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NOTES • DISCUSSION • BOOK REVIEWS

Jurisprudence in an Indeterminate World: Pragmatist not Postmodern

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Determinacy marks a belief in the existence, for any given law, of a "correct" meaning or "proper" application and, correspondingly, of a "right" answer to any given legal case. Indeterminacy refers to the lack of determinate knowledge of what many legal rules mean, and of how they should be applied in specific instances. A pragmatist[1] jurisprudence fully embraces the phenomenon of indeterminacy. It regards legally relevant behavior and belief as products of their particular social and historical context, not of innate knowledge (as natural law[2] asserts) or established authority (as

[1] Among the presuppositions of pragmatism I count the following: rejection of a correspondence theory of truth; the claim that, even if truth itself is immutable, our estimation of it can only be variable; the notion that we estimate a belief as "true" if it proves to be a successful guide to action; the conviction that knowledge in moral and non-moral situations is not sharply distinct, nor are the respective knowledge gathering procedures by which people control their environment; the view that no inquiry whatsoever provides infallible results. This particular list is directly inspired by Posner (1990, 28), although it is hardly original but rather broadly representative of the pragmatist movement. Compatible with this list is West's (1989, 5) understanding of pragmatism as "an attitude whose common denominator is a future oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action."

[2] Natural law descends from Aristotle, Cicero, and Thomas Aquinas and finds contemporary advocates in Lon Fuller (1969), John Finnis (1993), and Michael Moore (1985), among others. It claims that some moral judgments can be objective and in this important sense it supports a strong thesis of determinacy—even as it allows for indeterminacy in several ways. While it posits absolutes, it recognizes contingent factors that may impinge on them. While it posits the existence of objective human goods and moral requirements, it allows for significant indeterminacy in our knowledge and understanding of them. A whole society guided by natural law would nonetheless require mechanisms of adjudication with the authority to choose among alternatives which, from the standpoint of natural law, are equally viable. And natural law allows for more than one correct answer to some legal questions inasmuch as it does not require us to follow a necessary sequence of steps in applying laws.

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analytic jurisprudence[3] maintains). Today only one other type of jurisprudence embraces indeterminacy in this strong sense: What I shall construct[4] as "postmodern jurisprudence." Lyotard (1984, xxiii) distinguishes postmodernism from any "metadiscourse appealing to some grand narrative." From this distinction we can derive at least an initial definition of a postmodern jurisprudence: One that views legal determinacy as one of the false "grand narratives" of the European Enlightenment.

Clearly jurisprudence both pragmatist and postmodern eschews any kind of transcendental foundation or principled[5] approach for which meaning is "closed," unique, or otherwise strongly determinate. This similarity is so striking that we might ask: Is a pragmatist jurisprudence postmodern (or a postmodern jurisprudence pragmatist)? Various authors regard some types of postmodernism as compatible with some types of pragmatism. Schlag (1989, 1223, n. 109), for example, suggests that "pragmatism is the indigenous American version of modernism or postmodernism." Lyotard (1984, 65) views language games from a postmodern perspective as "heteromorphous, subject to heterogeneous sets of pragmatist rules" and concludes—contrary to modernist claims—that all speakers *cannot* come to agreement on which rules or metaprescriptions are universally valid for language games. Handler (1992, 704) tenders the unlikely assertion that "[p]ostmodernists use pragmatism to deny that contingency is the equivalent of indeterminacy." In fact contingency is a *form* of indeterminacy, as Winter (1992, 797), among other theorists of postmodernism, recognizes: Postmodern "subjects are exposed as contingent incidents of ongoing practices rather than the self-directing, originary authors of those practices."

I, too, shall identify several affinities between pragmatism and postmodernism. Yet I shall argue that, at least with reference to their respective jurisprudential implications, they are more different than similar—and that

[3] Analytic jurisprudence derives from Bentham (1962), Austin (1885), Kelsen (1949), and Hart (1963), among others. It emphasizes the enclosed character of law as something that can be analysed independent of its causes, purpose, history, or values. The "command of the sovereign" (rather than, say, reason, nature, God, or the "plain meaning" of the text), constitutes the sole guide for the interpretation and application of laws. Legality and meaning can be unambiguous to the extent any command can be unambiguous (namely, sometimes but hardly always). On the other hand, legal meanings can transcend context and contingencies since solely the sovereign command controls.

[4] I "construct" these types by offering specific versions of the broad intellectual movements called pragmatism and postmodernism. Neither construction exhausts the wide variety of thought in each of these respective "schools." Indeed, neither "school" is sharply delimited in terms of beliefs, methodology, or canon; pragmatism and postmodernism are both, unavoidably, umbrella terms, each sheltering diverse perspectives some of which may not agree with each other. Hence to speak collectively of either "school" is necessarily to construct a version, much as I have.

[5] Walker (1990), Stoner (1992), Scheuerman (1994), and Habermas (1996) are more recent examples of what I critique as "principled jurisprudence" (Gregg 1994b), "formal law" (Gregg 1997), and "transcendental legitimacy" (Gregg 1998).

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as a jurisprudence of indeterminacy, pragmatism is superior to postmodernism.[6]

Pragmatism And Postmodernism Are Both Antifoundationalist

One similarity between the two approaches has emerged already: Both accept a strong version of the indeterminacy thesis,[7] that is, reject notions of ultimate foundations for knowledge or morals. The "right" meaning or "proper" application of any given law is open at the levels of practice and consciousness. We cannot know, with any finality, which non-legal norms should guide the application of legal norms.

Pragmatism And Postmodernism Are Both Localist Not Universalist

Pragmatist and postmodern notions of law agree that, even if the determination of "correct" meaning or "proper" application is impossible by appeal to some putatively *universal* standpoint, it might yet be possible by appeal to some *local* standard. A standard is local if for example it is available only in the community concerned, and/or valid for that particular community but not for all communities, and/or valid on one or more occasions but not all. Unlike universal standards, *local* standards are *ad hoc*, discontinuous, and inconsistent.

The notion of local determination can accommodate the fact that the historical development of any contemporary legal system (for example with respect to extending rights to more, and more diverse, groups within society) is discontinuous, indeed often internally inconsistent.[8] Such discontinuity and inconsistency follow from the *ad hoc* nature of determining meaning and application.

Localism Need Not Be Parochial

For both pragmatist and postmodern jurisprudence, legal and other norms are a form of cultural practice. Cultural practices are historically specific,

[6] This perspective accords with Best and Kellner's (1991, 176) discussion of the relationship between pragmatism and postmodernism. They contrast Lyotard, who "rejects macrotheory and fetishizes difference […] while stigmatizing […] totality, grand narratives, consensus, and universality" with "certain postmodern theorists (for example Rorty) [who] operate with a more contextual epistemology which derives epistemological criteria from specific tasks, goals, and topics. Such a *conceptual pragmatism* is consistent with the spirit of Lyotard's emphasis on a plurality of language games, but conflicts with his prescriptions against certain kinds of social theory by allowing grand narratives as well as localized ones."

[7] One leading postmodern author, Derrida (1988, 144), speaks of "the play of relative indetermination" yet dismisses talk of "some vague *indeterminacy*" in favor of "undecidability" (ibid., 148). In fact, the "undecidable" *is* so precisely because it is itself indeterminate, or is subject to factors that render it such.

[8] Elsewhere (Gregg 1992) I track the parameters of this discontinuity in American constitutional history.

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contingent, and ungrounded except in terms of other, prior, contingent, historically specific behavior. Foucault (1980, 112–13, 131, 133), a leading theorist of postmodernism, concludes that each cultural practice has its own criteria for truth and falsity, its own institutional sanctions.[9] But such an open-ended notion of contingent, historically changing and culturally variable norms allows the cynical conclusion that "who will do what to whom under the new pluralism is depressingly predictable" (Lovibond 1989, 22).

We reach a different conclusion from pragmatist presuppositions: that legitimation cannot be plural, each instance of legitimation warranting its own constitutive norms, with practitioners legitimizing their own practice. Otherwise legitimation is parochial. A postmodern localism is parochial in the sense that its moral scope is so limited as to be incapable of claiming validity across disputes or among communities. But if one appeals to local standards as the final moral arbiter, to whose locality is one appealing? The constitution of *local* standards is as problematic and subject to contestation as the constitution of *universal* standards. Moreover, how likely is it that every local member of a community or group helps determine local standards? How likely is it that every local member even agrees with all other members as to what those standards are? If disagreement occurs and adjudication is only local, then adjudication would appear impossible because, from the local point of view, every claim would be equally valid. Pragmatism embraces localism as does postmodernism, but it doesn't embrace the notion of *plural* legitimacy—our next rubric.

Normative Critique Is Possible Even Under Indeterminate Conditions

Both types of jurisprudence allow that legal and non-legal norms can be indeterminate in meaning and application. A postmodern stance concludes that the indeterminacy of norms *precludes* the very possibility of social and legal critique, or more precisely: Critique is possible only as something normatively idiosyncratic or wholly subjective. But pragmatism allows for the still viable, if sharply restricted, *modernism* of what I shall call "enlightened localism,"[10] a notion of "decentered" critique of a society, community, social institution or role. "Decentered" means that critique, whether of an entire society or of a single statute, starts from norms immanent in that society or legal system (immanent, hence "centered"), but goes beyond them as well, becoming decentered. In exceeding them, critique neither ceases being situated nor starts being universal. I term such a localism "enlightened" to distinguish it from *parochial* forms of localism such as we observed, under

[9] Similarly Lyotard (1984, xxiv) urges a notion of justice "not linked to that of consensus," recognizing the "heteromorphous nature of language games" and the "principle that any consensus on the rules defining a game and the *moves* playable within it *must* be local." Postmodern society accordingly is characterized by "institutions in patches."
[10] I develop this notion in Gregg 1994a.

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the previous rubric, in the respective postmodernisms of Foucault and Lyotard.[11]

Postmodernism by contrast cannot exceed the radical subjectivism of parochialism or "centricity." Balkin (1994, 1142) proposes a non-parochial postmodernism yet can do so only incongruously, via a notion of "*transcendental* deconstruction,"[12] an oxymoron akin to a "universal localism." Less ambitious is Winter's (1992, 806) defense of the "deep humanism of postmodernism [which] inheres in its affirmation that our values need not be underwritten by anything more than our own actions." But even here the point remains: If values need no warrant outside and beyond themselves, then the moral narrowness of unrestrained subjectivism prevails; critique would be crippled by its own parochialism.

I would make the same argument with respect to the term "decentered," a term central to both types of jurisprudence. Winter's understanding of the term simply precludes the possibility of critique: "In the Western tradition, the dominant discourse [...] affirms the subject as an originary, self-directing agent. To undermine *that* discourse is to decenter the subject" (Balkin 1992, 799). In fact, to "undermine that discourse" is to undermine the very possibility of critique: Critique by any other-directed agent (someone not in control of him- or herself, a heteronomous agent) is not critique but mimicry (which is never critical) of whoever or whatever controls the agent. The pragmatist notion of a decentered standpoint, by contrast, is a *condition* of critique, not its elimination. A standpoint can be decentered and still aspire to a non-parochial form of localism.

Non-parochial localism presupposes what might be called "weak objectivism," a type of objectivity defined

> by contrast to the "subject," or unreflective and unsorted beliefs and preferences people happen to have. The objective is what has passed certain tests of reflective scrutiny [...] that need not have anything to do with extra-human or extra-historical standards of value. (Nussbaum 1994, 201)

A weak objectivism comports with a pragmatism that doesn't exclude the possibility that moral beliefs can be objective. Weak objectivism refers to non-absolute objectivity which, again, is compatible with the pragmatist view that judicial decisions can be given objective grounds for the most part, but not grounds that will be morally legitimate always and everywhere. Weakly objective norms are locally, not universally applicable.

[11] I term such a localism "enlightened" to distinguish it also from Rorty's (1984, 50) self-proclaimed "frank ethnocentrism" in the face of relativism, "letting our philosophical view dictate terms in which to describe the dead"—reasons such as regarding past generations in terms of their "benighted times" and "outdated language," and for purposes "for which it is useful to know how people talked who did not know as much as we do."

[12] Transcendental deconstruction turns on a "conception of values that *go beyond* the positive norms of culture and convention" and "attempts to reveal the mistaken identification of justice with an inadequate articulation of justice in human culture and law" (Balkin 1994, 1139).

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Feminist perspectives have shown particular sensitivity to those aspects of postmodernism that defeat critical intentions. Nicholson and Fraser (1988, 87–9), for example, conclude that Lyotard's postmodernism allows for a merely "anemic" social critique because it "rules out the sort of critical social theory that employs general categories like gender, race, and class." Postmodernism's rejection of large-scale approaches to oppression (Lyotard's "grand narratives") renders it incapable of recognizing women collectively as an oppressed *group*. Postmodern antifoundationalism precludes institutional analysis and therefore cannot, *in terms of postmodernism*, support social and political movements whose goals postmoderns otherwise may share.[13]

Autonomy Is Possible Even Under Indeterminate Conditions

Postmodern theory is a radical form of skepticism,[14] claiming that anything sayable in language can be explained or elucidated, but *only* explained or elucidated; it cannot be criticized discursively or rejected rationally. By contrast pragmatism claims that the strategies we employ in disparate discourses are groundable solely in the linguistic practices embodying them. It claims not that radical skepticism can be articulated coherently (it can't), but rather that certainty *is* possible, if only in a limited or narrow sense, namely as a certainty constructed through linguistic *conventions*, within *particular* discourses. Postmodernism by contrast urges that no standpoint of rational, discursive critique is possible because no "residue of transcendence and alterity remains [and] all society has become immanent to the operations of a totalitarian discourse that allows nothing to escape" (Goodrich et al., 1994, 23). From this perspective law and legal institutions appear to be *nothing but* monolithic instruments of oppression. Only a "postmodern theory of justice allows otherness to survive and to become a theoretical space through which

[13] For their part, if Nicholson and Fraser are to realize an antifoundationalist form of feminism, they must "develop a method for discussing gender relations as oppressive without invoking universal principles of justice or human nature," and will "have to show how they can talk about women as a group without falling back on universal claims about a woman's identity" (Smiley 1991, 1580–81). Young (1990, 36) characterizes the dilemma of postmodern normative theory as a contradiction between norms based on "certain values derived from a conception of the good human life," that is, "a conception of human nature"—and the antifoundationalist consequence of rejecting "the very idea of a human nature as misleading or oppressive."

[14] The postmodern standpoint is distinguished from a purely *epistemological* position like skepticism (which is why the ancient Greek skeptics were not postmodern). The postmodern version constitutes a form of "openness" at the level of *practice*, not only at the level of consciousness. Deleuze (1988, 5) offers a vivid account of this openness in depicting Foucault's notion of power: Social "institutions are not sources or essences, and have neither essence nor interiority. They are […] mechanisms which do not explain power, since they presuppose its relations […] There is no State, only state control, and the same holds for all other cases" including "the Family, Religion, Production, the Marketplace, Art [and] Morality." Winter (1994, 241, 235) contends that the postmodern perspective is one not of *radical*, but of *alternative*, skepticism: It radicalizes not skepticism but "our concept of constraints" qua contingency. It doesn't undermine values but emphasizes that "they are profoundly human products made real by human action."

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to criticize the operations of the law's ceaseless repetitions"; postmodernism's "openness to the concrete materiality of the other [...] enables postmodern ethics and justice to resist the totalizing influence of politics and law" (ibid., 23–4).

Pragmatism need not draw such politically debilitating conclusions from indeterminacy. It can employ the Wittgensteinian trope of "language games" to explain law and politics in terms less sinister. As a social institution in part generated by and through language, law appears as a collection of language games. If the language of law is not monolithic, institutions of law need not be monolithic either: The very heterogeneity of legal language games points to at least the logical possibility of heterogeneous legal institutions.

The *local* determination of legal meanings and applications generates *heterogeneity*, since by definition different localisms differ from each other. Decisions in the interpretation and application of laws then do not imply totality or unity; they can be made according to an idea of multiplicity, diversity, or plurality. Pluralism of this sort allows for the very autonomy Lyotard dismisses as impossible; it allows for the modernism of self-determination, for the "unencumbered interplay of different perspectives and the competing demands of different interest groups" (Ehrenreich 1990, 1188). Ackerman (1980, 41–2) and Shklar (1964, vii–xi), among many others, associate pluralism with democracy. Pluralism is a form of indeterminacy, and democracy a form of self-determination. Indeterminacy so understood is not the ominous phenomenon, the carrier of heteronomy and foil of autonomy, posited by various theorists of postmodernism.

Of course the premise of multiple language games does not, by itself, entail our autonomy to choose among them. *That* conclusion follows only from the additional premise of an autonomous, self-directing subject who can choose. This is an explicitly pragmatist premise, indeed one which highlights pragmatism's distinctly modernist cast. Modernism in the sense of the European Enlightenment places individual autonomy at the very center of its conception of the good life, the good society, but also of a *possible* life and a *possible* society. From a postmodern vantage, the subject is but a contingent, passive incident of the ongoing language games in which it participates, such that the multiplicity of language games implies not the subject's autonomy but its dissolution as a coherent entity. The postmodern subject is more dependent object than self-determining subject.

The same conclusion—that pragmatism allows for, yet postmodernism precludes, individual autonomy—follows from a postmodern understanding of power as all-pervasive domination. According to Foucault (1978, 92–7; 1988, 11), power is in play in every social association and connection, even at the basic level of language use: "in human relations, whatever they are [...] power is always present." "[P]olitical dialogue" for postmodernism "must always be, in part, distorted and exclusive" (Feldman 1993, 2245, 2265) because prejudices and self-seeking interests immediately constrain the

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possibilities and parameters of dialogue, much as traditions preclude, exclude, even destroy some prejudices as well as some interests and their carriers.

Fish (1994) provides an alternative reading of Foucault, one that retains an element of individual autonomy. Power then is never concentrated in a single person or place but rather is distributed throughout a community or institution. No one is simply an object of power; everyone is also, potentially, a subject exercising power, for the exercise of power is "always reciprocal, a two- (or more) way traffic in relation to which the action of one person is effective only insofar as some other persons affirm its scope and thereby maintain a balance that can always be altered at almost any point" (ibid., 189). Hence the configuration of power relations is subject to "innumerable nodal junctures at which a shift in emphasis and pressure can lead to a systemwide readjustment or even to a systemwide breakdown." (ibid.)

But this reading confuses the normative *presupposition* of Foucault's analysis of power with the *analysis itself.* The analysis concludes that individuals "are not only [the] inert or consenting target [of power]; they are always also the elements of its articulation [...] the vehicles of power, not its points of application" (Foucault 1980, 98). Yet it presupposes political autonomy and individual sovereignty: A society as a whole, as well as the groups and individuals composing it, *ought* to be self-determined. This presupposition of Foucault's analysis of power—a type of knowledge independent of power relationships—is at war with that analysis inasmuch as the analysis itself *rejects* any possibility of realizing the presupposition. The presupposition is useful only as a foil, a counterfactual impossibility, since Foucault so thoroughly identifies knowledge with power.[15] Contrary to Fish's reading, Foucault is not explaining the constitution of subjectivity so much as its *elimination*. And in this respect Foucault is representative of postmodern thinking. For example, Winter (1992, 814, 794) argues that "postmodernism's decentering of the subject is not the same as its obliteration," yet he describes nothing less than the subject's extinction: The postmodern self "lacks freedom

[15] This point emerges from even the briefest glance at several of his major works. In the *Archéologie du savoir* (1969) he argues that discourse is both an act and a product of domination: Statements are independent of all intentional meanings, yet discourse is generated by society's control over natural and social processes. *L'ordre du discours* (1971) analyzes knowledge as power; power itself (embedded in institutions like the school, prison, and factory) actually generates social integration without recourse to human action. *Surveiller et punir* (1975) denies all viable influence of social groups; social processes are nothing but the systemic increase of power, and all human behavior is but the raw material for peculiarly subjectless power strategies. The later Foucault (1983, 250) might be interpreted to have modified his stance somewhat, suggesting that the individual is constituted "not just in the play of symbols [but also] in real practices—historically analyzable practices." If "the play of symbols" refers to knowledge, and if "historically analyzable practices" are not only matters of power, then Foucault might be interpreted no longer to have equated knowledge with power—hence no longer to have reduced all human behavior to mere fodder for subjectless stratagems of power.

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or intentionality" [and] is itself an effect of power/knowledge. It no longer uses discourse to express itself but is an effect of discourse."[16]

Law Does Not Require Mass Delusion

Pragmatism has long observed how patterns of human behavior in society engender regularities in the social world. Regularized patterns of behavior contribute to the production and reproduction of social systems, but they also constitute resources for the exercise of free will: Without routine and habit, individuals would need to think from scratch on each occasion.[17] Much human behavior, and not just complex intersubjective behavior, would be impossible had it to be continually re-invented. A readily available cognitive pattern (any commonsense theory, for example) simplifies experience to manageable proportions, imposing order on an otherwise stochastic series of events.

From a pragmatist standpoint, however, none of the regularities we observe in everyday life, or in a legal system, is a *necessary* consequence of adopting a given regime of rules. Any given rule-system could have generated a different set of stabilizing conventions leading to opposite results. Why, in any given instance, we observe one set of conventions rather than another concerns contingencies quite beyond the sphere of law.

Fish (1990, 1468), combining a pragmatist standpoint with a postmodern one, contends that legal actors must behave pragmatically *in bad faith*, in sustained and complex acts of self-dishonesty, given humankind's frailty in capacity both moral and epistemic. The institution of law *pretends* that justification in the interpretation and application of laws is *independent* of the particular goals and self-seeking behavior of legal actors. In reality, however, legal justification is *dependent* on just such goals and behavior. Law engages in sham and pretence: It describes partisan programs as the natural outcomes of non-partisan imperatives, makes self-centered goals appear decentered, and misrepresents limited, parochial, idiosyncratic goals and behavior as objective and universally valid. To do away with this carapace of bad faith and subterfuge would, says Fish, do away with law itself.

Contrast this view with a more straightforwardly pragmatist one, in which individuals and groups seek to understand their world in a manner pragmatically efficient, for example, by formulating *ad hoc* theories. Because individuals probably theorize only to the extent subjectively necessary to

[16] Winter (1992, 794–95) concludes that the "unity of a community [...] sliver[s] and fragment[s] into a thousand components and competing perspectives. [A]ny discourse of *community* is suspect as a discourse of oppression." From a non-postmodern starting point, Radin and Michelman (1991, 1041–42) reach a similar conclusion: Where Foucauldian postmodernism obtains, we cannot "possibly hope to find the unprescribed yet predialogic *community* required for undominated dialogue."

[17] The pragmatist Moore (1923, 609) captures this aspect in his description of a legal institution as "the happening over and over again of the same kind of behavior."

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make meaning of a situation or achieve some result, and because they rarely if ever have reason to consider the overall consistency of their various *ad hoc* theories, they may easily hold internally contradictory views (Gellner 1970). But a contradictory mix of views is not the same as the mass self-delusion postulated by Fish or Posner. Law for Fish (1990, 1462) is nothing more than a psychological prop for human frailty: "Humans as such" (no matter what culture or history) desire metaphysical entities like "predictability, stability, equal protection, the reign of justice" and "want to believe [...] it is possible to secure these things by instituting a set of impartial procedures." Precisely the mistaken belief in determinate rules, value-free adjudication, and judicial restraint makes law plausible to anyone who would use it.[18]

By pragmatist lights, however, when judges convince themselves and others that their decisions are dictated by law, when judges engage in the pretense of constraint, they do so not necessarily as an act of willful deception, nor necessarily to deleterious effect. A public announcement of the contingency and heterogeneity of value likely would be of no operational consequence to anyone. Awareness of contingency doesn't allow one to master contingency; knowledge of an inescapable condition doesn't free the knower from the inescapable. Judges and other legal actors behave pragmatically (in an indeterminate world law would be impossible otherwise), yet for law to function pragmatically, law need not require mass self-delusion among officials or within a community.

Justice Is Singular Not Plural

At the level of language as well, a pragmatist jurisprudence entails a modern, not a postmodern notion of justice. In the legal sphere, as in so much of social life, individuals are bound together through language. Law is codified, interpreted, and disputed via language; it provides the sole medium in which legal disputes are conducted within a social system. This bond is not of a single thread, however, but like a woven fabric, made up of many pieces of thread. It is formed by the intersection of an indeterminate number of language games, perhaps obeying different rules (as the postmodern theorist, Lyotard (1984, 40), also maintains), yet most more or less coordinated, somehow, with most of the others.

Both pragmatism and postmodernism contend that each language game may have its own presuppositions and goals, different from those of every other language game. As we earlier found, both approaches support a notion

[18] Similarly, Posner (1990, 190) (a pragmatist without being postmodern) argues that most judges believe without evidence (indeed in the face of *contrary* evidence) that the judiciary's effectiveness depends on a belief by the public that judges passively interpret unambiguous texts, that judges find law and do not make it. Yet the lack of independent evidence for this belief poses no problem for law's practical functioning or normative validity: Legal institution and public each believe in the other's belief about itself, creating "a world in which expectations and a sense of mutual responsibility confirm one another without any external support."

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of localism. They then part ways: A pragmatist jurisprudence leads to a conception of justice that can only be *singular* while postmodernism entails a notion of *plural* justice. Lyotard claims that, in a postmodern world,

> [m]ost people have lost the nostalgia for the lost narrative. It in no way follows that they are reduced to barbarity. What saves them from it is their knowledge that legitimation can only spring from their own linguistic practice and communicational interaction. (Lyotard 1984, 41)

In short: legitimacy is plural.

Yet how can the idea of a multiplicity or diversity distinguish for example between a "just" decision and an "unjust" one? How can we decide *justly* according to a multiplicity, a plurality of justices, a plurality of language games, with no one game dominating the others (as Lyotard and Thebaud (1985, 94) imply)? Can justice be plural? Lyotard and Thebaud (ibid., 100), speaking not of law in particular but of knowledge in general, can propose the "justice of *multiplicity*" only paradoxically: By insisting on a universal and therefore *singular* value, namely the singular justice of *each* game. In attempting to resist the imperialism of the allegedly totalizing perspective of modernism, Lyotard actually reproduces it as the *universal* value of *each* game (Weber 1985, 103–4).

To claim, with Lyotard, that each game is entire unto itself—that each game is its own universal value—entails in practice that all interpretations and applications are metaphysically equal, because each is beyond the critique of the others. For each game, then, "anything goes" normatively, in which case normatively nothing matters—and one coherent set of values, for example intolerance, racism, sexism, or xenophobia, are no more or less desirable than a very different but also coherent set of values, for example tolerance, respect, kindness, or solidarity. We could no longer claim a capacity to identify evil; we could merely identify "tastes" dissimilar to our own, tastes that might be adjudged substandard (*different* from our own) but never evil (morally *unacceptable*).[19]

Unlike Lyotard, Derrida (1990, 949), another major theorist of postmodernism, claims that justice is addressed always to events and persons in all their singularity. Yet he presupposes the very transcendentalism postmodernism cannot (anymore than pragmatism) presuppose: transcendental

[19] I find support for this argument in Nussbaum (1994, 217), who criticizes the "skeptical maneuver [that claims]: Once we recognize that the values involved in our moral debates are human and historical, all then seem to have equal weight. But they do not have equal weight, and the bare fact that a human society invented something gives it no claim at all to our respect." Further support comes from Benhabib (1990, 113), who argues that, if we accept a "polytheism of values," we can neither talk about justice nor coherently criticize the status quo. She wrongly asserts, however, that if we reject the polytheism of values, we are forced to "privilege one domain of discourse and knowledge over others as a hidden criterion." The notion of singular justice entails that rejecting a polytheism of values needn't lead to furtive moral relativism.

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justice. Derrida (ibid.) argues that the meaning of justice must—as an ethical imperative—transcend individual acts of legislation, cases of judgment, and existing codifications of law that might bring about justice in concrete instances:

> The responsible interpretation of the judge requires that his "justice" not just consist [...] in the conservative and reproductive act of judgment [F]or a decision to be just and responsible, it must [...] be both regulated and without regulation: it must conserve the law and also [...] suspend it enough to have to reinvent it in each case. (Derrida 1990, 961)

By itself this proposition might seem to express the indeterminacy of law, an indeterminacy that sometimes requires judges to go beyond the printed word and the four corners of a page if they are to understand and apply a law. But Derrida (ibid., 965) intends more, much more, indeed an "infinite *idea of justice*, infinite because [...] irreducible, irreducible because owed to the other, owed to the other, before any contract [...] This *idea of justice* [is] irreducible in its affirmative character." At this point transcendentalism contradicts Derrida's (ibid., 961) assertion of legal indeterminacy, that "[e]ach case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely."[20]

Derrida's (ibid., 959, 955) postmodernism differs from Lyotard's in another way as well: He regards singularity as a condition of justice, recognizing for example a "distinction between justice and *droit*, between justice (infinite, incalculable, rebellious to rule and foreign to symmetry, heterogeneous and heterotopic) and the exercise of justice as law." Justice "always addresses itself to singularity, to the singularity of the other, despite or even because it pretends to universality."[21]

[20] Derrida similarly claims that the postmodern notion of "deconstruction" doubts the very "boundaries that determine who is a proper subject of justice—that is, to whom justice is owed" (Balkin 1994, 1137). Indeed, deconstruction entails "a responsibility without limits" (Derrida 1990, 953). Of course boundaries and limits are *standards* distinguishing (for example) just from unjust, knowable from unknowable, responsibility from non-responsibility. Derrida (ibid., 953) readily acknowledges as much, indeed in the context of postmodernism: A "deconstructionist approach to the boundaries that institute the human subject [...] as the measure of the just and the unjust, does not necessarily lead to [...] the effacement of an opposition between just and unjust but [rather] to a reinterpretation of [...] boundaries." But a standard that *sets* boundaries and limits—a standard that sets other standards is a *transcendental* standard. By relying implicitly on the transcendental, Derrida confounds explicitly the antifoundationalism he professes. Because his notion of justice—addressed to events and persons in all their singularity—is a transcendentalism, it constitutes the very foundationalism postmodernism rejects. The notion collapses in on itself.

[21] Accordingly, generality and uniformity characterize law, which "calculates those it judges according to their broad similarities and differences, and attempts to subsume them to a rule as instances of its application or to distribute them according to the regularities of a norm. But the justice of the judgment will depend on law's answer to the unique and singular demands of the person who comes to the law" (Goodrich et al., 1994, 23).

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Interestingly, justice can be singular for a pragmatist jurisprudence as well, although in a somewhat different sense. Each language game—each local group or community—may have its own conception of justice. The *differences* among the various localisms are important from a local standpoint. The "grand narrative" of epistemic and normative determinacy, the modernist urge to definite and distinct meanings and exclusively appropriate applications of legal rules, insists that differences among localisms be elided, that what is true for one localism should be true for many, perhaps all. This however is a false universality, false because imposed from *outside* each localism, one that simply ignores, denies, or represses the differences among the various localisms rather than, for example, discovering already existing relations of reciprocity among them.[22]

Similarities among the various localisms are also important, and are so from the pragmatist vantage of what might be called "singular justice." If we spoke Dworkin's (1977) language, we might say that each local justice is a particular "conception" of justice, whereas singular justice refers to the "concept" of justice. The notion of singular justice may be used to adjudicate among the various local justices, and does so first by identifying the similarities among them. Unlike Dworkin's notion of "concept," however, singular justice is not what Lyotard calls a "grand narrative" of Enlightenment rationalism, something claiming transcendental validity. Singular justice is indeterminate, itself a product of deliberations. Ideally such deliberations would be as public, and as inclusive of the community, as possible. Deliberations might lead to provisional definitions of the singular justice that can adjudicate among the various local justices of disparate groups or communities (and their incommensurable language games).[23]

Justice Is More Than Simply Authority

Pragmatism and postmodernism agree that if justice has no fixed content, justice cannot be determinant. Both hold that an indeterminate concept of justice can be normatively regulatory nonetheless. Such a concept *can* regulate behavior yet *not*, as Lyotard and Thebaud (1985, 84–5) urge, by defining law as that which simply must be respected. This definition mocks the notion that justice refers to anything other than authority as such. If "just" simply means authority, we lack criteria by which to distinguish normatively acceptable forms of authority from unacceptable ones. While a

[22] I elsewhere (Gregg 1994a) develop this notion of coping with normative indeterminacy in or between communities by drawing on already existing relations of reciprocity within or between them.

[23] Lyotard (1984, 81), by contrast, embraces localism but nonetheless rules out, as oppressive in the extreme, any strong form of agreement. Language games do not admit of any normatively acceptable reconciliation: Only "transcendental illusion [...] can hope to totalize them into a real unity," and only at the price of "terror."

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concept of justice need no fixed content to be coherent, a postmodern concept of justice—authority *simpliciter*—is normatively incoherent. If authority were hopelessly politicized then the *ultima ratio* of law could only be force. Disputes between what Holmes (1961, 36) called "groups" who want to make inconsistent kinds of world are resolvable by rational, rather than forceful, means *only* if groups and individuals can make judgments of fact and value *apart* from their parochial self-interests.

Justice conceived as simply authority is a conception of arbitrary content. "Arbitrary" does not mean "chaotic" in the sense of "lacking discernible patterns" or "unprincipled," or even "unjustified" or "unfair." When predicated of justice, it refers to the application of a rule to a concrete situation, or to a judicial *decision* that appeals to a rule, where that application or decision is guided by nothing more than a concern with power—with creating, conserving, applying or otherwise husbanding power.

Derrida (1990, 935) reminds us of Lyotard by asserting that "justice is not necessarily law [but] become[s] justice legitimately [. . .] by withholding force or rather by appealing to force." Similarly Fish maintains that law is a matter ultimately of force. Against this politically and morally defeatist conclusion, the pragmatist notion of enlightened localism implies justice as *more than* authority *simpliciter*. Justice overshoots authority when enlightened localism historicizes and relativizes grounds advanced for the legitimacy of authority. Authority is then up for grabs.[24] Enlightened localism equally implies justice as less than objectivism, justice created intersubjectively, through discursive disputations within a community. It implies justice as *less than* natural law or some other essentialist jurisprudence, and *less than* analytic jurisprudence or some other formalist approach. Unlike conventional jurisprudence, it does not seek ahistorical or transcendental or otherwise enduringly determinate guides to legal interpretation or application.

Justice can derive from the pragmatist notion of a non-local, decentered critique of a legal community or society. Justice of this sort entails a critical optic that adjudicates among real alternatives. It adjudicates on explicitly normative grounds without being petrified by intractable problems: In an indeterminate world, and amid the multiplication of worldviews characteristic of complex modern societies, ultimate grounds are unavailable and complete systemic consistency appears impossible. Justice in this sense is singular not plural, a modernist ideal precluded, denied, or refused by postmodern alternatives.

With respect to its *indeterminacy*, law may be viewed plausibly from a postmodern perspective; with regard to legal *justice*, the postmodern perspective is morally incoherent. For purposes of realizing justice through law, or even theorizing about justice, postmodern theory fails where it would *prescribe*

[24] Insofar as access to the material and other resources for "grabbing" are distributed more equally than unequally.

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legal justice or any other normatively regulatory idea. To this end we still need modernist theory. Yet we need it in a modified version, modernism as a type of non-transcendental Enlightenment rationalism. We need a rationalism that is enlightened because non-arbitrary, non-transcendental because pragmatist.

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