'MADNESS AT THE MARGINS': THE PLACE OF FOUCAULT AND DERRIDA IN THE POSTMODERN CRITIQUE OF LAW

*Abu Mathen George**

I Introduction

Amongst contemporary legal academia, it is often argued that many jurisprudential theories of the past tend to reflect a characteristic 'upbringing,' which is rooted in particular traditional constructions of the nature of society and its relationship to the authority of the law – all of which are seen through the prism of a 'discoverable and objective truth.'[1] Perhaps the most open challenge of this nature today is offered by the postmodern school of thought, the basis of which lie in a contemporary disenchantment with modernity; the rejection of all grand stories which promises to understand reality perfectly and solve all its problems, in what the French philosopher Jean Francois Lyotard calls an "*incredulity towards all meta-narratives.*"[2]

While most postmodernists dealt in the realm of abstract philosophy, arguing for a rethinking of the 'Enlightenment Project,'[3] which had broken down, others moved into literary criticism and social sciences. Obliterating constructions based on presumptions, these thinkers attempted to show that those premises were themselves rooted in subjective representations rather than the fiction of objective truth.[4] Soon after, many began to inquire into the possibility of applying their techniques in an examination of the law, given its close relationship with society, and the manner in which law operated at the general level. The considerable impact of Enlightenment thought on the formulation of law, whether in the understanding of law as merely a science,[5] or in many of the assumptions that

---

* III Year B.A., LL.B (Hons), National Law School of India University, Bangalore.

1. Jerry Goodman., *A Review of 'American Legal Thought from Premodernism to Postmodernism,* 36 TULSA L.J. 231, 234 (2000). These include writers within Critical Legal Studies, Critical Race Theory, Feminist Jurisprudence, Law and Literature.

2. JEAN FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE, xxiv, (Bennington and Massuni trans., 1984) [Hereinafter LYOTARD].

3. The 'Enlightenment Project' represented the beginning of 'meta-narratives,' or grand stories which originated from the Enlightenment Period and claimed to unify diverging thoughts and discover truth on the basis of scientific rationality. DAVID HARVEY, THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE 27 (1989).

4. The course of this movement is not very clear, and others contend that postmodernism grew out of literary criticism in the 1950's and then was adopted by art critics in the 60's and the 70's. Because of its origins, postmodernism has come to mean a number of things, including the general temperament of late industrialization [*See* FREDERIC JAMESON, POSTMODERNITY OR THE CULTURAL LOGIC OF LATE CAPITALISM (1991)]. However, in the sense that I have used it in this paper, postmodernism is the sustained critique of the doctrines evolved from the Enlightenment period – particularly, the notion of universal truth discoverable by practised reason.

5. As put forward by the Dean of Harvard Law School, Christopher Colombus Langdell. Langdell also created the 'casebook method,' by which any legal concept could be broken down into smaller parts, to create an organized system which would enable comprehension of that legal concept. Douglas Litowitz, *Postmodernism without the Pomobabble,* 2 FL. COASTAL L.J. 41, 48 (2000)[hereinafter LITOWITZ].

underly common law principles, is beyond dispute.[6] Hence began postmodernism's engagement with law, primarily in the form of criticisms as to its underpinnings, but subsequently in the form of a movement in jurisprudence, through continued inputs on its own understanding of law.

In this paper, the author looks at two prominent post-structuralist philosophers,[7] Derrida and Foucault, and their role in the evolution of a radically new critique of law. For the philosophers, both of whom were French, and who could draw upon the immense heritage of the continental philosophers, the universalist claims of the Enlightenment as reflected in law represent something more than just immodesty; the attempt of this paper is to show that modernity's influence on the law has resulted in powerful and debilitating hierarchies and exclusions, often rooted in fictional assumptions, and that this is true of both the structure of the law and its interpretations. In particular circumstances, this is even characterized by crippling violence, especially to the person fighting for justice from the margins. Hence, the paper, while appreciating the critique, simultaneously asks the question as to postmodernity's way out. The following therefore is the outline of the paper: In Part II of this paper, an attempt is made to show how Foucault conceptualizes power and its subsequent impact on legal theory – particularly on the notion of power as constitutive-of-law. Then picking up on legal hermeneutics via Foucault (on the limits of language), Part III tries to sketch generally the postmodern turn in interpretative theory, paying particular attention to emerging 'deconstructive' practice, as per Derrida. Part IV looks specifically at Derrida's own use of deconstruction in understanding law, and the challenge to its legitimacy, through his essay: *The Force of Law: The Mystical Foundations of Authority.* In the concluding section, the impact of these theories on certain legal movements is outlined, looking concurrently at the possibility of evolving a postmodern jurisprudence.

II Foucault: Power and the Law

Foucault, is probably most well known as the figure that filled the academic void in French intellectual life after Sartre,[8] but created a special position for himself as the explorer of power relationships that are "invariably involved in the reality-construction process" such that human culture creates methods regulating the behaviour of its members.[9]

---

6. A typical example given is that of contract theory – in contracts, is always *assumed* that contracting persons are in a state of nature, have equal information, contract with full consent, and so on. Similarly, private property is understood as given, natural aspect of human existence, and common law proceeds to examine the manner in which 'men' interact with each other, with relation to property, without ever explaining the manner of its origins. *Id* at 49.

7. Though throughout the paper, I use the words post-structuralism and post-modernity interchangeably, there exist some subtle differences that must be highlighted. Thinkers such as Foucault and Derrida are primarily post-structuralists, evolving their theories as a reaction to the strict regimens of structuralism, especially in language. Later, the underlying formula of 'post-structuralism' was broadened by JF Lyotard to embrace incredulity towards 'all grand narratives', as 'post-modernism'. The term itself was used by him in his 1984 work: LYOTARD, *Supra* note 2.

8. It is indeed interesting to note that almost all the initial thinkers in the postmodern discourse were French, whether it was Lyotard, Derrida, Foucault, Deleuze or Baudrillard.

9. Michel Foucault, *Strategies of Power, in* THE FONTANA POSTMODERNISM READER 36 (Walter Truett Anderson, ed., 1995)[hereinafter FONTANA].

But unlike many other post-structuralist thinkers[10] who clearly enunciated their effort at dealing with law, Foucault was quite ambiguous, perhaps to the point of writing nothing at all on the topic. Therefore, one would venture to say that Foucault's understanding of law can be traced through his discourse on something bigger, namely the idea of power. At any rate, is there an absence here that legal scholarship must take note of? In a review article of the book *Foucault and Law* written by Alan Hunt and Gary Wikham, Hugh Baxter parodies the authors in saying that though Foucault has written much on the law, he expounds no legal theory.[11] To Baxter, this absence is critical to legal academia. "*If we seek to bring Foucault into law,*" he asks, "*must we not first bring law into Foucault?*"[12]

The question is left unanswered while Hunt and Wikham pursue another aspect of the study of Foucault – which of his theories[13] could lead to an understanding of law, and therefore which '*Foucault*' must we select?[14] Here, the Foucault that Hunt and Wikham prefer is that of 1975-77 who developed his "analytics of power" through three major works - *Discipline and Punish*, *The History of Sexuality*, Volume I, and *Power/Knowledge*. They contended that the law formed an important '*motif*' in these works.[15] Using Hunt and Wikham's formulations as a basis, the author shall first sketch Foucault's understanding of law in relation to power, and then look to reasons why it may not be a convincing critique.

A Power as Productive; As Counter-law

Foucault's nomenclature of traditional understanding of power as 'juridico-discursive,' or the juridical notion of power, is a good place to begin the search for his understanding of law.[16] This idea, he says, formulated on account of the victory of the monarchies of Europe, was inextricably linked to sovereignty. The principal features of this juridical notion were:

---

10 Foucault himself would probably contend such a classification. He attempted to evade classification at every stage of his intellectual career. At one point he even remarked, "*I have never been a Freudian. I have never been a Marxist. I have never been a structuralist. Do not ask me who I am and do not ask me to remain the same. Leave it to the bureaucrats to see that our papers are in order.*" *Id* at 36.

11 ALAN HUNT AND GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE, viii, (1994). For other Foucault-ian influence in legal writing *See:* Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production,* 94 COLUM. L. REV. 753 (1994); Kendall Thomas, *Beyond the Privacy Principle,* 92 COLUM. L. REV. 1431(1992).

12 Hugh Baxter, *Bringing Foucault into Law and Law into Foucault,* 48 STAN. L. REV. 449, 450 (1996) [hereinafter BAXTER].

13 Foucault's theories primarily concerned 'rules of exclusion,' that operated in society. In his two principal works, he looked at the distinction between the 'sane' and the 'insane' (*Madness and Civilization*, 1961) and the separation of society into the criminal and the ordinary. (*Discipline and Punish: The Birth of the Prison,* 1975). His other works include a history of sexuality, (*A History of Sexuality*, 1976) and a history of the discourse of knowledge (*Archaeology of Knowledge*).

14 The question assumes importance when one observes that Foucault's intellectual career rapidly changed course during his lifetime, and his principal interests varied. For example, the 'power' that was his principal concern during 1972-77 became power 'linked to the discourse of truth' at the end of that very decade and later transformed to examining the role of the subject (of power). Michel Foucault, *The Subject and Power, in* MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 237 (Dreyfus & Rabinow ed.) ("*It is not power, but the subject, which is the general theme of my research.*").

15 BAXTER, *Supra* note 12, at 451.

16 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 82 (Robert Hurely trans., 1990) [hereinafter SEXUALITY].

(i) power was negative and prohibitory,[17]
(ii) it was issued as a *legal command,*
(iii) it was issued from the sovereign to the subject, and
(iv) it was homogenous in its manifestations.[18]

Is such an understanding helpful in positioning power in the present day? Foucault argues no, because it misunderstands and misrepresents the real nature of power. Instead, he puts forward an 'analytics of power,' which attempts a historical mapping of power, showing that there are technologies of power that operate outside the framework of sovereignty[19] and are "*irreducible to representations of law.*"[20]

But before this, why the 'analytics of power' and not just a 'theory of power'? The effort must be, as he explains, not to relate to power as a substantive entity and explain its properties as a theory of power would do, but merely to show where power is present and how it works.[21] A theory of power would identify locations and posit targets, but in Foucault's understanding that power is diffused everywhere. It does not have a source and therefore he does not concern himself with power (residing) with the sovereign, but rather "power at its extremities."[22] So, the effort is to begin at the local level, and work with the "microphysics of power."[23] In displacing the traditional notion of power as sovereign command, Foucault emphasizes that power relations include not just the application of force, but also resistance. For Foucault, the very existence of power relations "depends on a multiplicity of points of resistance,"[24] and to analyze power is to map the dense network of forces, including resistance, which are at play in a given context.[25]

To return to the 'technologies of power' that operate outside the framework of sovereignty, Foucault in *Discipline and Punish* tries to show the historical relationship between the traditional notion of power and the modern forms of power that emerged in the 17th century, which he calls 'disciplinary power.'[26] For him, out of this transformation, arises the opposition between law-as-sovereign-power, on one hand, and disciplinary power on the other.[27] While sovereign power, as previously mentioned, is repressive and negative in character, disciplinary power is meant to act on the human body and is primarily an effort to make it more productive and useful. Disciplinary power uses three techniques, namely, "hierarchical observation", "normalizing judgment" and "examination" for these purposes.[28]

---

17. He describes this nature of power as: *"incapable of doing anything, except to render what it dominates incapable of doing anything either." Id* at 85.
18. BAXTER, *Supra* note 12, at 452. Even in today's Constitutional monarchies, notions like "the monarch is above the law" and the "monarch as the fountain of justice" only explain this notion.
19. *Id* at 453.
20. *Ibid.*
21. SEXUALITY, *Supra* note 16, at 82.
22. Michel Foucault, *Two Lectures*, reprinted in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, 78, 96 (Colin Gordon ed., Colin Gordon et al trans., 1980) [hereinafter POWER/KNOWLEDGE].
23. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: BIRTH OF THE PRISON, 26 (1997) [hereinafter FOUCAULT].
24. SEXUALITY, *Supra* note 16, at 95 (*"Where there is power, there is resistance ...."*).
25. BAXTER, *Supra* note 12, at 454.
26. POWER/KNOWLEDGE, *Supra* note 22, at 104.
27. BAXTER, *Supra* note 12, at 454.
28. FOUCAULT, *Supra* note 23, at 170-192.

The first of these involves arranging individuals so as to ensure that one is always watched by another, the second involves penalties and rewards so as to induce norm-conforming behaviour and the last is a combination of both – surveillance in order to qualify and classify individuals.[29]

Foucault himself explains disciplinary power in context, with an analysis of the 'Panopticon' or 'Inspection House' which Jeremy Bentham designed in 1791,[30] which he describes as the 'epitome of his power-knowledge principles.'[31] In the Panopticon, physical repression is replaced by a gentle structure of domination.[32] The usefulness of these structures, which would allow discipline to be established without the use of overt force, was so advantageous that it soon circulated within the social body and was adopted by society's major institutions.[33]

An important question arises here: how can any society, especially an 'Enlightenment' West which discovered the liberties, conceive an ordering and surveillance of the type reflected in his 'disciplinary power?' For Foucault, the answer is easy – he says that it was the generalization of discipline that made possible the expansion of liberal forms of freedom and the formation of constitutional democracies. Without an ordered and disciplined populace, no expansion of 'liberty' could have been conceived.[34] Moreover, he says that:

> "*law only creates a visible rationale for any action, with its fairness and equalities of status provided, while the real force at play, the disciplinary power is hidden from our view and acts in an extra-legal fashion.*"[35]

This in effect, acts as a 'counter-law',[36] undermining the formal fairness of the law. However the situation appears paradoxical – on one hand disciplinary power is the predecessor of liberties and constitutional democracy and on the other, the law that constitutional democracy creates is in opposition to that same disciplinary power. The author attempts to examine this problem in part B of this section of the paper.[37]

Baxter also brings to the fore the notion of 'bio-power' that Foucault enunciates in his *History of Sexuality*.[38] This includes both disciplinary power over bodies and 'bio-politics of the population.'[39] It

---

29. BAXTER, *Supra* note 12, at 455.

30. The Inspection House takes the form of circular building, with individual cells around its perimeter whose windows and lighting are arranged so as to make their occupants clearly visible to the central inspection tower, though it remains opaque to them. Hence, they constantly had to assume that they were under the guard's watchful gaze without ever knowing whether it was really so, and their actions were consequently restricted. FOUCAULT, *Supra* note 23, at 200.

31. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 146, (1990) [hereinafter GARLAND].

32. FOUCAULT, *Supra* note 23, at 201.

33. *Id* at 209.

34. GARLAND, *Supra* note 31, at 147. Garland says that such an argument reminds us of the Hobbesian contention that freedom under the law implies a prior process of subjugation. *Ibid.*.

35. *Ibid.*

36. FOUCAULT, *Supra* note 23, at 222.

37. The matter is examined in Part B, (power-as-constitutive), *infra*.

38. BAXTER, *Supra* note 12, at 456.

39. SEXUALITY, *Supra* note 16, at 139.

is from this second terrain, the interplay of power and population, that Foucault moves on to 'governmentality,' or a form of government rationality that has learned to deal with the problems of the population. Governmentality is a power "*over all and each that simultaneously individualizes and totalizes.*"[40] And yet Foucault is quick to point out that he is not engaging in chronology – one that goes from sovereignty to discipline and then to governmentality – while historicizing the notion of power, for that would be a misrepresentation given that in different time periods, traces of different types of power can be seen.[41] Commentators such as Nikolas Rose have pointed out that he could in fact be conceiving of a triangle between sovereignty, discipline and governmentality.[42] Once again, law becomes relevant here as a 'tool' for the enforcement of government rationality, operating on the middle ground in this new found conception of power.

This mapping of power which Foucault attempts includes another element that has so far been omitted: knowledge. Knowledge is constituted in direct relation to power, or rather as a product of power and they cannot exist without some relationship to each other. So for Foucault:

> *"...development of all these branches of knowledge can in no way be disassociated from the exercise of power.....generally speaking, the fact that societies can become the object of scientific observation, that human behaviour became, from a certain point on, a problem to be analyzed and resolved, all that is bound up. .....So the birth of human sciences goes hand in hand with the installation of new mechanisms of power."*[43]

This would mean that fields of 'knowledge,' like psychiatry, psychology and criminology, developed and are intimately connected with the exercise of disciplinary power, as they produce scientific '*truths*,' which would enable power to be used efficiently and effectively. This observation is of particular relevance when one considers that many legal classifications are understood in modern law only in relation to their medical status – for example, the question as to who is *legally insane* in a court of law is left to the determination of the psychiatrist.

B Power as Constitutive; Part-of-law

As mentioned earlier, the most interesting of Foucault's observations on law can be found in his argument that law and disciplinary power are set against each other, based on his findings in the area of discipline. It is on the basis of this that Hunt and Wikham argue that Foucault "expels the law" from any significant role in modern society.[44] For them, the argument is two fold – *First*, Foucault consistently relates sovereign power to law, and this is reinforced by equating "power-law" to "power-sovereignty." *Secondly*, Foucault attempts to show the incompatibility between sovereign power and disciplinary power. This is so because the latter is represented as repressive and negative, while all modern forms of power are productive and positive and are diffused throughout society. Taking the above propositions together, it seems evident that law-as-sovereignty has no place in a society

---

40. BAXTER, *Supra* note 12, at 457.
41. An example of this is when Foucault traces the origin of governmentality, from antiquity, to the early liberal and current neo-liberal trends. *Ibid.*
42. NIKOLAS ROSE, POWERS OF FREEDOM 23 (1998).
43. FONTANA, *Supra* note 9, at 40.
44. BAXTER. *Supra* note 12, at 461.

dominated by disciplinary power, and the expulsion of the law is therefore, a necessary consequence.[45]

It is here that the author must return to the problem encountered while conceptualizing Foucault's disciplinary power as 'counter-law': the notion that the eighteenth century development of a system of rights was aided by "*all those micro-powers we now call the disciplines.*"[46] The paradox is in fact not a paradox at all, if it is shown that what Foucault was suggesting is that law and discipline are complementary, and not fundamentally opposed to each other.[47] If this is possible, Foucault's understanding of disciplinary power as underlying all legal framework, and acting in opposition to it, would be misleading. Clearly, the law does not merely rest 'atop' disciplinary power, but has an active part in how that power is shaped and exercised;[48] hence, it would be more appropriate to say that law is '*constitutive*' of disciplinary power.[49]

In the light of the above, are we to reinterpret Foucault to create our own 'Foucault' for the uses of legal scholarship? At any rate, a re-look at Foucault's 'expulsion' of the law or the above-mentioned problem serves only to muddy the waters and not to clarify it. The root of the problem lies in Foucault's understanding of 'law as the command of the sovereign' in the Austinian sense, which excludes a large bulk of law governing the relationship between citizens and is not negative or coercive in nature, such as contract law. Perhaps one solution would be to set aside such an interpretation of law for a while and to use his understanding of disciplinary power to uncover the hidden biases in the law using the tool of 'critical history' or genealogy.[50]

This brings us to a third aspect (after the notions of understanding power as productive, and as constitutive of the legal framework) of Foucault's theory in its relevance for legal scholarship. 'Critical history' or 'Genealogy,' a term that Foucault borrowed from Nietzsche, is a methodological tool; one which takes an existing phenomenon, usually a 'ritual of power' and undertakes to uncover its history, not for its own sake, but to understand why it has gained importance in the present.[51] In particular, critical history uncovers the various hidden forces and biases that shape the discourse of law, which is itself just another social practice.[52] The use of critical history is also invariably tied up with a *fourth aspect* of Foucault's theory – that of social construction of norms, practices and classifications.

---

46. FOUCAULT, *Supra* note 23, at 222.

47. BAXTER, *Supra* note 12, at 463.

48. This is to say that the exercise of disciplinary power and the use of law in that regard are not always separate, with the law acting in the visible arena, and the disciplinary power 'underneath.' At many times, law helps to constitute disciplinary power, with both acting as one.

49. BAXTER, *Supra* note 12, at 464. *See* also Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 103.

50. This tool was in fact developed by Nietzche in *The Genealogy of Morals*, Foucault acknowledges this intellectual debt in his essay: Michel Foucault, *Nietzche, Genealogy, History*, in THE FOUCAULT READER, (Paul Rabinow, ed., 1984).

51. In a very paradoxical sense, genealogy is the 'history of the present.' Foucault himself conducted these genealogies in an examination of the birth of the prison, the mental asylum, and the human sciences, although not in the area of the law. The tool is merely one the legal academic pursues in this regard. *See* DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY (1990).

52. Douglas Litowitz, *Postmodernism without the Pomobabble*, 2 FL. COASTAL L.J. 41, 55 (2000) [hereinafter LITOWITZ].

According to Douglas Litowitz, this is an extension of Nietzsche's perception of the "*extreme fluidity in social and legal categories.*"[53] This is quite important when one looks at legal classifications based on racial and sexual norms.[54]

In both the use of critical history as a methodological tool, and the uncovering of the social constructions of norms, the interpreter/subject has a prominent role to play, and her position cannot be fully divorced from the process of interpretation. In this context, interpretative theory assumes importance. Hermeneutics in a postmodern setting conceptualizes the limits of language, and Foucault and Derrida, as two important post-structuralists figure prominently here. In the next part, it is precisely this aspect of postmodern thought that I will attempt to understand, using first Foucualt's understanding of interpretation and then Derrida's use of deconstruction.

III The Impact of Postmodernity on Interpretative Theory

A The Strength of 'Etcetera'

Traditional structural thought, headed by the Structuralist movement based in France in the 1960s attempted to synthesize the ideas of Marx, Freud, and Saussure,[55] and say that the individual is shaped by sociological, psychological and linguistic structures over which she has no control.[56] Thus, a speaker of English cannot hope to make the English words she uses mean whatever she wants, nor does she *want to,* because that would impede her communication.[57] Hence, for the structuralist, as for the post-structuralist, "language speaks us" rather than "we speaking language." However, for Derrida, as for Foucault, these linguistic and sociological structures and the symbols and discourses they shaped, became *in flux* – or constantly changing (as against the rigidity of these structures for the structuralist) and this was their principal point of departure from the latter.[58] They argued that structures of social meaning are always "*unstable, indeterminate, impermanent, and historically situated, constantly changing over time and acquiring new connotations.*"[59]

---

53. *Ibid*

54. *Id* at 56. The legal categorization of sexualities – homosexual v. heterosexual where the latter is posited as the natural while the former is 'unnatural,'(S.377 of the Indian Penal Code, 1860) is an example of such a social construction.

55. The fundamental unit for a structuralist is a sign. The Swiss linguist Ferdinand de Saussure, put forward this notion of sign in his 1915 *Cours de linguistique generale* defining it as comprising the signifier and the signified. Vivian Curran, *Deconstruction, Structuralism, Anti-Semitism and the Law,* 36 B.C.L. REV. 1, 11 (1994) [hereinafter CURRAN]. However, the term itself was coined by the anthropologist Claude Levi-Strauss to describe a method of applying models of linguistic structure to the study of society as a whole, in particular to customs and myths. Though Levi-Strauss claimed inspiration from Marx, he interpreted Marxism to be a science of society, not a guide to political action.

56. Roger Jones, *Post Structuralism, at* <www.philosopher.org.uk/poststr.htm> (last visited on October 10, 2003) [hereinafter JONES].

57. For example, A person will not want the word 'cat' to mean 'tree.' Whenever she would refer to the tree, and say 'cat,' those listening to her would be unable to understand, and her communication would be impeded. Hence, she will only use the word 'tree,' for the organism growing out from the earth with branches and leaves.

58. JONES, *Supra* note 56.

59. J.M. Balkin, *Deconstruction's Legal Career,* at <www.yale.edu/lawweb/jbalkin/articles/ deconstructionslegalcareer1.pdf> (last visited on October 10, 2003) [hereinafter BALKIN].

In law, where often judicial and academic interpretation is constructed over minute differences between the interpretation of words and terms, the importance of the language, and the conceptualization of language in particular ways, must be reiterated. Indeed, an entire discipline of study has grown around interpretation of law and legal norms. In this context, interpretative theory or hermeneutics (initially the interpretation of sacred texts) has gained importance. What is the impact of the above ideas to interpretative theory? How relevant is the discovery of '*hidden truths*' through the process of interpretation in the light of postmodern theory? In this part, the author looks at answers to this question, using the notion of limits of language in the theories of Foucault and Derrida.

The structuralists, though contending the impossibility of a person using language, still maintained the objective identification of that use from an external vantage point in the hope that interpretation would yield the right meaning. However, for Foucault and Derrida, this distinction was merely illusory. Instead they took the argument to its logical conclusion. If the powers of language control the speaker, rather than the speaker being able to control his language, the attempt to clarify language is limited by its own impossibility, because in essence, we are trapped by that very language and cannot step outside it.[60] As Clarke says, we find ourselves in the paradoxical position where:

> "*the* more *we converse, the less we are able to discover the "end" of narrative or language. We are* less *able to find determinate meaning.*"[61]

Hence, while the structuralists made excessive claims as to the existence of 'truth' and the possibility of uncovering that truth through interpretation, the post-structuralists voiced the often silenced dissent – that perhaps the 'unmediated access to some primordial truth' was just absent.[62]

In effect, their claims were even more modest. If, say, a story was told, passed from generation to generation, over the course of many centuries, and a person studying this narrative would uncover earlier and earlier versions of the same story, and would believe that such versions were 'better' and 'truer' versions than the existing one. The aim of the investigator would be to find the 'original' tale in its pristine, untouched form. The postmodernists, though crediting the process of uncovering past histories, would disclaim the existence of such an original, as each story was an 'original' in itself, mediated by its language and symbol systems, and influenced and changed by its own power relations. Moreover, the person studying the tales would become part of the story himself, just as the interpreter would become part of the text.

Following the above analogy, the interpreter of law (say a statute, or a decision of a court) would dig deeper and deeper, recovering different interpretations at different stages, till she achieves her purpose, and the process must be stopped for practical considerations.[63] But is this really so? Doesn't interpretation mean that there is a certain fixed manner in which to approach a text, and to identify/

---

60. This dilemma was best expressed by Derrida in the famous statement: "*There is nothing outside the text.*" JAQUES DERRIDA, OF GRAMMATOLOGY 64 (Gayatri Chakravorthy Spivak trans., 1978).

61. Michael Clark, *Foucault, Gadamer and the Law: Hermeneutics in Postmodern Legal Thought*, 26 U. TOL. L. REV 111, 112 (1994) [hereinafter CLARK].

62. LITOWITZ, *Supra* note 52, at 44.

63. *Ibid.* The simple practical consideration is that a person cannot go on interpreting *ad infinitum*. She must stop at one or other point of time.

create its meaning? For Foucault, this is precisely the dilemma that we must grapple with. Though there seem to be endless interpretations to a text, the law creates limits and eliminates what seem to be impossible interpretations – to prevent the process 'from getting out of hand.'[64] This is the fear of *runaway signification;* that the interpreter will go wherever she wishes if given a free hand.[65] By positing the limited number of interpretations, the law also creates the fiction of truth among those interpretations. All impossible classifications are de-classified; put into the category of 'etcetera,'[66] and carefully excluded. In this manner, the law creates its own truth, and there arises the impossibility of proposing alternate discourses, simply because it cannot fit into the phrase of the current/ dominant discourse.[67] Hence for Foucault:

> *"A proposition must fulfil some onerous and complex conditions before it can be admitted within a discipline; before it can be pronounced true or false it must be . . . 'within the true'"*[68]

Jean Francois Lyotard carries the notion forward when he argues that all adjudications and judgments are oppressive, and to understand law's underlying nature we should observe all those instances when the claims of one of the parties cannot be heard by the adjudicating authority, purely because that claim cannot be phrased to fit the discourse. To Lyotard this is the "differend," and at this point of time justice is revealed as terror.[69]

This last notion, that of the differend, offers the possibility of escape from being trapped within the discourse. It is also for this reason, that both Foucault and Derrida cannot see the situation as an absolute. If justice is seen as terror, a change is definitely in order, and hence, for the former, hope lies in the form of 'discursive ruptures,'[70] or instances when the discourse of law breaks free from the manner in which it had been ordered so far, and the debate is no longer about technical questions of how a word should be interpreted or its position in a matrix of norms, but of the general manner in which the game has been conducted. This can happen through a variety of methods – through an important judicial decision, through a paradigmatic enactment, or even through revolutionary upheaval that challenges the Constitutive documents of the State.[71] In such a 'multiple-discourse'

---

64. CLARK, *Supra* note 61, at 113-114.

65. *Ibid.*

66. The notion of 'etcetera' as the unclassifiable, emerges from a story of Borges narrated in Foucault's *Order of Things*, where a Chinese Encyclopaedia classifies animals in a peculiar manner; such as *belonging to the emperor, siren, fabulous*, and finally, *etcetera*. The power of the etcetera is the power of the unclassifiable. MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES xv (1994).

67. CLARKE, *Supra* note 61, at 122.

68. Michel Foucault, *The Discourse on Language, in* THE ARCHAEOLOGY OF KNOWLEDGE 224, (A. M. Sheridan Smith, trans. 1972).

69. CLARKE, *Supra* note 61, at 117.

70. Similar to what Thomas Kuhn called 'paradigmatic shifts,' in THE STRUCTURE OF SCIENTIFIC REVOLUTIONS; CLARKE, *Supra* note 61, at 114.

71. An example of paradigmatic change in the American context is given in John Valauri's analysis of *Brown* v. *Board of Education*. In the paper, he points to manner in which the United Supreme Court interpreted the existing version of segregation, based on the principle of 'equal but different.' By refusing to examine minute differences in terminology, but rather by looking at the overall question of segregation, the Court had achieved such a paradigm shift. John T. Valauri, *Constitutional Hermeneutics,* in THE INTERPRETATIVE TURN 245, 253, (David Hiley et al. eds., 1991).

environment, conversation (in a very metaphorical sense) does not happen in the language or the grammar of any dominant party, but simply by listeners and speakers in their own versions of understanding.[72]

But how does one identify these fissures? Can discursive ruptures be created, or must one wait for the 'natural course' of a legal discourse to run its length? Though there seems to be little writing on the point, it seems possible that Derrida is actually proposing a model tool for identifying and exposing these fissures through his idea of 'deconstruction'. Before attempting a more studied evaluation of this tool in the next part of this section, it must be said that philosophically, both deconstruction and hermeneutics have common roots. Both agree as to the continuity and permanence of interpretation ("*we are always and already interpreting*").[73] But while hermeneutics stresses the affirmative coming into being of meaning, deconstruction looks primarily at the limits of communication and understanding. While Hans-Georg Gadamer,[74] of the former, is concerned with the manner in which societies continue to operate and function through its relationship to tradition and subsequent interpretation, Derrida, of the latter, is alarmed that such a discussion does not look closely at the violence and the deception that has legitimized those traditions.[75]

B Derrida's Challenge: The Use of Deconstruction

Developed initially as a method or technique for literary criticism and the interpretation of texts, and brought to the notice of the Western English-speaking academia through the efforts of persons like Paul de Man,[76] deconstruction was introduced into legal circles only in the 1990's. Vivian Curran, writing in the *Boston College Law Review*, identifies the origin of Derridian thought in other Continental philosophers like Heideggar, from which Derrida borrows the '*destruktion* of traditional ontology,'[77] and says that the change from Enlightenment thought was on account of the fact that

> *"After Auschwitz and the gulag, absurdity, barbarity, chaos and regression became part of the perception of human progression; a coherent view of mankind required incorporation of profound incoherence."*[78]

Noted American legal theorist J. M. Balkin, who has written much on the relationship between deconstruction and the law, says that deconstruction became fashionable in America around the same

---

72. The notion of interpretative 'understanding,' has another completely new perception according to the theories of Hans-Georg Gadamder, who claimed that each interpreter brought his own horizons of knowledge to the hermeneutical table; and it was through an interplay between different horizons of different interpreters, or for the same interpreter, different horizons within the history of text, that ultimately produced understanding. For a more comprehensive account of his impact on legal hermeneutics *See:* Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry based on the Work of Gadamer, Habermas, and Ricoeur,* 68 B. U. L. REV. 523 (1988).

73. Stephen Feldman, *The Politics of Postmodern Jurisprudence,* 95 MICH L. REV. 166, 185 (1996) [hereinafter FELDMAN].

74. German philosopher of the early 20th century, whose work on hermeneutic theory (*Truth and Method,* 1960) is still considered to be one of the most important statements in that field.

75. FELDMAN, *Supra* note 73, at 190-191.

76. CURRAN, *Supra* note 55, at 5-6. Paul De Man was the head of Yale's French department, during the time in which he was active in popularizing deconstruction.

77. CURRAN, *Supra* note 55.

78. CURRAN, *Supra* note 55, at 2.

time as a theory known as reader-response, leading to the strange conclusion that the deconstruction of texts would mean whatever the readers would want them to mean.[79] He says this interpretation was particularly 'silly' because deconstruction arose as a response to the structuralist movement. As mentioned above, both structuralist and post-structuralist thinkers agreed that 'language spoke,' rather than 'we speaking language,' though the latter group took issue with the former's fixed understandings of those structures in society.

The entire fulcrum of deconstruction challenges two assumptions of western philosophy. This includes the understanding that there exists a centre to any system or structure, which is the point of origin, and that all systems or structures are created of binary pairs of oppositions, of two terms placed in some sort of relation to each other.[80] As regards the second, Derrida argues that the creation of such a binary opposition also involves the privileging of one of those terms over the other.[81] Derrida argues that most of western philosophy has been based on one particular dichotomy – the privileging of speech over writing, which he calls 'logocentrism.'[82] 'Logocentrism' desires a perfectly rational language that perfectly represents the real world. Such a language of reason would absolutely guarantee that the *presence* of the world, interpreted as the essence of everything in the world, could be viewed by an observing subject, who then would be able to speak of it with absolute certainty.[83]

To him, the problem in this binary opposition lies in the exclusion of all that is uncertain, and the repression of the unprivileged within that text. Through deconstruction, Derrida shows that the term which is unprivileged against its paired term is actually part of the term in the first place, and one does not hold without the other, and therefore the argument that they are 'different' falls apart.[84]

Applying this notion to the interpretation of texts, one can see that any 'meaning'[85] that is constructed is provisional and relative, because it is *never exhaustive*, and can always be traced back to a prior network of differences, and the antinomies[86] in this can further be exposed by deconstructing them, and so on. In the legal arena, a deconstructive analysis of the public/private distinction would reveal such a distinction to be illusory. For example, it is clear that private property is made possible only through 'public enforcement,' which would mean that instead of understanding private property as a personal relation between the owner of the land and the land itself, it is actually understood as a public and social arrangement. Once the hierarchy is exposed as problematic, the stage is set for the re-construction of new legal categories. In all such interpretation, as mentioned above, the interpreter (or the self) is positioned within the text, unlike in structuralism, which says that there can be an

---

79. BALKIN, *Supra* note 59.

80. JOHN LECHTE, FROM STRUCTURALISM TO POSTMODERNITY: KEY CONTEMPERORY THINKERS 106 (1994) [hereinafter LECHTE].

81. Examples that can be shown in this regard are opposites like light/dark, masculine/feminine etc in which the latter is always subjected and rendered inferior to the former.

82. J.M. Balkin, *Nested Oppositions,* 99 YALE L.J. 1669, 1693 (1990).

83. RICHARD APPIGNANESI & CHRIS GARRAT, INTRODUCING POSTMODERNISM, 78 (1999) [hereinafter GARRAT].

84. LECHTE, *Supra* note 80, 107.

85. Meaning involves both identity (what it is) and difference (what it is not), and is therefore being continuously 'deferred.' The word Derrida coined to show this tension was 'differance'. GARRAT, *Supra* note 83.

86. An antinomy is a contradiction between two beliefs or conclusions that are in themselves reasonable

objective standpoint to view the discourse.

Many legal scholars discount deconstruction, arguing that it is used randomly, its purpose being simply to destroy and debunk, rather than its use being of any discernible pattern.[87] Derrida's response is that, instead of random use of deconstruction, the technique is most often used when the manner in which words are juxtaposed throw open the possibility of different interpretations.[88] But a more valid, and reasoned pronouncement against deconstruction argues that its anti-foundationalism is inherently dangerous because it questions the very manner in which we order our lives. Hence, critics such as Hegland say that our world would become worse off if we were to perceive the Rule of Law as an illusion.[89] But even these criticisms stem from the misunderstanding of deconstruction as nihilism.[90] In effect, deconstruction only offers the possibility of multiple meanings, and is precisely the opposite of 'an absence of meaning.'

IV The Possibility of Justice

For long, Derrida had been primarily concerned with developing his notion of deconstruction in order to attack Western rationality. Interestingly, though the technique was used by other legal scholars, it was not used by its author himself until the last decade when he made some interesting forays into the aspect of law and justice using the tool of deconstruction. At the Cardozo Law School conference in 1992, for which he writes his most important work in this context,[91] he expresses his complaint over the obligation to write something on justice, which he did not volunteer to do.[92] Mariana Valverde says that in this essay as well as his work entitled *Spectres of Marx*,[93] he addresses justice not as a conceptual idea, as in natural law, but rather as a 'praxis'.[94] Therefore, the question for him is: "*How can we, in our particular time and place, work towards justice?*"[95]

In his *Force of Law*,[96] Derrida begins by pointing to the intimate connection between violence and the law. He does so by making two assertions:

---

87. CURRAN, *Supra* note 55, at 20.

88. *Id.*

89. Kenney Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1205. For other criticisms, *See also* Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). Fiss says that deconstruction, being nihilistic, *"threatens our social existence."* Another prominent 'intellectual' case against deconstruction was brought forward in JOHN ELLIS, AGAINST DECONSTRUCTION, (1989), where he claims to use the 'tools of logic' to expose the flaws in the deconstructive method. For the postmodern response *See* J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990).

90. Or that which rejects all available possibilities, and results in the absence of meanings

91. Jacques Derrida, *Force of Law: Mystical Foundations of Authority*, 11 CARDOZO L. REV. 919 (1992) [hereinafter FORCE OF LAW].

92. John P. McCormick, *Schmittian Notion on Law and Politics: CLS and Derrida*, 21 CARDOZO L. REV. 1693 (1999). [hereinafter MCCORMICK].

93. JAQUES DERRIDA, SPECTERS OF MARX: THE STATE OF DEBT, THE WORK OF MOURNING AND THE NEW INTERNATIONAL (Peggy Kamuf trans, 1994).

94. 'Praxis' means 'practice,' as distinguished from theory.

95. Mariana Valverde, *Derrida's Justice and Foucault's Freedom: Ethics, History and Social Movements*, 24 LAW & SOC. INQUIRY 655, 657 [hereinafter VALVERDE].

96. The article was later reprinted in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE, (ed. D. Cornell et al, 1992) [hereinafter DERRIDA].

(i) There is violence in the establishment of the system of justice, and

(ii) post-founding, the day to day applicability of law is marked by the coercive force which backs it.[97]

Roberto Buonamano makes the connection explicit in saying: *"the law is bound up with a silence of its own force, and is self-preserving."*[98] The law is not in service of force, nor force in service of law, but rather law is seen as *"founding, justifying and preserving force."*[99] For Derrida, all the three are simultaneous acts, performed at the starting point – at the origin of authority.[100] They are also necessary, for without one of the three, the force of the law would fall apart. Here arises Buanamano's insistence on the importance of silence. The silence of the founding act becomes necessary for the law as it legitimizes itself through that act. If there were no silence, it would expose the paradox of the act, the legitimizing of law in none other than itself, and therefore the violence implicit in the founding act.[101] Hence, arises for him, the 'mystical foundations of law.'[102]

Here the question that Derrida asks, and which Valverde says Foucault evades,[103] is whether any such system (backed by force) is just, and if so, then aren't we not making claims as to different types of violence, some more just than others.[104] So for Derrida,

> *"What difference is there between, on one hand, the force that can be just, or in any case deemed legitimate...and on the other hand the violence that one always deems unjust? What is a just force or a non-violent force?"*[105]

This open ended style of questioning is typical of Derrida,[106] and therefore there are no immediate answers to the question through his own method. This is because deconstruction as a relentlessly negative method seems to preclude the possibility of taking sides, and arguing that A is just and B is

---

97. DERRIDA, *Supra* note 96, at 13-14.

98. Roberto Buonamano, *The Economy of Violence: Derrida on Law and Justice,* 11 RATIO JURIS 168 (1998) [hereinafter BUONAMANO]. Buonamano's statement is the third of three sweeping claims on Derrida's understandings of law that he makes. The other two are (1) the law always tends towards universality. (2) the law operates to maintain and is therefore inseparable from rights. *Ibid*

99. *Id* at 170.

100. Derrida is less clear as to what exactly constitutes a founding act, but from its relationship to authority, it would appear that it would account for a situation where a system of justice has initially been established.

101. BUONAMANO, *Supra* note 98, at 170.

102. Derrida pays particular attention to this notion in the second part of his essay, where he attempts to make sense of the inherent violence and differentiates between mystic and mythic violence. The argument is incidental to the above discussion.

103. VALVERDE, *Supra* note 95, at 657. Foucault, otherwise, is in agreement with Derrida in that what goes by the name of justice is often thinly disguised force.

104. MCCORMICK, *Supra* note 92, at 1707.

105. DERRIDA, *Supra* note 96, at 6.

106. Levi Strauss says that this style was employed by Plato, taking account of the dialogical structure of his works. He says it points out the irreconcilable differences, and the permanent problematization of reason, justice, etc. MCCORMICK, *Supra* note 92, at 1708.

unjust.[107] But does this indecision distance us from the possibility of justice? No, says Derrida as he is firm that: "*what is currently called deconstruction would not correspond to a quasi-nihilistic abdication before the ethico-politico-juridical question of justice and before the opposition between just and the unjust.*"[108] In fact, for him, the possibility of justice lies in *leaving open* that tension between justice (which is "infinite, incalculable, rebellious to rule, foreign to symmetry, heterogeneous and heterotopic") and the law (defined as "rights, legitimate, stabilized, statutory, calculable and a system of regulated and coded prescriptions.")[109]

So, in effect, deconstruction is exposing this tension and making possible justice through a two-step process. At the first step, one is to adopt an "*excessive and incalculable*" responsibility to the question of justice.[110] This responsibility is to take account of the past – the origin of laws, rights and norms, and the "*apparatus surrounding justice.*" At the second, this responsibility is not possible without a grounding in the "*experience and experiment of the* aporia."[111]

Derrida concludes the first part of his essay by showing three specific aporia, or irresolvable internal contradictions in law. In effect, there is only one aporia: the contradiction that law claims to exercise itself in the name of justice though justice is required to establish itself in the name of law that must be "*enforced*". But this aporia 'infinitely distributes itself producing infinite examples.'[112] The following are the three examples he gives of this aporia.

First, judges in writing a judgment, conserve and destroy the law at the same time. They apply previously established rules *and* make new law at the point of judgment. Thus, the paradox is that on one hand consistency is required, and on the other, each case is different and thus must be treated differently.[113]

Second, if we can understand decision as a process of learning, reading, understanding, interpreting, and calculating the rule, the 'decision to decide' between two equally competent, though different interpretations, belongs to the undecidable. Hence, the second aporia in the law is the 'ordeal of the undecidable,' Like a reader must always choose between competing interpretations of any given text, none of which is more 'correct' than others, similarly a judge must decide in choosing the applicable rule of law.[114] Even in deciding one or the other, for Derrida that decision will not be comprehensively just, either because it has not followed the rule, or in following it, the rule is not guaranteed. However, one cannot suspend the decision because only a "decision is just." So the ordeal of the undecidable is one that each judge must endure.

---

107. Others like Stanley Fish have argued that there is no way of distinguishing between justice and injustice except by taking one political stance. *Supra* note 95, at 657.

108. DERRIDA, *Supra* note 96, at 19.

109. *Id* at 22.

110. BUONAMANO, *Supra* note 98, at 171.

111. DERRIDA, *Supra* note 96, at 41. An aporia is an irresolvable internal contradiction in any system. In this context, I refer to it mean a contradiction within law.

112. *Infra* note 120, at 453.

113. MCCORMICK, *Supra* note 92, at 1710.

114. *Id* at 1711. "*There is apparently no moment in which a decision can be presently and fully just: either it has not yet been made according to a rule, and nothing allows it to be called just, or it has already followed a rule - whether received, confirmed, conserved or reinvented - which in its turn is not absolutely guaranteed by anything; and, moreover, if it were guaranteed, the decision would be reduced to calculation and we couldn't call it just*" DERRIDA, *Supra* note 96, at 24.

Finally, there is a second aspect to the notion that one cannot suspend a decision. This is the imperative of urgency that judgment must be rendered *now*, and cannot be put off. Derrida quotes Kierkegaard to the effect that "the instant of decision is madness." This is the third aporia, as the decision cannot be sure of all infinite information, rules and conditions which would justify it, nor can it be a 'response from a privileged historical stand point.'[115] Hence, in its inescapable finitude, that the decision must be rendered momentarily and not at some obscure point in the future, it displaces justice from the 'now' to sometime in the future, but does not discount its 'possibility.'[116]

Where, then, does Derrida leave us on law and justice? Clearly, to him, justice is an ideal to which, through deconstruction – adopting responsibility and understanding the aporias – we must *tend towards*. In his essay on the *Force of Law*, Derrida says that justice is impossible,[117] and is not deconstructable. On the other hand, law is deconstructable, and that taken together the possibility of deconstruction is ensured and that finally deconstruction *is* justice.[118] However, Balkin argues that taken together, these statements yield a contradiction. This is because on one hand, deconstruction is possible (the deconstructability of law and the indeconstructability of justice taken together), and on the other, deconstruction is impossible (because deconstruction is justice, and justice is impossible).[119]

What Derrida was most probably trying to say, is that if the deconstructability of law and the indeconstructability of justice both make deconstruction possible, then deconstruction would happen in the interval that separates the deconstructability of law from the indeconstructability of justice.[120] For Derrida, herein lies the possibility of justice; through the aporetic experience of the impossible. Clearly, such an experience can only be one of *madness* (like the instant of decision), and just as modernism banishes any such situation from mainstream legal understanding,[121] the madness at the margins is justices' real hope.[122]

The aporetic experience of the impossible is also the most commanding answer to the modernist rejection of postmodernity – the seductive comfort of nihilism is abandoned for the tension of continuously seeking alternatives. But by pushing ahead the possibility of justice as 'a venir'(to come),

---

115. BUONAMANO, *Supra* note 98, at 173.

116. *Ibid.*

117. FORCE OF LAW, *Supra* note 91, at 945.

118. *Ibid.*

119. J.M. Balkin, *Being Just with Deconstruction*, 3 SOCIAL AND LEGAL STUDIES 393 *available at* <www.yale.edu/lawweb/jbalkin/articles/beingjust1.html> (last visited October 10, 2003).

120. Vladimir Dokic, *Reading Derrida's 'Force of Law: The Mystical Foundations of Authority'*, <http://facta.junis.ni.ac.yu/facta/pas/pas98/pas98-03.pdf> (last visited October 10, 2003).

121. As was shown in the theories of Foucault, in the preceding Part, with particular regard to how extraordinary interpretations suffer from the pain of runaway signification, and hence are banished from legal understanding

122. Madness has an additional meaning in postmodernity, though not particularly relevant here. This stems from extreme skepticism that guides postmodernism's rejection of modern legal theories which attempted to use sociology and economics to shape the law, and has been described as 'paranoia.' Francis J. Mootz III, *The Paranoid Style in Contemporary Legal Scholarship*, 31 HOUS. L. REV. 873 (1994).

he fails to answer his own question - that of how to work for justice in our times. One could only speculate here that Derrida, of the ever-changing flux, willed local solutions to different legal problems, given different sets of norms, histories, influences, authorities, and etcetera.

V Conclusion: Towards a Postmodern Jurisprudence?

In the preceding sections, an attempt has been made to outline the role of two significant post-structuralist thinkers, namely Michel Foucault and Jacques Derrida in constructing a critique of law. This was depicted in the mapping of power for the former, and the law's relationship with justice for the latter, as well as their impact on interpretative theory. In this concluding section, an attempt is made to show how their work and the larger postmodernist enterprise have affected legal scholarship. It is also attempted to explore the move in recent years, towards creating some kind of a postmodernist jurisprudence in order to fit in with current philosophical trends.

Among recent legal movements, the *Critical Legal Studies Movement*, commonly referred to as CLS, has been considerably influenced by the postmodernist way of thought.[123] Begun somewhat in the late 1970's, as a result of a conference of the faculties of US law schools, and a mood of disillusionment that prevailed all around, the CLS movement challenged the traditional or formalistic picture of legal development present in America since the 1920's.[124] Through critical interrogation of the social phenomena of law, the CLS found different problematic characterizations, such as the person, the text, the liberal ascription of rights, and the meaning of law's claims and effects.[125] Wayne Morrison, author of *Jurisprudence: From the Greeks to Postmodernism,* says that for some part, CLS was an '*expression of angst.*' In other words, it was the coming to terms of the legal academia with the end of modernity; to see all the poverty, irrationality, corruption and violence of the world and to be able to ask the question that there must be something wrong with a legal system which says that everything is fine as it is – that *status quo* must be maintained.[126]

Before postmodernism, CLS drew upon Marxism[127] (Marx, Gramsci, the Frankfurt School[128]) and Legal Realism (an early Twentieth Century jurisprudential movement that brought out the indeterminacy of law.)[129] Upon postmodern influence, many CLS members, in addition to using Marxist and Realist themes, began to speak about 'deconstruction,'[130] and 'critical legal history'.[131] Hence, for CLS arrived the postmodern tool of making visible the hidden strings which held up, or shaped a discourse.

---

123. LITOWTIZ, *Supra* note 52, at 62.

124. For a comprehensive history of the CLS *See:* Mark Tushnet, *Critical Legal Studies: A Political History,* 100 YALE L. J. 1515 (1991).

125. WAYNE MORRISON, JURISPRUDENCE: FROM THE GREEKS TO POSTMODERNISM, 457 (1997).

126. *Id* at 458.

127. From which they drew notions of base/superstructure (Marx), hegemony (Gramsci), etc.

128. The Frankfurt school included, among others, Walter Benjamin whose *Critique of Violence* Derrida remarks facilitates its own self-deconstructive reading. BUONAMANO, *Supra* note 98, at 173.

129. LITOWTIZ, *Supra* note 52, at 62.

130. For an example of the manner in which deconstruction has been used by CLS, *See* Claire Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L. J. 997.(1985)

131. LITOWTIZ, *Supra* note 52, at 63.

Apart from CLS in America, other prominent schools of thought that postmodern theory has influenced includes the *Law and Literature* movement. This school argues that law is simply another narrative, just one more story, and judges employ their own logic while pretending to utilize precedents and statutes.[132] Another school so influenced is *Legal Semiotics*, which utilized the notion of self as created by symbol systems to demystify legal doctrines.[133] In addition, many legal theorists straddled the divide between postmodernism as a social theory and adapted it for understanding legal discourse.[134] Scholars like Balkin drew from Nietzsche and Foucault to show the manner in which external factors, beyond those actors visible on a plain reading, influenced legal classifications/ categories and thinking.[135] Others in this group include Drucilla Cornell (who edited *Deconstruction and the Possibility of Justice)* and Peter Goodrich.

Indeed, at many times efforts has been made to group these movements together, add a couple of legal theorists who've written critically, and claim the entrance of postmodern jurisprudence.[136] The attempt is clearly a misrepresentation of both postmodern theory, and an understanding of jurisprudence. To be a jurisprudential theory, any formulation must dwell, at least minimally, on a blueprint for what the law should be. However, postmodernism, via Foucault and Derrida merely continuously engages in the critique of law, questioning its origins, it traditions, and its legitimacy. Furthermore it operates at the margins and hence is placed in a position where it *cannot* suggest any reform – for such reform can only be superficial, and the foundations/fundamentals which the postmodernists attack will remain. The madness at the margins, the term I've used above to describe the experience of the impossible, *cannot* become the casual pursuit of simply rectifying law, since it would then cease to be a postmodern critique of law.

Hence, criticism wedded to undecidability becomes postmodernism's most valued characteristic, and most disappointing failure. Consider the following analogy: A traveler on the highway is told that the path she is pursuing *is problematic*, but the speaker also admits that s*he may be incorrect,* and, at any rate, which is a better path is not very clear either. This is the ambiguity that confronts our postmodern lives. The only hope is that the ambiguity will preclude the commission of the grossly incorrect, perhaps more aptly defined as the grossly *inhuman*, examples of which can include those as disparate as the Holocaust and contemporary representations of neo-imperialism. Though neither Foucault nor Derrida explicitly mention the phrase, it is precisely this *human* spirit that informs both their writings, and to which they both committed their endeavors.[137]

---

132. *See* Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

133. LITOWTIZ, *Supra* note 52, at 67.

134. The divide depicted is that of postmodernism as a purely social theory, and the discipline of jurisprudence as having no formal connections with such social theories.

135. J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L. J. 105 (1993).

136. Litowitz commits this error in his article 'Postmodernism without the Pomobabble,' but is quick to reflect and lay down the difficulties in putting forward such a term. LITOWITZ, *Supra* note 62.

137. I use the word *human* as separate from *humanist or humanism.* The latter, which was the system of thought that originated from the Renaissance, and believed in attaching prime importance to the human through the recognition of the rational, autonomous self, came under critical interrogation by postmodernist writers including Foucault and Derrida. R. Radhakrishnan, *In Memoriam: An Obituary of Edward Said,* Frontline, Oct. 24., 2003, 105.

In the end, the one manner in which the postmodern critique of law can be utilized is to link it up with some sort of a programme for change (as distinct from mere reform), one which does not simply capitulate to distinctions between superficial interpretations of terminologies, but continuously addresses the general rules of the game. In this manner, the traveller acknowledges the possibility of error on her part, but both the traveler and the speaker are engaged in an effort to find alternative roads and to move forward (and backwards) ceaselessly, in the hope of rendering justice possible.