⁵ Note that this is not a problem for neo-pragmatist philosophers and lawyers. In fact, this is their starting point. However, because they feel that this fundamental gap in the Western conception of reason somehow provides a starting point for a justification for theoretical “shrugging” is why this aspect of postmodernism is so interestingly pernicious.

¹¹⁶ Exodus, 2:14, 15.

¹¹⁷ *Ibid.* See also Northrop Frye’s discussion of this in *The Great Code: The Bible & Literature*. (Toronto: Penguin, 1982), at 114-21.

¹¹⁸ Kant, “What is Enlightenment?” in *Philosophical Writings*. Ernst Behler ed. (New York: Continuum, 1986), at 263.

¹¹⁹ GS 344.

¹²⁰ A 18.

in the world. Sin is juxtaposed with fate. The second prong of Nietzsche's critique looks at the motives which underlie the initial moral moment when the need for such truths arise. For Nietzsche understands that the "need" to find truth does not arise as a function of living or from being a being in the world. On the contrary, he finds that only a very particular kind of experience yields the need to see a "true" world beyond the immediate one, the need to have a moral code that dictates "thou shalt" and "thou shalt not": *ressentiment*, or resentment at the hand one has been dealt.¹²¹ These two aspects are really on a continuum along the same argument; I will go through each in turn, treating the original moment of *ressentiment* first.

Nietzsche defines the kinds of experience that we have in the world according to a metaphorical dichotomy between what he calls "noble" and "base".¹²² The world contains suffering due to the fact that situations continually change despite human effort to divine a purpose to the world. Massive killing still occurs, people live in misery and grief, perceived wrongs create disharmony which is not necessarily rebalanced. The world is a mass of continual change and, in Nietzsche's words, is marked not by being but by *becoming* – things are never constant.¹²³ The noble live tragically as the Greeks did: understanding the temporality of life, cultivating virtue for its own sake, knowing that they had to accept fate.¹²⁴ This did not mean that there could be no emotion and sadness at things which pass, but such emotion is not vengeful or spiteful with respect to time and fate. The noble could never say (for it would never arise) that fate or life is "unfair." The base however live in continual judgment of the past with respect to present suffering. Fate delivers situations that produce suffering which are unbearable, and the base, rather than accept it, conjecture that this cannot be what life is about. The emotion that arises consequent to such suffering is a resentment toward life as it is forced to be lived, an emotion Nietzsche terms *ressentiment*.¹²⁵ The question "why suffer" receives an answer, and the slide to feeling that all suffering is for naught, all suicidal nihilism, is prevented: life has new purpose in overcoming and redeeming.¹²⁶

The world as it exists (as becoming / unfolding) is contrasted with a vision of the world of what it needs to be to redeem the injustice and suffering contained in it. Resentment and ill-will expressed become expressed in the original move to create a metaphysical conception of "being." It is held that there needs to be a truth that exists out there in the world because this world of arbitrariness does not redeem it, cannot make it all seem "worthwhile." We create concepts of "being" behind becoming in order to be able to refer dialectically to what we have in front of us in the world (becoming and fate) and what we want to see or what we feel we need to see if the world as it appears is to be redeemed and have meaning (truth and the

¹²¹ GM, II:11.

¹²² GM I. This is also found in numerous places in Nietzsche: see BGE IX.

¹²³ WP, 1053-67.

¹²⁴ BT 1; GM I:11-12.

¹²⁵ He uses the French for reasons that are debated. Some think that he is trying to place the word into the French in order to "combat" the romanticism of Rousseau and those aspects of the French Revolution that romanticize a glorified future out of a terrible past: See Keith Ansell-Pearson, *Nietzsche Contra Rousseau*. (Cambridge: Cambridge University Press, 1991). Some argue that it is his homage to Napoleon, a figure he often refers to as one who did not succumb to the imposition of the values of others: see Bruce Detwiler, *Nietzsche and the Politics of Aristocratic Radicalism*. (Chicago: University of Chicago Press, 1990). Still others claim it is because he felt that German philosophy was so impoverished that he had to make a gesture to conceptualize in another language to demonstrate his distrust of his own language: see Walter Kaufmann, *Nietzsche: Philosopher, Psychologist, Antichrist*. (Princeton: Princeton University Press, 1974).

¹²⁶ GM III 28.



ideal).¹²⁷ In this way, the construction of a God and a true world of concepts is opposed to the way in which life is lived. Out of this act of creation necessarily follows a code of conduct which allows for the truth to be demonstrated.

It is important to realize that resentment becomes creative in reaction to, for lack of a more concise way of stating it, suffering.¹²⁸ Going back to the first prong of Nietzsche's argument we learn that morality becomes created out of this "ill-will" against the past. This way they redeem the suffering of the past by indicting it, and by indicting anybody they can.¹²⁹ They thus understand the necessity of finding / creating a concept of free will (which of course cannot be proven) in order to hold others culpable – the past sufferings are now redeemed through the infliction of suffering on the person they have chosen to receive it.¹³⁰ "An eye for an eye."

Free will is thus a creation of the moralist. It is a *modus operandi* for redeeming the world against fate because someone can be held responsible for the suffering that happens. Kant showed that a belief in the existence of free will requires a faith that it does, not a rational process of deduction.¹³¹ This act of faith, he claimed, was based on the necessity of grounding morality, for there can be no morality without a concept of free will – there can be no "should" nor "should not" without an idea of being free to judge what to do. How can someone say that they are guilty of doing or not doing *x* if they were not free to do it? In this way, morality's ground in metaphysics is a ground in a particular disposition toward life and community, and as such demonstrates that morality is based not in an idea of truth, but in a desire to be done with life as it is currently lived.

Just when one would have thought that morality had been thoroughly dissected, Nietzsche goes one step further to demonstrate the extent of creativity and viciousness that is really at the bottom of *ressentiment*. He notes at the beginning of *On the Genealogy of Morals*,

It was here that *promises* were made; it is here, one suspects, that we shall find a great deal of severity, cruelty, and pain. To inspire trust in his promise to repay, to provide a guarantee of the seriousness and sanctity of his promise,... the debtor made a contract with the creditor and pledged that if he should fail to repay he would substitute something else that he "possessed,".... Above all, however, the creditor could inflict every kind of indignity and torture upon the body of the debtor; for example, cut from it as much as seemed commensurate with the size of the debt.... Let us be clear as to the logic of this form of compensation: it is strange enough. An equivalence is provided by the creditor's receiving... a recompense in the form of a kind of *pleasure* - the pleasure of being allowed to vent his power freely upon one who is powerless.... The compensation, then,, consists in a warrant for and title to cruelty.¹³²

¹²⁷ GM I:13.

¹²⁸ GM I:10.

¹²⁹ GM I:13.

¹³⁰ GM I:10, II.

¹³¹ Kant, "Foundations" *supra* note 87, at 57.

¹³² GM II:5. This appears to be historically accurate, at least in England: J.S. Baker, *Introduction to English Legal History*, *supra* note 16, at 573-78.

The debt is an agreement of exchange between, say, myself and another that occurs at the primary level. If I do not fulfill it, then the other person gets to punish me, to extract a pound of flesh, to chop off my foot.¹³³ The pleasure that the person derives in extracting the pound of flesh or in chopping off my foot is equal to the amount that I owe that person: morality is sublimated cruelty.¹³⁴ The foundation, at root, of finding someone guilty is not simply a mild resentment and annoyance at times gone bad. It is a vengeful cruelty that needs to exact suffering in order to feel vindicated.¹³⁵

Truth then is not simply a function of the down-on-their luck who attempt to rationalize their luck as a piece of history that will be redeemed in another life (though the question of redemption is there). Instead, truth arises out of the intensely vengeful spirit of wanting redemption of current suffering, redemption of the current judgment they have cast against life, and actual repayment of this by being able to hold someone accountable. Revenge is extremely creative.

At the level of the ideal, then, truth is cast as that which is permanent in the face of suffering in order to justify and rescue all that is impermanent, since the impermanent cannot justify nor rescue itself in the eyes of the base. One might think that this understanding of truth would fail because it necessarily runs up against a fate which continually mocks any redemption of suffering according to universal notions of truth or justice, however history has shown it to be quite resilient and creative.¹³⁶ When the word "life" is replaced by the word "tragedy" to describe events which are terrible and cruel and unjust, we have moved into a modern conception of truth. There cannot be an idea of tragedy without a sense of justice somehow being transgressed.¹³⁷

Truth is now the furniture in our common discourse because of a particular disposition toward life and the world; this disposition had, by Nietzsche's time (indeed by Augustine's time), become culturally ingrained. Today we obey it with all the circumspect of a child on the first day of school: all-too-willing to follow it to its conclusion. The problem we come to then is that our particular conception of truth is rooted in an entire mode of being which is expressed through the agency

¹³³ Shylock's debt is a pound of flesh in *The Merchant of Venice*. However such retribution existed much closer to home, and is reflected in our contradictory understanding of what constitutes punishment for a crime and what constitutes compensating society for the debt created. Both originate in the Christian understanding of sin and the requisite need for a bodily punishment that suffices as repayment for the violation of "law." Harold Berman, *Law and Revolution*. (Cambridge, Massachusetts: Harvard University Press, 1983), at 183ff. This is the general theme of Foucault's *Discipline and Punish*, *supra* note 35.

¹³⁴ GM, II:6; BGE 229; D 18, 77, 113.

¹³⁵ This is key for many reasons, but particularly for a "rehabilitation" of some of Nietzsche's ideas. Though he is certainly no liberal, there are humanist aspects to his thinking - and his discussion of cruelty as a type of weakness *may* be indicative of this. See Berkowitz, *Nietzsche*, *supra* note 6, at 88.

¹³⁶ Indeed, Nietzsche comments on how "successful" Christianity is in creating a powerful form of morality, one that can subdue the noble: GM I:8.

¹³⁷ To push this further, in the face of nihilism, tragedy does not measure. We do not see the death of God as tragedy, but as something which leaves a yawning chasm of meaninglessness. In an interview with CBC, Martin Amis was asked about his book *Time's Arrow* and whether or not he felt that it made too light of the horrors of the Nazi and the tragedy it represents. He disagreed with the entire question because he said we can no longer even conceive of what tragedy is. In the face of the utter horror that the Nazi regime presents us, the word tragedy is a trifling concept. He says that the best we can do is to resort to senseless comedy: to show a Nazi guard with his pants down or to catch him picking his nose. To think in terms of "tragedy" is to really go back well over a hundred years.



relations we find in society. It is reflected in our moral ideas, in legal relationships manifested in contract and property rights, and in socio-cultural practice. Nietzsche's criticism of the Kantian articulation of "truth" is thus a criticism of the contemporary understanding of truth as it is embedded in culture.

And yet we are stuck with the problematic position into which this conception of truth throws us. Specifically, we are left with a vision of truth that, as Kant has illuminated, is not sustainable on its own terms: there is no truth that can be known except such that we believe. All truth becomes no more than the expression of particular perspectives, all finality and demonstrability mere opinions and narratives. This is problematic because our moral, legal, and ultimately cultural institutions reflect a belief in a truth that is uniform and verifiable rather than subjectively based and subject to consensus; they also reflect a value structure which assumes universalistic status (like 'dignity,' 'natural equality') grounded in an absolutist notion of truth, that is, where the existence of one truth excludes all others. Thus, when postmodernist theorists write as critics, they do so automatically within a realm of argument that uses this dialectical way of proceeding: there are truths and there are errors. And thus they end up revealing the absence of truth, the destruction of meaning, and the aimlessness of modern culture.¹³⁸ Hence: the modern understanding of truth plays into cultural practices of criticism which erode meaning away from our value constructs such that we are left with nothing but the signposts of an earlier time without understanding what the signs mean.¹³⁹

The problem with the particular values we have come to possess, therefore, is that they pitch us toward nihilism because the foundation rests in a self-contradictory conception of truth. Nihilism is described by Nietzsche as the devaluation of values, which is when the values we hold draw their final consequences.¹⁴⁰ Nihilism is not a belief in nothingness, chaos, or anarchy. Truth, fully configured and detailed by Kant, draws its final consequences when we understand that values are not universal, meaning in the world is not inherent, right and wrong are not true, people are not free, and that life has no demonstrable purpose.

The end of the moral interpretation of the world, which no longer has any sanction after it has tried to escape into some beyond, leads to nihilism. "Everything lacks meaning" (the untenability of one interpretation of the world, upon which a tremendous amount of energy has been lavished, awakens the suspicion that *all* interpretations of the world are false).¹⁴¹

Nihilism thus represents the phrase "God is Dead" in its fullest sense, rather than in the simple sense of there being no authoritative view of what is (which is occasionally the postmodern view, which is why they celebrate it). Alasdair MacIntyre describes the loss of constitutive meaning for the Polynesian word for *taboo* in a context which allowed lax sexual habits with rigorous prohibition on men and women eating together; he suggests that these beliefs had no real

¹³⁸ Such a result is consistent with Derrida's way of proceeding to reveal those things which lay underneath, and here nothing lies underneath: see *Of Grammatology*, *supra* note 33, at 306-13.

¹³⁹ MacIntyre, "Preface: A Disquieting Suggestion" *After Virtue*, *supra* note 25.

¹⁴⁰ WP 1-12.

¹⁴¹ WP 1.

significance because of “the ease with which Kamehameha II abolished the taboos in Hawaii forty years later in 1819 and the lack of social consequences when he did.”¹⁴² Just as the Polynesians no longer understood the practical meaning of the word “taboo,” we no longer understand the ultimate meaning of a conception of truth that has been eroded of its core. That “God is Dead” is the ultimate act: there can be no justificatory significance to any actions now other than those that *mere* humans give it, for, as the madman suggests, we need to become gods ourselves in order to be equal to the deed. Who will take responsibility for their subjective consideration of truth and assert it to be the singular one? More strongly, who will challenge the conception of subjective truth which is itself a product of the Western tradition’s reliance on an objective one? And this erosion of the core is not the work of a lack of historical and cultural memory in cultivating a belief in God in order to sustain a vision of truth: history is full of the zealotry with which such “cultivation” occurred. The madman tells us: “This deed is still more distant from them than the most distant stars – *and yet they have done it themselves.*”¹⁴³ Our own conception of truth, embraced with macho enthusiasm, destroys the foundations of meaning as philosophers trot forward chanting *Sapere Aude!*¹⁴⁴ Operating with a framework of “truth” that we have inherited through Millennia of belief in an ultimate being which inheres in reality “out there,” we sit and gargle ideas like dilettantes with vacuous concepts. And worst of all, we do not realize it: “What was once [Nietzsche’s] scream ‘the Wasteland grows...’ now threatens to turn into chatter.”¹⁴⁵ What is “God is dead” other than a slogan representing the loss of religion? Do we understand it yet?

The significance of Nietzsche’s understanding of morality is the reality of nihilism as a process which is continually occurring in contemporary culture.¹⁴⁶ All action is necessarily uprooted from its previous moral and cultural significance, while “morals” become those labels we give to action rather than any commitment we can make to them beyond functional ones. Out of this scenario arises a way of life that is disconnected from its greater significance.¹⁴⁷

I have shown how Nietzsche understands truth, values, and perspective in a much more radical way than simply as expressions of power that form discourse. He has made it clear why nihilism lies central to an understanding of the history of Western metaphysics, and consequently that we need to overcome morality by overcoming our conception of truth. But how can something like this be done? How do we escape the brutal categories under which we live without suffering a crisis in identity? In *Thus Spoke Zarathustra* Nietzsche goes to the bottom of morality and suggests what is required to overcome it. It is important to grasp how the value of “truth” dictates a certain path to its own overcoming in order to see how difficult the terrain of postmodernity is: all is not ‘play.’ I will go through Zarathustra’s journey and his confrontation with the moral categories underlying

¹⁴² MacIntyre, *After Virtue*, *supra* note 25, at 105. For an interesting discussion on how such operative frameworks have been formed / mutilated here in Canada, see *infra* note 286.

¹⁴³ GS 125.

¹⁴⁴ For an excellent companion piece analyzing Nietzsche’s metaphors on truth and masculinity, see Luce Irigaray, *Marine Lover of Friedrich Nietzsche*. Gillian C. Gill trans. (New York: Columbia University Press, 1991).

¹⁴⁵ Heidegger, *What is Called Thinking*. J. Glenn Gray trans. (New York: Harper Collins, 1968), at 49.

¹⁴⁶ Allan Bloom, *The Closing of the American Mind*, *supra* note 13, at 141-56.

¹⁴⁷ For a fuller discussion of some of the dynamics surrounding this loss of meaning, see Alasdair MacIntyre, *After Virtue*, *supra* note 25; and Allan Bloom, *ibid.*



“truth” so that we can come to a place to see the full dimensions, and challenges, posed by nihilism in our legal culture.

III: Recovering Nietzsche

Nietzsche uses the character of Zarathustra to speak to the problem of nihilism, what it is, where it comes from, and how it is possible to overcome it. Zarathustra embarks on a quest for everything great in humanity, to preach that humans have to overcome themselves and their petty nature, to make themselves into super-humans, or *übermensch*. He finds that this quest is burdened and destined to fail because it too contains the seeds of resentment against fate; indeed, Zarathustra discovers that the most difficult expression of resentment... is pity. I will go through Zarathustra’s journey with an eye to demonstrating how Nietzsche deals with it through his idea of *amor fati* (or love of fate), how perplexing the problem of nihilism becomes, and how really completely bound up in it we are.

Zarathustra discovers in himself a great longing to overcome the pettiness of humanity: to find out what is great in human beings. At the beginning he descends to the village to give humanity the fruits of his wisdom; however, upon arriving in the market place he is shocked to see the uninspiring nature of the people there.¹⁴⁸ He sees their suffering and the lack of meaning in their lives beyond the immediate day-to-day transactions that take place there. Feeling a great welling up of emotion, he implores them to reach for the stars and to overcome themselves: he preaches to them an image of the *übermensch*.¹⁴⁹ His preaching is met with derision and laughter. At this point he decides that it might be better to speak to what is most contemptible in them: the “last man.”

Alas, the time is coming when man [sic] will no longer give birth to a star. Alas, the time of the most despicable man is coming, he that is no longer able to despise himself. Behold, I show you the *last man*.

‘What is love? What is creation? What is longing? What is a star?’ thus asks the last man, and he blinks.

The Earth has become small, and on it hops the last man, who makes everything small. His race is as ineradicable as the flea-beetle; the last man lives longest.

‘We have invented happiness,’ say the last men, and they blink. They have left the regions where it was hard to live, for one needs warmth. One still loves one’s neighbor and rubs against him, for one needs warmth.

Becoming sick and harboring suspicion are sinful to them: one proceeds carefully. A fool, whoever still stumbles over stones or human beings! A little poison now and then: that makes for agreeable dreams. And much poison in the end, for an agreeable death.

¹⁴⁸ Z “Prologue”

¹⁴⁹ The English translations refer to this being as the superman or the overman. As such usages no longer seem to capture the spirit that is meant by the original, I choose to leave it in the original. Z “Prologue” 3.

One still works, for work is a form of entertainment. But one is careful lest the entertainment be too harrowing. One no longer becomes poor or rich: both require too much exertion. Who still wants to rule? Who obey? Both require too much exertion.

No shepherd and one herd! Everybody wants the same, everybody is the same: whoever feels different goes voluntarily into a madhouse.

‘Formerly, all the world was mad,’ say the most refined, and they blink.

One is clever and knows everything that has ever happened: so there is no end of derision. One still quarrels, but one is soon reconciled – else it might spoil the digestion.

One has one’s little pleasure for the day and one’s little pleasure for the night: but one has a regard for health.

‘We have invented happiness,’ say the last men, and they blink.¹⁵⁰

At this point Zarathustra stops speaking to the crowd, only to be cheered by those in the market place who want this “last man” delivered to them. In profound disappointment, Zarathustra leaves the town and returns to the mountain.

He soon discovers that this longing is also a way of expressing that which is difficult about morality. That is, he realizes that he is casting a disparaging judgment on “the state of things” out of a hope that one day they will be better. Thus, he sees that he is casting a negative judgment on the necessity of things just as Kant and all other philosophers and creators of morality had done prior to him.¹⁵¹

Zarathustra therefore understands that even his desire to overcome that which he despises in humanity is in itself suspect for its longing to be rid of those things which have arrived, through Time and history, of necessity. He is thus caught by the horn of morality: pity. Pity becomes the ultimate philosophical problem because to pity someone is to wish they are not as they are, to wish they could be different, hence to wish the world is a different place and that things are not as they are.¹⁵²

Hence, Zarathustra must understand that even a philosophy of optimism that Socrates held out (of this being the best of possible worlds) is actually pessimistic because it still holds out a vision of there being a real world out there that redeems the world of appearance. Reality is those sets of propositions toward which societies must work if they are to be “just,” thus the Socratic optimism expressed is one which qualifies the best of all possible worlds as being something we must attain.

The obvious fallout of this view is that the world that Zarathustra lives in is not one that is moving toward some sort of emancipation. Indeed, it can be neither the best

¹⁵⁰ Z “Prologue” 5.

¹⁵¹ Z III “The Convalescent.”

¹⁵² GS 270-75.



of all possible worlds, nor the worst of all possible worlds. It is simply a world where the human being is all-too-human.¹⁵³

He understands that the real serpent of morality is the knowledge of what good and evil is comprised:¹⁵⁴ namely, a resentful vision of the world as ugly and bad produces the creation of that afterworld or beyond where, in striving to give meaning to suffering, the higher type of human being is redeemed.¹⁵⁵ Thus the project of the “higher one,” the *übermensch*, becomes defunct because it has roots in the same emancipatory longing that all morality hitherto has been.¹⁵⁶

So if the totality of human action does not move toward some goal through time, then it must not have one. Indeed, if time were to have a goal, it would have been reached.¹⁵⁷ Thus, Zarathustra meets the real devil which sits beneath his vision of the world as it is: the eternal return.¹⁵⁸ That there has been no real past, no real future, since both are simply constructions based on moral understandings of the valuelessness of life. Time is circular, without beginning and end. Zarathustra confronts the “devil” on this point:

‘Behold,’ I continued, ‘this moment? From this gateway, Moment, a long, eternal lane leads *backward*: behind us lies an eternity. Must not whatever *can* walk have walked on this lane before? Must not whatever *can* happen have happened, have been done, have passed by before? And if everything has been there before – what do you think, dwarf, of this moment? Must not this gateway too have been there before? And are not all things knotted together so firmly that this moment draws after it *all* that is to come? Therefore – itself too? For whatever *can* walk – in this long lane out *there* too, it *must* walk once more....’

Thus I spoke, more and more softly; for I was afraid of my own thoughts and the thoughts behind my thoughts.¹⁵⁹

Nietzsche is explaining that if there is no basis to assertions of “should” since time does not allow for purposes, and since any purposes built into nature would be reached, then time goes eternally forward and eternally backward without consequence. Since one cannot ill-will against time, that is, change the past, then the past must be connected to the future and the present in an infinite circle such that all action is bound to be repeated over and over in an endless sequence of events. The doctrine of eternal return thus makes morality impossible because it makes any question concerning a better world moot.

Zarathustra comes to understand that the real challenge is to see that there have always been despicable people, there always will be, that life does not get better, nor worse. The even more difficult thought is the idea that all things that have happened will happen again and again in an eternal return of moments. This

¹⁵³ Z “Prologue” 10.

¹⁵⁴ Genesis 2:17.

¹⁵⁵ “The Christian resolve to find the world ugly and bad has made the world ugly and bad.” xxx. GS 130.

¹⁵⁶ Z III “The Convalescent.”

¹⁵⁷ WP 1062; Z III “On the Vision and the Riddle” 2.

¹⁵⁸ Z III “On the Vision and the Riddle” 2; GS 341.

¹⁵⁹ Z III “On the Vision and the Riddle” 2.

becomes the “greatest weight”¹⁶⁰ because it takes superhuman strength to bear the thought that *not only* is suffering meaningless and unredeemed, it will occur again and again. It is widely debated what role this doctrine of the Eternal Return plays in Nietzsche’s thought. Some view it as a simple thought experiment to demonstrate the need to understand that in the end each individual reckons with her own values, and must live with it.¹⁶¹ Other philosophers have noted that the Eternal Return is the logical conclusion to the Nietzsche’s understanding of the contradictions within the Western metaphysical tradition. For this very reason, Heidegger believes Nietzsche has in fact taken Western metaphysics to its end point, that he is indeed the “last metaphysician.”¹⁶² Philosopher Joan Stambaugh also characterizes the Eternal Return as inherently involved with coming to terms with the relationship between truth and time that is embedded in the origins of truth in *ressentiment*, but did not go so far as to say that this was a logical conclusion of his thought, though intricately interwoven with the questions he posed.¹⁶³ The difficulty that such a spectre poses is the incredibly weighty task of attempting to lead life with the full comprehension that each action will be repeated again and again.

Ill-willing against time is impossible in this context. The expressions “you should have” and “you shouldn’t have” have no meaning. What could it possibly mean if I think I “ought” to do something? If time is circular, no actions have no consequences since they will occur again in the exact order. There is no tomorrow in the figurative sense: the only thing that even matters is the moment, the thing which continually accompanies thought.

In this way, the logic of Zarathustra’s explosion of morality leads to a forced re-understanding of the way we contemplate our relationship with Time. Stambaugh notes that by following Kantian categories to their conclusion forced Nietzsche to rethink the categories that Kant thought.¹⁶⁴ Hannah Arendt claims that the understanding Kant has of reason is based in a particular experience and questioning regarding Time.¹⁶⁵

Zarathustra understands that we experience weakness in the face of Time’s ignorance of the pain and suffering of existence; we fear that all things which live will die, all things which carry on will cease to, that nothing is constant and everything is up for grabs. Out of such weakness we become creative and we lash out at the state of things and we create a world in need of something to redeem it: we create *übermenschen* and heroes and saints.

Zarathustra understands that to overcome morality is to overcome the longing to be rid of the burdens of time as they accumulate in each moment: it means to continually affirm fate.¹⁶⁶ *Amor fati*.¹⁶⁷ To continually affirm fate is to never

¹⁶⁰ GS 341.

¹⁶¹ This view is quite common – though not very rigorous in application: see Kaufmann’s notes to GS at pp. 15-21.

¹⁶² Heidegger, *Nietzsche*, *supra* note 61, vol. 2, at 1-4.

¹⁶³ Joan Stambaugh, *Nietzsche’s Thought of Eternal Return*. (Baltimore: John Hopkins University Press, 1972)

¹⁶⁴ *Ibid*, at xiv.

¹⁶⁵ This theme is elaborated upon throughout the entire lectures: see Hannah Arendt, *Lectures on Kant’s Political Philosophy*. R. Beiner ed. (Chicago: University of Chicago Press, 1982).

¹⁶⁶ Z III “On Old & New Tablets.”



experience injustice, which is to understand that all things are as they must be. In this way, Zarathustra comes to understand the devaluation of all values as a work of fate which forces an understanding of the need to not create values which desire an overcoming of the present through a longing to be other than what one is.¹⁶⁸ Thus to overcome morality is to become the “will that wills itself.”¹⁶⁹

Obviously this is extremely rare and practically impossible for the mass of humanity because to be the will that wills itself is to assume a mastery over fate and contingency that implies that all action is to be self-contained and strangely reflective only insofar as it allows the being to remain in the moment.¹⁷⁰ In other words, to affirm fate continually requires a strangely god-like state. This itself is consistent with the history of German philosophy, which again is rooted in this idea of self-deification through a particular form of emancipation.¹⁷¹ Nietzsche writes that the eternal return forces the greatest weight upon us, that indeed it threatens to crush those who contemplate it, and could therefore be used as a principle for separating those who should rule and those who should not.¹⁷² However Nietzsche recognizes that such an idea is too much to expect from the demise of metaphysics, that indeed what is needed is to allow nihilism to finish itself and draw its final conclusions as it will. He understands that Zarathustra is much younger, and much stronger, than he is.¹⁷³

Nietzsche thus sees philosophy’s task as picking up the pieces after Zarathustra’s “lesson”: that Zarathustra is an experiment founded upon the ideals of Western culture, and an experiment which *fails*.¹⁷⁴ The task of philosophy therefore is to understand the importance of the dynamics latent within nihilism, and to push those aspects to their ultimate conclusions as they arise, be they threatening or not.¹⁷⁵

We understand that the experience described as the “last man” is an expression of where our values have lead us. We understand that morality and the language and conceptions of truth in which they inhere have bottomed out. It is clear that a political task to affirm the “last ones” will simply amount to another form of shoulder-shrugging conservatism, and such affirmation really amounts to abandonment. We also understand that nihilism is something that is occurring of necessity.

Thus, we can see that the problem presented by our values is one where the real threat to the vibrancy of culture is one which reduces meaning to its lowest

¹⁶⁷ GS 276.

¹⁶⁸ Which is the subtitle of EH.

¹⁶⁹ Z I “Of the Three Metamorphoses.”

¹⁷⁰ To be in such a state sounds remarkably like the type of Enlightenment claimed by Tibetan Buddhist monks. I remark on Tibetan Buddhism because it is the only form of Buddhism that believes that any human being can attain Enlightenment in a single lifetime: anyone can be a Buddha even though so very few do become them. See Robert Thurman, “Introduction” *Essential Tibetan Buddhism*. (San Francisco: Harper Collins, 1995), at 3ff.

¹⁷¹ Though very similar to Tibetan Buddhism, it is very *dissimilar* to the rather flaky ideas of “self-creation” of the subject that come out of some postmodern literature, notably Rorty. See “The Contingency of Selfhood” in *Contingency, Irony, and Solidarity*, *supra* note 2.

¹⁷² Again, very Tibetan. Also seemingly contradictory.

¹⁷³ Cited by Ahmed Baig, Interview, *supra* note 101.

¹⁷⁴ Peter Berkowitz, Interview. Montreal: March, 1994.

¹⁷⁵ BGE 292.

denominator without creating a new understanding of what it means to be human. Reflecting on Nietzsche's "last man," we see that nihilism is a place where there is no substantive meaning left to living, that being human is to have lost the ability to create (even to create values – to long to be beyond what is present – to be unable to despise oneself): nihilism is when we as a species, a culturally uniform species, actively will nothingness rather than not will at all.

Thus, Nietzsche's original problem with perspective gives way to a much richer analysis of what is at stake: the very lifeblood of our cultures. Perspectives are not illuminating of the way in which we continually claim to speak truth when we in fact do not; perspectives do not enlighten us about the way we oppress others with statements of fact which are nothing more than inflated expressions of will. Perspective highlights the fact that we have undermined a conception of truth which has formed the basis of our moral discourse, and without that foundation we are forced to confront consequences which speak of a life without meaning. Such a confrontation also highlights the impossibility of returning to morality – since we understand that such foundations are simply irresponsible and lead to the same conclusion. Thus we are left with the deepening of nihilism as an immediate task: to insist that we get to the bottom of what this threat to liberal values is all about. In a certain sense, we have come too soon to be able to ascertain what might emerge from the philosophical and cultural carnage of nihilism, but necessarily must keep our eye focussed on it.

To summarize, we have seen how morality has its basis in a sublimated form of cruelty which is expressed through a resentment at the suffering caused by the falling away of the future into the past. We have seen how Nietzsche understands the particular construction of truth to lead to nihilism, and the way that this is positioned within our culture. We need to understand how postmodernism plays a role in this process, and subsequently to identify what this role does to law in liberal society, and what it does not do. These are the topics of the next three sections.

IV: Postmodernists on Value

Values are called into question by postmodernism, shearing free the ideological and other structural blinders which deafen us to the demands of oppression. In this section I will elucidate why postmodernism is engaged in the process of nihilism, why this engagement is unconsciously reflected in the purposes it pursues. At that point, we will be able to undertake an assessment of its impact in law.

Postmodern theoretical practice is unwittingly nihilistic because it perpetuates the devaluation of values by continually subjecting all aspects of social relations to perspicuity.¹⁷⁶ By forcing such analysis on meanings which would otherwise remain hidden, postmodernist theorists demonstrate that there is no basis to social relations in any kind of ultimate sense, that social relations are based on varying

¹⁷⁶ Here I am referring to a wide variety of works like Derrida's *Of Grammatology*, *supra* note 33, like Gary Minda's *Postmodern Legal Movements*, *supra* note 3, Hutchinson's *Dwelling on the Threshold*, *supra* note 3, as well as works ranging from those by Foucault to those by Rorty.



relations of power, on historicity, on things other than that which the social relations claim to be based. It is unwitting because it does not see its basis in a particular disposition toward life: postmodernism wants to hold someone responsible. The root of this is in the underlying inheritance of the decadent worldview that sees decline as an indictment against life.¹⁷⁷ An analogy should suffice to demonstrate what postmodern criticism is doing to our legal institutions.

S.F.C. Milsom has argued that property rights emerge during the thirteenth century as feudal society began to wane.¹⁷⁸ Feudal lords controlled the processes by which tenants would be seised of the land, usually picking the eldest son of a family line on to whom to pass the land. This did not always occur: occasionally a lord would choose a different son, someone he felt would be in a better position to meet the moral obligation that seisin implied. Generally the custom of the place governed the way title would be transferred, just as much other law was governed.¹⁷⁹ This moral obligation was not “title” nor was it any kind of proprietary interest as we would understand it, rather it was a personal obligation that tied the lord to the tenant in complex and meaningful way. The relationship of the tenant to the land was a source of moral meaning as was the service of the lord.

This relationship was altered by a policy instituted by Henry II designed to add certainty to the ownership of land in England at a time when the Baronial wars had led to much confusion. In order to foster this, the King’s Bench allowed tenants to appeal seisin to their court to establish who had veritable title. The King’s Bench ensured, as a matter of policy, that the eldest son would be entitled to the land. So where the previous system of seisin created a series of expectations and obligations enforced customarily, this new regime turned those expectations into entitlements. Thus, if an eldest son had been passed over, his heirs’ heirs could bring an action to have the entitlement decided at the King’s bench and have the current tenant ousted. This turned the moral obligation of seisin into little more than a formality that was secondary to the entitlement created at law. Rights had been congealed out of obligations, transactions out of meaningful social relationships.

Thus, by subjecting social relationships and obligations to the scrutiny of an outside standard destroys that meaning by requiring it to be substantiated according to that standard. Such scrutiny is the knife under which God is dissected for truth, and the one under which all moral bonds come to be exposed for their basis in a particular disposition toward life, and the one under which language is exposed as a system of concepts created and mobilized according to power rather than *logos*. Postmodernist criticism, far from providing a radical critique of social relations, is simply an advanced form of liberal rationality in search of that emancipatory truth that will allow us to become the humans that we are meant to be, of course implying that what we have is not good enough to be affirmed. Thus postmodernists have reached the despairing and cynical Kleistian conclusion without living the consequences of it.

¹⁷⁷ WP 135-37.

¹⁷⁸ For this discussion, see S.F.C. Milsom, *The Legal Framework of English Feudalism*. (Cambridge: Cambridge University Press, 1976), at ch. 2; see also Paul Brand’s interpretation in *The Making of the Common Law*. (London: Hambledon, 1992), at ch. 9.

¹⁷⁹ Richard Ireland, “How Common was the Common Law?” Landsdowne Lecture. University of Victoria, Spring 1997.

Postmodernism grows out of this estranged relationship with truth.¹⁸⁰ At its most stark and crude, the postmodern critic understands her position as a social critic as one of occupying the precarious ground of pointing out those elements of social practice and theory that evidence power and oppression as assertions of truth rooted in perspective. At a more profound level, the postmodern critic delves into the hierarchies of language to discover, and hence to create, categories of our thinking that were previously hidden.¹⁸¹ For instance, Derrida sees his task as deepening the critique leveled by Nietzsche by going into the assumptions implicit in our use of language and grammar to discover the hidden meanings that a text implies. More than simply “close reading,” this practice of taking apart the textual meanings of texts, something he termed *deconstruction*,¹⁸² involves looking at the duality of terms, by looking to identify that the presence of a particular meaning also involves the absence of its opposite. This “move” to obscure the meaning of the absent, to construct a reality on top of those hidden elements, exposes the power moves that are at work in the text. Such dualities, he claims, are in need of being broken down.¹⁸³

In this way, postmodern “theory,” if we can call it that (and I think we can), identifies the motive of such perspectives as “power” moves rather than as moral ones or as innocent expressions. Though there are a variety of ways of describing what postmodernism is about, it is true that we are dealing with philosophical excursions, and not with literary theory nor architectural developments.¹⁸⁴ But these are not hard and fast categories. Indeed, postmodernists resist categories as unjustified expressions of domination which seek to constrain and dominate discourse along particular lines to serve particular interests, interests which may or may not coincide with those mobilizing such categories.¹⁸⁵ This is a sticking point for some social theorists. Neo-Marxists and Marxist historians problematize domination according to a structure that makes sense out of domination by pointing to a particular dynamic which identifies a particular class as in control of domination while also reaping its rewards; Foucault and others identify the non-centralized dimensions of power by pointing to the unconscious way power infuses social relations; the trends that emerge, though serving particular interests, may not serve the original ones. Comparing Foucault’s *Madness and Civilization* with the view expressed in E.P. Thompson’s *Whigs and Hunters*,¹⁸⁶ the kind of history engaged in by Foucault yields distinctly different results and portrays different dynamics at work than the one by Thompson.

¹⁸⁰ See Habermas, “Postmodernity: Nietzsche as Entry Point” *The Philosophical Discourse of Modernity*, *supra* note 1, at 85ff; see also Gregory Bruce Smith, *Nietzsche, Heidegger and the Transition to Postmodernity*. (Chicago: University of Chicago Press, 1995), at part 2.

¹⁸¹ This is the project (and I guess the un-project) of Derrida’s *Dissemination*, *supra* note 38.

¹⁸² Derrida, *Of Grammatology*, *supra* note 33, at ch. 1.

¹⁸³ Derrida, *Of Grammatology*, *supra* note 33, at 3-5.

¹⁸⁴ To cover such topics is obviously too huge, but the theorists themselves do not limit themselves to discussions of topics which fit neatly into “disciplines.” Thus Lyotard will engage literary and aesthetic developments, architecture, pop culture, and haute couture all in the same short essay: Jean-François Lyotard, *Peregrinations*, *supra* note 47.

¹⁸⁵ See Foucault, “Preface” *The Order of Things*, *supra* note 33; and *The Archeology of Knowledge*, *supra* note 33, at 31-7.

¹⁸⁶ Michel Foucault, *Madness and Civilization*, *supra* note 64; E.P. Thompson’s *Whigs and Hunters: A History of the Black Act*. (New York: Pantheon, 1975).



The implicit assumption at work is that the use of power to dominate is suspect. Foucault never comes out and says that what we need to do is to resist power, he simply notes that that is what will necessarily happen: with all assertions of power there will be resistance.¹⁸⁷ Baudrillard as well looks at the hegemony of the “sign” and the effect it has in controlling and mobilizing, if not forging, our attention span. With both Baudrillard and Foucault the implicit message is that assertions of meaning are not some objective reflection of reality, but rather are a power move made by someone somewhere which reflect what sort of domination and discipline they seek to wield. However the use of power may not be determinative: meaning remains up for grabs. At the risk of oversimplifying to prove the point, rather than picture meaning as an open forum where people trade attempts at articulating the closest representation of reality,¹⁸⁸ and rather than picture meaning as the result of a program instituted through the regular meetings of a group of old white men who own all the industry in the world, postmodernism offers the picture of a pile of monkeys all clambering to shout a single word upon which no one can agree.¹⁸⁹ With such chaos as the underlying picture of what is really going on in the world, postmodernists lunge into the construction of meanings to shout: “meaning is constructed, and you are trying to hide behind the word ‘truth’ when in fact you cannot.” The postmodernist calmly, if not boldly, asserts: “Truth is relative, and only bullies use the word,” and blinks.

Thus the underlying agenda of much postmodern criticism is to uncover the abuse of power over the subject; such an analysis is yielded in order to free us from the shackles of domination. Postmodernism is rooted in a specific vision of what it means to be human, and implicit in this construction of what power relations bear on the individual there is an emancipatory ethic underneath which creates a general feeling of dissatisfaction and resentment with the present.

By seeking to destroy the myths around the use of language and truth, postmodernism reflects an older category of belief in an ability to “uncover” the bases of things as they really are. Which, it seems to me, is really a subterfuge for asserting a claim of verity. To be able to say that the sign is itself reality is to say that appearance is all reality. Appearance, however, is still based in a conception of perception which implicitly endorses an “out there.” To talk of signs and similar aspects of perspectives as the only reality is to enter a conundrum that is not merely linguistic nor conceptual. Though Wittgenstein would point to the way the labyrinthine contours of language necessarily control the outer limits of our thoughts,¹⁹⁰ Nietzsche would point to the moral inclination which drives postmodernist theorists to want to blame the users of power, since this is what those who would find “truth” are up to. The problems of the present described by postmodernists are thus reflected in an implicit utopic vision of what is preferable: an “ought” statement is implied, just as is an “ought not.”

¹⁸⁷ Foucault, “The Concern for Truth” *Foucault Live*. John Johnston trans. Sylvere Lotringer ed. (New York: Semiotext(e), 1989), at 304-5; for the way resistance and discipline work in the particular context of the evolution of punishment through the establishment of the panopticon-style of prison management, see *Discipline and Punish*, *supra* note 35.

¹⁸⁸ Something blown apart by Nietzsche, though oddly reiterated by Rorty in *Philosophy and the Mirror of Nature*, *supra* note 2: Nietzsche is conspicuously absent in this book.

¹⁸⁹ I have simplified these into archetypes not to demean their respective analytical power but simply to demonstrate in a crude way the fundamentally different picture of the world with which postmodernists approach questions.

¹⁹⁰ See Rorty’s discussion of Wittgenstein at *Contingency, Irony, and Solidarity*, *supra* note 2, at 11-13.

This Utopia is, however, unbelievable to postmodernists: is this “play”? Or is it masked despair? Through much of postmodern literature we find an amalgam of styles and methods to pursue the agenda of deconstruction, of illuminating bases of power, of defining new non-oppressive paths for respecting difference. The purposes and vocabulary are varied and, reading the excitement with which they are bandied around, it is as though theory and philosophy were at an exciting time and breakthrough: all kinds of new and creative developments are pushing forward toward a new synthesis and dispersal of meaning into a veritable cacophony of “truths,” each with its own right to exist.¹⁹¹ This excitement thankfully lacks religious zeal, but is no less suspect. Postmodern enthusiasm does not approach Zarathustrian affirmation, nor contemplate it. Postmodern enthusiasm is, as we have been witnessing, emancipatory. Given Nietzsche’s critique of the foundations of morality and the ethic of pity and resentment which underlie it, I simply do not understand how this can be an accurate or sustaining vision let alone a theoretical standpoint inspiring anything but skepticism.¹⁹²

One theorist in particular has attempted to come to terms with the apparent contradiction of critique after a belief in universal truth has withered. Richard Rorty has formulated a new pragmatism which accepts that our beliefs are contingent on history and community and yet that we believe in a conception of liberty and justice which seeks justification on universal grounds.¹⁹³

He believes that there is no use in trying to get to foundations. Indeed he is right. Rorty argues that to be an ironist is to accept the contingency and historicity of our beliefs, aware that they could not be universal, and yet to proceed upon them as though they were. This is less clear. He argues that at some point we simply cannot question anymore, we cannot understand why cruelty is not bad, why hatred is unacceptable. Therefore, Rorty states that the ironist must accept that these will be her core values, not open to criticism, and that she will, and should, actively engage difference in her life to challenge her identity and her entire way of life to ensure that she is not perpetuating cruelty.

Such a view is reflected in the recent work of John Rawls and Richard Posner, both of whom have found Rorty’s justification of the liberal tradition to be quite appealing because it inevitably justifies it by default: “this is just what we do around here.”¹⁹⁴ The postmodern pragmatist believes in freedom because of where they are rather than because it is true. Truth is no longer required to justify any beliefs – indeed, they are tired of trying. Beliefs are not *true* because they are ours: no one has an absolute standpoint to ascertain what is true and what is not. But they are *justified* because they are ours. We walk through the world with particular

¹⁹¹ See Rorty’s discussion of the possibilities for the “future” in what he would call a non-utopic way: *ibid.*, ch. 9.

¹⁹² I admit that theorists like Rorty, Lyotard, Irigaray, Foucault, and Derrida are all picking up the pieces left by Nietzsche and Kant in their own particular way, and each one finds something compelling about this legacy. This paper addresses their efforts. It does not, however, address the larger sociological phenomenon occurring in Universities around the world, which is the move towards an increase in postmodern jargon at the expense of sound and critical rigour into concrete philosophical problems which, as Nietzsche’s tenor certainly indicates, are as serious as it gets. Which begs the question of the real reason people engage in this process in such large numbers. Is there a herd mentality among postmodernists as well? Law is not immune.

¹⁹³ See *Contingency, Irony, and Solidarity*, *supra* note 2 for a complete discussion of this quandary and how we as a society should attempt to merge from it.

¹⁹⁴ Rawls, *Political Liberalism*, *supra* note 26; Posner, *The Problems of Jurisprudence*, *supra* note 2.



vocabularies which reflect the contingency of our “selves” and of our communities. The liberal ironist immerses herself in the vocabulary of others to understand how her vocabularies are impacting upon them. Apparently the belief in not promoting cruelty is enough to buttress what seem to me to be obvious concerns of power in discourse formation.

Rather than look at concerns of power, however, recall how these ideas of freedom, and the despising of cruelty, are based in a specific form of universalism.¹⁹⁵ The liberal heritage that is contingently ours arose out of an ethic of belief in a truth that was beyond the power of human beings to alter. A tension emerged between authoritative relations of power in society and those based on reason. Such a conception of truth both allowed and required philosophers to assert that human beings endowed with reason are free and equal, that humans have dignity by virtue of their reason and their free will, and that the moral law stands to each of us through reason; Nietzsche reminds us that all of this is our heritage, and he rightly notes that it is the *bravery* of Kant to have lead us onto the ground of truth by bringing it into question.

The abandonment of “truth” as a goal within this structure of beliefs introduces disarray and contradiction into the liberal identity.¹⁹⁶ The ideas of liberality, toleration, and the desire to end cruelty are moral ideas which imply being “true.” Freedom is an idea created to buttress morality, not simply an unspoken capacity that ironists have;¹⁹⁷ toleration is desirable because (i) it produces the free exchange of ideas in order to foster truth,¹⁹⁸ and (ii) it encourages respect for individuals *qua* individuals as opposed to according to their beliefs or identity.¹⁹⁹ Thus, Rorty’s new pragmatism abandons the idea of truth which necessarily underpins and forms these liberal conceptions, and yet retains such conceptions because abandonment of such contradictions would be to denature the being of identity.²⁰⁰ A philosophy of radical criticism that accepts the contingency of morals as criteria of validity is contradictory when there is no basis upon which to rest such claims: radical criticism requires, in its basic etymology, a belief in a “root,” “core,” or “essential truth” at bottom.

¹⁹⁵ Trinkaus and Shipman describe the way in which science historically constructs the metaphor of the Neanderthal to reflect what scientists see as latent aspects of human nature. Thus at one point in time they were conceived of as having a dark and beastly side, and in the 1960’s they were seen as being primitive flower children. The point in relation to our discussion is that we continually create ideas of what truth is and base it in a form of universalism rather than in metaphor or myth. See Erik Trinkaus and Pat Shipman, *The Neanderthals: Of Skeletons, Science, and Scandal*. (New York: Vintage, 1994).

¹⁹⁶ Rorty would disagree because it assumes there was uniformity before; further, uniformity assumes that there is some absolute perspective out there where so-called “relative” perspectives can be canvassed and compared. *Contingency, Irony, and Solidarity*, *supra* note 2, at 46-7.

¹⁹⁷ Is this a form of universalizing? I imagine that Foucault would indict Rorty for the worst kind of theorizing, that is, the most insidious form of concept creation: the passive-aggressive power move made when speaking about how the ironist *accepts* contingency, *challenges* herself to be less cruel, *acts on* her liberal credo. Such language introduces free will through the back door rather than problematizing it in the forthright manner of Kant. This is a very serious tension in Rorty’s work, and one that ironically runs through “The Contingency of Selfhood” *Contingency, Irony, and Solidarity*, *supra* note 2.

¹⁹⁸ See J.S. Mill, *On Liberty*, *supra* note 18, at ch. 2; and John Locke, *A Letter Concerning Toleration*, *supra* note 12.

¹⁹⁹ Kant, “What is Enlightenment” *supra* note 117, at 268-69.

²⁰⁰ Denature is not Rorty’s word, but this is the idea – which begs the question as to what an un-denatured being is, that is to say, a “natural one.” At a certain point, it is unfair to demand consistency and verifiability of Rorty’s concepts, since the vocabulary he is forced to operate with implies such ideas and usages: See Nietzsche’s explanation of the control that grammar demands: GS 354. This is the thread upon which Derrida works in *Of Grammatology*, *supra* note 33.

The result of “anti-foundationalism” as an approach to political philosophy is a renewed conservatism: the implied trust in old categories (“it is what we do around here”) promotes an unwillingness to question tradition since it is now a pillar of identity. One can question these things only insofar as one is willing to question the bases of one’s identity, and as Rorty notes, we only question identity insofar as it reflects upon our own social construction. This means I inevitably run up against values which I will not question, which will remain. More importantly, what is the impetus to question pillars of identity if there is no “truth” or “answer” to such question other than trying to live within what my heritage demands. The conservatism that results from an abandonment of central categories is not, I repeat, a new phenomenon.

Hume’s skepticism resulted in conservatism because there were no truths received except those learned by experience.²⁰¹ The thing to be trusted was not what reason as a separate capacity could establish, but what was known from experience. Habit and custom therefore expressed the wisdom of reason as it had been lived through the ages. This allowed Hume to say that one could not *prove* that the sun would rise, or even that there was one, but that he would bet that it would rise.²⁰² As we know, Kant’s radical dissection of truth was spurred on by Hume’s skepticism. The unwillingness of Rorty and others to adequately dig into the consequences of dismissing “truth” should serve as an argument against them.

Rorty is not breaking through the moral categories here – which is why it remains locked in as unconscious nihilism. Again, it is unconscious because it incorrectly assumes that the consequences of dropping truth are liberating. Further, the acceptance of “what we do around here” as a ground for morality in something we might call custom by Rawls and Posner demonstrates that a conservative approach to liberal institutions is formed by the postmodern gesture to revert to historicity as authority for whether things are right. Unfortunately, much of the legal criticism surrounding pragmatism has not focussed on the contradictory position of the anti-foundationalist and the neo-liberal, which is why his responses to such criticism are effective: he is able to continually entrench the acceptance of liberal ideology as something which makes sense though not called to defend it on absolutist grounds.²⁰³ It is when this postmodern pragmatism is challenged on both counts at the same time that the consequences emerge. And the consequences demonstrate that Rorty’s neo-pragmatist postmodernism is also embedded in a moral discourse which builds utopias of human emancipation and betterment at the expense of the terrible and oppressive present.

²⁰¹ Hume, *On the Nature of the Human Understanding*, *supra* note 82, at 61.

²⁰² *Ibid.*

²⁰³ Rorty’s interpreters and critics are numerous. For a taste of the kinds of things that are being said about him with respect to his legal pragmatism, see Lynn A. Baker, “‘Just do it’: pragmatism and progressive social change” (1992) 78 *Virginia Law Review* 697; Frank Michelman, “Private personal but not split: Radin Versus Rorty” (1990) 63 *Southern California Law Review* 1783; and William G. Weaver, “Richard Rorty and the radical left” (1992) 78 *Virginia Law Review* 729. See Rorty’s ideas on pragmatism and law, and his responses to these pieces and others in “What can you expect from anti-foundationalist philosophers?: a reply to Lynn Baker” (1992) 78 *Virginia Law Review* 719; “Pragmatism and Law: a response to David Luban” (1996) 18 *Cardozo Law Review* 75; and more generally “The banality of pragmatism and the poetry of justice” (1990) 63 *Southern California Law Review* 1811. See the more nuanced piece on the extent to which the underlying idea of Rorty’s pragmatism (which had not been fully articulated yet by Rorty) can be pushed in John Stick, “Can nihilism be pragmatic?” (1986) 100 *Harvard Law Review* 332.



Postmodernists thus engage in deconstruction on moral grounds, while their particular understanding of values and subjectivity is Kantian. By relying on the differentiation of assertions of verity as attempts to establish objective truths and the inevitable impossibility of truth being anything but subjective, the postmodernist capitalizes on Kant's distinction with the purpose of attempting to show how truth claims are immorally imposed on others.

The loss of the Nietzschean origin is apparent in that the urgency of what nihilism represents has been lost. "God is dead" is still a cry of escaping authority rather than a cry at the lost of horizons, the "last ones" unwittingly moved toward. Which really is what Nietzsche expects from nihilism. In this way, the advent of the "last ones" occurs without scrutiny.

In this section we have seen that postmodernism actively participates in the devaluation of values, but with emancipatory rather than destructive intent. At this point we need to fill in what the relationship between nihilism and liberal legal culture is. I turn to discuss the theory of Max Weber because he adds to the discussion of the *philosophical* creation of the "last ones" by giving a *sociological* description of the arrival of nihilism through the *social* creation of the last one. That is, he explains what nihilism looks like in social practice.

V: Weber on Value

Max Weber's discussion of facts and values, as it arises in the context of the Protestant Work Ethic, points to the way in which meaning drops out of values in the practices of modern capitalist society. Weber takes on Nietzsche's originating questions concerning value as a problem.²⁰⁴

In his lecture "Science as a Vocation," Weber sets out his understanding of the way in which science is limited to ascertaining empirical facts, and yet cannot justify nor give an account of the values which underpin it. Science as a vocation involves the dedication to understanding such empirical studies and not to their basis in value; an understanding of the empirical nature of reality is structured by the vocation, not by the nature of "truth" as such.²⁰⁵ Weber argues that the scientific spirit, defined by a conception of "infinite progress," gives the imprint of meaninglessness to death and to life because of their finitude. The underlying theme of the lecture is the idea that the rationalizing tendency giving rise to science functions to render meaningful frameworks of community meaningless by demonstrating that there is no factual basis to them, *and by linking the reality of such values to their negative facticity.*²⁰⁶ "The fate of our times is characterized by

²⁰⁴ Bloom, *Closing of the American Mind*, *supra* note 13 at 195; Bernstein, *The New Constellation: The Ethical-Political Horizons of Modernity / Postmodernity*. (Cambridge, Massachusetts: M.I.T. Press, 1992), at 38.

²⁰⁵ SV 283-86. The vocation of science is also a rationalization of "thought" in that scientific research becomes bureaucratized. Weber writes, "Through the concentration of [scientific research and instruction] in the hands of the privileged head of the institute the mass of researchers and instructors are separated from their 'means of production,' in the same way as the workers are separated from theirs by the capitalist enterprises." ES at 983. The same thing is remarked, but with the verve of an academic address, in SV 278.

²⁰⁶ SV 285-302.

rationalization and intellectualization and, above all, by the ‘disenchantment of the world.’²⁰⁷

Weber came to the understanding of the Kantian fact / value distinction through his reading of Nietzsche.²⁰⁸ Nietzsche argues that the Kantian distinction between the knowable world and the objective world serves to augment the nihilistic tendency latent within Western rationalism.²⁰⁹ By dedicating himself to the ideal of “truth,” Kant ends up affirming a subjectivist understanding of the foundations of moral values by pointing out that our knowledge of them *as true* is dependent upon our faith that such a realm exists. The explicit differentiation between the ‘is’ and the ‘ought,’ between facts and values, means that any ascertainable values, norms, ends, visions, or goods held by communities are particularized to their subjective position in the world: they have no objective basis.²¹⁰

Weber captured this Nietzschean critique in his sociological studies by looking to understand the way in which the process of meaninglessness unfolds in practice. As early as *The Protestant Ethic and the Spirit of Capitalism*, Weber noted that the rationalizing tendency of the modern world had its roots in particular cultural beliefs.²¹¹ Science is implicated in this process as a producer of “facts” according to a specific agenda of which facts are worthy of identification; in this way, there is no possibility of an “objective” social science: “an ‘objective’ analysis of cultural events, which proceeds according to the thesis that the ideal of science is the reduction of empirical reality to ‘laws,’ is meaningless.”²¹²

The subjective ascertainment of cultural values always takes place from a point of view.²¹³ As is plain by Weber’s characterization of the basis of social action, facts and values play a different role in our analysis of things.²¹⁴ Social action provides the ground for the interpretation of all meaning.²¹⁵ Thus, meaninglessness is not necessarily lifelessness, since a machine’s meaning is connected to its productive relationship.²¹⁶ Meaning comes from the association made on the significance of observable facts. The significance we give to it is the way in which values enter into the finding of facts in social analysis.²¹⁷

²⁰⁷ SV at 302.

²⁰⁸ It was with Nietzsche that the Kantian project of grounding moral values in reason received its most fully developed analysis. And yet Nietzsche was not out to prove Kant wrong, but rather to deepen the critique. Mark E. Warren, “Nietzsche and Weber,” in *The Barbarism of Reason: Max Weber and the Twilight of Enlightenment*. A. Horowitz and T. Maley eds. (Toronto: University of Toronto Press, 1994) 68, at 76. Weber was indebted to Nietzsche for the fundamental insight as to the transitory nature of “values” and the lack of basis these had in “reality.” See Bernstein, *supra* note 203, at 38; and the affinity noted by Karl Löwith, “Max Weber’s Position on Science” in *Max Weber’s ‘Science as a Vocation’* E. Carter and C. Turner trans. P. Lassman and I. Velody eds. (Boston: Unwin Hyman, 1989) 138, at 138-9.

²⁰⁹ See Nietzsche, “How the ‘True World’ Finally Became a Myth” TI 335.

²¹⁰ *Ibid.* See also, generally, BGE.

²¹¹ *The Protestant Ethic* was written in the early 1900’s, before much of Weber’s later work on the finer elements of the rationalizing tendencies in society. Indeed, in the closing paragraphs of the book, Weber identifies the infamous “iron cage” which the rationalizing tendency of modern capitalism has wrought, and then proceeds to draw up a plan of areas which need to be looked into. A quick scan of the contents of *Economy and Society* shows that Weber was able to look into many of these areas. See PE 182ff.

²¹² OSS 255-56.

²¹³ OSS 257

²¹⁴ ES ch 1, 4-22.

²¹⁵ ES 7, 9, 10, 13, 22-4.

²¹⁶ ES 7.

²¹⁷ ES 4-24; OSS 256-8.



However, Weber notes that since science is based on establishing facts, it cannot make claims about values because there cannot be scientific, that is, *rational*, foundations for normative claims. It is precisely here that the true nature of the fact / value distinction, for Weber, comes into view: facts concern the propositions made concerning reality which are taken as demonstrably true, whereas values are those normative claims which are not, nor could not, be the subject of such social observation. In “Science as a Vocation,” he writes

Let us first clarify what this intellectualist rationalization, created by science and by scientifically oriented technology, means practically. Does it mean that we, today, for instance, everyone sitting in this hall, have a greater knowledge of the conditions of life under which we exist than has an American Indian or a Hottentot? Hardly.²¹⁸

The reason that science cannot tell us more about the conditions of life is because of the differentiation between matters of fact and matters of value. Matters of fact are those with which science occupies itself; matters of values are those which, according to Weber, are matters of politics.²¹⁹

Science is preoccupied with the domain of facts because facts render the unexplainable explainable. Weber notes that science is the result of complex cultural developments throughout history: the Greek understanding of dialectics coupled with the pursuit of truth and the need to explain the irrationality of the world which make up the history of Western thought. Humans give meaning to suffering through reason.²²⁰ In its early stages science represented a means for knowing God’s kingdom, that is, as a path to true nature.²²¹ Thus, “facts” come to represent “absolute” truths concerning that reality. However, once the religious underpinning for the rationalizing tendency that religion signifies is lost, then one is left with a series of pieces of knowledge about the world which are no longer given significance by the purpose which gave rise to them. Thus, facts come to be meaningless because the values through which we interpret them have either become discredited or have been undermined by the search for “truths.”²²²

Values are not reducible to facts, but are concerned with notions of the good, i.e. how one should live one’s life and in what one shall believe.²²³ It is difficult to conceive of “believing” in science *per se*: does it mean anything to be committed to a belief in gravity? Meaning is not something that comes from a set of demonstrable facts, but rather from the creative act of value positing. For Weber, this creative act involved, among other things, acts of prophecy through a charismatic leader for an identifiable group.²²⁴ Values are those propositions

²¹⁸ SV 286.

²¹⁹ See SV 292-3.

²²⁰ Covered in ES ch. 6, pt. 1 & 2.

²²¹ ES 289.

²²² Weber notes that this is the way in which science operates without referring to “nihilism.” Compare Nietzsche, WP 1-12.

²²³ See Heidegger, “The Word of Nietzsche” *supra* note 65, at 72ff.

²²⁴ This understanding is another debt owed to Nietzsche. See “On the Old and New Tables” Z. See Weber on the power of the charismatic prophet as a creator of values and visions for society: ES 439-50.

which direct the conditions of life of given communities by stating the conditions of living: they concern how we think it best to live.²²⁵

Thus, values are a *cultural* phenomena because they are beliefs grounded in custom concerning the way in which life is led from a particular point-of-view. As he showed in *The Protestant Ethic*, capitalism, and the rationalizing tendency particular to it, is a value-driven phenomenon. In the same way, science itself is driven by values, but by values it cannot ascertain scientifically. Value judgments are possible, indeed, they are highly important; however, these judgments are *only* important within the conceptual scheme of the observer, i.e. from the scientist's point of view, since "the choice of the object of investigation and the extent or depth to which this investigation attempts to penetrate into the infinite causal web, are determined by the evaluative ideas which dominate the investigator and his age."²²⁶ With this, Weber has deepened the subjectivism of Kant by taking the subjectivity of value to its logical conclusion: values are particular to points-of-view and they determine which facts are valuable.

Since there are no normative claims based in science, it is not aware of its own basis in value: the belief that the pursuit of truth at all costs is valuable.²²⁷ Weber's focus is not, however, on the lack of self-reflexivity,²²⁸ but rather on the power that rationalization exerts through science. Science, regardless of its paradoxical history, effectively subverts questions of value by demonstrating the groundless nature of values in reality (a reality taken to be constituted on a factual basis).

Weber admits that science does not exist without presuppositions: it is committed to an ideal of truth. This "value" itself is not effectively understood by the domain of science because it is not possible for science to analyze this value according to its own criteria. Thus, when Weber asks "what is the value of science?" he is not doing so in the same spirit as Nietzsche. Rather, Weber is directing our attention toward the way in which science *rationalizes*. He readily acknowledges that science further presupposes that the quest for knowledge will yield truths which are valuable.²²⁹ However, such an acknowledgment does not go far enough in explaining how science, as the pursuit of truth, works to subjugate myth, or how it "disenchants." It is in its *rationalizing* that science breaks down meanings.

Science is based in demonstrable fact and calculability: during the Renaissance the path to true nature was considered to be through the empirical experiment, of which "art" was one kind.²³⁰ This "path to truth" was, however, taken with

²²⁵ Heidegger, "The Word of Nietzsche" *supra* note 65, at 71.

²²⁶ OSS 259.

²²⁷ Again, Nietzsche hovers at the edges of the discussion as the philosopher who indicted science for its lack of self-reflexivity into its own origins. SV 290-91, 301; Nietzsche, GS 344. Indeed, Nietzsche claimed that the scientific spirit serves to paralyze it because the pursuit of truth results in the realization that there are no ultimate truths.

²²⁸ However, he does note that "forgetting" has significant consequences for the loss of values. PE 182. Husserl's early work on science borrowed the Nietzschean understanding of the value of "forgetting" for action. He claimed that the reason that science was so effective was because it was able to "forget" the problematic roots from which it sprung and work to isolate particular problems to study. See Edmund Husserl, *The Crisis of European Science and Transcendental Philosophy: An Introduction to Phenomenological Philosophy*. D. Carr trans. (Evanston: Northwestern University Press, 1970).

²²⁹ SV 290-91.

²³⁰ SV 288-89.



religious zeal by people like Francis Bacon in the 1600's.²³¹ When the religious framework becomes a decoration of thought rather than a driving force, the will to truth inherent in science ends up breaking down values without looking to their significance. Thus David Strauss's work on the life of Jesus Christ appears in the mid 1800's as a pinnacle work of secularization.²³² By taking different aspects of values and giving them a factual ground does not serve to disprove the value, but it does work to render it unbelievable. In this way, science may render a belief in Creationism, or the parting of the Red Sea, less believable, which in turn affects whether or not people will find the belief in a Judeo-Christian God something that resonates within them; by rendering the world calculable, science makes reference to these values seem difficult if not irrelevant. The explanatory force values hold is diminished through rationalization.²³³ And yet, as Weber points out, science is not able to give rise to values: it cannot tell us how we should live our lives.²³⁴ Science cannot create values because it is based on the calculability of everything not on the creation of meaning.²³⁵ It can provide no answer to the question of how to live because, first, the question does not lend itself to instrumental rationality and calculability, and second, facts themselves do not furnish meaning on the world.

Because science is based in a conception of continual progress, death is rendered a senseless and irrational event.²³⁶ This idea of progress is a religious inheritance: the world is on a course toward something more significant than the individual. However, with the rise of secularism and the disappearance of the religious ideal, the ideal of an "infinite progress" lacks its normative basis, and the idea of death, of the finitude of the human, becomes even more monstrously meaningless and irrational. Thus, science retains aspects of its religious origins: demise of religion without demise of religiosity.²³⁷ At this point, the irrationality of the world becomes striking as there is no larger framework to make it appear intelligible. Nothing remains as a substantial element for belief since all values become subsumed in fact.²³⁸ And since facts do not provide grounds for values, values "disappear."

Rationalization is the process of rendering everything intelligible. It has its origins in the ordering of charismatic prophecies into institutionalized forms of religion. But what makes the process of rationalization peculiar to the West is the specific way it originated in a monotheistic conception of truth.²³⁹ The process of the

²³¹ Francis Bacon believed that science could "master" and "control" nature, that only then could "man" extract "her" secrets. It is important to view the thought of the man in the context of his life in order to get a complete view of the malevolent patriarchal attitude driving the scientific spirit of the early 1600's. As the Lord Chancellor of England during the witch trials, Bacon was responsible for the death of thousands of women.

²³² Nietzsche launched a scathing attack on Strauss and the young Hegelians, claiming that those engaged in his type of secularizing did not know the effects of what they were doing, which was, in effect, killing gods. See Nietzsche, "David Strauss, the Confessor and the Writer" UM I:1; see also his biting indictment of Socrates as the one to start the train of demythologization in BT 15.

²³³ SV 286.

²³⁴ Weber cites Tolstoy: "Science is meaningless because it gives no answer to our question, the only question important for us: 'what shall we do and how shall we live?'" SV 290.

²³⁵ SV 286-7, 289-90.

²³⁶ SV 287.

²³⁷ Bernstein, *supra* note 203, at 40; Nietzsche, GS 125.

²³⁸ SV 302.

²³⁹ SV 288; see Nietzsche, GS 143.

rationalization of social relations is thus a product of an ancient way of looking at the world (of seeing an eternal “being” behind the “becoming” of experience),²⁴⁰ tempered by a religious understanding, and augmented by elements particular to each.

I have sought to show in this section that the basis of disenchantment, of seeing the calculability of everything, has its roots in the distinction between facts and values. This distinction is further based in a cultural understanding about the “rational,” that is to say, ascertainable, nature of the world. Taken as knowable, our pursuit of “the world” in knowledge brings us to the stark and bitter realization that there is no basis in reality for our most strongly held convictions. Thus the motor driving this will to know, the distinction between facts, the observable elements of the reality, and values, those norms of conduct and life in which we believe, produces a state of affairs where we lose sight of our values. This understanding of the world leads to *disenchantment*.²⁴¹ As Weber describes it, the *process* where we see the distinction between facts and values significant in causing disenchantment is *rationalization*.

The loss of meaningful frameworks for understanding the world is part of the phenomenon of rationalization. Generally speaking, rationalization is the process whereby the world at large is rendered comprehensible. Thus, Weber demonstrates, at length, the precise way in which religion operates to rationalize the normative meanings produced by the creative act of prophecy, and by the material conditions of communities. At different times Weber uses the term “rational” in very different ways. Prophecy serves to “rationalize” the world by giving its irrational basis the stamp of meaning.²⁴² Here the word means “to render order” on the world by “organizing” its interpretation into meaningful values. By routinizing prophetic value into social action, religion “rationalizes” practice, referring to the routinization of religious practices. Religious institutions appropriate this creative valuative force by institutionalizing the practices with which it coheres.²⁴³ Institutionalization means that the practices of the religion are depersonalized and routinized such that it becomes technical (i.e. based on *téchne*, the technique of practice) and specialized.²⁴⁴ As Weber notes, the institutionalization of such prophetic worldviews into “religion” is the most effective way to ensure their survival, their broad based acceptance, and their efficient administration.²⁴⁵ “Religion” becomes the rationalized way in which values are brought to the masses.

Thus, rationalization is a way of systematizing knowledge. Where prophecy gives meaning to the suffering implied by an irrational world, religion systematizes that meaning in a way that allows for such meanings to be efficiently “administered.” Thus, worldly religions develop an administrative apparatus through the creation of a hierarchical organization where knowledge and power correspond near the top. This routinization, however, has its difficulties because it leads to instrumentally

²⁴⁰ This is the task set upon by Plato. SV 288.

²⁴¹ SV 286.

²⁴² PV 122-23.

²⁴³ ES 500-17.

²⁴⁴ ES 452-67.

²⁴⁵ ES 432-3, 435-9; PE 176, 179-83.



rational forms of social action which obscure the values giving rise to them.²⁴⁶ This type of “bureaucratic” administration is, for Weber, the most efficient and rational (in the sense of “logical”) form of organization for institutions to manage their projects, and yet he mourns the passing of a type of creativity that such organizations actively displace.²⁴⁷

Rationalization also implies “depersonalization.”²⁴⁸ This means that a person is who they are by virtue of their role in the institutional setting, not in terms of their relation to their family or the community at large: one goes to see a priest, not Mr. Jones, to have one’s confession heard. Depersonalization allows for the specialization of tasks according to roles within an organization; its rationality is due to the efficiency, consistency, and continuity that specialization brings.

Thus rationalization leads to a specific form of social action Weber refers to as instrumentally rational (*zweckrationalitat*).²⁴⁹ In *The Protestant Ethic* he describes the process whereby social action becomes increasingly rational, in the sense of instrumental, and as it does, loses its grounding in the prophetic value from which the social action is derived. The ascetic drive to obtain material goods, at once a sign of “God’s grace,” comes to assume its own life when divorced from its other-worldly significance. “In the field of its highest development, in the United States, the pursuit of wealth, stripped of its religious and ethical meaning, tends to become associated with purely mundane passions, which actually give it the character of sport.”²⁵⁰ In this way, the routinization and depersonalization of the Protestant Ethic, “work hard in your calling,” provides the ground for the accumulation of material wealth once value requirements have faded.

Since asceticism undertook to remodel the world and to work out its ideals in the world, material goods have gained an increasing and finally inexorable power over the lives of men as at no previous period in history ... The rosy blush of its laughing heir, the Enlightenment, seems also to be irretrievably fading, and the idea of duty in one’s calling prowls about in our lives like the ghost of dead religious beliefs. Where the fulfillment of the calling cannot directly be related to the highest spiritual and cultural values, or when on the other hand, it need not be felt simply as economic compulsion, the individual generally abandons the attempt to justify it at all.²⁵¹

Value-rational social action slowly becomes instrumentally rational, with the latter displacing the value of the former when the preoccupation with technique and calculation all “forgetfulness” to usher values *out*.

²⁴⁶ Gilbert G. Germain, “The Revenge of the Sacred: Technology and Re-enchantment” in Horowitz and Maley eds. *The Barbarism of Reason*, *supra* note 207, 248, at 251.

²⁴⁷ “Max Weber finds the irrationalities of all rationalization all collected in bureaucratization.” Jürgen Habermas, “Discussion on Value-freedom and Objectivity” in *Max Weber and Sociology Today*. Otto Stammer ed., K. Morris trans. (New York: Harper & Row, 1972) 59-66, at 64.

²⁴⁸ ES 956-63, 1121. See Thomas McCarthy, “Introduction” to Jürgen Habermas, *Legitimation Crisis*. T. McCarthy trans. (Boston: Beacon Press, 1975), at xxi-xxii.

²⁴⁹ ES 24-6.

²⁵⁰ PE 182.

²⁵¹ PE 181-82,

The lack of meaning to the routinized performance of duty is at once efficient and paradoxical: it is an efficient, that is rational, way to promote the formation of organizational processes, and yet paradoxical because the animating values which gave rise to it perish in the process. One is reminded of Dostoevsky's Grand Inquisitor, who chastizes the Messiah for jeopardizing the rational order the Church has striven to create. The old inquisitor states that it has taken two thousand years for the Church to overcome the 'burden of freedom' that Jesus "gave" to humankind: now that the Church had given meaning to the suffering of humanity by rationalizing it, the inquisitor was not about to let this be taken away lightly.²⁵² The rationalization of belief into efficient and reliable, which is to say depersonalized, institutions ensures the continued existence of religious organizations despite the loss of the religious values which produced them.

As we noted above, one of the primary motors of this process is the practical manifestation of the distinction made between facts and values. Capitalist production, as Weber shows, arises in its modern form when the drive to accumulate becomes separated from the institutionalized values of Calvinism.²⁵³ Essentially, then, the move into the modern world is characterized by social actions restructured in accordance with instrumentally rational criteria: goal-directedness and technical efficiency in all ways of carrying out the business of living.²⁵⁴ Such goal-directedness and technical efficiency erode values by converting the basis of social action and social relations from being substantively rich with normative meaning to a state of technical efficiency pregnant with empiricism.

Rationalization is a scientification of social relations which functions to make social relations calculable by eschewing general questions about the ends of life in general in favour of a focus on the more immediate goals of material self-interest. In this way, there is a tension between value-rational action, action based on our convictions, and instrumentally rational action: instrumental rationality does not want to be burdened with the restrictions of value-rational ends.

From the latter point of view [of instrumentally rational action], however, value-rationality is always irrational. Indeed, the more the value to which action is oriented is elevated to the status of an absolute value, the more 'irrational' in this sense the corresponding action is. For, the more unconditionally the actor devotes himself to this value for its own sake, to pure sentiment or beauty, to absolute goodness or devotion to duty, the less is he influenced by considerations of the consequences of his action.²⁵⁵

Rationalization works first by changing the material and social orders, for example, as with the idea of working hard in one's calling. Through such a change, it changes the people involved by changing the conditions and opportunities for their adaptation to ways of living through a rational determination of means and ends.²⁵⁶ Thus, rationalization replaces the belief in the sanctity of traditional norms by

²⁵² Fyodor Dostoevsky, "The Grand Inquisitor," *The Brothers Karamazov*. (London: J.M. Dent, 1927), at 252-70.

²⁵³ Demonstrating this was the task set by Weber in *The Protestant Ethic*. PE 179.

²⁵⁴ SV 302.

²⁵⁵ ES 26.

²⁵⁶ ES 1116.



creating a scheme of compliance with rationally determined rules, supplemented with the knowledge that these rules can be superseded by other individuals at any time depending on their position: hence they are not *sacred* in nature.²⁵⁷ Thus, rationalization works by replacing social action which is meaningfully related to the behaviour of others by social action which is meaningfully oriented towards rules established by “associates” and which is instrumentally, rather than substantively (or value-rational), rational.

As noted, among legal theorists Weber is better known for his distinction between formal and substantive rational and irrational types of legal systems. Formally rational law refers to systems where (i) the external facts of each case are looked at to resolve an issue of law (ii) which is framed according to abstract rules.²⁵⁸ Substantively rational law refers to aspects of law which find their origin in ethical norms and policy which is not part of formal law.²⁵⁹ The law is formally rational in its application of legal rules to cases; the law is substantively rational in its application of legal norms to cases. Insofar as substantive rational law departs from formalism, the two are in conflict; insofar as formally rational law is “more rational” than its substantive counterpart, formal law continually works to subvert it.²⁶⁰

Rationalized law evolves out of systems of authority which are traditional in nature. Thus, the charismatic authority of the king or the priest is continually challenged by the demand for predictable and clear, i.e. knowable, standards of justice. These demands are in keeping with the spirit of capitalism, for the interests of the capitalist class are for a formally rational legal system where rights are enforced in a way that is not arbitrary and is highly predictable.²⁶¹ Weber notes that the move to formally rational law expresses the scientific and technical nature of rationalized law because “[j]uridical formalism enables the legal system to operate like a machine.”²⁶² Thus, the desire to see the law *qua* machine is driven by forces of rationalization rooted in economic conditions, which in turn are expressions the rationalizing tendency of modernist culture.

The rationalization of law involves such machine like calculability. In *Roncarelli v. Duplessis* Rand J describes the ideal of justice as embedded in the law’s formalism, for only in this way is law not arbitrary. In this way he is able to argue that legal formalism is an expression of justice because it gives the best protection of people’s rights.²⁶³ People are authorized to act in the capacity of their “office,” which means that the grocer is entitled to certain rights, and the administrator has

²⁵⁷ ES 1117. See also Stephen Carter, “Evolutionism, Creationism, and Treating Religion as a Hobby” (1987) 6 *Duke Law Journal* 977; and the response by Stanley Fish, “Liberalism Doesn’t Exist” (1987) 6 *Duke Law Journal* 997.

²⁵⁸ ES 654-8.

²⁵⁹ ES 813-4.

²⁶⁰ ES 332-3, 657.

²⁶¹ ES 809-16. See also Sheldon S. Wolin, “Max Weber: Legitimation, Method, and the Politics of Theory” in *The Barbarism of Reason*, *supra* note 207, at 297ff.

²⁶² ES 811.

²⁶³ But according to our discussion of legal formalism, this is tautological. For the formal nature of the law is defined by its basis in uniform legal principles which protect the rights of litigants regardless of who they are. To state that such a system is “more just” takes as its starting point a formalistic conception of what justice means. Thus, to say that black cats are more in keeping with black-ness than white cats does not add anything to our understanding of “blackness,” it merely gives a definition of it in a round-about way. See Rand J.’s judgment in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at 140-45.

certain responsibilities and limits to those responsibilities.²⁶⁴ Law rationalizes these social norms into a system of identifiable legal rules by structuring social action according to the externally identifiable criteria of “efficiency” and calculability. It is as though it were a scientific exercise.

Thus, the systematization of law is formally rational because it breeds calculability: (i) it allows for the same result with each new case, and (ii) the individuals who are part of the *administration* of justice are specialized bureaucrats with expertise. Weber notes that law produces a bureaucratic apparatus by rationally segregating and specializing the tasks of knowledge required within the legal system.²⁶⁵ In this way, justice cannot be “made” according to wisdom but requires a complex system of procedural mechanisms in order to guarantee that the formal requirements of justice have been met: law becomes a technological justice dispenser based on instrumental reason.²⁶⁶

Similarly, the making of laws, rather than an expression of democracy or the realization of the general will, is the outcome of the bureaucratically organized public sphere.²⁶⁷ The public sphere is a rationally structured and technically administered institution which efficiently allocates tasks according to specialized knowledge.²⁶⁸ Those elected to make the law do so as part of their position in the *office* of the politician, not as a creator of values. Thus, the law-maker is only fulfilling his or her specialized role within the bureaucracy of law as a whole.

As Weber notes, the rational *qua* formal cannot give rise to values other than those which are contained in it. Science, like law, cannot *create* values. Modern conceptions of justice define themselves by their formal nature, i.e.: predictable, based in rules not the caprice of authorities, intellectually demonstrable; because it defines them, the legitimation of modern legal systems depends upon the degree to which they are formally rational.²⁶⁹ And yet the processes of rationalization subvert communal values and destroy horizons of shared meaning. Thus, the liberal legal formalist conception of justice is itself a harbinger of disenchantment.

We need to be clear on the mechanics of this last point: precisely how does the formal rationality of law work to “disenchant” the world? At an immediate level, many people feel a gut reaction to economic analysis as being “cold and calculating,” for example in certain tort actions where monetary compensation for losses is difficult to imagine.²⁷⁰ There is more to it than “economic analysis,” however. The ideal of the liberal state is to be *neutral*, to provide space for the citizen to decide for oneself just how one ought to live. The entire point of liberal legal formalism is to be neutral and objective, to be the fact-finder like the scientist. The scientist cannot give rise to values, just as the process of law cannot.

²⁶⁴ ES 958-63.

²⁶⁵ ES 775-6, 785-92.

²⁶⁶ See *supra* note 262, on the tautological claims made concerning formally rational legal systems as being “more” just. See ES 758-60.

²⁶⁷ PV 125; Germain, *supra* note 245, at 251; also Habermas, *The Structural Transformation of the Public Sphere*. Thomas Burger trans. (Cambridge, Massachusetts: M.I.T. Press, 1989).

²⁶⁸ ES 983-6; see also Hannah Arendt, *The Human Condition*. (Chicago: University of Chicago Press, 1958), at part II.

²⁶⁹ ES 952-3, 1158; Wolin, *supra* note 260; Habermas, *Legitimation Crisis*, *supra* note 247, at 97-102.

²⁷⁰ Take, for example, the case of *Malette v. Shulman*, where a Jehovah’s Witness was given a blood transfusion against her wishes. How does one compensate a victim that has lost, according to their understanding of the world, their Salvation? *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (Ont. CA).



Law becomes based in rationalization. Disenchantment is the result of the intellectualization and rationalization of social action into set processes according to instrumentally rational criteria. Thus, the law's ideal of objectivity subverts values by denigrating their status to a sub-state level. Since the law is higher than the sacred, and since people are seen to move "beyond" the law, the sacred loses significance.²⁷¹

At a more general level, we can speak of law's reduction of tangible social relations to the status of the transaction. Law structures social relations by defining their content, that is, by defining what it is that makes them significant to the community. For example, law defines what a family is, who can inherit land, who can live where, who can drive and who can *own*. Thus, the idea that "property" is not a thing but rather a legally created entitlement demonstrates the extent to which law structures social relations. Because formally rational law is a product of rationalization, it structures the relations of the community in a way consistent with its vision. Thus, where it is argued that formally rational law gives greater "freedom," the argument proceeds according to the vision of formally rational systems.²⁷² It is an internal justification for freedom. Formalism does not *give rise to* freedom, it merely describes the particular types of social actions peculiar to it *as* freedom. The concern for the technical efficiency of impersonal relationships, which we call freedom, means that we prefer the tidy transaction to the on-going embedded relationships of community.

Rationalized social relations move from custom to convention and on to law. Instead of creating values, law is the institutionalization and bureaucratization of normative values in a way that robs them of their constitutive meaning. As with the religious institutionalization of prophetic value, the systematization of the communal practices leads to a spiritless technical efficiency which is "rational," yet which has nothing to do with the meaningful relationships of the community which manifest their own ideals of justice through their own practices.²⁷³

Law then is part of a larger social economic process of rationalization: it is a historical process which reduces meaningful webs to the level of symbols. Because social relationships lack any constitutive meaning beyond the mere transaction, the identities of individuals become formed by these processes.²⁷⁴ Thus in the capitalist world one's vocation becomes an intimate part of one's identity: people will tell you what they do for a living as a ballad for who they are. Sub-cultures of identity politics become mired by the empty stamp that a world of transactions leaves them.²⁷⁵ Individuals are defined by these transactions in a way which forms the primary conditions of meaning for them, conditions which are really not very constitutive. Thus we see people who define good and evil

²⁷¹ ES 1117: "The bureaucratic order merely replaces the belief in the sanctity of traditional norms by the compliance with rationally determined rules and by the knowledge that these rules can be superseded by others, if one has the necessary power, and hence are not sacred." See also Carter, "Religion as a Hobby," *supra* note 256.

²⁷² ES 811-14.

²⁷³ Richard Ireland, "How Common was the Common Law," *supra* note 178.

²⁷⁴ ES 1115-17.

²⁷⁵ On this, the idea that the reality of the sign replaces reality itself, that Disneyland is "more real" than America see generally Jean Baudrillard, *For a Critique of the Political Economy of the Sign*, *supra* note 43.

according to the dictates of their own vocation.²⁷⁶ With larger constitutive visions of life subsumed into a formalistic one, there are no means for citizens to answer the question ‘how shall I live.’ One is left to one’s devices in the transitory world of symbolic representations that make their way onto the market.

The belief that the formal rationality of the law is the most efficient way to allocate outcomes, according to Weber, is a fact of modern existence. But this fact provides little insight into the serious questions of how to live.²⁷⁷ Such systematization leads to humanity’s banal and nauseating happiness which expresses itself in a benign commodity fetishism. The Nietzschean “last man” comes to signify the type of human being who is completely and smugly contented with the efficiency of living, so much so that there can be no comprehension of things like creation, love, hate, greatness, or violence. All visions which make life worth living are irretrievable. For according to the “last man,” the beautiful is reduced to the agreeable.²⁷⁸ This, then, is the dilemma posed by the disenchanting world: one cannot find a way back to the richly textured *vergemeinschaften* because the creation of values necessary to do so cannot be accomplished by way of technical means. Reason cannot create values, hence it cannot tell us anything about life. And yet our lives are defined by our faith in the power of reason, so much so that our legal system rests on a formally rational conception of justice.

Rationalization creates a social milieu where it is impossible to leave: for we can see that the way in which we do things is the most rational and yet the emptiest. By the iron cage, Weber means that we cannot escape the hold that instrumental rationality has on us.

No one knows who will live in this cage in the future, or whether at the end of this tremendous development entirely new prophets will arise, or there will be a great rebirth of old ideas and ideals, or, if neither, mechanized petrification, embellished with a sort of convulsive self-importance. For of the last stage of this cultural development, it might well be truly said: ‘Specialists without spirit, sensualists without heart; this nullity imagines that it has attained a level of civilization never before achieved.’²⁷⁹

²⁷⁶ We can think of all the instances where people of different vocations understand their reality in terms of it: the lawyer, the police officer, the doctor, the nurse, the tradesperson, the professional athlete. In each case, the dictates of the vocation provide generalized criteria about what one needs to believe in order to dedicate themselves to that position and to “become that person.” Interestingly, in the case of lawyers, Weber writes, [T]here is no science, jurisprudence least of all, which can demonstrate the validity of any value judgment or the “ought” of any legal maxim. Those lawyers who have claimed such a role for themselves as legal people are in my eyes the most godforsaken bunch in the world. If there is anyone who is not suited to decide what ought or ought not to be, it is a lawyer; if he wishes to be a man of his science, he is duty-bound to be a formalist.

M. Weber, *Gesammelte Aufsätze zur Soziologie und Sozialpolitik* (Tübingen: Mohr, 1924) at 401, cited in F.C. DeCoste, “From Formalism to Feminism Seventy-Five Years of Theory in the Legal Academy” (1996) 35 *Alberta Law Review*. (No. 1) 189.

²⁷⁷ Nor did Weber think it could: SV 286ff. Leo Strauss, in criticizing such a position, remarks: “We are then in the position of beings who are sane and sober when engaged in trivial business and who gamble like madmen when confronted with serious issues - retail sanity and wholesale madness. If our principles have no other support than our blind preferences, everything a man [sic] is willing to dare will be permissible.” *Natural Right and History*. (Chicago: University of Chicago Press, 1951), at 4-5.

²⁷⁸ “And since Nietzsche, we realize that something can be beautiful, not only in spite of the aspect in which it is not good, but rather in that very aspect.” SV 295.

²⁷⁹ SV 182. The final lines describe the Nietzschean ‘last man’ completely.



The formal rationality of law signifies that social relations are empty of meaning, and yet we want them to be full of meaning. Liberal legal formalism, based on an idea of freedom for human fulfillment, actively destroys the contexts through which such meanings exist by turning the sacred into a hobby.²⁸⁰ The death of god becomes *the* terrible event because we lose our idol, our singular delineation of “truth,” without losing our religiosity; we lose the ability to believe in a god, but do not lose our need to see meaning as ‘out there’ in the world. All social relations, in the disenchanting world, become transactions, with the social purpose of existence measured by such transactions.

Liberal legal formalism is the stepping stone to nihilism because it provides the conditions of the coming-to-pass of nothingness in the public sphere. Existing in the formally rational state is the bureaucratic nightmare of Kafka: people disassociated from themselves and defined by their place in rational transactions. In the final analysis citizens are members of the community only by virtue of the role that they play as a specialized piece within the machine that is the rational society: people are teachers, bus drivers, ticket takers, attendants, judges, and when they are not, they are consumers of happiness. The law institutionalizes and systematizes this type of social reality, and in doing so, creates series of social relations without formulating the purposes for living for the individuals so engaged. Nihilism looms at the edges.

Previously we had seen what postmodernism does in practice, how it is motivated by a concern that augments the nihilistic tendency of our culture, and the way in which it does so unconsciously. We have also seen that Weber’s description of how nihilism works to rationalize social relations rendering meaningful frameworks without substance. To finish the discussion, I will now turn to discuss how postmodernism functions to rationalize social relations in our society by participating in the rationalization of law. Such a discussion will demonstrate that nihilism is furtively present.

VI: Nihilism and the Rationalization of Law

This paper has been giving contours to the dynamics at work within postmodern criticism, within liberalism, and within nihilism such that the three stand to each other in a precarious relationship. The main pitfall, which perhaps this paper has not avoided, in conceptualizing postmodernism’s relation to nihilism is that postmodernism, nihilism, liberalism are all reified into near ideal types such that the social processes which underlie the concepts do not fit neatly into such analysis. Nonetheless, as the discussion has shown, it is possible to canvass widely what we understand as “postmodern,” what “liberalism” signifies, and the diverse elements involved in the process of “nihilism.” In this section I will demonstrate how law in liberal societies rationalizes social relations in a nihilistic way, and consequently why the practice of postmodern criticism in legal literature does the same.

²⁸⁰ Carter, “Religion as a Hobby,” *supra* note 256.

The functional dynamic of nihilism as expressed in the rationalization of social relations occurs in and through law because law questions the essence of particular relationships and rewords its meaning. Rationalization of law refers to a systematization of its meaning. However, just as we see property as a bundle of rights that express a particular set of social relations rather than about who owns what, those rights express a series of entitlements and obligations. The word “right” comes up in a particular context, creating a method of securing expectations and entitlements which were not previously conceived of in this way.

This may seem quite incidental, but the following example will demonstrate that there are very serious issues at stake. First Nations communities approach their traditional grounds in terms of very different understandings of what “property” entails. “Property” is not a concept that exists in such cultures, thus when we look into Native practices to ascertain what sort of legal regime exists within them, we automatically import an understanding of reality, of social relations and hence of the nature of truth itself. So where the Native goes through a series of social actions that are similar to what we would call ownership and possession, an argument to ascertain who is to trap a certain trail²⁸¹ or the collective procurement of a cedar tree to be carved and given as a gift,²⁸² we might impute that there are institutional arrangements which designate the way the entitlement to use certain resources works. But we are already colonizing when we put such words like “use” to work! In fact, we are actively rationalizing their culture in order to try to ascertain and describe it for ourselves. If we are in fact liberal and believe in treating people and their cultures equally, we would do well to not attempt to import our own understandings into theirs. However, in order to establish that the “other” is a culture which warrants status as being sufficiently different from ours that it needs to be separate, we devise strict tests. In *Delgamuukw v. the Queen*, a case being heralded for its visionary approach to Aboriginal Title in British Columbia, the court sets out a definitive test for what shall count as demonstration of occupation of lands, for standards of evidence, and of what self-government shall be constituted.²⁸³ By requiring native groups to live up to a certain standard of evidence we necessarily demand that Aboriginal groups abandon their own understandings of certain social relationships in favour of what we will call it for legal (read ‘political’) purposes. The court’s definitive test for what shall count as demonstration of occupation of lands, for standards of evidence, and self-government all demand Native groups to demand their concepts for ours.

What if Natives don’t have a conception of property or ownership? What if their set of social relationships is expressed through a complex series of inter-familial and spiritual relationships that is too complex for us to grasp? If we begin to ask certain questions, answers to them will actually create that reality within that culture. Just as the tenant’s obligations to the Lord dissolved when expectations vest in entitlements, forcing an idea of title and property into Aboriginal cultures dissolves the exact kinds of social relations we are trying to ascertain. “Who owns it” is met with “we do,” the consequence being that the group then begins to understand its relationship to the land in terms of the answer to the question imposed from the outside rather than according to the complex series of relations

²⁸¹ *R. v. Polchies et al.* (1982), 37 N.B.R. (2d) 546 (NB Prov. Ct.).

²⁸² See the generic description of these types of activities as “rights” in *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

²⁸³ [1997] 3 S.C.R. 1010.



previously governing it. This becomes nihilistic when such groups are encouraged to see their beliefs and practices as fitting within the Western way. Just as seisin obligations and rituals became obsolete when the social meaning of them had evaporated, the social integrity of Aboriginal conceptions of the world breakdown when these are made subservient to, or described from, the Western understanding. As we have seen, the dynamic at the centre of Western thought creates a trend of value erosion that will not stop until all values are subject to the scrutiny of “truth.” Nihilism extends everywhere in the rationalized political economy of capitalism.

How can one have faith in the rule of law in a multicultural country without being a hypocrite? How can the rule of law work to accommodate decentralized and local knowledge and practices if the law requires centralized meaning? The law of evidence regulates which occurrences in a loosely defined reality will count as facts before the law. As we have seen throughout this essay, certain facts materialize and are created by virtue of the asking of particular questions.²⁸⁴

The rationalization of law is thus not just any systematization, but one which creates a new substantive vision in place of a particular old one. The systemic relations governed and created by custom and censure, the entire series of ways in which “justice” was meted out, is replaced by a regime of casuistry. In looking at the basis of casuistry, we see that its basis is in a particular metaphysical vision marked by a transformation in thinking about what justice is, what communities are to look like, and subsequently, about what social relations will be constituted by.

The rationalization of law, then, is the process whereby a very specific legal regime that focuses on creating rights and entitlements according to a largely scientifically rational understanding of the world replaces any other way of doing things *not only* on the basis that these are both irrational and unfair, but because the nature of reason itself demands the erosion of the intangible.²⁸⁵

In this way postmodernism is itself a form of academic casuistry, seeking to deepen the moral fibre of liberal legalism by quibbling on our conscience about how social relations operate to conceal their real nature. As this paper demonstrates, and as Nietzsche argues: it can be no other way.²⁸⁶ Postmodernism destroys bases of meaning by calling them into question, uses technical analysis to rid society of oppressive moral obligations and to replace them with equitable ones; though it does not directly cause rationalization, it is active in the process in that postmodernism accepts casuistry not in name but in practice: it uses its tools to forward an implicit vision of what society should be like.

The emancipatory ethic, to which I keep referring, is interwoven with to the decline of legitimacy of older beliefs and social structures. Though there is much criticism for the oppressiveness of modern society and the way in which it has robbed traditional cultures of their ways of doing things, the postmodern critic plays on the distinction between objective knowledge and subjective truths in argument in order

²⁸⁴ Heidegger argues that the act of questioning in a particular way leads us to a specific result in the history of philosophy: see “The Question Concerning Technology” in *The Question Concerning Technology and Other Essays*, *supra* note 65.

²⁸⁵ The administrative state is a fine example of this. See J.M. Evans and David Mullan. “Introduction” *Administrative Law: Cases, Texts, and Materials*. (Toronto: Emond Montgomery, 1995).

²⁸⁶ TI 5:1.

to call into question the daily practice of individuals in a way which effectively adds to the rationalizing power of the law. Rather than spurring social action, postmodernism paralyzes because it can only say what action should not be: it cannot create substantive visions of truth. Weber highlighted why this was the case: reason does not create value, people do, and only particular kinds of people.²⁸⁷ “Deconstruction” demonstrates the inherent oppositional relationships in language; deconstructing the practice of deconstruction demonstrates the motives behind finding inherent injustice in such oppositional relationships: resentment at suffering and the desire to avenge it.

Meaning is drained from constitutive relations such that the deeper meaning of each relation drops from the signifier and all one is left with is the sign. The sign continues on, as truth does after God disappears, and no longer holds its moral tenor in the hearts and minds of the community. Instead, the deep moral bond that culminates in a particular obligating relationship is replaced by the transaction that results in the contract. These relations lack meaning because they are based in an economic expediency which leaves the value of such arrangements open for definition on behalf of the individual. However the individual is not grand enough to create a substantive vision of value so long as this beast called “truth” walks around and savages every attempt: we are not ready to become gods and create our own horizons of value. The extremely self-critical nature of postmodern criticism could be said to have created an entire rubric of “self-conscious traditionalism” where we seek to create the bases of authentic action and existence out of one which has been sufficiently atrophied.²⁸⁸

For this reason, the expression “God is dead” is not an expression of rationalization as a harbinger of freedom, freeing us from the fetters of authoritatively oppressive dogma. It is an expression of the philosophical demise of a particular conception of truth. However, that particular conception of truth is still at work in our legal system, creating a conception of justice that is founded in an understanding of right and wrong. Thus the full consequences of the conception of truth are not limited to the destruction of religious idols, but extend to any non-rational beliefs which substantiate social relations.

Since all expression of authoritative positions are defiled as oppressive, the law begins to attempt a functional approach to freedom: providing a framework for the hundred flowers to bloom. In this way, it is utilitarian in form, similar to economics. The content of individual utility curves is left open (because it must be left open – there is no way to determine what the content *should* be), while the analysis proceeds. Postmodernism actively rationalizes law in liberal societies by

²⁸⁷ PV.

²⁸⁸ This is the active concern in First Nations communities. For instance, the primary prophet of the Iroquois Confederacy is the 19th century prophet *Skaniatario*, or Handsome Lake. It was recently noted that the roots of Mohawk political philosophy from the *Kaienerekowa*, a tract of Iroquois political theory from around the 14th century, as interpreted by *Skaniatario* have a basis in Christianity as well because *Skaniatario*'s philosophy was a hybrid of traditional Mohawk belief and Christian belief. Purists wanted to reject *Skaniatario*'s philosophy whereas many others did not. The debate sparked further debate over the nature of traditionalism, with some Mohawk asking if anyone really wanted to bring back the use of torture for religious festivals, or even cannibalism. Instead, many Mohawks are advocating a self-conscious traditionalism, one which seeks to preserve core Mohawk values while attempting to create the bases of a new and vibrant culture. Some would argue that this is not possible. See Gerald Alfred, *Heading the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism*. (Toronto: Oxford University Press, 1995), ch. 4, at 68-9, 76-82.



making large question of value irrelevant with regard to law: law's domain is to provide room for such questions to yield answers which effectively appropriate the meaning of these relationships, hence changing them.

Thus, the implicit emancipatory ethic that drives postmodernism in law does nothing to foster community ideals and values because it is unable to respect the foundations upon which such community is founded: myth, charisma, hierarchy, ritual. In the end, postmodernism creates a dynamic that is actually for, rather than against, the procedural republic. The procedural republic is not the messenger of nihilism; it is the passive aggressive participant. The procedural republic is the man in the street who laughs at the madman while not realizing that he was the one under whose knife the driving purposes in life fall.²⁸⁹ By destroying the bases of knowledge that allow us to formulate visions of what makes life worth living, postmodernism attempts to integrate two primary qualities of the "last ones" into our culture: (i) the desire to be done with anything difficult, with the suffering of life; and (ii) the inability to create meaning for suffering, vengeful or not.²⁹⁰ Therefore there is not simply that postmodernism perpetuates a value of "truth" that reduces other values, but that it is active in subduing cultural meanings in such a way that renewed creativity becomes less and less possible. The real fear that Nietzsche and Weber have of this "last ones" is based in the fact that the "last man" is unable to create values – not even out of revenge.²⁹¹

The liberal statesperson approaches statecraft as the scientist does science: the liberal state scrutinizes the larger framework that appropriates the individual's constitutive webs of meaning; the scientist believes all questions of fact are divorced from value, and proceeds to splice genes together. Hence the life of the citizen becomes an active acquaintance with what it means to be, appropriating in Nietzsche's term, the last ones.²⁹² There is no ability to become acquainted with anything meaningful except as a source of knowledge, as a tourist in a museum. All things meaningful are no longer believable. They are too innocent for us. The engines of capitalism thrive on the loss of meaning because it encourages continual consumption of the "new." Once we are bored with our life and its contours, we consume images, we consume goods, we consume everything, in a continual quest to create a sense that there is something meaningful out there that will resonate within. "The BMW is two years old and gosh there are no good shows on anymore: why is life so empty?"

Nihilism lies latent within postmodern criticism, actively working its process through a vindication of these "last ones": values are continually being called into question. And in the midst of all this critical analysis the paradoxical nature of the Western conception of truth lies untouched despite the bravado of philosophers to be able to do without it. We simply do not focus on the issue that is of the most

²⁸⁹ *Gay Science* s. 125.

²⁹⁰ For this reason, Nietzsche even bemoans the passing of Christianity because at the very least the ability to despise oneself and life spurred a vengeance which was creative and strong. GS 355-62.

²⁹¹ Which is why Nietzsche bemoans the inability of the last man to despise himself, not even worthy of revenge.

²⁹² This theme is canvassed in the notable Straussian way by Francis Fukuyama in *The End of History and the Last Man*. (New York: Free Press, 1992). Note as well that later in the book, Zarathustra comes back to see the "last man" and finds that they are even smaller. He does not worry anymore, for he can affirm it. He understands that a dry grass burns even faster – a fact that seems to indicate that we affirm what is most difficult and troublesome because we understand that opportunities arise therein.

important to the sustainability of our legal culture, and that is to look adequately at that which the tradition is founded upon. A renewed will-to-truth is the only way to force the conclusion of such values, to understand the bases of social action, and to create the conditions under which new meaning can be given to social relations, to our political and legal institutions, and to a renewed philosophy. To be sure, philosophy does not exist without it, and nor, for that matter, does law.

Conclusion: Nietzsche's Lessons

There is a schizophrenic stance which seems to be underlying the argument I have been advancing. As I critique postmodernism for its emancipatory stance, I am not necessarily falling back on moral arguments. Nor am I asking them to be other than they are, nor to do other than they do. The study, it is argued, merely points out what is happening, just as Nietzsche argued that he was not out to refute Kant. And yet there is an urgency to the tenor of his work, and to this one. That urgency speaks to a certain phenomenon which is occurring in modern liberal legal culture; and the urgency seems to suggest that we should do something about it, or else... or else things will be worse, life will be worse, we will lack reason to judge life positively.

And here, again, we fall on moral ground. Perhaps we have come too late to understand that there may have been a way to avoid the emptying of our culture, perhaps we are no longer innocent with respect to what authentic moral action looks like and sounds like. Indeed, we anthropologize as tourists who wonder what it would be like to possess a world view that spoke of magic, of the Great Mother, of a peace and harmony that breathe through all living things.

And yet we have also come too early. How do we create values and a vision without existing in the traditional moral stadium of truth which paralyzes the visioning process. Indeed, we have come to approach such questions with the eyes and ears of accountants: able to see figures and amounts, relationships of quantified things, no ethereal qualities or frameworks. We have, it seems, taken on knowledge of what good and evil are composed, and it does seem to have made it much more difficult to live.²⁹³ The challenge seems to be one we can neither bear nor throw off: meaning, as Weber demonstrates quite clearly, is created very irrationally. In a completely rationalized culture, it is hard to imagine how a prophets and proselytizing may emerge without first entering a period of crises which seem to mark the rise of such visionaries.

So the tenor of this paper is serious to the extent the hard place we have unconsciously arrived at is a threat to those things which allow fulfilling lives to be lead; and it is tinged with a confusion as to how an emergence from it, other than the impossible one trod by Zarathustra, is achievable in philosophical and practical terms. For we must admit that no matter how readily we embrace the logic of nihilism, we are pulled by the decadent strings attached to liberalism, not wanting to see such ruin.

²⁹³ Genesis 2:17.



If the practical consequence of public reason is nihilism and rationalization, and if nihilism is an inevitable result of our historical processes, then we may have to stick to our course of pushing the limits of truth, of language, of identity, and of all those other things which speak of this historical process. Are we doing so out of a moral concern for the emancipation of humankind? Or are we simply trying to re-infuse meaning into our culture? Or is there a difference?

It is certain that as we continue to demonstrate the relationship between nihilism and liberalism, we are accosted by the prospect of the flattened and non-creative “last ones” whose thrills are malls and potato chips. But, I would argue, as Nietzsche has, that sticking to the course that these values have presented to us *in the unconscious and active way that postmodernists do* will force something to happen as a consequence of wiping horizons away with sponges. The ominousness of the consequences is a concern to someone like myself who, for all intents and purposes, is locked into a liberal frame of mind and must acknowledge the reality of nihilism and yet wonder how its cataclysmic effects can be avoided. For as Nietzsche warns us, a dry grass burns even faster.²⁹⁴

²⁹⁴ Z III “On the Overcoming.”