A Way Out of the Realist Indeterminacy Morass

*Virginia Black**

You are going to be King over Israel and I shall be second to you. (Jonathan to David, I Samuel 23:17)

It is quite wrong to overaccentuate the power element and to underrate the ethical and societal components in law. (Edgar Bodenheimer, Jurisprudence)

INTRODUCTION

There is currently a central idea in legal philosophy and education that needs continual support because it bears seriously on legal practices. The idea is legal justification, the method by which values and facts are rationalized in law. Stephen Toulmin has called legal justification "that most intense forum for the practice and analysis of reasoning."[1]

Legal justification is not terribly important unless law is construed as a rational and normative mode of resolving conflicting claims, maintaining rights, and governing those aspects of society that require uniformity and order. Justification is the crux of argument; it stands as "evidence" for judgment just as observation stands as evidence for facts. Reason is the exemplary component of justification as we know it. However we understand this many-featured word, rationality is very much at issue.

In this Essay, I will demonstrate how rational the law and legal justification really are, however covert the appearance of rationality. Rationality and its cognates penetrate deeply into the legal enterprise. They are assumed, they ramify procedures, they stand as rules and criteria of definitions. I will show how reasons present themselves in the law in ways which are not readily apparent but which go deeply into law's inner workings and ramifications. Because they are necessary components of the legal enterprise,

* Associate Professor of Philosophy, Pace University; M.Ph., New York University; M.A., B.A., University of Minnesota.

[1] STEPHEN TOULMIN ET AL., AN INTRODUCTION TO REASONING 282 (1984).

"deep reasons" escape subversion to which certain critics called "deconstructionists" seek to subject law and its justificatory nerve. One of these critics maintains that all cultural and legal activities are weapons in the struggle for domination.[2]

Some of these critics are ideologues espousing a visionary value system that lacks all tests of consistency and confirmation.[3] Accompanying their ideologies are often forms of determinism that, if taken seriously, put an end to the call of reason. For reason presupposes personal freedom and choice, luxuries which determinists say we must do without.

In Part I, I set forth the problem that I think led to the deconstructionist morass. In Part II, I scrutinize certain meanings of reason in law. My purpose is to show how an attack on law's rationality *does not touch certain reason-essential concepts that pervade the law*. In Part III, I look at justification, the method by which values and facts are rationalized in law, and show how ideological deconstruction drives this concept to an absurdity. Finally, Part IV ties everything together. I suggest that conceptually bonding certain moral ideas traditionally known as natural laws to the rule of law may relieve the indeterminacy of interpretation that deconstructionists use to reduce legal justification to political power.

I do not define reason. Instead, I use the word and its cognates in contexts that allow the reader to discover for herself what it means. Practical reason refers to many things. It can be deliberation about facts and values or a carefulness in language. It can also involve taking account of relevant experience and prior knowledge or being objective about evidence and open to criticism. I once counted ten different meanings of reason in philosophical literature. I am sure there are more but ten is surely enough to work with.

Reason in law is widely acknowledged and would not require additional scrutiny if legal justification had not come under a heavy ideological fire that seemed to collapse both its identification and its certification as a valid mode of settling the law. My project is not to discredit or deny the non-rationality, or worth, of

---

[2] *See* Mark C. Taylor, *Descartes, Nietzsche and the Search for the Unsayable*, N.Y. TIMES, Feb. 1, 1987, § 7 (Book Review), at 3. We can add Michel Foucault, Theodore Adorno, Roberto Unger, Paul de Man, Stanley Fish, and of course, with respect to law, Duncan Kennedy, as leaders in the deconstruction movement.

[3] *See* D.D. RAPHAEL, PROBLEMS OF POLITICAL PHILOSOPHY 22 (2d ed. 1990) (criticizing internally inconsistent value systems).

influential rhetoric in many segments of legal practices. Since law, society and human nature are intimately linked, law cannot be completely rational or cognitive because the human tendencies by which we associate—affiliation and affection—are not. For example, the notion of harm upon which much of law is based takes credence not from reason but from our human frailties and sentience. We are whole persons; the old hermeneutic of will, affect and cognition, as separable aspects of our being is discredited.

Indeed, I acknowledge these non-rational aspects and roots of law. "Good faith" is built on human good will. Similarly, the notion of property is built on an abundance of emotional egoism. I recognize the human aspects of law to demarcate the functional differences of emotion from reasons in law and to suggest that these emotive aspects of law do play a basic and accepted part in law's activities.

Emotion and passion, along with our interpersonal associations, deserve due deference as a foundation for the existence of law. Trust, for example, is a non-rational attitude that permeates every aspect of social life even though sometimes trusting serves a highly rational purpose. It begins with each child's trust in her parents. Eventually, all of us must trust those who have the authority to make law, interpret law and enforce law. We have to maintain this trust throughout our occupancy of a civic order until there is good reason to turn it elsewhere or abandon it, perhaps for a transitional wait-and-see skepticism. In law we have to know *whom to trust* when disagreements and contradictions arise within law's body. Knowing whom to trust, however, is hardly a rational calculation. Juries face this question every time they must decide which story or person to believe. It may be that trusting is simply an intuitive or aesthetic leap influenced by personal and subtle emanations we cannot explain. Certainly it defines the associational nexus. We may give reasons justifying our choice of whom to trust but these reasons do not fully explain the choice. For reasons must also be trusted and often people disagree about these.

I think, too, that presuming a person's innocence until she is proven guilty is a sympathetic and not at all an intellectual presumption. Having installed such a presumption, it would likely appear to us irrational to eliminate it. In addition, our sense of property, on which law is based, involves our non-rational egos; yours and mine are primitive emotions. A great many compo-

nents of fairness and justice rest on an emotional outcry at their absence. If there were no such thing as a universal *sense* of justice I do not see how any reasoning on the matter could ever grip us with conviction.

I suggest that from the abundant amount of non-cognitive material there is plenty to accept and to criticize in the law. Thus, it is unnecessary to attack law's deep, ineradicable and central lines of justification and the practices that make law the reason-absorbing and reason-expressing institution that it is.

I concern myself with this age-old business of reason in law because it has, for more than a century now, been in dispute. Deconstructionists declare that the nature of justification is itself in dispute. They argue that rather than stable or objective values, law is based only on the interests of the power elite and that meanings are simply what people make them out to be. These doubts formulate the thesis of legal incoherence in different ways and make their charges with degrees of stridence. The underlying premise is that those with power bamboozle the rest of us into thinking that law is a rational discourse in its search for justice. The critics contend that law is not at all rational but merely a source of power for power-holders and power-seekers. The critics contend that the purpose of law is seldom a search for the morally right decision but is, instead, a pretense for self-serving uses of coercive power.[4] Law's justifications of its public acts and communications are simply a means toward expedience or settlement.

This law-as-power doctrine is not merely a declaration that moral depravity has set in where once good law reigned supreme, or that moral education has deteriorated and needs reform. On the surface, such claims would be reasonable and properly submitted to scrutiny and change. Rather, this theory is a declaration that the *nature* of law is a power game. In essence, law's meaning and the meanings of the myriad threads that comprise its discourse are themselves irrational. In the end, those whose voices are loudest and whose organizations are most dominant determine the law. Those who think otherwise are naive, for the only law is that of the might, not the right, of the strongest.

Of course, if a popular movement such as deconstruction derides reason and meaning throughout the natural language

---

[4] *See* Andrew Altman, *Critical Legal Studies*, *in* TIMOTHY C. SHIELL, LEGAL PHILOSOPHY: SELECTED READINGS 71 (1993).

then no reason will dissuade it, for "reason" too is deconstructed. It depends upon how far into the bowels of natural language the movement penetrates and the relentlessness of its attack. One assumes that a reason-and-meaning-bashing ideology cannot at the cost of consistency consider reason at all because of the risk of inconsistency. Therefore, it cannot consider reasons counter to itself. One's only hope is to appeal to marginal thinkers and wait until the storm blows over and the shabby residual, like dead leaves stuck to gutters, flutters in the dying wind.

I think, for instance, I have detected in some deconstructionist voices criticisms that focus unwittingly on analytic propositions in law, such as the fact that law is enforceable. They speak as if these were substantive evils that need ideological cleansing.[5] But the fact is, ideas that adhere *conceptually* to the nature of a discipline like law need time to evolve into something more refined. This refinement and replacement no ideology can achieve. If criticisms fall on analytic truths buried in the *nature* of a discipline, one can only expose these criticisms to reveal them empty of any persuasive force on changing legal contingencies, which are the only elements that can be changed.

My project, then, is to look into areas where reason, as the foundation for law, simply is not eradicable without so changing the meaning, nature and spirit of the institution as to make it unrecognizable. If it is eradicable, then whatever passes for law in a particular area cannot be called law at all; and so criticism of it *as law* loses its force. If we want to criticize A, then through language integrity we must hold A as it is before our criticism can reach its mark.

I. INDETERMINACY: THE CONTEXT FOR IRREASON

In modern times, Legal Realists, an American school of legal scholars and practitioners, have called the rational nature of law and the decision-making process into question. The movement allegedly began with the jurists, John Chipman Gray and Oliver Wendell Holmes and continued with the positivists, Karl Llewel-

[5] In my paper, *Putting Power in Its Place*, I identify five or six legal propositions that critics would claim denote political power but that are merely analytically true within legal systems or theory. *See* Virginia Black, *Putting Power in Its Place*, 51 ARSP (Weltkongresses, Göttingen 1991) (forthcoming 1993).

lyn and Jerome Frank.[6] Gray and Llewellyn eventually modified their positions, as they found room for legitimately rationalized norms and values within legal systems. I imagine that the dire ramifications of their pronouncements on indeterminacy and their positivist stricture, "law is what judges do," struck them as incoherent and untenable as they matured in legal understanding.

The influence of the Realists on critical legal scholars (CLS) is confirmed in a passage by CLS scholar Robert Gordon:

> In the process of doing history, we discovered a partly buried treasure, the writings of the "Legal Realists". . . CLS writers have tried to resurrect some of the Legal Realists' more substantial scholarship, to appropriate it to their own purposes, and to generalize it into a critique of mainstream modes of liberal-legal thought more far-reaching than anything the Legal Realists themselves had in mind.[7]

Yes, indeed. It is interesting to remind ourselves that reason, along with equity, entered the English common law tradition through natural law. Reason was the Anglo way of acceding something morally natural to the legal endeavor. For reason was inherently opposed to the obstinacy, absolutism, and sometimes cruelty of the royal will. It is important to remember that it was Holmes who described natural law as "pie in the sky."

Edgar Bodenheimer wrote his classic *Jurisprudence: The Philosophy and Method of the Law,* before critical legal studies gained momentum. But he too, like myself, is critical of the Realist school:

> . . . legal realism has tended to give an insufficient weight to the role of legal rules and legal doctrine in the practical life of the law. It has sometimes (especially in the theories of Jerome Frank) offered to us an overdrawn picture of judicial arbitrariness and cadi justice, and it has failed to provide us with a blueprint for maintaining that degree of rationality and consistency of law which is within the human powers of achievement. . . . achieving justice in human relations is the most challenging and vital problem of social control through law, and it is one that is by no means impervious to the method of rational argument. The use of this method does not demand unanimity

---

[6] I have used Edgar Bodenheimer's account. *See* EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 97-120 (rev. ed. 1974); *see also* Jerome N. Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 653-55 (1932) (asserting judges arrive at decisions before developing rationale).

[7] Robert Gordon, *Critical Legal Studies on Contract Law, in* SHIELL, *supra* note 4, at 480.

> or universality in the reaching of conclusions concerning the justice of a legal measure. It only demands that the problem be approached with detachment and broadmindedness, and that the relevant issues be appraised from all angles, with consideration of the interests and concerns of all people or groups affected by the regulation.[8]

One would think that the foregoing liberal analysis of the task of law and jurisprudence leaves more than adequate room for a rethinking of concepts without maintaining that interpretation of the law, and the rationality of justification that rests on clear meaning, has no limits at all.

Because the movement is well known, we need not examine the historical progression of this 19th century school of legal thought still influential in legal analysis, education, and semiotics. Certain problems the Legal Realists pointed to in decision-making seemed to consummate, for them, in a peak experience. For them, our vaulted reason-in-law tradition is exaggerated, even mythical and untrue. It is not nearly so true as we think or hope. One of their targets, and a well-deserved one, was the logic-in-law thesis claiming that every proper legal judgment resulted from syllogism, often explicit but at least implicit. In other words, every decision was formulated by logic that flowed from fact and value premises. Under this legal theory, failing to discern this syllogism was to acknowledge that the law in that respect was irrational and defective.[9]

According to the Realist indeterminacy thesis rules of law, precedent, logic, ratio decidendi and other legal norms seldom determine what the law becomes. Certainly syllogisms and pure logic do not determine exact and necessary outcomes. In place of this false paradigm of exceeding formalism and artificial rationality, the preferences and interests of the law-giver drive justice. His eccentricities, biases, emotions, intuitions, remote concerns, and especially positions and power—the persuasive edges of rhetorical tone—influence the direction of justice. As one writer noted, "[t]hese discourses of legal and technical rationality, of

---

[8] BODENHEIMER, *supra* note 6, at 167.

[9] Von Jhering's "Rationalist-Utilitarian method" is a good example. However, Von Jhering later repudiated the earlier formalism and "indicated the strained emphasis upon the logical moment in law as a serious error." HENDRICK J. VAN EIKEMA HOMMES, MAJOR TRENDS IN THE HISTORY OF LEGAL PHILOSOPHY 214 (1978).

. . . rights, consent, necessity, efficiency, and tragic limitation, are, of course, discourses of power."[10]

The Realists claim that what really motivates judges is not rational-fairness factors but personal proclivities. Of course, judges give good reasons because they are expected to judge wisely and because law is a public commodity. This is what their experience prepares them for. They cite precedents and rules of law, deciding reasons and warrants, and they formulate relevant justificatory formulae. But underneath these reason-appearing structures are the real and effective engines of speech and action: the self-serving preferences of judges who are, after all, human beings who naturally desire to retain their prerogatives and power.

As we slip away from reliance on and respect for reflective public judgment, we begin to appreciate how justification suffers a double blow: the abdication of its essential character as a form of reasoning, and skepticism regarding the objectivity of the values it encompasses. In this view, justification as we know it slips away into nothing. Under a critical legal studies analysis, especially if coupled with a deterministic ideology, justification collapses into a sociological account, a causal explanation of what motivates a justifier to say what she says. The question then is not how well her justification stands up to reason but what personal or social forces *determined* her argument or contention. Thus, the autonomy of justification as a form of confirmation, as universally valid and independent of the personal caprice of the justifier, is dead.

The hit list lands on interpretation, on meaning, an undeniable and hardy linguistic core for analysis and subreption in legal practice and communication. For interpreting verbal materials is something judges and lawyers do. Beneath the modalities of law lies interpretation, the search for meanings suitable for describing the case with some specificity, conforming to the rituals, and prescribing a remedy. But, according to deconstructionists, beneath the appropriate and anticipated terminology of legal interpretation lurk the power interests of the interpreter. There is enough vagueness, generality and indeterminacy in law and its language to understand exactly how the private interests of the legal authority leak in, yet can hide themselves beneath justifications that appear to be in line with the practice and profession.

The Realists set an undeniable tone for this transformation of

---

[10] Gordon, *supra* note 7, at 481.

law into power in their belief that judicial decisions really are based on political convictions. It follows from their observations and theory that there is no distinction between law and politics. This was, indeed, an explicit thesis of the Realists. If what Gray believes is correct, that law is what judges say it is, then law loses its autonomous empowerment. Judges take over.[11]

The subtle nuances which some interpretations suggest, and hence a provocative vulnerability for "getting by" with the indeterminacy thesis in making meanings do what one wants, are a consequence of the fact that legal language already reflects choices, and necessarily so. This is evident when a lawyer scrutinizes previous cases to decide which one(s) provides precedents most favorable to her client. Many terms used to summarize a particular case may also be unfamiliar or context-laden, used in new or extended ways, or admit of numerous connotations that may heavily influence a given judgment. There is no equivalent in law to Greenwich mean time or to the physicist's Uniform Fiduciary Standard. There is no precise means to determine the meaning of a word or a case. Words go in and out of meanings over time. Agreement on usage is never more than an approximate, often multiguous, and certainly context-bathed interpretation. Many words are contestable, "open-textured," a feature of some general terms so abstract as to make it impossible to limit the kinds of objects the terms describe.[12] If nothing internal to a judicial conflict ends indecision over meaning, then authority rising out of social need must do so. In law, as in choice, this is natural and expected. That is why we require that law's nature *be* authoritative.

Dialectical reasoning which law employs is unpredictable too. When a procedure itself is rational, its conclusion, if there is one, is never guaranteed. To use reasoning as a means to arrive at decisions is to be free to choose the reasons and honest enough to go where they lead.

The adversarial nature of courtroom proceedings also contrib-

---

11 John C. Gray, *Legal Realism*, *in* SHIELL, *supra* note 4, at 31.

12 Friedrich Waismann's description of an open-textured concept is that "there is not a finite and determinate set of necessary and sufficient conditions which determine the application of a concept . . ." Alasdair MacIntyre, *The Essential Contestability of Some Social Concepts*, 84 ETHICS 1, 2 (1973). But W.B. Gallie is usually credited with first using "contestable" to describe such concepts. *See* W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 169 (1956).

utes to law's indeterminacy. The existence of legal conflict announces that winning or losing the contest depends in great measure on who wins the language battle. These choice-and-value-laden orientations dispose us to recognize that to win or lose is "indeterminate."

Thus, the indeterminacy thesis, which emphasizes only one dimension of the semiotic analysis of language, namely, that feature which rests upon the interpersonal dimension of meaning in that the receiver of a communication determines what it means for him ("reader-response criticism"), expels clear meaning and intended rationality in language (syntax uniformities, semantic conventions of association, denotation, and fixed, observable referents) from its repository of dependable assumptions and methods in the law. Under the indeterminacy thesis, there is "no possibility of establishing the range of meanings of any human condition, including the text."[13] The result is that no resolution is possible, only an authoritative power.

II. Reason in Law

Reason has been the darling of law since full and systematic reflection on morals and the positive law began in Western philosophy with the Greek humanists. It was born long before this, however. The Hebrew scriptural sources dramatically, through story, history and legend, developed the priorities of legal society and of just legal resolution. The Hebrew Scriptures saw and illumined these priorities in contexts wherein contestation, harm and injury, social disruption, war, and evil—in short, the troubling operatives of communal life—were ever present. Transcendent and terrestrial authority, enforcement and punishment, statutes, equity, subordination and legitimate leadership, government, power and its excesses and violation—it was all there. The Ten Commandments are imperative and authoritative. Some scholars also argued that they are rational. The Commandments and the Noahide laws in *Genesis*[14] can be viewed as reasonable and just

---

[13] M. Weiss, *Crimes of the Head*, Reason, Jan. 1992.

[14] The seven Noahide commands are to establish courts of justice and to prohibit blasphemy, idolatry, incest, bloodshed, robbery, and eating flesh cut from a living animal. Although the commands allegedly were given to the Israelites by God, they were sufficiently reasonable to be "required of non-Jews living among Israelites, or attaching themselves to the Jewish community." The Pentateuch and Haftorahs (J.H. Hertz ed., 1964).

strictures for communal life, despite Hugo de Groot's belief that they need not have been given by God.[15]

When the Hebrews pitched the flaps of their tents away from each other, they were communicating the idea of the right to privacy. When the Maccabees fought the Syrians for the preservation of their kingdom, they were asserting political freedom and freedom of religion.

A philosophy that examines anything will necessarily be rational even if its subject matter is not, just as an intuition may emerge from a non-rational unconscious or a moral instinct from a non-rational conscience. Despite the genesis, its critical examination and discussion must be rational. Whatever part of the philosophical method of argument and dialogue parallels the dialogue of law must, therefore, be rational. This is true even if some of its meanings are wobbly, or it would not be the critical interchange we know as the law. Practical rationality makes a salient appearance in law when questioning occurs. During the process, contrary cases are set forth, dissents are heard, analogies are weakened. An obligation to be rational is an obligation to state objections. When legal theorists evaluate a subject, they attempt to preclude elements that are unique, personal, theatrical, subjective, emotive, irrelevant, transitory, biased, illogical, or otherwise unamenable to the dialogue of critique and correction that is the pulse of the legal conversation and the construction of its science.

Law and its procedures and instrumentalities cherish reason because rules require generality, and good and effective judgment requires factual accuracy and neutrality. Factual accuracy requires cautious observation and witness while neutrality requires the suspension of bias and passion. Even if we fall short of meeting these integrity supports, their terms, their referents and our capacity to perceive and rectify their absence are clear enough. The warrants that bond these elements of fact, evidence, and neutral judgment are a paradigm of practical reasoning itself, or nothing is. The converse is true as well. Ongoing practices and the real-life situations that help define them generate over time what we name things, the identifying features we impute to

---

[15] Referred to is Hugo Grotius' famous "etiamsi daremus" by which he declares the rational bindingness of the natural laws per se, even if God willed them. *See* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (A.C. Campbell trans., 1901); *see also* JAMES ST. LEGER, THE "ETIAMSI DAREMUS" OF HUGO GROTIUS: A STUDY IN THE ORIGINS OF NATURAL LAW (1962).

them, and the resultant meanings that settle themselves into acceptance—be those meanings essentialistic, conventional, contestable, or choice-inclusive.[16]

The fact that law is rational in building on correct observations and suppressing through its rituals the emotions of interested parties is *analytically true*. This premise cannot be denied without contradicting law's purpose. This is so even though the etymological course of a belief is reciprocal: language penetrates the sense of the legal concept while human interactions employing this sense recreate its mature semiotic functions and practical applications. Meaning informs action and actions generate meaning in a dialectic of mutual exchange. The process goes on, as communal relations and the law they generate manifest variation, culture transmission, growth and complexity.[17]

Hence law is rational on grounds other than its analysis by philosophers, its arguments by lawyers and its justifications by judges. The burden of proof is always on the one who challenges or denies the ordinary meaning of a word or the characteristics of an institution. The entrenched and the expected meanings prevail until disaffirmation is plausible and solid. This pattern of reasoning is not extraordinary. It is the way of natural human association: what has been done or thought before prevails until suggestion and innovation set in motion growth and refinement in ideas. If there is no text even for language *critical* of law's established procedures, then reform and evolution cannot guide us forward.

There is more to law's inherent rationality, therefore, that cannot be touched by textual skepticism. What law is rests on the *ontology of human association*. Law is rational because order is rational and because well-considered laws sustain what is fundamental in pre-existing, actual orders. As Bodenheimer stated, "[t]he rational component of natural law is to a large extent rooted in the cognitive capacity of human beings, which recognizes the social dangers resulting from man's irrational and

---

16 "Choice-inclusive" concepts are those "whose constitution involves both objective elements and human decisions," such as "adulthood," denoting both objective age and certain human conventions concerning voting, drinking, etc.. *See* John Lachs, Human Natures, Fourth Annual Patrick Romanell Lecture, *in* 63 APA PROC. & ADDRESSES, Dec. 1990, at 31.

17 The literature on the ubiquitous phenomenon of cybernetics ("feedback," "bi-causation") is copious. *See, e.g.*, NORBERT WEINER, THE HUMAN USE OF HUMAN BEINGS, CYBERNETICS, AND SOCIETY (1970).

destructive impulses and the necessity for controlling these impulses through the agency of the law."[18] Disorder is set aright by well-considered laws. Smoothing interpersonal controversies which denote irreason requires the energy and will that oppose destructive passion. In such circumstances, passion is the antithesis of reason.

The inclination to set things right by restoring balance where conflict or neglect has set some human affair out of order is an inclination that serves expedience as well. The human association which prevailed before the upset is examined to determine each participant's punishment or reward in an attempt to resurrect the previous association or some propitious equivalent of it. A seemingly innate proclivity—an aesthetic?—images the symmetries of civic order, almost like graphic representations of reason. This tendency urges us to reinstate the situation that prevailed before the self-interests of the parties upset the civic order. However abstract, vague, or variously interpreted, that which is due, *fittingly* due, is a time-honored, judicial, and moral paradigm of reason aimed at paralleling the concords and customs of society.[19] Resurrecting the content of an idea for rejuvenating a disturbed social order is often difficult and good people may argue over it. But gaining clarity as to its boundaries and limitations is a universal yearning, or can become so when reasons are proffered to those who are willing to shed their dogmas and acknowledge possible defects in their positions. Behind this search to repair the damaged fragments of fittingness and adaptation lies the love of order. Ontological reality cannot be dislodged by linguistic folly.

When arbitrary, a coercive order is law's antithesis. Thus, in symbolizing the depraved will, coercive, arbitrary power stands as a prompter of irreason. One of the paradoxes of deconstruction is that fraudulent power in high places seems to be discovered. But in destroying legitimacy in law's language through its reductive analysis of meaning, the movement destroys the tool that can excoriate fraudulent power in high places.

A. Precedence

All knowledge rests on resemblance, the perceptual and cogni-

---

[18] BODENHEIMER, *supra* note 6, at 219.

[19] I take up "fittingness" as a nuanced form of "what is due" in another article. *See* Virginia Black, *Reflections on Natural Law: A Critical Review of the Thought of Yves R. Simon*, 9 VERA LEX, Summer/Fall 1989, at 10.

tive exemplar of thought; for the general terms used to convey what we know may be analyzed as inductions from referents that look alike or that bear common, abstract features. When we are unclear about these features or their relevance, the problem we posit or the purpose we have can assist us in their identification. Precedent gives us knowledge of prior like or resembling cases, events, or relevant features of events. This element of knowledge is the element of reason. When two situations are not materially different, it is not reasonable to reject one response for an identical one. This is what babies do when they insist upon having the exact ball they lost rather than a look-alike that is offered to them. Respect for look-alikes is also the route to survival. This mushroom, this berry is just like the one I ate with immunity yesterday. Disregard for resemblances is the route to self-destruction and death.

We cannot avoid resemblance however much we try. Nature's evolutionary direction stamps us with precedents. Precedent in law, as in everyday life, is the memory and utilization of a look-alike, of the resemblance by which we treat like cases alike (a principle of natural justice, or as Cicero called it, "a disposition of the mind") and accordingly aim to render what is due. Analogies in law based on resemblance are never perfect. But good ones are adequate to serve our sense of equity and to justify our conclusions, even if not all the meanings of the words in a fairness proposition are crystal clear and unanimously agreed upon.

Suppose we adopted another legacy from the Realists: Law is what judges do. Such a description implies the indeterminacy and deconstructionist thesis that meaning can be transformed and manipulated, *if this is what judges do*. Instantly, law has no valid guiding norms, no standards of rigor or consistency, and hence no perspective from which to criticize or even change it. It may be that Legal Realists believed that law and its practitioners naturally embodied or tried to embody the traditional norms in the everyday exercise of their profession. But what if they didn't? What if over time these norms were eluded and deteriorated? Or what if some judges did not always respect the normative orders of the law? The radically behavioristic formula, "Law is what judges do," opens no path to regaining these norms, for if what judges do degenerates and becomes self-serving, then that is the law.

B. Rules

The generality of meaning, by which we understand that something is a rule and not aimed at a unique condition also rests on resemblance. The ontology of "universals," or general terms, whose abstract form allows indefinite application, underlies the meaning of a rule. A rule ranges over like cases regardless of how we determine the similarities. A statute that respects the rule-governing nature of law reminds us that if we involve ourselves in a situation similar to the others to which the statute applies, we have made a rational decision with respect to our intent to comply with or violate the rule. My own rights and my "imperfect obligation" to respect others' rights rest on my intent and capacity to choose, or to create, a resemblance. That is, I must grasp the abstract nature of a right that allows me to act within a range of self-expression and deters me from acting in a way that harms someone else in her like right. If I ignore my obligation to desist from harming another in her right, or if I positively harm another in her vital interest, I thereby choose the negative resemblance by which violations of rules can be identified.

No matter what their content, then, rules as such are rational in that their identification rests upon the notion that it is irrational to treat what is alike as if it were not alike. Rules are reasons, and deciding reasons are rules. Our capacity for this discernment is our capacity for discerning resemblance. Even if surface texts are scrambled, the *form* of a rule cannot lose its meaning. This is a conceptual truth.

C. Fairness

Fairness in law, another principle of natural justice, is founded upon the same resemblance by which we measure strategic strands in our knowledge of justice. Fairness is the moral counterpart of a measure. Measuring is reason's innate discriminatory facility that balances the worth of both resemblance and difference in an effort to gauge, for a given affair, what precisely is apt. Aristotle wrote, "He who bids the law [to] rule may thus be deemed to bid [that] . . . reason alone [should] rule . . . The law is reason unaffected by desire."[20] An unfair law excludes the fitting or includes the unfitting in its range of meaning. An unfair

[20] ARISTOTLE, *Politics*, Book III ch. 16, *in* THE BASIC WORKS OF ARISTOTLE 1127, 1202 (Richard McKeon ed., 1941).

legal decision is morally repugnant because it fails to consort with justice.[21] It also violates rationality in failing to differentiate the relevant components of resemblance that can be effectively treated by legal means. Herein can be seen the rational base for equality as a component of certain meanings of justice. Equal liberty, for example, implies that each person's claims against interference enjoy equivalent legal standing and that grievances against such intrusions are treated with like respect for the alleged wounding of their varying, but morally equal, interests.

Here we clearly see the deeply rational nature of justice. Indeed, fairness and justice as equal treatment are acknowledgeably our most rational and principled postulate of law. No tampering with their language erases the integrity and fixity of their referent.

There is also a dark side to rules which surfaces when the rule does not fit an extraordinary set of circumstances. It is then that our sense of fairness requires redress or remediation. In addressing these legally troublesome anomalies, Aristotle called on equity and stated that equity is "a correction of law where it is defective owing to its universality. . . . [A]bout some things it is impossible to lay down a law . . . For when the thing is indefinite the rule also is indefinite."[22]

But consider, if rules are rational because they are general, how exceedingly *reasonable* is equity if it has to find its way to judgment without a deciding rule. In equity remediation, practical judgment surveys hosts of factors, separates relevant from irrelevant and alternatives which can be dealt with from those which cannot, all the while keeping an eye on complex constraints adhering to the appropriate principles of equity. Equity judgment is a prototype of wisdom at work. A responsible equity decision so taxes the intellectual vigor and sense of fittingness of the decision-maker that I imagine there is little energy left over to consider how to advance one's own position!

---

21 David Hume's ethical theory is based on sentiment, not reason, and his frequently used terminology includes affect words like affinity, sympathy and repugnancy. *See generally* DAVID HUME, A TREATISE OF HUMAN NATURE (L.A. Selby-Bigge ed., 1951) (1739) (presenting Hume's early philosophy); DAVID HUME, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS (Charles W. Hendel ed., 1957) (175l) (presenting Hume's restatement of his non-rational ethical philosophy).

22 ARISTOTLE, *Nicomachean Ethics*, Book V ch. 10, *in* THE BASIC WORKS OF ARISTOTLE 935, 1020 (Richard McKeon ed., 1941).

Officials or not, we all act on silent ideas, hidden intentions and unconscious motives. Executive secrecy on international affairs is no secret at all. No matter what politicians say, they please their voting constituency with actions that conform to silent ideas. Recently, Haitian refugees were turned back from American shores. The stated reasons were the safety and health of the refugees. But unstated reasons also prevailed: disgruntlement of already crowded citizens, housing shortages and fiscal weakness of the state that has to finance their settlement and welfare.

Clearly silent ideas prevail in politics and law. Even if they are maneuvers for power, explicit legal communication must also forward public action and private right. An attack on language will take some time to damage the habits and anticipations of the people who will eventually learn that rhetoric and power, not good will and public interest, consume the energies of officials. That onlookers carry away from an observation different interpretations is merely a commonplace, not a tragic drama of "indeterminacy." Law has always acknowledged interpretative variations; for descriptions of actions and their environment are notoriously different from person to person. But to believe that never is there a *better* interpretation dooms law to the robotics of a machine. Law does not train us, it enlightens us. One can create a Hobbesian motive of self-interest for every action one considers. Irrefutable philosophical grounds exist, contradicting the egoistic perspective on human nature and conduct. But ignorant of these, anyone can claim at any time, with an air of plausibility, "Oh, she really sacrificed her life for that person because she wanted to be noticed (remembered heroically, recognized, rewarded, etc. . .)." No one can quarrel with dogma that admits no refuting evidence.

The same is true for the law. One can always create a Hobbesian example to contend that a given decision, procedure, reason or rule—or the whole of it, the law itself—serves mainly the self-interest of the officials involved. And of course, often it does. Because reasons can also be motives and because motives for action are often multiple, it is easy to depict the self-centered motive as the "real one." This presumption of knowledge about all of human nature is simplistic: one has only to assert that neutral justice is never served by the law because human nature is driven by materialistic, self-aggrandizing forces. I would answer that as long as there are those who have no interest in political power even when, like Jonathan, son of King Saul, they stand to inherit it without a struggle, Hobbes' philosophy of man is false.

Equity decisions require close and severe justification because they sidestep a rule that would otherwise pertain. If justification itself is undermined, we have no forum at all for convincing a legal official that injustice will be done if an equity decision does not predominate.[23] As with rules, there is a dark side to equity too. It emerges from the gaps left by rule-irrelevance, from the authority of the decision-maker which must sometimes be dire and is often ultimate, and from the possibility that his personal character is wanting. It is ironic that a practice so principled, so reasonable, originating out of natural law and put to the task of doing justice can admit the element of self-aggrandizement. But like every other practice seamed into institutional history and organization, when reasonableness is lacking, the cure is often more, not less, of the same, just as when interpretations are inadequate, more, not less, reasoning, and more, not fewer, facts are the cure. There are self-refurbishing "equity" decisions, like those of Queen Elizabeth I who found anyone she thought was threatening her throne guilty of treason. These kinds of judicial evils have to be stricken from the system. Exactly for these reasons, ritualistic law, strict rules of evidence, and other procedural securities, however rigid at times and yielding odd results, announce their worth. Yet it is these rigidities that critics sometimes denounce as turning the emphasis away from substantive justice. We should welcome some rigidities in the law. When the law is rigid, it is difficult to insert one's personal interests. Even entrenched, they are safeguards against playing fast and loose with their implicit assumptions. In ignoring rules, equity does not run counter to law. To forward an act of justice that would otherwise escape, it simply does not use it.

When law is defined as the stronghold of the class-interest of a power elite, hope of restoring rationality to justification is abandoned. A self-serving justification is a mistake, a misfortune in the legal system, not its modus operandi. It is something to undermine, to beat at its own game. To discover this misfortune, there has to be a text that is something more than a "reader's response."

---

[23] *See* Milton R. Konvitz, *Equity in Law and Ethics*, *in* 2 DICTIONARY OF THE HISTORY OF IDEAS 148, 148-54 (Philip P. Wiener ed., 1973) (providing historical and philosophical account of equity principles).

D. Relevance

Discerning relevance is a primary act of reason. Imagine passing even an hour of one's life without using one's intelligence to discern what relates to one's purpose and what does not. To relate X to Y usually requires one to posit a problem or envision a plan, however subtly this activity embeds itself in the nuances of our thoughts or action. To discern a relevance is to discern a causal relation. For example, I know that if I drop this china cup it will likely break. Or: If we take this fact as relevant to our judgment, the accused must be guilty. Shall we really claim that to assume causal relations in one's judgment subordinates reason to the search for status-enhancing rhetoric?

Importantly, to discern relevance is to discern logic. Analytic propositions and conceptual relations among terms unify legal systems and aid overall consistency and fairness in treating like situations alike as analogy and precedent require. To question coherence requires a burden worse than that of Sisyphus: disconfirming the logic. Conceptual relevancies and entailments in law tie decisions to rules and principles by exhibiting that the meaning of the decision necessitates the rule. They tie purposes and intentions to action and hence their vocabulary to internal networks of semantic and syntactic sense.[24] They employ "deep reason" because logical relations are not refutable.

We may *choose* a postulate to initiate examination of a proposal. Law would scarcely be a human enterprise if it prohibited choices. But the postulates we choose are not capricious; they inhere in deep-reason coherences within larger circumferences of law which linguistic attacks do not disturb. Comprehensive legal circuits with broad internal consistency develop in free jurisdictions, welded and secured by eliminating over time irrational practices and contradictory instructions. If this cleaning out does not occur, law suffers. At least we preserve the meaningfulness of the ideal. All of this implies that we dare not celebrate irrationality as the norm simply because indeterminacy suggests that more than one relevant rule or principle can be found in the legal structure.

Certainly the predilections of the judge must weigh each argument and choose one over another. We expect this selection and rejection, although what is selected or rejected are value perspectives. Value perspectives are ineliminable and no one has yet

[24] The seminal work arguing for a logical link between motivation and action is R.S. PETERS, THE CONCEPT OF MOTIVATION (1958).

proved that all values are reducible to subjective preferences. The deconstructionist Stanley Fish believes that even our so-called personal preferences "will derive from the norms inherent in some community."[25] His belief may be only an unfettered assumption of social determinism. Even if it is, it makes no difference at all if judges act on these or on obligations fixed by legal doctrine. The result is that the entire deconstructionist critique of the law amounts to nothing. But what if our personal preferences do derive from the norms inherent in our community? Shall we introduce Hottentot law into the polity? If Hottentot law is arguably more reasonable, approvable, and morally uplifting, I believe we could do so. This would destroy the case for cultural and social determinism.

E. Language

Language is the explicit vehicle of law's communication. Could we be more irrational than not to have honed this phonic and scriptural skill called language by which we discriminate and solve problems and by which, broadly, we reinforce human adaptation, prosperity, and social advance?

It is true that language can be used negatively. It facilitates lies, breaches in social order and irrational behavior. It sometimes causes situations to deteriorate. It can arouse to ire and revolt. But the expletive that incites anger and conflict is not fastened into grammar. The expletive *violates* the rules of grammar, which have to be in place and recognized as normative and order-preserving before conflict and disorder can be recognized and resolved. Thus, as rule-guided, language conforms to the rationality of its own ineluctable laws. Some of these laws are based on the structure of nature,[26] exemplifying another meaning of deep rationality. Language *expresses* what is real as often as it creates it. Like an open river, language carries downstream in its imbricating rapids coherence in speech and substance in ideas. Language has logic in it. A well-formed statement is the self-contained carrier of consistency. In contrast, an inconsistent sentence says nothing, for everything that can be uttered agrees with it. The canons that a thing is what it is, that a thing is or is not, that noth-

---

[25] STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 11 (1989).

[26] Linguistic anthropologists have shown that all languages, historic and contemporary, exhibit subject-predicate form.

ing both is and is not—are incontrovertible. So too is all else derivable from these fundamentals of intelligibility and knowledge. Shall we really claim that logic, the guarantor of meaning and sovereign of precision, has no text?

As the paradigmatic communication vehicle of law, language necessarily carries logic into law. But logic is not language. Logic is a rudimentary mental form that expresses itself in language only to correct it. When law secures consistency, it secures our idea of it, not its verbal container. It does not follow from this that the syllogism's exact form is the model of legal judgment. It does follow, however, that logic, as pure reason, restricts and binds legal meaning both in referent and in sense as they pertain to veracity in assembling and organizing facts and values and from these, satisfying the morality-supporting judiciary acts of decision and settlement.

F. Property and Justice

Next we must consider property. Once again, reason is found underneath the law. This is comforting, for this is where supporting beams should be. In the 18th century, the Scottish philosopher David Hume described property as the root beam of justice.[27] This thought astonishes most students of legal philosophy. To them, property is their car, or their clothes or sometimes their paycheck. It is disconcerting to think that justice is built on these disparate, idiosyncratic, transitory and often trivial material things.

When we begin to understand Hume and the 17th century English philosopher John Locke, property takes on an extended meaning. All of modern rights theory comes into view. First, we own ourselves and therefore we are our own most significant property. If we are not, then slavery is tolerable and rights to autonomy, freedom, and choice are meaningless. As authors of our own actions, we inherit their consequences as well as the responsibility for them. This is an analytic truth, an entailment, from which there is no escaping. From the idea of property in myself comes labor, *my* labor. From labor, a mix of me and my energy, come not only the effort, intelligence, will and autonomy that make us persons who speak and act and associate but also the endlessly imaginable things that labor creates. Labor looks for-

---

[27] *See* DAVID HUME, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS 14-33 (Charles W. Hendel ed., 1957) (1751).

ward to property in the narrow sense as material possessions and services and intangibles that labor creates. It also looks backward to the person as a causal agent, a producer, and to her energies and actions directed toward what she owns, has rights to and responsibilities for. Tangible property is vitally important because without rights to such property there are few incentives to cultivate the property: to build on it, mine on it, grow on it, produce or take from it, exchange it.

In short, property is everything about which law can say something, and more. It is also everything about which law is silent because often it is best to let the social nexus influence matters in its own way. A parent often quells children's quarrels with nuances of comfort, tact and relief. We do not think of this as justice, but it is justice all the same, working itself out through what Montesquieu called *les corps intermédiare*, the institutes of social life.[28] The parental response is reasonable and justified. In contrast, it would be irrational to continually ignore disruption in the family pattern. Thus, if legalized, wouldn't its repair be called just? Fairness and justice pervade family relations as well as law; therefore, the model cannot be destroyed, however strident and overpowering the voices of politicians and jurists caught on a theory of indeterminacy.

Viewed thus, property is the foundation of justice in that with property claims of one sort or another—Who gets custody? Who's the fiduciary trustee? Is this a gift or a sale? Is this contract valid? Who stood in line first and so deserves the ticket? Whose insurance will pay this claim? Was bodily injury done?—a matter of justice that Aristotle called "rightly constituted laws" is involved. Cicero also wrote of it stating: "[T]he mind and reason of the intelligent man [is] the standard by which Justice and Injustice are measured."[29] This places justice outside the law where it preserves its identity intact, waiting to recover the spirit of law if its practices degenerate.

This rudimentary thinking makes justice as rational as property and ownership, from which justice takes its bearings; for everything depends upon it. Property is to law what scarcity is to economics. Antagonism is aroused when a property settlement is not

---

[28] *See* CHARLES LOUIS DE SECONDAT MONTESQUIEU, THE SPIRIT OF LAWS xxiv (Thomas Nugent trans., 1949) (1748); CARL J. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 106 (2d ed. 1973).

[29] CICERO, DE LEGIBUS 319 (Clinton W. Keyes trans., 1966).

handled justly or a serious harm is left without compensation. The idea of justice also *implies* reason as equitable treatment, which we saw is parasitic on the meaning of resemblance. Not to have property is irrational, for it is not to survive.

We could continue relating property to justice indefinitely, discovering activities, relationships and objects that presume some notion of property in legal justice. Justice is the legal component of reason in law. Property, a foundational value in law, is the ontological component of justice.

Justice is not only a normative legal fact. It is also normative, in a different sense, when construed as a regular, usual or ordinary course of the way life goes; for what is regular becomes a custom and customs become "norms." It is also normative as an ideal; hence justice as a moral and legal value provides a standard for law to live up to. The "moral sense theorists" that came out of the Anglo tradition of Shaftesbury, Hutcheson and Smith had it right when they tried to demonstrate that a *sense* of justice is inherent in our nature. Justice cannot be so deep a yearning and so rational, pervasive and ancient a value if its source is a blank tablet on which our various and transitory sensations, experiences, and stimuli impress their shadows. Feelings, mature intuitions, and a sense of things have a place in morals and law, and reflection upon them may be quite capable of originating their enduring valuative correlates. If justice is a sense more than it is a cognition, then the emotions which deconstructionists contend replace reason in law are harmless and ineradicable. If harmless and ineradicable, then the deconstructionist complaint has no victim.

It is absurd that a social institution like law, so old even while still evolving, unchanging in certain essentials, indigenous to our permanent condition of communal life, and ineluctably fixed to rational justification, should be declared void of meanings that can speak for themselves independent of our politics and personalities, that is, of the idiosyncratic desire of some for power over others.[30] Reason so interpenetrates legal culture that any confuting analysis of its basic character cannot stand, for we would not

[30] Toulmin and co-authors come very close to asserting that no methods of confirmation are without historical input into their meanings and validity. *See* TOULMIN ET AL., *supra* note 1, at 263. "Complete immutability in our rational procedures and standards of judgment is not to be found . . . [even] in the judging of mathematical arguments. . . ." *Id.*

know it as law. When a skill such as law-making, adjudicating or lawyering is learned, the meanings of its uniformities of practice radiate into its remotest veins, laminating to the natural idiom of their expression. Any legal meaning or its correction has unforeseen, implicit ramifications that cannot, by definition, be simultaneously or abruptly changed; for we may never know them. They have to work themselves out through the system as we tamper with what is explicit and effable.

Semiotic sophistication teaches us that facts are not isomorphic with what they describe, even if visible, material referents are suggested by the signs denoting them. This prompts us to *take care* for our interpretations and to diversify our witnesses since for most of us the inconvenience of falsehood outweighs our small power victories. If legal language is really just a mask for motives that serve primarily the motivator, how then could law successfully levy enforcements against the aggressions of its own providers?

Law is a self-evaluator. It is always seeking interior reform of its techniques, its jurisdictions, and the language in which it understands ideas. As a discipline, law has developed *ultra vires*, rules of evidence to restrict its proceedings, restraints on jurisdiction, limitations to some causes of action, appeals, stare decisis, constraints on legitimacy, and other power-quashing limitations on its own activities. Such a discipline cannot be the mere tool of class interests that know no boundaries to their appetites for power.

The burden of proof, therefore, is on those who try to show that law and its justificatory function are irrational, that preference, passion, partisanship, and power sabotage reasoning in the law. To prove their claims, legal iconoclasts must keep intact the meanings of their own replacement vocabulary. This vocabulary, however, will hypocritically represent their own value preferences. Yet while the burden of proof is on the iconoclast, nothing can be proved because the vehicles of proof employ a vocabulary which describes law in a disingenuous fashion. On a large scale, reversals of accepted meanings cannot be vindicated but only exhorted because under a canopy of incoherence the meta-terms of proof lose their meanings too.

I have tried to show that the indeterminacy thesis has been a catalyst for a pathological development that works its way through the understandings that arbiters and citizens come to assimilate and anticipate. Some of these understandings live

underground in deep reason bonded to inherent factors in human social life. It is doubtful that the popular slogans, linguistic manipulations, and ideological manifestos of deconstruction can reach them there.

III. The Value Inquiry: Justification

It is generally held that knowledge of values presents a problem. Unlike knowing a fact whose components are often observable, values are fully abstract, or personal. Values seem closed to the agreements that witnesses to facts can often reach.

Values have no direct physical referent; we do not observe them and they are not sensations; only indirectly, if at all, do they denote objects. Their sensory parameters are minimal. Values are products of our larger experience and deeper purposes, of the empathic sense and of reflection, the serious thought that ranks their priorities and weight. At times, this lifts values to the status of ideals. Let us suppose values are defined as empirical "interests." Even then an element of normativity remains in that the interest claimed as a value has to be justified. Philosophically, therefore, values should be dealt with: What are they? How are they applied? What criteria exist to measure their adequacy and worth? Practically, however, law interprets values without waiting for answers to philosophical questions. Its interior structure is too value-ridden and norm-locked to pause over too many indeterminacies. Norms and standards within the legal system determine the way in which a case is settled. These parameters guide the participants throughout the legal process.

Could it be that one of our most effective institutions for social control is built on values that have no substance true to the character we believe we find? If the decisions that result from a legal interaction and all that goes into it are indeterminate or if, as the arch-deconstructionist Paul de Man says, there is "no possibility of establishing the range of meanings of any human condition, including the text,"[31] then the methods of law and not only its findings must be indeterminate as well.

On the other hand, maybe values do not present a more formidable problem than facts. Both facts and values utilize general terms. The term "desert," which can be used to describe a visible terrain, is at least as general as the social and valuational term

---

[31] Weiss, *supra* note 13.

"murder." The legal meaning of "murder" is not disputable. The only contention is when murder occurs. Similarly, where a desert begins or ends is often a difficult question for a geologist. The decision-maker asks the same questions with respect to both facts and values: What are they? How do we interpret them? What do they represent or communicate? How do we confirm them?

One can approach an understanding of values from various perspectives. Facts too need definition and legal facts are dependent on the modal norms that limit their definition and acceptance, not the other way around. Values can be construed as communal norms, as identifiable through action or consensus. They can be viewed as objectively real, as goals, as personal interests, as what is desired or pleasurable, as god-given and as indefinable. They have, in fact, been defended as all of these. Indeed, they appear so multiple, so variously applied, and at times so contested that they have been held to be hopelessly subjective. If they are hopelessly subjective, then justifying the use of a given value is hazardous, no more rationally neutral than justifying one's taste in food. Delving into values may seem like a random exercise in existential self-assertion. Indeterminacy suggests taking one's pick. But whatever the analysis of their meaning, everyone agrees that good values are fulfilling; they represent something in the human quest for satisfaction. As symbols of human satisfaction, values are approvable in denoting appraisals of the worth of something.

Almost everyone agrees, too, that some values are more fundamental than others and that fundamental values play a part in almost every value claim. The equal dignity of all persons has become a widely recognized fundamental value. Without recognition of such a value, it is difficult to convince some people that horrendous actions such as racial defamation, incarceration of the innocent, torture or genocide are not legally tolerable because they are not morally tolerable. Political freedom is another foundational value. Without political freedom, the social values of opportunity, responsibility, personal choice and rights to expression and association do not even arise.

The moral and legal value of not being a victim of bodily or mental harm is another fundamental value. Rights are built on this foundation of social interaction: the avoidance of harm. Many of the things that one believes are right or wrong, good or bad, ought or ought not to be done, refer, even if only indirectly, to

avoiding harm to oneself and others. One encounters this fundamental value if someone asks "why?" a particular act is right or wrong. At some point, the foundational value is discovered: ". . .because that would needlessly hurt someone." If the questioner does not understand or does not care, then the reasoned exchange comes to an end.

Bodenheimer wrote, "[t]here would, indeed, appear to exist some minimum postulates of justice which, independently of the will of a positive lawgiver, need to be recognized in any visible order of society."[32] Among these value postulates, Bodenheimer lists the preservation of life, the need for food and sleep and for private property in personal goods, the desire to protect one's bodily integrity and to "receive some modicum of respect for [our] personalities." Anthropologist Clyde Kluckhohn called these values "inevitabilities . . . given the nature of the human organism and of the human situation."[33] People in all cultures prohibit courses of conduct that oppose basic value systems. For example, deception and fraud, bad faith and breach of promise are *universally* prohibited.

There is also universal agreement that values serve to *justify* procedures, actions, beliefs and judgments. Like precedent, rules, equity judgment and fairness, legal justification is an intrinsically rational procedure. This is because justifying uses reason as its basis and takes logical form. Few have questioned the prevailing concept of justification as a generalized deduction. The first or general premise in a justifying argument expresses, or implies, a value (purpose, desire, interest, goal, etc.). The secondary or minor premises are the facts related to the judgment. The conclusion is a policy or an action statement regarding what ought to be done. Consider the following syllogisms:

It is good to quench one's thirst.
I am thirsty.
I ought to take a drink.

Landlords ought to repair their apartments.
The ceiling leaks in my apartment.
My landlord ought to repair it.

Expressing a value as an estimation of worth is to express a preference. But this does not mean the preference relates to one-

---

[32] BODENHEIMER, *supra* note 6, at 216-17.

[33] *See id.*, at 190 (quoting Clyde N. Kluckhohn, *Ethical Relativity: Sic et Non*, 52 J. PHIL. 663, 675 (1955)).

self, any more than if I *want* to mow a neighbor's grass, my want is self-serving. What the agent wants to do is "subjective" by definition. But the value her judgment approves is not.

At first glance, it would seem value language is indeterminate in that even if people are in accord on fundamentals, they may differ over the value they select to justify a particular judgment. They may differ over which value is most relevant, most effective or most important. A belief that serious and widespread value-unpredictability invades law led some early advocates of the indeterminacy thesis to proclaim that legal decisions are, in theory, open to limitless interpretation. Insofar as it inclines to value skepticism, no doubt other schools of legal positivism added their voice to this position. At that time, anthropology was espousing comprehensive moral relativism, now abandoned. Later on, the theories of Sigmund Freud suggested moral relativism. Philosophical ethics turned to a critical analysis of terms, away from normative ethics, as the culture at large bathed in a new discovery of moral relativism. If value differences cannot in principle be rationally settled there is an excuse to declare them void of meaning and applicability so far as legal affairs are concerned, as legal philosophers Hans Kelsen and Alf Ross have advocated.

A. The Sociological Reduction of Value

More than one avenue leads deconstructionists to collapse justification as the rational heart of legal argumentation. About the time that moral relativism began to surface, "emotivism" became popular in philosophical ethics as well. Emotivism held that values and valid moral obligations are only expressions of their author. A later, more "sophisticated" view deemed that valid moral obligations are only the interpretations of whom they target.[34] The general disregard of reason urged by the claim that reasons are masks for self-interest casts shadows over any enterprise in which reasoning plays a part. If values are reasons for acting in certain ways (and no matter what their definition, no one questions that values motivate persons to act, and motivate institutions to formulating laws and policies), then value skepticism extends to the action or the policy that results. Relatedly, if justification occupies such a frame and if justification is fundamentally a logical exercise, then again reasoning is downgraded. The logi-

[34] The classic account of ethical emotivism is ALFRED J. AYER, LANGUAGE, TRUTH AND LOGIC (2d ed. 1953).

cal form of justification, besides being causally inert, adds nothing to its objectivity and neutrality. For it, too, is simply a rationalization behind which judicial personnel conceal their bias.

The indeterminacy thesis reinforces value skepticism in its abjuration of reason, spawning nihilism out of the implication that legal decisions are without text. Quite literally, nothing stable exists. There are no prior meanings, decisions, assumptions or techniques to support reasoning procedures and precedents in legal matters. Legal paraphernalia seldom determine the law because no one knows which of them a decision-maker will draw upon. The legalistic space remains empty until the "reasoner" injects into her "findings" what she prefers. Thus, covert ad hominem argument supplants the law. In the end, intuited proclivities harnessed to power determine the law.

This brings us to the ideological species of the genetic misologism described above. Much deconstructionist writing reflects neo-Marxism in one version or another. The legal officer can thus have an ideological vision of what she would like law to be, and this vision, because untestable, could be as "licit" as what is already established. She could try to install her own utopian visions into the system either by way of the content of decisions (e.g., egalitarian social policies "legislated" by a common law judgment) or by way of procedural changes made system-wide (e.g., by one subterfuge or another, refusing to count as legitimate the testimony of someone belonging to the wrong political party). If, additionally, an ideology espouses historical or social determinism, such as "class forces" being the moving causes of events, reasoning is further denigrated since determinism, we saw, contradicts personal freedom. Left open by an alleged "indeterminacy," justification would then assume in its premises the values of the ideology.

> These discourses of legal and technical rationality, of rights, consent, necessity, efficiency . . . are discourses of power . . . because access to these discourses, to be able to use them or pay others to use them on your behalf, is a large part of what it means to possess power. Further, they are discourses that . . . tend to express the interests and perspectives of the powerful people who use them.[35]

This statement by deconstructionist Robert Gordon has serious flaws. For instance, one may interpret it as analytic; it says noth-

[35] Gordon, *supra* note 7, at 481.

ing but what is implied. Who other than those who possess power, legitimate legal power, has "access to these discourses"? One may also find that it is false. It is false if it means that the ordinary citizen has no "access to these discourses." This statement is also flawed because power is not necessarily ulterior. Finally, the statement commits a non sequitur. To have "access to these discourses" does not imply that those who use them do so to satisfy their own interests.

If "law is what judges do," then another empirical line is fashioned, reinforcing positivistic implications from Realist legal thought. Left thus, and bound by no invariant structure or norms of conduct, breaches of legal principle become exceedingly easy. The deconstructionist, and certainly the Realist-indeterminist, may reply that she is not defending norm-neglect; she is merely finding it in the law wherever she looks. But I would reply if she still believes that normative and valuative standards are proper to law and that as standards we *should* therefore pay heed to them, then she cannot deride valuative-justificatory language as meaningless and irrational. She cannot be a comprehensive value nihilist. She cannot even endorse cultural relativism; for rational justification as a method, even though its factual premises may be situational, crosses national, cultural, and jurisdictional barriers. It seems to me it is a pernicious form of projection to find what one wants to find in law because one wants it to be in law.

It is at this point that justification collapses into explanation. It is here that justification ceases to manifest autonomous, or even semi-autonomous, value. A deterministic slant on history and events makes it *conceptually impossible* to freely choose the values (purposes, goals, interests, ideals) that in legal judgment occupy the general premise of a justificatory argument. Ideological determinism holds that the unfolding of legal events even when norm-bound (and by definition, a legal event must be norm-bound) is inevitable, driven not by free choice but by a base of power domination. Moreover, since values are themselves determined by social forces and never by reflection, since we can only explain, never truly choose or intelligently ponder, values lose their modal character and they cease to maintain any validity, obligatoriness, or causal energy to motivate action independent of what inexorably exists. Since legal reality can only be explained, nothing legal can be justified. The norms that define the parameters of legal fact, what is relevant among facts and how to deal with these in justificatory formulae, all disappear from our frames of reference.

"[T]he CLS position can be interpreted as linking the logical claim to the causal one. The position is that it is implausible to believe that any system of norms generated by such a process of struggle and compromise will be capable of an ethically principled reconstruction . . ."[36] In this statement, Altman asserts that facts are inseparable from a system of norms capable of motivating anyone to a principled position. But note that "struggle and compromise" is an ideological insertion, reflecting not the ordinary course of law but the writer's cynicism. If laws were politics, "struggle and compromise," it might well be implausible to believe that an ethical reconstruction could result.

On its own grounds, the deconstructionist perspective can never be rationally defended. Rather, it must be harangued into existence by a strong use of convincing words and impelling passion. The ideological vision must then itself suffer destruction by the transitory forces of history and economic class that brought it into being and will watch it disappear. Since it is meaningless to justify values, when the normative elements of law are torn down, anarchy invades the system, unperceived and unassessed. Negative indeterminacy is two-faced. A self-centered judge can use the decision which indeterminacy cannot prohibit to advance herself. But her political opponents can also use it to quash her decisions or to reform the law in a direction she may not approve. We have descended into a Hobbesian war of every man against every man. No sequence of ordinary facts can in itself be a justification—although I believe that *fundamental* facts about human nature, certain of its uninhibitable needs and purposes that cannot further be reduced, constitute a base for value.[37] If facts of history are determined, it is absurd to pass judgment on them. Yet it is ordinary facts that we bring justification to bear on, especially those we effect by our individual and institutional actions. Further, certain facts may be morally abhorrent and we use justification to try to eliminate morally abhorrent conditions. Or certain alleged

---

[36] Altman, *supra* note 4, at 77.

[37] Certain very foundational facts about social living are also normative in that they must be given modal status in order to retain moral inviolability. If secured in a rule of law polity, these fundamentals can reinforce social knowledge by revealing what people naturally do, how they naturally associate, etc., when not obstructed by coercive political mandates. I argue for these theses in Virginia Black, *Using Law to Understand Society*, 9 MEMORIA DEL X CONGRESO MUNDIAL ORDINARIO DE FILOSOFÍA DEL DERECHO Y FILOSOFÍA SOCIAL 133 (1982).

facts may be mistaken or wrong. A jury, for example, may presume a defendant guilty before her trial begins. In such cases, their state of mind is inconsistent with the presumption of innocence.

A jury's empirical, factual perspective, however, is conceptually irrelevant to the fairness of a trial. We look not for existing beliefs in the minds of trial personnel but for the presumption of the normative outlook that justifies how the course of a trial *should* proceed. Only if such justification is distinct, but not remote, from the factual realm causally related to it can we do this. Importantly, if justification is reduced to a form of factual explanation, it lacks the normative force that begets the obligation to obey the law.

Transformation of values into facts may seem so incongruous as not to be credible. But this folly has been subscribed to, indeed, recommended. Certain relativists allege that even verification of a scientific hypothesis does not rest on neutral evidence. Rather, it is based on the convincing rhetoric of the most popular and powerful authorities of the day. Thomas Kuhn's "paradigm shift"[38] illustrates the thesis that the power to persuade *sets the criteria that determine validity* in a system of causal explanation.

I have read books on logic in which the distinction between rules of thumb for discovering a proof and rules of the system for confirming a proof is denied. Yet only the latter are rational, licit, and proper to the system. Rules of thumb are those personal actions and skills which depend only on what one finds easy or efficient to do. For example, if my mother is good at logic, one of my rules of thumb for solving a problem may be to ask her to discover the answer. It is not my mother's testimony, however, that confirms a proof! Only the rules of the system confirm a proof. On the other hand, I can also stumble onto a logic proof, but this is only an empirical, autobiographical account of how I got there. Should everyone's eccentricities be inscribed in the logic books as the right method of confirmation because "that is what logicians do?" The mistake is to take the origins of an idea for its vindication. I think there is a giant confusion here. Valid methods of confirmation in the different fields of knowledge are not everlasting Platonic ideas, but they are not fashions or "historical inevitabilities" either. Certain ideas may be *fashionable*, but

[38] *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

that is not what determines their validity. This is because we can make mistakes about how to confirm a proposition or hypothesis. To recognize a mistake is to recognize that some methods of confirmation are *more valid* than others. We could not discern this unless we had principles of validity well in mind that are independent of mere occurrences in time. Such principles remain valid until others are discovered that appear to the profession to do a better job, where "better" is defined not as more authoritatively powerful but as inducing more purely to an understanding. An exact parallel occupies the law.

IV. NATURAL LAW AND THE RULE OF LAW

> So deeply is the evolution of human thought on justice enmeshed with inquiries concerning the existence and significance of an assumed "law of nature" that no adequate theory of justice can afford to ignore this enduring problem. . . . There is consensus . . . that natural law consists of principles and axioms which are entitled to recognition regardless of whether or not they have found formal expression in the positive law of a state or other community.[39]

A certain perspective on natural law morality, combined with the rule of law can help subordinate those aspects of indeterminacy that I feel have distorted legal theory for more than a century. Classically referred to as the rule of law, this pillar of Western legal thought and practice admits of at least two related meanings. In a general sense, a polity said to be constituted more of laws than of personal or executive rule is a rule of law polity. It is hard to imagine today a polity of any magnitude, continuity, complexity or significance giving itself over to administrative fiat with only a few laws fibered through its social marrow.

The rule of law also has a narrower meaning, although its ramifications are broader. A society based on laws is a rule of law society if the laws govern those who make and enforce the laws as well as the ordinary citizens of the polity .[40]

---

[39] BODENHEIMER, *supra* note 6, at 214-16.

[40] Two important tenets in Albert Dicey's famous formulation of the rule of law are the following: (l) Absolute supremacy or predominance of regular law; and (2) Equality before the law, or the equal subjection of all classes to the ordinary law of the land. *See* ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202-03 (10th ed. 1965).

I take up the rule of law at some length in Virginia Black, *The Isonomic Order in Constitutional Theory*, *in* 3 REASON IN LAW 221-36 (Carla Faralli &

A rule of law society treats its citizens equally. Where there is a separation of powers there is less chance for usurpation. Socrates was sentenced to death by a *legislative* assembly that also possessed the power of judicial trial. Naturally, his enemies cleverly shaped the laws to catch him in the net of legal wrongdoing. When lawmakers are subject to their own rules, they take care that the rules are not onerous. Thus, the rule of law quells power. Aristotle put it: "[T]he rule of law . . is preferable to that of any individual."[41] A polity whose laws are radically indeterminate and continually and markedly in question, cannot be a rule of law society. And if we believe that law is what judges say it is, judges rule, not the law. Abandonment of the rule of law is the road to tyranny.

Natural law has been criticized because it is vague. The critics are those who insist that effective law must be specific in its meaning. Unlike natural law, where "the concept of legal validity is a concept of moral legitimacy,"[42] the positivist critics contend that law need not be moral.

It is true that natural law theorists sometimes disagree about what substantive content a natural law system contains. Some of this disagreement results from vagueness. Value skeptics point to these disagreements as indicative of a chimera, "pie in the sky." They allege natural law principles—do good and avoid evil; use practical reason; aspire to actualize your highest intellectual potential; tyranny is contrary to natural law; an unjust law is not a law—are too unclear to offer direction to those who participate in law's official functioning.

Natural law also comprises a set of virtues and of basic moral goods: happiness, integrity, friendship, justice, life, health, knowledge, sociability, religion, freedom of conscience, the equality of all mankind, truthfulness. All these values, according to a recent proponent, are grasped by the practical intellect "in non-inferential acts of understanding."[43] All these values and virtues have occupied mainstream natural law thinking almost from the begin-

---

Enrico Pattaro eds., 1988) (proceedings of the Bologna Conference, Dec. 1984).

41 ARISTOTLE, *supra* note 20, at 1202.

42 Deryck Beyleveld & Roger Brownsword, *The Practical Difference Between Natural-Law Theory and Legal Positivism*, *in* 2 NATURAL LAW 135, 138 (John M. Finnis ed., 1991).

43 Robert P. George, *Recent Criticism of Natural Law Theory*, *in* 1 NATURAL LAW 353, 371 (John M. Finnis ed., 1991).

ning, and so too have the postulates of natural justice and equity: No man should be judge in his own cause; dispute settlers should have no private interest in the outcome or be biased in favor of or against a party; each party should be given fair notice of the proceedings; the dispute settler should hear the argument and evidence of both sides, etc.[44]

We can see that the basic natural principles and moral goods, like all values and character ideals, are abstractions. As such, they have lived varied and special lives in philosophical, religious, and moral history.

I would like to suggest, in closing, that if certain fairly well defined natural laws are presupposed as positive laws in constitutional systems, they stand ready to be called upon to override and supplant the more gross and power-tempting indeterminacies that can turn up in judicial decision-making.[45] To some extent, this propitious system ensuring that fundamental morality occupies the highest law is already true of American government. It has not, however, been explicitly suggested as a method by which justice should regularly proceed. Attention must be paid to which natural laws lend themselves to legalization so that the voluntary nature of morality is not jeopardized. In general, the natural laws which form the basis of society—intolerability of harm and needless pain, respect for the necessities of nature, man's normative dignity—have shown themselves to be agreeable to positivization, as have the moral obligations relating to rights and roles that respect the independence of persons and forward their flourishing.

The rule of law must be *conceptually connected* to natural law as its necessary condition because although persons can exist under tyranny they cannot thrive under tyranny. The rule of law makes possible and is essential to the achievement of personal fulfill-

---

44 MARTIN P. GOLDING, PHILOSOPHY OF LAW 122-23 (1975). "They [the postulates of justice] have been considered so fundamental that, despite the doctrine of parliamentary supremacy, some English judges have said that an act of Parliament against them would be void in itself." *Id.*

45 Michael Moore in *A Natural Law Theory of Interpretation* comes close to paralleling what I say here, but his emphasis, well considered, is on developing a theory that specifies exactly how natural law concepts can become valid interpretants. So far as I know, Moore does not claim, as I do, that the rule of law has to guide their entrance into the law. *See* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 286 (1985).

ment. But if persons rule and not law, little opportunity exists for one to work toward the realization of her potential. Accordingly, some principles of natural law make good sense as essential occupants and goals of a rule of law society.

Indeed, many natural laws already appear in legal codes and systems as ultimate reference points for continuous and ongoing legal instrumentation. The principles of natural justice and equality of persons, for example, are constituents of political and judicial morality in all polities that respect human rights.

Natural laws and moral goods are no more vague than, say, the American Bill of Rights. Vagueness characterizes all basic laws so as to maintain the inclusiveness that is their purpose. They become concrete and specific, as do any moral and general legal rules, only through application. Determining when they are appropriately applied is and always has been the provenance of experienced judicial judgment. As for the natural law of equity, this pervasive doctrine, for centuries an effective recourse in humane legal systems, is no exception to law but, to the contrary, fulfills the spirit of rules when rules, not men, are seen as a means to justice.

The strongest reason for making sure that the positive law cannot contradict the natural law, that legal legitimacy be seen as a form of moral legitimacy, is that to the extent that indeterminacy occupies legal affairs—even if such indeterminacy is benign or unavoidable and still argued over—a known, tried and approved morality stands ready to fill the gap. There will be controversy over which is most appropriate for the situation, but the argument will be about morality and not about power. If moral principles that we share and anticipate fill the gap, then the caprice of the lawmaker is precluded from doing so. In addition to the political and judicial morality already resident in mature legal systems, principles of natural morality can be drawn upon in the security that to reach out for the culturally sanctioned is to reach out for the authoritatively moral obligation of the law.