

1-1-1992

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Recommended Citation

Michael G McQuade, "Deconstruction and Marxism: Implications for Legal Theory" (1992) 1 Dal J Leg Stud 87.

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DECONSTRUCTION AND MARXISM: IMPLICATIONS FOR LAW AND SOCIETY

Michael McQuade*

The law in its majestic impartiality forbids rich and poor alike to sleep under the bridges, to beg in the streets, and steal bread.

Anatole France¹

Let us pretend that two people, one a Marxist political theorist and the other a deconstructionist literary theorist, come across a sign bearing the above epigram from Anatole France. The Marxist theorist interprets the sign from a politico-economic perspective and concludes that 'law reflects the interest of the ruling class, and is a means of perpetuating a social order.' The deconstructionist theorist says, 'this sign reflects the prevailing ontological and epistemological perspectives, in that it accepts both the existence of a thing called 'law' *per se*, and that the world consists of a series of oppositional pairs' (here, for example, rich and poor).

At first glance, these two opinions do not seem to have much in common, nor are their implications for law obvious. Yet, both have much to offer contemporary legal studies. Each, in its own way, brings to light some of the unarticulated biases which support both the existing legal tradition and society at large.

The basic theories of deconstruction and Marxism and their respective implications for society are outlined first. In brief, both are critical of hegemonies evident in liberal capitalist society: the deconstructionist of structuralist epistemology, and the Marxist of capitalism. From this it should become evident that the two are not as dissimilar as they might seem at the outset. Their similarity will be made more explicit as the implications of each for legal theory are explored. Specifically, I shall compare the deconstructionist and Marxist theories on the origin of law, the functions of law, and the future of law. It is proposed that not only will these two schools arrive at many of the same conclusions about the present state of law, but that they both point to a new way of viewing law and society.

DECONSTRUCTION: THE TEXT AND SOCIETY

It is commonly thought that Jacques Derrida founded the 'school' of deconstructionist literary theory in France in the 1950s. However, Derrida himself would say that such a statement would involve a displacement- a misreading- of his work insofar as it seems to suggest that literature and literary theory can be viewed in isolation from the society in which they exist. Central to Derrida's work is the notion that there is nothing outside of the text. This will require elaboration. In order to place deconstruction in its proper context, however, a brief

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history of semiotics (the interpretation of signs and symbols) and literary theory is required.

Any discussion of literary theory must begin, however briefly, with Ferdinand de Saussure's 1916 *magnum opus* *Course in General Linguistics*. Briefly, de Saussure rejected the view that language was to be viewed 'diachronically' - that is, in its historical development - in favour of a 'synchronic' approach.² De Saussure had two main points: (1) at any point in time, language is a complete set of written and oral symbols; and (2) the written word is somehow more valuable than the spoken word.

First, in de Saussure's model, language is, at any given point in time, a complete system of symbols. Each symbol, or sign as is more commonly used, consists of a "signifier" (a sound-image or, more usually, its graphic equivalent) and a signified (the thing or concept represented).³ De Saussure's model begins, then, from a standard western metaphysical perspective which privileges 'presence'; it begins with the acceptance, in Platonic terms, of an archetype or universal which the mind immediately grasps.⁴ In applying this to semiotics, it means that the three letters d, o, and g, when arranged in that order represent to the mind a four-legged domestic animal, the canine.

Second, de Saussure divided systems of communication into two parts, *langue* and *parole*. In structuralist thought, *langue*, meaning both the written word and the system of laws governing those words, is privileged over *parole*, the verbal articulation and communication of a community:

Saussure argued that *langue* was the more important element in the understanding of language because the system of relations among various signs is what constitutes a language. Specific examples of *parole*, that is specific speech acts by speakers in a linguistic community, are only possible because of the preexisting *langue* that speakers unconsciously rely upon to understand each other.⁵

Such a view was consistent with de Saussure's basic aim of articulating a science of language; it is easier to study what can be seen (*langue*) than what can not (*parole*).

In various formulations, these basic dualisms - signifier/signified, *langue/parole*, and synchronic/diachronic - formed the basis of structuralist semiotics. Structuralism held the day almost unchallenged until the 1950s when a few literary theorists brought their critical focus to bear on their own discipline. The first to do so was Northrop Frye who challenged the 'ahistoricity' of the structuralist approach by attempting to place the structuralist constructs within a definite historical context.⁶ The most significant attack, however, came shortly after when Derrida questioned the metaphysical underpinnings of the structuralist beliefs.⁷

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The notion of 'relativity' was always present in structuralist theorizing- in fact, it was central to it. For the structuralists this relativism was essential for definition- the signifier 'cat' represented the signified 'cat' by virtue of being other than 'hat' or 'car' or anything else. However, it was not until Derrida that people began to fully realize the implications of the fact that the 'signified' does not correspond neatly to any one signifier, but only to what it is not.

Central to *Of Grammatology*, Derrida's study of the writing of Jean Jacques Rousseau, is the notion that standard metaphysics consists of defining the world in terms of binary opposites (e.g., light/dark, good/bad, etc.), one of which is taken to be the original and model, and the other subordinate and derivative.⁸ At the same time that it is derived from the original, the latter is the opposite of, and therefore a threat to, the former. If the first is valued, the second can legitimately be suppressed.⁹ One should begin to see the legal and political implications of the traditional metaphysic.

In Derrida's view, this system of prioritization is problematic. In its place he proposes a new theory which seeks to avoid such prioritization. Central to his theory are the concepts of 'differance', 'trace' and 'supplementarity'. Each of these will be discussed in turn.

While for structuralists the notion of difference was something to be overcome, for Derrida it provides the key to understanding. Derrida termed this 'differance'. "The French word 'differance' is a neologism that combines two verbs - to differ, as in spatial distinction or relation to another, and to defer, as in temporalizing delay."¹⁰ This relation- "the inscription of other-relations is the self same"- Derrida describes as "radical alterity".¹¹

Derrida begins with, but ultimately rejects, the underlying Western Platonic notion of identity.¹² Western philosophy has always begun with and assumed identity as the basis for metaphysical thought:

anything is identical to itself; if two things are different they are not identical to each other. While this seems reasonable, it is here that the deconstructionist critique begins...

The deconstructionist wants to show that the notion of identity, which seems so basic, so 'present', actually depends upon difference because a thing cannot be identical to something unless it can be different from something else. Identity is only comprehensible in terms of difference, just as difference can only be understood in terms of identity.¹³

Thus Derrida deconstructs the notion that one half of any binary system is necessarily dominant and original while the other is independent of, and subordinate to, the former. Not surprisingly, since this metaphysic underlies de Saussure's *langue/parole* dichotomy, it too can be deconstructed.

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If, as we have seen, *langue* and *parole* are not two discrete notions, but only, analogically, two sides of the same coin, this begs the question of the origin of language:

Language must have begun with speech acts, and through history the collection of past speech acts (*parole*) was consolidated to create a linguistic system (*langue*). On the other hand, speech acts could not have been understood without some pre-existing structure... No matter how far back we go into history, each speech act seems to require a pre-existing linguistic and semantic structure in order to be intelligible, but any such structure could not come into being without a history of pre-existing speech acts by past speakers. Neither *langue* nor *parole* could be a foundational concept in a theory of language because each is mutually dependent upon the existence of the other.¹⁴

How then do we get around this problem of identity/ non-identity? Simply stated, we don't need to; the problem of identity/non-identity, it follows logically, can and must be both the problem and the solution simultaneously. This is the notion of 'differance' of which we have already spoken.

Recalling that 'differance' meant both spatial and temporal distinction which exists between words, this leads Derrida to another important concept: the differential relation of alterity, which he titles 'trace':

The word 'trace' is a metaphor for the effect of the opposite concept, which is no longer present but has left its mark on the concept we are now considering. The trace is what makes deconstruction possible; by identifying the traces of the concepts in each other, we identify their mutual conceptual dependence.¹⁵

Although he labels this differential relationship, Derrida resists the attempt to privilege even it metaphysically; in Derrida's theory neither differance nor trace can be allowed to dominate. From this, Derrida derives his theory of 'supplementarity'.

In *Of Grammatology* Derrida critiques the hierarchy of speech over writing through 'the logic of the supplement'. The term 'supplement' derives from Rousseau who described writing as a 'supplement' to speech; Rousseau believed that the natural state of language was spoken, with the written word evolving from speech.¹⁶ We have already seen one problem with this view, but here the social consequences of such a view become obvious through Derrida's notion of 'supplementarity'.

The word 'supplement' has many meanings, only two of which concern us here: it can mean "something added to an already complete or self-sufficient thing", but it can also mean "something added to

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something lacking in order to make it complete."¹⁷ Given Rousseau's onto-theology (namely, his Platonic tendencies) he could only have intended the former meaning. In fact, this is confirmed by Rousseau who feared that writing "might infect the purity of speech."¹⁸ But, Derrida suggests, this is problematic. Speech can not be, as Rousseau suggests, whole and pure because logically writing can only supplement speech if speech is already lacking something (even if that lacuna is only the supplement of speech).

Thus speech is not pure and writing impure, or a mediation of speech. Speech is, like writing, only a supplement of something else (thought), and obviously an incomplete representation of it. This leads to an obvious problem: if speech is a supplement, that which it supplements must also be lacking. The result is a chain of supplementarity *ad infinitum*. This allows Derrida, in what J. Balkin calls "the ultimate deconstruction of presence",¹⁹ to proclaim that:

[T]here is nothing outside of the text ... What we have tried to show by following the guiding line of the "dangerous supplement," is that in what one calls real life ... there has never been anything but writing; there have never been anything but supplements, substitutive significations which could only come forth in a chain of differential references ... [T]he absolute present, Nature, ... ha[s] always already escaped, ha[s] never existed.²⁰

So far, it has been suggested that the Derridean notion of difference allows one to deconstruct words and the philosophical constructs which support them. Adopting Derrida's supplementarity notion, one can then move on to deconstruct metaphysical principles underlying society, and ultimately then, society itself. In "The White Mythology: Metaphor in the Text of Philosophy" - his study of Anatole France's *The Garden of Epicurus* - Derrida gives an example of how this might be accomplished.²¹

Derrida titles the first section of "White Mythology" 'exergue' which has both a numismatic meaning, namely "the space on a coin ... reserved for inscription", and an epigraphical meaning of something "outside-the work."²² Similarly, he subtitles the first section 'usure' a word which has two meanings, one economic and the other linguistic. 'Usure' in French means both the acquisition of too much interest, and using up or deterioration through usage.²³ These 'latent' connections between language and economics are soon made manifest.

In *The Garden of Epicurus*, Polyphilos and Aristos carry on a conversation in which the former ruminates on the grinding down of coins until nothing, not even the sovereign image, is visible in their crown pieces. He suggests that "metaphysicians, when they make a language for themselves, are like ... knife-grinders" who, by erasing the images of the sovereign attempt to free the crown pieces from all limits of time and space.²⁴ But Polyphilos is anxious to retrieve the capital to

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restore the "‘original figure’ of the coin which has been worn away ... in the circulation of the philosophical concept."²⁵ Thus, Derrida concludes, it is the very possibility of restoring, beneath the metaphor which hides it, the 'original figure' of the coin which is central to the metaphysics.

The primitive meaning is physical. This meaning becomes metaphorical when philosophy puts it into circulation. At that point, however, "the first meaning and the first displacement are then forgotten. The metaphor is no longer noticed, and it is taken for the proper meaning." ²⁶ France titles this co-option of the primitive meaning, 'White Mythology'. Derrida asserts that Western thought acts in such a manner by seeking to escape appearances, but is condemned then to live "in a world of allegory":

Metaphysics - the white mythology which reassembles and reflects the culture of the West: the white man takes his own mythology, Indo-European mythology, his own *logos*, that is, the *mythos* of his idiom, for the universal form of that he must still wish to call Reason.... White Mythology- metaphysics has erased within itself the fabulous scene that has produced it, the scene that nevertheless remains active and stirring, inscribed in white ink, an invisible design covered over in the palimpsest.²⁷

The influence of these theories has not stopped at the edge of literary theory. Clearly these theories exist in society because they support society. By deconstructing the metaphysical grounding upon which society rests, Derrida seeks to bring society itself into the critical discourse.

Deconstruction begins with, but ultimately rejects, the traditional Western notions of ontology (the study of being) and epistemology (the study of knowledge and reality). Rather, deconstructionism begins with a critique of traditional formalist literary theory, and through the notions of radical alterity, difference, supplementarity and trace, posits an entirely new manner of perceiving literature and ultimately the world. Broadly speaking, the deconstructionist critique of structuralism is that it seeks to overcome difference by the imposition of a literary and social system which is based ultimately on physics, and is, to that degree, rationally unsupportable. It sees everything as meaning distinct but not discrete. Everything is related ultimately through the chain of supplementarity. In both its critique of metaphysics, and its emphasis on the oppositions that exist within society, one can see the similarities to Marxist theory.

MARXISM: ECONOMICS AND SOCIETY

It is commonly held that it is impossible to speak of the orthodox Marxism. At best, one can speak of an orthodox Marxism; a theory which is not inconsistent with that which Marx wrote. One is not surprised to

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encounter such a problem in discussing a 'Marxist theory of law' since Marx, in spite of his university training in law, never completed a systematic study of law.²⁸ Rather, he alluded often but usually briefly and indirectly to the role of law in the development of the capitalist economy. As many recent writers have suggested, however, this indeterminacy applies also to Marx's more purely economic writings. It is with them that we must begin our discussion.

The main notion derived from the writing of Marx is that society is economically determined. Economic relationships, or more accurately relationships to the control of the means of production, dominate society. Central to any Marxist theory is 'the base/superstructure metaphor':

In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness.²⁹

Yet, even this passage which is at the heart of any Marxist analysis has not been free from problems of interpretation.

Two main schools of Marxism have arisen and are divided on, *inter alia*, the questions of the meanings of the base/structure metaphor and the fetishism of commodities. Alvin Gouldner termed these schools 'scientific' and 'critical' Marxism. The former, he argues:

is grounded in the axiom of the Soviet Union's celebrated metaphysic, "dialectical materialism." It interprets the world in one way at all times, and, therefore, it remains closed to new advances in philosophy and critical analysis, such as deconstruction.³⁰

Conversely, critical Marxists tend to be characterized by a:

rejection of the model of authoritarian central state communism. They favour models of socialism which are dehierarchized, egalitarian and democratic. Whereas the Soviet model privileges productive forces (technology, heavy industry, and the like) over relations, thus permitting the preservation of capitalist work relations, critical Marxists demand a complete transformation of the form of work and of all social power relations.³¹

Here it is suggested that scientific Marxism is based on a misreading of Marx's work. In reducing everything to economic rela-

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tions, scientific Marxists privilege economics philosophically in a manner which Marx himself could not have intended. Critical Marxism is not only internally consistent in its emphasis on productive relations rather than loci of production, but also is compatible with the deconstructionist theory of radical alterity.

In *Deconstructionism and Marxism* Michael Ryan argues that a common misreading of Marx's various writings "conflates them into a homogeneous formula", which Ryan suggests, does not exist in reality. Central to such misinterpretations is the displacement of Marx's statement in the *Communist Manifesto* that "the first step in the revolution by the working class is to raise the proletariat to the position of the ruling class" and "to centralize all instruments of production in the hands of the state, i.e., of the proletariat organized as a ruling class."³² Ryan argues that Marx did not intend that the temporary rule of the proletariat should be confused with the 'state' in the bourgeois sense of the word. But this is evident even in parts of Lenin's reading of Marx:

The crucial displacement occurs in the next paragraph. "By educating the workers' party, Marxism educates the vanguard of the proletariat, capable of assuming power and leading the whole people to socialism, of directing and organizing the new system, of being the teacher, the guide, the leader of all the working and exploited people" ... After establishing the "Marxist" definition of the state as the "the proletariat organized as a ruling class," Lenin substitutes the vanguard party for the proletariat.³³[emphasis deleted]

While Marx's view of society was fluid, and the need for a ruling class was only a conduit to a truly socialist society, Lenin here seems to suggest that a ruling class, (albeit one composed of proletariat), will be necessary at all stages in social history if the revolution is to be given an on-going effect.

The problem, obvious to both critical Marxists and deconstructionists, is that if any segment of the proletariat is advanced to the position of ruling elite, surely they are no longer proletariat. Rather, they would have become *de facto* part of the ruling elite. Such problems of interpretation continue to flourish. Another equally common difficulty that is no less problematic lies in the assertion that Marx reduced all social relations to economics.

As support for the assertion that Marx would reject out of hand such a reductive deterministic perspective, one need only look at the work of Marx's collaborator, Engels. While Engels wrote that "economic base is determining only 'in the last instance' or 'in the final analysis'",³⁴ in a letter to Block he also argued that "if somebody twists this ... into saying that the economic factor is the only determining one, he transforms that proposition into a meaningless, abstract, absurd phrase."³⁵ Milovanovic writes:

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In Engels' letter to Borgius in 1894, Engels stated that the economic condition "ultimately determines historical development"; however, although "political, legal, philosophical, religious, literary, artistic, etc., development is based on economic development... all these react upon one another and also upon the economic base." Further, he states, "one must think that the economic situation is cause, and solely active, whereas everything else is only passive effect. On the contrary, interaction takes place on the basis of economic necessity, which ultimately always asserts itself."³⁶

The key word in this passage then is 'determines'. As suggested, the two schools of Marxism take different views on the meaning to be ascribed to this word.

In his study of Marxist and Weberian notions of law, Dragan Milovanovic distinguishes two notions of 'determination' within Marxism. One school (which here has been called 'scientific Marxism' but which he calls 'instrumentalist') defines 'determination' as "prediction, i.e., some antecedent factor [which] totally predicts, or totally controls—prefigures— subsequent activity."³⁷

The other school, which is favoured here and which he calls structuralist, defines determination as the setting of limits through the exertion of pressures.³⁸ Importantly, these pressures are both internal and external. Structuralism itself is divided into two schools, 'commodity exchange structuralism' and 'interpellative structuralism'. The former sees the economic factors determining in the first instance, while the latter "sees the economy determining only in the last instance; it is the political and ideological structures that have primal effect."³⁹ This notion of three relatively discrete forces acting in society — politics, ideology and economics — is called by Poulantzas (the leading interpellative Marxist legal theorist) and Althusser (a prominent Marxist theorist) the theory of 'overdetermination'.⁴⁰

While the former definition of determinism is exclusionary, in that it excludes the second, the latter definition can, with slight modification, exist without excluding the former. If one accepts the instrumentalist definition, powerlessness is assumed; people are not actors, but powerless receptors of economic laws. While this stems partly from a reductive reading of the writings of Marx and Engels, it may also be attributable to the bias within the English translation.⁴¹ However, a fundamentally different view develops from an understanding of the interpellative notion of 'inherent determinism'.

In his letter to Block, to which reference was made earlier, Engels wrote that "we make history ourselves, but, in the first place, under very definite assumptions and conditions."⁴² Here the notions that 'we make history ourselves' and 'the necessity of definite conditions' are equally important. 'Determination' implies not only being subject to the forces of economics and history, but also an act of purpose or will. The

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two meanings of determination are thus clearly distinct, not necessarily mutually exclusive:

Here, determination means that the first factor qualifies, or sets the limits to the second. Subjectivity is restored. It is not that the individual is a passive recipient and reactor; rather, the person finds him/herself constrained, somewhat, by the historical conditions s/he is born into; meaning, that above all else, it is the "exertion of pressure" by external factors that is equated with the notion of determinism. But these interact with the subject's desires, wants, capacities, abilities (in formulating projects), and strivings (in transcending existing conditions, including by means of oppositional praxis).⁴³ [emphasis deleted]

With this understanding of determination and working backwards to the base/superstructure metaphor, one can see that a 'deconstructive' reading of Marxism (that is, beginning with, but not privileging 'determinism', which is itself accomplished by always keeping in mind the larger context in which it exists) suggests that the scientific/instrumentalist understanding of Marx is fundamentally a misunderstanding of Marx's writings. It onto-theologizes economic factors. Only the critical interpellative view of Marx's work allows one to escape antinomies and thus a recourse to metaphysics. In the sense that it sees economics as both 'supplementing' and 'supplemented by' other factors, one of which shall be seen to be law, interpellative Marxism is compatible with Derrida's understanding of deconstruction.

In summarizing Marx's contribution to social theory, there is a tendency to think of the modern Soviet applications of 'economic determinism' and the 'dictatorship of the proletariat'. To do so would be to do violence—indeed an injustice—to the theories of Marx. As Marx suggests in his *Manifesto*, the key to Marxist theory is not the loci of production, but the relations of production. This is the only understanding of Marx's dialectic that is logically consistent with the rest of his work.

Just as Marx's dialectic demands a fluidity of economic relationships, it demands a similarly malleable notion of society in general. This has two main implications for Marxist theoreticians. First, as the interpellative Marxists suggest, economics cannot determine society absolutely; rather economics interacts dialectically with superstructural forces like law and politics to produce society. Second, as Gouldner suggests, there must be a transformation of all social power relations from reified and hierarchical to fluid and egalitarian. In both its critique of scientific Marxism's reliance on a 'metaphysical' reading of the material dialectic and its reified social theory, critical or structuralist Marxism shares much with Derrida's understanding of deconstruction. This is evidenced in their respective views on the law.

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DECONSTRUCTION, MARXISM, AND LAW

Capitalist production begets, with the inexorability of a law of nature, its own negation.

Karl Marx⁴⁴

Derrida's work manifests a clear understanding of the Hegelian dialectic,⁴⁵ but like many European academics of his generation, he came to reject this classical dialectic because of what he perceived as its metaphysical nature. Derrida was following in a rather well-worn path.

After his initial period in the Young Hegelians, Marx also rejected Hegel's notion of the historical dialectic. In spite of this similarity, early in his career Derrida rejected the Marxist as well as Hegelian dialectic—and for the same reason! The year 1971, however, brought the now famous interview with Scarpetti and Houdebine in which Derrida was criticized publicly for ignoring the commonalities with Marx, and the social utility of deconstruction.⁴⁶ This seems to have signalled a shift in Derrida's outward attitude towards Marxism, although as shall be seen later, his notion of the origin of language from *Of Grammatology* is compatible with Marxist theory even if not framed in classical Marxist jargon.

By 1972 Marxist jargon had begun appearing in Derrida's work. In 1976 he spoke explicitly on the role that deconstruction might play in exposing ideology. By 1979 he publicly described himself as a Marxist.⁴⁷ Why the change? There is no clear answer, but it appears that Derrida's notion of deconstruction itself did not change, but rather it is his understanding of Marxism which has evolved. Although Heidegger, Nietzsche, and Freud are the obvious influences on Derrida's early writing (Freud's role will be explained later), in the later works, Nietzsche and Freud are joined by Marx as the dominant figures.

This paper has thus far suggested that scientific Marxism is both a misreading of Marx, and incompatible with a deconstructive epistemology. The next step is to suggest that such an epistemology is compatible with the critical Marxist school of thought. In *Marxism and Deconstructionism* Michael Ryan has argued for just such a point. Although Ryan develops a full-blown social theory based on both Marxist and deconstructionist notions, here one needs only to outline his first point: Derrida and Marx develop compatible social theories because they share a similar criticism of metaphysics.

Although they operated in different fields, Marx and Derrida share many critical tools: the concepts of relation, difference, and antagonism. This leads inevitably to similar results when they discuss common subjects, such as the critiques of positivism and idealism. In his introduction to the *Grundrisse*, Marx speaks of the concept or category of "production in general". But production he says is not a thing; it is a series or segment of relations which Marx calls 'essential difference'.⁴⁸ The similarities to Derrida's notion of radical alterity are obvious:

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For Marx, once alterity, the relation to the other which is "internal" to the thing (production), is taken into account, one arrives at a full concrete determination, as opposed to an empty abstraction. It should be noted that the word "determination" [*Bestimmung*] does not mean a self-identical "thing", but instead a locus of relations whereby something is constituted by or in relationship to other determinations.⁴⁹

Although it has been suggested here that Derrida shared this notion of 'radical alterity' with other thinkers, the striking lack of a metaphysic in the critical Marxist reading renders it the most akin to the deconstructionist approach. This similarity carries over into their respective critiques of law and society.

Some people can imagine approximately what a Marxist theory of law might encompass. Fewer would probably be able to envision a deconstructionist theory of law. In brief, the latter rejects as metaphysical any law or legal construct which is based upon unassailable first principles. Such a theory as well as an interpellative Marxist theory of law will be outlined; these two theories are proved to be similar and mutually supporting.⁵⁰ Specifically, an examination of three aspects of law is adopted: the origin of law(s); the functioning of law in society; and the future of law. It will be evident that, although, for the purposes of clarity, these three notions are treated as distinct, there is necessarily considerable overlap among them.

THE ORIGIN OF LAW

Deconstruction and the Origin of Law

In the deconstruction of Rousseau's theory of the origin of language, Derrida in *Of Grammatology* begins to develop a theory on the origin and function of law.

In *The Social Contract* Rousseau declares a centre— "one single origin, one single point in the history of languages."⁵¹ He speaks of the movement during 'primitive times' from the development of 'no language' to an 'almost language' (signs used amongst family, and even then, only infrequently) to language (a full set of signs and symbols). According to Rousseau, this accompanied the development of more complex social organizations, from families to clans to tribes. Rousseau calls this period, when people came together and understood each other, the 'time of festivals'. But Derrida draws our attention first to the time before the festival:

What then! Before that time did men spring from the earth? Did generations succeed each other without any union of the sexes, and without anyone being understood? No: there were families, but there were no nations. There were domestic, but not popular, lan-

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guages. There were marriages but there was no love at all. Each family was self-sufficient and perpetuated itself by inbreeding. Children of the same parents grew up together and gradually they found ways of expressing themselves to each other: the sexes became obvious with age; natural inclination sufficed to unite them. Instinct held the place of passion; habit held the place of preference. They became husband and wife without ceasing to be brother and sister.⁵²

This non-prohibition, however, is interrupted after the festival. While the festival is the "moment of pure continuity, of indifference between the time of desire and the time of pleasure", the age that follows is the age of "the supplement, of articulation, of signs, of representatives. That is the age of the prohibition of incest."⁵³ In Rousseau's model, this prohibition is the beginning of law.

Rousseau ascribes to society "a sacred and holy character only to the natural voice, ... the natural law ..., it is, ... the social order itself, the right of law."⁵⁴ Recognizing family as the original or 'natural' organization, society cannot maintain its prohibition except "by convention".⁵⁵ As Derrida suggests, however, this displacement of the father figure by society does not follow smoothly; "the political father no longer loves his children, the element of the law sets him apart"⁵⁶:

Rousseau consecrates convention only on one condition: that one might universalize it and consider it, even if it were the artifice of artifices, as a quasi-natural law conforming to nature. That is exactly the case with this prohibition. It is also the case of the order of that first and unique convention, or that first unanimity to which, the *Contract* tells us "we must always go back" for understanding the possibility of law. The origin of laws must be a law.⁵⁷ [emphasis deleted]

To make the point clear, Derrida suggests that the two arguments are heterogeneous; neither the prohibition nor the morality can be the first cause. He states, "neither of the two is intrinsically pertinent to the argument: the morality that condemns incest is constituted from the interdict, the former has its origin in the latter."⁵⁸ From this one can derive two important principles.

First, as Derrida suggests, law does not exist in the Platonic sense; there is no 'essential law' in the universe just waiting to be derived and applied. Law is created and imposed by society. Second, not only is the nature of law prohibitive, but also it is permissive. Law only prohibits certain actions to the degree that it imposes other actions in their place. Thus Derrida questions not only the metaphysical underpinnings of the traditional understanding of law, but also its very definition.

At this juncture, some may begin to question whether in the deconstructive model if law is ultimately reducible to politics. If law is

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not a fully autonomous set of rules, is it simply arbitrary, or nothing more than politics in another form? In "Deconstruction and Legal Interpretation" Michel Rosenfeld also asks these questions, and answers clearly 'no' to both.⁵⁹ Admitting a certain degree of indeterminacy, Rosenfeld suggests that this answer need not lead inevitably to arbitrariness or a morass of uncertainty. He suggests that within traditional society, indeterminacy (particularly in economics) is already established as a key notion. These two points will be discussed in turn.

To many, deconstruction is something of a semantic parlour game; by denying anything its unity, it is thought to deny everything. Yet Rosenfeld suggests that a careful balance can be achieved- between past and future, inclusion and exclusion, theory and practice- so that deconstruction can accept meaning without recourse to arbitrariness:

Because the requirements of ontology and those of ethics are inscribed in history - that is, because they leave their mark on the succession of concrete historical social formations - at every moment, they constrain the range of possible legitimate meanings without ever imposing a single, fully determinate meaning. Hence, ontology and ethics, which are always projected both towards the past and towards the future, constantly open and close possible paths of interpretation without ever settling on any single, distinct, clearly articulated and exhaustively circumscribed.⁶⁰

Thus, although law, politics, and ethics, are related, they are also three distinct semantic and historical notions. To those critics who suggest that society could not agree on something as intangible or ethereal as meaning, Rosenfeld suggests not only that it could do so, but also that in market exchanges it already has.

Rosenfeld analogizes the agreement on semantic exchange with agreement on economic exchange within the marketplace. Each commodity has both an use value and an exchange value; the former is what value each person places on a good for his or her own use, and the latter is the value he or she thinks another might value it at (and so, what another would be willing to exchange for it).⁶¹ Although use and exchange values change with circumstance, it is suggested that these values, while clearly not objective, are not merely based on subjective whims:

Upon closer scrutiny, the values of commodities on the rudimentary market are no more purely subjective than they are strictly speaking objective on the fully developed market. In both cases, such values are intersubjective as they are the product of a combination of, or a compromise between, the diverse subjective desires which seek fulfillment through market transactions.⁶²

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That this theory is consonant with many of the notions found in Derrida's work is not surprising. In fact, Rosenfeld's paper was written for a symposium on deconstruction and the law at which Derrida was the keynote speaker. Nor is it surprising that a deconstructionist theory should move so easily among linguistics, legal theory, and economics; such is expected for a theory which denies the absolute autonomy of each of these disciplines, but sees them all as necessarily connected. Derrida is emphatic in stressing the social utility of deconstruction in "Force of Law," his keynote address to the 1989 Cardozo Law Symposium.⁶³

Derrida himself has long resisted the 'American' interpretations of his work. In particular, he has objected to the manner in which the American 'deconstructionist' literary critics (beginning with the Yale critics) have misinterpreted his work to support a reactionary epistemology and social-structure.⁶⁴ Somewhat surprisingly in light of this, his address to the Cardozo symposium commended the largely American Critical Legal Studies (hereinafter CLS) movement. This is because, unlike the American literary critics, the CLS scholars were expanding the applications, if not the limits, of his work by moving into the world without necessarily going outside the non-existent limits of the text:

If hypothetically, it had a proper place, which is precisely what cannot be the case, such a deconstructive "questioning" or meta-questioning would be more at home in law schools, ... than in philosophy departments and much more than in the literature departments where it has often been thought to belong.⁶⁵

Why law? Law, although related to semiotics, has a direct and unmediated bearing on social life in a way that a discipline such as literary studies could not.

It is the notion of praxis, particularly transformative praxis, central to so much of the CLS work, that most commends the movement to Derrida. He continues:

They respond, ... to the most radical programs of a deconstruction that would like, in order to be consistent with itself, not to remain closed in purely speculative, theoretical, academic discourses but rather ... to aspire to something more consequential, to change (1) things and to intervene in the efficient and responsible though always, of course, very mediated way, not only in the profession but in what one calls the cite, the polis and more generally the world.⁶⁶ [emphasis deleted]

The similarity here to Marx's rebuke of Hegelianism- that the point of philosophy is not to interpret the world, but to change it⁶⁷ is too obvious to be accidental. That Derrida echoes Marx is not surprising; indeed, as suggested above, the deconstructionist and Marxist theories on the origin of law are very similar.

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Marxism and the Origins of Law

As noted, Marx did not write a comprehensive theory of law. In fact, no such systematic Marxist theory of law existed until 1904 when Karl Renner published *The Institutions of Private Law*. Renner concluded from his study of the private law realm that "economic change does not immediately and automatically bring about changes in the law."⁶⁸ While, it shall be argued here that such a view of relative autonomy of law is the only valid view, it was not immediately accepted by all. The most influential of the early Marxist legal theorists was Evgeny Pashukanis whose work would today be considered to be part of the 'commodity exchange school'.

Pashukanis published *The General Theory of Law and Marxism* in 1924, but his notion of the "withering away of state and law" was not favoured under the Stalinist regime.⁶⁹ Consequently, Pashukanis' ideas were suppressed, but he has since been restored to the position of one of the fathers of Marxist jurisprudence. Although rejected here for being overly deterministic, his "commodity exchange theory of law" which argues that economics determines law in the first instance is still accepted by some.⁷⁰ It has been surpassed, however, in achievement by more contemporary views which take their lead from Renner's work.

'Interpellative structuralist Marxism' came to the fore in the 1970s. This school argues that the political and ideological superstructures are relatively autonomous from the economic base, and that the interaction of all three determines the shape of society. This multi-causal explanation of society is called the theory of over-determination.⁷¹

An overdeterministic analysis of law in capitalist society must be sensitive to the dynamics of commodity exchange; it does not, however, argue that legal reform is a reflex of economic change. Thus interpellative-structuralist Marxism (hereinafter, simply referred to as Marxism) differs from instrumentalist Marxism in that the former sees economics as being but one factor operating in relation to others including law, which determine the shape of society. Thus Marxism distinguishes itself from traditional capitalism in two important ways. First, it rejects capitalism's self-understanding as a system of economics governed by rational and equitable rules; and second, it rejects the underlying assumption that law is an autonomous and apolitical factor influencing society from the outside.

In the capitalist system, law is normally seen as being rational. Rationality in law means both a non-contradictory sense of principles, as well as a system which is logically connected to the economic system. As Duncan Kennedy demonstrates, however, this 'rationalism' is a clearly qualified rationality:

[F]irst ... this body of economic thought is incomprehensible unless it is treated as an aspect of a larger totality. The most important non-economic element in that totality is legal thought. Second, the totality functioned

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ideologically: it operated as a legitimator of oppression.⁷²

Kennedy thus clearly calls into question the two notions stated above that are often thought to underlie the capitalist notion of law.

Law arises in the capitalist economy to regulate the exchange of commodities. Neither the notion of the marketplace nor the capitalist valuation of commodity is natural, but rather both are products of social convention and law. In order to have the value of their own commodity guaranteed, each person must agree to a value of the other person's commodities. All must agree to a common system of rules to govern exchange, or a system of 'equivalency'. As the market becomes central, the rationality and predictability central to exchange norms governing the market transactions become more formalized. In Marxist terminology, law developed in conjunction with a society which developed from one concerned with 'use values' in trade to one with 'exchange values'.⁷³

The notion of capital developed from one which was based on an object's use (which depended upon a particular historical situation), to one based on an abstract notion of equivalence. A pound of wheat could be traded for a dozen eggs because the latter was useful at that time and had only a limited life-span (because they would spoil, and would lose their usefulness shortly). Conversely, capitalism allowed one, if a buyer could be found, to transfer goods into capital that could not spoil. In this way, history was transcended. Similarly, the law which developed this 'ahistorical' notion of capitalism was also necessarily seen to transcend history. Here, the Platonic ideal underlying capitalism is evident.

A simplification of a Marxist critique of law into its elements would suggest that the 'fetishization of capital' allowed those who had control of goods at the beginning of capitalism to extend this hegemony into the future. This required a notion of law which would govern not only present actions but also future actions, since capitalism demanded an 'ahistorical' market. Thus developed a notion of law governing commerce which was seen to transcend the particular historical situation and relation in which it existed. To adopt the language of the deconstructionist, neither law nor capitalism can be posited as a first cause, and neither can be seen as complete in and of itself. Thus, capitalism required the law as a supplement.

In the Marxist view of the development of law then, law is rationalizing and performative; it explains why someone can do something (monopolize capital) which economics would suggest should not be done. At the same time, law does not so much preclude actions as much as it forces compliance under threat of penalty. This analysis is very similar to Derrida's critique of Rousseau's view of the origin of law; law not only prohibits certain action, but forces an acceptance of other forms of socio-political or economic relations.

In the Marxist perspective then, modern law developed initially in conjunction with a system of laissez-faire capitalism and provided the justification for that early form of capitalism. As capitalism evolved, so too did the system of law. Yet if we cannot assert a definite causal link

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here- that economic changes caused a change in the law or vice versa- how can the Marxist theory of the necessity of capitalism to evolve be explained? This has been done through Habermas' notion of 'interaction'.

'Interaction' or 'communicative action' is based on "intersubjectively shared understandings stemming from reciprocal expectations developed by 'consensual norms' of the kind in existence in 'traditional societies.'"⁷⁴ A linguistically shared understanding of a situation becomes the base for action. Through communicative language society reflects changes in economic models at the same time that economics reflect changes in society.

The primary change in society was the development of rationalism, which gave rise to a theory of equivalence. This law of equivalence permeated all aspects of rational society, especially, as Milovanovic suggests, in the legal sphere:

It was here that it was given an ideal expression in such constitutional principles as formal equality. And with this process underway - that is, with the system generated model forms being increasingly duplicated ... combined with hegemonic groups actively generating myths substantiating the righteousness of the prevailing socio-economic conditions, the insoluble conflict, or the necessity of class struggle is more likely to disappear for the consciousness at one level.⁷⁵

Although on one level formal equality in law undermines the likelihood of class conflict, on another level it leads logically to conflict. As suggested above, capitalist economy has developed from a laissez-faire system to one requiring substantial state interference in late-capitalist society. Central to the state's role has been the enforcement of these notions of equivalency and formal equality.

In late capitalist society, state intervention becomes necessary to curtail the excesses and antimonies which would develop naturally in capitalist society. For example, this state intervention can take the form of anti-combines legislation: "the state actively develops an ideology that unifies all as citizens with formal rights."⁷⁶ As Kennedy notes, increasingly these rights are being used to subvert the very process they were designed to serve:

Others within the structural Marxist perspectives, not denying the importance of economic as one factor [in mediating changing social and legal structures], point out the significance of relatively independent factors found within the superstructures, i.e., the logic of the legal form itself unfolding; shifting coalitions within the power bloc; contradictory concerns felt by higher level courts expressed in formulated ideologies justifying existing social economic and political arrangements; col-

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lective oppositional action such as union, women's liberation, civil rights, anti-nuke movements, and so forth. These are not without effect.⁷⁷

The Marxist critique of the origin of law stresses the contradictions over which capitalism glosses; yet these contradictions are essential if capitalism is to maintain its place in society. The Marxist critique of the origin of law can be stated succinctly: in capitalist society, law is inextricably connected with economics and politics, and following from that, law cannot be an autonomous and apolitical 'Platonic' construct as suggested by legal formalists.

An interpellative/structuralist Marxist notion of the origin of law has much in common with Derrida's critique of Rousseau's theory of the origin of law. Like Derrida, who showed that neither the morality nor the interdict could be posited as a first cause, the Marxist critique suggests that law is not an autonomous body that exists independent of society. Law could not have developed independently of capitalist society as the legal formalists claim, any more than society could have developed without law. Thus law and society operate in a natural dialectic; law transforms society, and the social changes demand accommodation in law. When one is privileged over the other, as in early capitalist society in which capital was privileged over law, contradictions arise. While in later capitalist society, this dialectic has shifted with law attaining greater power over capital, the contradictions have not been eradicated.

As one class increasingly dominated economically, there occurred a recourse to a formalist notion of equality in order to justify the inequality in practice. Each person was accorded equal rights under the law, even if they could not exercise these rights in practice. This posed two problems. First, in order to secure personal freedoms, state intervention and suppression of freedoms became necessary. Second, the oppressed classes responded to the formal equalities given them to subvert the system of legal hegemony.

From this, one can draw two conclusions: one, as Derrida suggests, law is not inherently prohibitory or negative; and two, that in order to continue its oppression, a ruling elite will continually need to resort to increasingly draconian laws or violence. The connection between these two notions is explored at greater length by Derrida in the Cardozo lecture. In drawing together the deconstructionistic and Marxist views on the origin of law several common ideas arise: law cannot exist apart from society, but only exists in a dialectical relation with other factors (for example, the economy) within society; law and semiotics are closely linked to use and exchange values of commodities; and only by understanding the origins of law can we begin to take some control of its future.

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THE FUNCTION AND FUNCTIONING OF LAW

In the discussion of the origin of law, it was said that law's inception was closely bound up with its functions. Here, the emphasis is on the functions and functioning of law, but, once again, one must remember that there is a great deal of overlap between these notions. In discussing the functions and functioning of law, one must, thus, keep in mind what was said concerning the origins of law.

Deconstruction and the Function(ing) of Law

In his lecture entitled "Force of Law", Derrida begins with a study of the English expression 'to enforce the law' or 'enforceability of the law or contract'. Implicit in this expression is the notion that law is always an authorized force, that it is "a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable."⁷⁸ Law and enforcement are not and cannot be separated:

There are, to be sure, laws that are not enforced, but there is no law without enforceability and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth.⁷⁹

This leads to the question of the connection between law and violence.

Derrida notes the texts of Heidegger in whose work one often finds the word '*Gewalt*', which in English and French is often translated as violence. Yet, as Derrida suggests, in German this expression signifies both "legitimate power, authority, and force" (for example, *gesetzgebende Gewalt* or legislative power), as well as violent force.⁸⁰ Once again we are confronted with the origins of law and justice.

Derrida approaches this question in his usual indirect manner. In this case it is through a discussion of Pascal's *pensées* on justice and Montaigne's passage which inspired it.

In a passage which has inspired many subsequent thinkers, Montaigne wrote, "[a]nd so laws keep up their good standing, not because they are just, but because they are laws; that is the mystical foundation of their authority, they have no other."⁸¹ Pascal followed this in his *Pensée* 293::

[O]ne man says that the essence of justice is the authority of the legislator, another that it is the convenience of the King, another that it is the current custom; and the latter is closest to the truth: simple reason tells us that nothing is just in itself; everything crumbles with time. Custom is the sole basis for equity, for the simple reason that it is received; it is the mystical foundation of

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authority. Whoever traces it to its source annihilates it.⁸²

Derrida draws our attention to two points: the distinction drawn between law and justice; and the 'mystical authority' of law. Derrida suggests that in the realization that law's authority is only 'mystical' one finds a key element in the critique of juridical ideology. It is the key to "the desedimentation of the superstructure of law that both hide and reflect the economic and political interests of the dominant forces of society."⁸³

In short, Derrida suggests that the function of law is bound up with its form as law. In Rosenfeld's paper, he discusses how the form ascribed to law can circumscribe its functions. He looks particularly at the school of legal formalism, and while questioning its ultimate value for the future, he suggests that with some modification it could be doing more to bring law up to par with the rest of our dynamic and evolving society.

Rosenfeld's main concern centres on legal interpretation. More precisely, he rejects traditional forms of legal formalism and replaces them with new forms of legal formalism informed by a deconstructive hermeneutic (method of interpretation). Traditional formalism argues that application of a rule of law leads to a determinable outcome "due to the constraints imposed by the language of the rule".⁸⁴ Conversely, the new legal formalism sees law as both dynamic, and in many important respects, distinct from politics. Even among the writers whose work to date has, in some respects, approximated this new legal formalism, (for example, Stanley Fish and Ernest Weinrib), Rosenfeld finds sufficient flaws to reject these theories.

He praises the 'formalism' of Stanley Fish for the recognition that law-making involves a double-gesture, in that "[l]aw must absorb and internalize that which threatens it from the outside, ... [b]ut, at the same time, ... must deny that it is appropriating extra-legal values."⁸⁵ But Rosenfeld ultimately rejects Fish's model as a result of its overidentification of law with rhetoric "which is more in tune with the conception of deconstruction as an interpretive technique" only.⁸⁶

Notwithstanding Weinrib's assertion that law is autonomous of politics, he nonetheless offers a number of insights. Weinrib's use of the concepts of corrective and distributive justice⁸⁷ is valuable, allowing for a distinction between past and present, between self and other, without the necessity of a separation between them. It is sufficient here to say that Rosenfeld rejects Weinrib's model for its parallel to Kantian ethics, in which the self is 'subordinated to the universal',⁸⁸ but Weinrib's influence on Rosenfeld's conclusions should not be underestimated. As Rosenfeld states:

First, there is no single formula or form which underlies all juridical relationships or which could be relied upon to draw any clear cut boundaries between law and politics. Second, law as a practice is distinct from other

practices but not self-contained, as it borrows and incorporates elements from other social practices, and as it partially overlaps with such other practices... Third, the law's distinct existence is not given, but must be constantly fought for, through a dynamic process of differentiation operating in a specific social and historical context and constrained by the requirement of integrity.⁸⁹

Rosenfeld concludes that the 'external reconciliation' promised by a law which has internalized some aspects of deconstruction is to be valued, but he leaves open the question of its more far-reaching implications for law:

Perhaps the limitations of law could be overcome by supplementing its external relationships with internal relationships capable of fostering greater intimacy and solidarity between self and other. Perhaps, however, the ontological and ethical demands of deconstruction require the erasure of the distinction between external and internal relationships which may require superseding the very order established by law.⁹⁰

As much as the function of law informed and was informed by its origin, so too, the function of law informs and is informed by its future. The point is that in a deconstructionist conception, law cannot be considered simply as it exists today. It needs a consideration of both the present demands of an awareness of its history, and of an expectation for its future. In its insistence upon viewing law in its historical development, Rosenfeld's criticism of legal formalism and Derrida's notion of law share much with the Marxist theorists who have preceded them.

Marxism and the Function(ing) of Law

The Hegelian dialectic subsumes difference into similarity and identity. This, he accomplished, through the imposition of an ahistorical, and ultimately onto-theological, teleology.⁹¹ The Marxist dialectic differs in that it is rooted in history, and is based on difference (manifested as class inequality and opposition).⁹² For Marx, capitalist society attempts to cover up this opposition or difference through the imposition of equivalency in the marketplace:

Capitalism, therefore, requires an idealizing operation that abstracts from inequality, identifies difference, and resolves seriality into a paradigm. That operation is a concrete version of the classical speculative dialectic. The aspect of the dialectic which Marx saw as being more helpful emphasizes the heterogeneity or scission internal to capitalism ... 'In its mystified form,' he says, the

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'dialectic seemed to transfigure and to glorify what exists.' But as Marx uses it, it includes a recognition of the 'inevitable destruction' of 'what exists.'⁹³

This notion of mystification has been employed by Marxist legal theorists to explain how law manages to preserve its privileged place in the superstructure.⁹⁴

An overdeterministic view would hold that the mystification of law is part of the ideological function that law serves in protecting capitalism. This ideological function is but one of three that instrumental Marxists attribute to law. The others are the facilitative and repressive functions.

The facilitative functions of law include: (1) a system of integration and coordination; (2) legal transactions (exchange); (3) the regulation of conflict; and (4) the realization of social values.⁹⁵ In short, these functions govern the everyday running of society. They are so pervasive that they have attained an autonomy of sorts, and a power to shape the people within the system. Such is the power of the facilitative functions of law "that logically formal rational law integrates the individual to system needs and not the system to human needs."⁹⁶

The repressive function of law follows from its facilitative role. As discussed above, for interpellative Marxists, late capitalism is characterized by contradictions requiring the intervention of the legal system (for example, through the increase in state regulation). In seeking to cover over the fissures in the system, what the judiciary provides is "the logic for the continued domination of the non-proper-tied"⁹⁷

Just as the repressive function is closely connected to the facilitative function, so too is the ideological function derived from the repressive function. The repressive function of law is legitimatizing or justificatory. Here, the connection to semiotics is most evident.

A critical semiotextual analysis of law begins with the notion of a "tension between formal constraints imposed by the linguistic form on one hand, and pragmatism (linguistic forms in use) and subjectivity (need to objectify and externalize internal thoughts, feelings... etc.) on the other."⁹⁸ As deconstructionists recognize, language is not neutral, but an articulation of an ideology, or at least, an articulation containing an ideology. As C.W. Mills writes, "a vocabulary is not merely a string of words, imminent within it are societal textures - institutional and political coordinates."⁹⁹ In the over-deterministic model, these co-ordinates are developed by superstructural practices, most notably juridico-political practices.

Milovanovic argues that the two spheres or functions of linguistic production and linguistic circulation can be seen here. Linguistic production entails giving content to signs, while linguistic circulation involves establishing those signs in popular culture.¹⁰⁰ As the legal superstructure has assumed greater proportions in late capitalist society, legal discourse has become increasingly common and influential even among those granted 'formal' equality rights.

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In his introduction to *Grundrisse*, Marx spoke not only of the fetishization of commodities as necessary for the development, but also of a "linguistic community" which would allow the capital fetishization to develop.¹⁰¹ The birth of capitalism required both the fetishization of commodities and of language. As Milovanovic concludes:

a homologous development exists between the commodity, legal and linguistic form. A double obfuscation exists. At the first level, once linguistic codes are established and once the grammar of a language are in place in circumscribed linguistic co-ordinate systems, linguistic workers situating themselves within them are limited in structuring cognitive process.¹⁰²

In applying this to legal practice, the obvious effects are two-fold. First, it allows an occupational elite (the judiciary of the superior courts) who reflect a certain class structure to control legalistic production. Second, it encourages internalization of these norms by the oppressed classes by limiting their linguistic avenues of opposition.¹⁰³

For both the deconstructionist and the Marxist, the function(ing) of law is closely linked to the form of law. Derrida suggests that if law arises as a justifiable force, this character already determines in large measure its function. Once created, the function becomes the justification for the continued existence of the law. This is picked up by Rosenfeld in his critique of the 'double-gesture' of legal formalism, which necessarily internalizes social facts, but cannot admit of doing so for fear of losing its autonomy and legitimacy. This idea that law subsumes various functions into itself is closely connected to the Marxist critique of the Hegelian dialectic, and the Marxist critique of law.

An overdeterministic Marxist view of law suggests that in capitalist society, law seeks to keep several functions to itself: the ideological, the facilitative, and the repressive. While each supports the others, all are dependant upon the ability of the dominant class to control discourse. While the deconstructionists maintain that the imposition of constraints on language precipitates the use of force, the Marxists suggest that the imposition of force can only be legitimated by controlling language and discourse.

THE FUTURE OF LAW

In his discussion of the functions of law, Rosenfeld suggests that in the short term a new formalism could be envisioned which would allow some progress to be made in development of law. Yet, he also questions whether even this revised formalism would be adequate for society's long-term development. In this section, I propose a brief suggestion of what the future may hold for law. As Rosenfeld suggests, it involves a radically different notion of law and society.

As we have seen already, in "White Mythology" Derrida suggests that society both reflects and is reflected by its metaphysics. In Western

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society, that metaphysic is that of the white Indo-European, rationalist male. Although in recent years law has attained more autonomy from economics, it has also played a greater role in maintaining this structure. A deconstructionist hermeneutic would share with an interpellative Marxist critique the view that such a concept of law is not necessary, any more than is the social structure which gives rise to it. Based on the foregoing discussions of the origin and function on law, a brief outline of a differential understanding of law and society which is compatible with a structuralist Marxist notion is presented.

Deconstruction and the Future of Law

It has been seen that Derrida rejects the standard view of law and society which suggests that law is both autonomous and prohibitive. Further, he clearly distinguishes between justice and law (*droit*), but says the two are necessarily joined. He writes:

Since the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are in themselves unjust, in the sense of "illegal." They are neither legal nor illegal in their founding moment. They exceed the opposition between founded and unfounded, or between any foundationalism or anti-foundationalism.¹⁰⁴

When laws are given effect in society, however, they lose this balance. At this point, law becomes deconstructible because it is founded either "on interpretable and transformable textual strata..., or because its ultimate foundation is by definition unfounded."¹⁰⁵ This is in contrast with justice, which like deconstruction, Derrida holds is necessarily beyond deconstruction. He concludes:

1. The deconstructibility of law (*droit*), of legality, legitimacy or legitimation (for example) makes deconstruction possible. 2. The undeconstructability of justice also makes deconstruction possible, indeed is inseparable from it. 3. The result: deconstruction takes place in the interval that separates the undeconstructability of justice from the deconstructability of *droit* (authority, legitimacy, and so on).¹⁰⁶

Derrida ascribes this deconstructability of traditional law at least partly to the fact that law is normative, while justice is always based on the individual.

Since justice is based on the individual, if law is to function justly, the individual must be able to understand the law. Yet, as suggested above, this is not always the case. There are many concrete

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examples of people tried and convicted who had little understanding of the language in which they were tried. In such a case, the injustice to the individual is obvious, but Derrida suggests this has larger ontological and societal consequences:

The violence of this injustice that consists of judging those who don't understand the idiom in which one claims ... "justice is done," ... is not just any violence, any injustice. This injustice supposes that the other, the victim of the language's injustice, is capable of a language in general, is a man as a speaking animal, in the sense that we, men, give to this word language. Moreover, there was a time, not long ago and not yet over, in which "we, men" meant "we adult white male Europeans, carnivorous and capable of sacrifice."¹⁰⁷

In short, a deconstructionist approach to law involves necessarily a reconsideration of what law is, but it does not stop there. Deconstruction demands a reconsideration of basic notions of ontology, which in turn demands continual reconsideration of society and criteriology.

Once again, Derrida warns that the application of the supplement to society should not lead to "quasi-nihilistic abdication before the ethico-politico-juridical question of justice", but to a positive understanding of the role of law in society¹⁰⁸. Derrida resists efforts to reduce the deconstructionist approach to a regulative scheme, although it surely involves this. This law, however, must be reinterpreted and re-invented with every case. Law can have no horizon but may have an "*avenir*, a 'to come'", which Derrida distinguishes from the future which can always "reproduce the present".¹⁰⁹

A deconstructionist notion of law sees law as always and necessarily 'differential'; law is spatially and temporally relative. In practical terms, it means that law cannot be seen as an autonomous entity existing outside society, but it is connected necessarily to the process of politicization. As Derrida claims, law is:

interminable even if it cannot and should not ever be total. To keep this from being a truism or a triviality, we must recognize in it the following consequence: each advance in politicization obliges one to reconsider, and so to reinterpret the very foundations of law such as they had previously been calculated or delimited.¹¹⁰

It should be stressed that the politicization of law clearly does not mean the reduction of law to politics. To isolate politics, and place it above law, economics, or anything else would be merely to reform the scientific Marxism which has already been rejected. Thus, it would be necessarily incompatible with Derridean deconstruction and the form(s) of Marxism favoured here.

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Marxism and the Future of Law

Traditionally, Marxist theories have posited an end to the capitalist system, its replacement by socialism, and its ultimate fulfillment in the development of the communist state. In spite of this notion of a final stage, it would be wrong to consider this notion as metaphysical. This can be shown by comparing Marx's use of the terms 'socialism' and 'communism'.

The first stage- the development of state socialism- involves the 'dictatorship of the proletariat'. In legal terms, this means the imposition of a legal structure not different in nature from the existing capitalist model, but with a different end.¹¹¹ Instead of supporting a bourgeois notion of society, the structures of law would be used to support the interests of the proletariat. This involves the return of use values in place of exchange values which have been privileged under capitalism. Once the law has been established, it can be used to bring about a change in ethics, which it is asserted will bring about an end to the law. This marks the beginning of the last phase of society: communism.

In the Leninist-Marxist idea of communism, state and law, (at least in their bourgeois incarnations), wither away. As Lenin suggests, in the highest form of communism people will become:

accustomed to observing the elementary rules of social intercourse that have been known for centuries ... they will become accustomed to observing them without force, without compulsion, without subordination, without the special apparatus for compulsion which is called the state.¹¹²

There will no doubt be transgressions of the social order, but "spontaneous controls" will arise to deal with these as the need arises.¹¹³ Of course, this would involve not the entire class acting together, but small collectivist organizations working independently for the common purpose.

Although many would dismiss such talk as utopian, Milovanovic responds to the critics in two ways. First, he asserts that these organizations do exist and are growing. Second, he contends that what has been predicted, namely the rebirth of substantive rationality in law, has been evidenced within many of these organizations. As proof, he points to the 1976 study of these collectives done by Joyce Whitt-Rothschild.

In 1976, these collectivist organizations numbered around 5,000 and were on the increase.¹¹⁴ In her study of these groups, Whitt-Rothschild listed eight factors common to them:

(1) Authority ... resides ... in the collectivity as a whole. The collective tries to reach a consensus on issues rather than talking formal motions.

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- (2) Rules are minimized in this new type of organization. Decisions are made as cases arise. Substantive rather than formal values dictate process.
- (3) Social control relies on 'personalistic and moralistic appeals' rather than on centralized authority.
- (4) Social relations ... 'strive toward the ideal of community. Relationships are to be holistic, affective, and of value in themselves'.
- (5) Recruitment and advancement are based on friendship and social/political values.
- (6) Incentive structures rest on 'value-purposive' action where value fulfillment in itself is paramount; material incentives are not central. In fact, pay is according to 'need'...
- (7) Social stratification rather than hierarchical is egalitarian... In the collectivist organizations studied ... a ratio between highest and lowest paid was never greater than two to one.
- (8) As far as differentiation of work roles, the ... organization places the highest value on holistic orientations to work. Thus through (a) rotating roles, (b) sharing tasks and team work, and (c) maintaining ... education to offset tendencies that maintain ... differentiated/specialized roles, the ... organization maintains an environment in which non-bureaucratic values are reinforced.¹¹⁵

Such may be idealistic, but an ideal is not by definition impossible to attain. Nor is the notion of the ideal society as outlined here incompatible with a deconstructionist notion of society, although admittedly the term ideal might be problematic. Ryan has suggested 'differential socialism' as a more appropriate term.

Central to the notion of 'differential socialism' is the concept of 'interactive adaptation'.¹¹⁶ In brief, interactive adaptation entails a critique of the contemporary monadic view of society, the obliteration of the distinction between theory and action, an attempt at genuine pluralism, and of course, a new conception of law.

A deconstructionist notion of law demands a reconsideration of the ontology of law, and relation between law and society. Law must become more consonant with justice, which demands a change in the way law is applied. It cannot simply be a set of *a priori* rules which will apply to all people in all places and at all times. Law must achieve a balance between predictability and sensitivity to situation which it has heretofore lacked. This demands a sensitivity to changing time and locale, but also an awareness of the differing needs of people based on race, religion, and gender, to name but a few of the many factors.

This notion of 'differential socialism' - of radical alterity applied to society - bears many similarities to the notion of communism, the 'penultimate stage' of social development found in Marxist theory. Here the words 'penultimate stage' are in quotation marks to stress that in the

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Marxist model, communism is neither fully 'the final stage' nor really a stage at all. The Marxist model requires the movement to small-scale differentially-based communities with laws which must balance the ever-changing intracommunal and intercommunal needs.

CONCLUSION

Adam Smith's contradictions are of significance because they contain problems which it is true he does not resolve, but which he reveals by contradicting himself.

Karl Marx¹¹⁷

As the above quotation suggests the notion of contradiction played a central role in the thought of Marx. In praxis, these ruptures would bring about the downfall of capitalism, while in theory they provide the loci of attack. Such a critique shares much with the Derridean school of deconstruction. The deconstructionist critique of literature and society attempts to show the contradictions underlying traditional structuralist thought - contradictions which the prevailing philosophies suppress necessarily through recourse to metaphysics or violence.

As suggested at the outset, that considerable similarities exist between the Marxist and the deconstructionistic critiques of society should not come as a surprise to anyone with a familiarity with the writings of Marx or Derrida. Although they began their respective careers in different fields, both begin their works with a rejection of the Hegelian idealism. Through their writings, they both sought to apply this inverted dialectic to social theory. Since both recognized the role that law has played and continues to play in perpetuating social norms, it is not surprising that their respective theories of law manifest a great many similarities.

With respect to the origins of law, both suggest that law is inseparable from the society in which it exists. Whether it is done through an ontological critique of Rousseau's origin of law, or a historical-economic analysis of early capitalism, the notion of law as an autonomous object acting upon society from the outside is clearly rejected. Instead, Marx and Derrida view law as both a factor in determining ideology and as a repository for these views. Here Derrida, echoing Montaigne and Pascal, sees law as operating in a 'mystifying' way. The notion of 'mystification' is also central to a Marxist critique of law and economics.

In interpellative structuralist Marxism, law is but one part of the superstructure which interacts with the economy to form society. As capitalism has developed from a use-oriented system to one based on exchange, law has taken on different and greater functions. These include the facilitative, repressive and ideological functions. Fundamental to contemporary Marxist notions of ideology is the role that language and literature play in circumscribing discourse and dissent.

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For Derrida, the future of law cannot be separated from the future of society, and vice versa. Thus a deconstructive analysis of law involves a deconstruction of society, and vice versa. In Derrida's notion of a differential society, law, like society, will be more egalitarian and open-ended. There will be less bureaucracy and less emphasis on the prohibitive dimension of law, because people will evolve beyond the stage of relying on it as we do today. Similarly, in Marxist theory, the transformation from capitalism to state socialism to communism will be accompanied by a change in human nature. At the same time that society is moving away from centralized bureaucratic state agencies, people will begin to move towards collective values characterized by use values in exchange. Thus for both deconstructionism and Marxism, law as it exists today will wither away, and be replaced by a system characterized by informal gatherings of small groups.

In conclusion, it might be said that the critics who suggest that Ryan's term 'differential socialism' is an oxymoron are clearly mistaken. If anything, I suggest that using both terms may indeed be redundant.

APPENDIX 118

To understand fully the implications of such a view demands an understanding of the dialectical theories to which deconstructionism is related, but ultimately rejects. Among the most important are Hegel's dialectic and the Heideggerian 'destruction of being'.

Hegel analogizes his onto-theological theory with the relationship of a text with its preface. His notion of the relationship between the two = signifier/signified, where the "=" he calls the *Aufhebung*:

Aufhebung is a relationship between two terms where the second at once annuls the first and lifts it up into a higher sphere of existence; it is a hierarchical concept generally translated as 'sublation' and now sometimes translated 'sublimation.' A successful preface is *aufgehoben* into the text it precedes, just as a word is *aufgehoben* into its meaning.¹¹⁹

Here, the reason for the deconstructionist rejection- the recourse to a higher plane- is obvious. It is less so, but no less problematic in the work of Martin Heidegger to whom Derrida often refers.

In *Zur Seinfrage* Heidegger outlines his concept of 'Being under erasure,' (simultaneous being and non-being) which he represents by Being.¹²⁰ Being represents a rejection of the pre-comprehended notion of being, which Heidegger, like Derrida later, is forced to confront as a result of the general problem of language and metaphysics (once one applies a word, one has in some sense 'captured' what really cannot be captured). Yet, here is where the similarities to Derrida's work end:

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To be sure, when Heidegger sets Being before all concepts, he is attempting to free language from the fallacy of a fixed origin, which is also a fixed end.¹²¹

But, *in a certain way*, he also sets up Being as what Derrida calls the "transcendental signified." For whatever a concept might "mean," anything that is conceived of in its being-present must lead us to the already-answered question of Being. In that sense, the sense of the final reference, Being is indeed the final signified to which all signifiers refer. But Heidegger makes it clear that Being cannot be contained by, is always prior to, indeed transcends, signification. It is therefore a situation where the signified commands, and is yet free of, all signifiers—a recognizably theological situation.

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1 A. France, quoted in C. Sumner, "The Ideological Nature of Law," in P. Beirne and R. Quinney, eds., *Marxism and Law*, (Toronto: John Wiley & Sons, 1982) at 255.

2 T. Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minnesota Press, 1983) at 127.

3 *Ibid.*, at 96.

4 J. M. Balkin, "Deconstructive Practice and Legal Theory" (1987), 96 Yale L.J. 743 - 86, at 748.

5 *Ibid.*, at 750.

6 See: N. Frye, *The Anatomy of Criticism: Four Essays* (Princeton: Princeton University Press, 1957); also, N. Frye, *The Great Code: the Bible and Literature* (New York: Harcourt Brace Janovich, 1983)

7 In this paper I am using 'metaphysical' and 'ontotheological' to refer to concepts which are not generally considered verifiable by most logical positivist philosophers. As such, it includes most traditional theological constructs, but is not limited to those.

8 J. Derrida, *Of Grammatology*, trans. G. Spivak (Baltimore: John Hopkins University Press, 1976).

9 J. Derrida, "Limited Incabc," quoted in M. Ryan, *Marxism and Deconstruction* (Baltimore: John Hopkins University Press, 1982), at 10.

10 Ryan, *ibid.*, at 11.

11 *Ibid.*, at 14.

12 See Appendix A for a summary of the relationship of Derrida's work to traditional philosophy, particularly the work of Hegel and Heidegger.

13 Balkin, *supra*, note 4 at 740.

14 *Ibid.*, at 751.

15 *Ibid.*, at 752.

16 Derrida, *Of Grammatology*, *supra*, note 8 at 144.

17 Balkin, *supra*, note 4 at 758.

18 *Ibid.*, at 759.

19 *Ibid.*, at 760.

20 Derrida, *Of Grammatology*, *supra*, note 8 at 158.

21 J. Derrida, "White Mythology: Metaphor in the Text of Philosophy," in A. Bass, ed., *Margins of Philosophy* (Chicago: University of Chicago Press, 1982), at 207 - 272 [hereinafter "White Mythology"]; A. France, *The Garden of Epicurus*, trans. A. Allinson (New York: Dodd, Mead, 1923) [hereinafter *The Garden*].

22 Derrida, "White Mythology", *ibid.*, at 209.

23 *Ibid.*

24 *Ibid.*, at 210.

25 *Ibid.*, at 213.

26 *Ibid.*

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- 27 *Ibid.*, at 213.
 28 D. Milovanovic, *Weberian and Marxian Analysis of Law* (Brookfield, Vermont: Gower Publishing Company, 1989) at 10.
 29 K. Marx, "A Contribution to the Critique of Political Economy," in J. Fudge, "Marx's Theory of History and a Marxist Analysis of Law," in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications, 1991), 151 at 152.
 30 Ryan, *supra*, note 9 at xiii.
 31 *Ibid.*
 32 K. Marx, *Communist Manifesto*, in Ryan, *supra*, note 9 at 161.
 33 Ryan, *ibid.*
 34 Milovanovic, *supra*, note 29, at 42.
 35 *Ibid.*
 36 *Ibid.*, at 43.
 37 *Ibid.*
 38 *Ibid.*
 39 *Ibid.*, at 26.
 40 *Ibid.*, at 46.
 41 *Ibid.*, at 44.
 42 *Ibid.*, at 45.
 43 *Ibid.*
 44 K. Marx, *Capital* (Toronto: Encyclopaedia Britannica, Inc., 1952) at 378.
 45 See *supra*, note 11.
 46 Ryan, *supra*, note 9 at 45.
 47 *Ibid.*
 48 *Ibid.*, at 47.
 49 *Ibid.*, at 48.
 50 In summarizing the deconstructionist critique of literary formalism, I find that I have relied quite heavily on the article by Balkin, *supra*, note 4. For lawyers unfamiliar with Derrida's work, it provides a good place to begin. However, his conclusion about the political values and utility of deconstruction are less convincing. He suggests that a deconstructive reading of a text is almost apolitical because it is compatible with any political reading, whether of the 'left' or 'right'. At 786, he admits that the 'left' is more likely to adopt it for two reasons:

[F]irst, because of the historical connection between continental philosophy and left political thought, and second, because the left usually has more to gain from showing the ideological character of the *status quo* than does the right.

While this is not entirely false, it is certainly not entirely accurate. Here, I am suggesting that such a position involves a displacement of Marxism as well as deconstruction (as his distinction between political 'left' and 'right' suggests in true structuralist fashion). Yet such a view is unfortunately all too common, even among literary theorists.

In *Literary Theory: An Introduction*, Terry Eagleton, one of the leading Marxist literary theorists, says of the 'apolitical' nature of deconstructionism, that "it allows you to drive a coach and horse through everybody else's beliefs without saddling you with the inconvenience of having to adopt any yourself." *Supra*, note 2 at 144. From the other end of the political spectrum, Art Berman, an American literary critic concludes that the Formalism against which Derrida writes is the legitimate offspring of Marxism. See *From the New Criticism to Deconstruction* (Chicago: University of Illinois Press, 1988). For the reasons I discuss in this paper, I reject such positions.

- 51 Derrida, *Of Grammatology*, *supra*, note 8 at 251.
 52 *Ibid.*, at 203.
 53 *Ibid.*
 54 *Ibid.*, at 264.
 55 *Ibid.*
 56 *Ibid.*
 57 *Ibid.*, at 265.
 58 *Ibid.*

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- 59 M. Rosenfeld, "Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism," (1990) 11 Cardozo L.R. 1211.
- 60 *Ibid.*, at 1229.
- 61 *Ibid.*, at 1222.
- 62 *Ibid.*
- 63 J. Derrida, "Force of Law: The Mystical Foundation of Authority," trans. M. Quaintance (1990) 11 Cardozo L.R. 919 at 931 [hereinafter "Force of Law"].
- 64 Terry Eagleton has described the work of the early American deconstructionists (the Yale critics) as "no more than the return of the old New Critical formalism" and a "retreat into formalism." Derrida, himself, has suggested that the "American uses of deconstruction ... work to ensure an 'institutional closure' which serves the dominant political and economic interests of American society." See Eagleton, *supra*, note 2 at 145-148.
- 65 Derrida, "Force of Law", *supra*, note 63 at 931.
- 66 *Ibid.*
- 67 K. Marx and F. Engels, "Thesis on Feuerbach" in L. Fruer, ed., *Basic Writings on Politics and Philosophy*, (New York: Doubleday, 1959) 243 at 245.
- 68 Milovanovic, *supra*, note 28 at 13.
- 69 *Ibid.*
- 70 *Ibid.*, at 14.
- 71 Milovanovic, *supra*, note 28 at 46. The term "overdetermination" was first used by Freud in *The Interpretation of Dreams* (New York: Avon Books, 1965).
- 72 D. Kennedy, "Essays on the Fetishism of Commodities" (1985), 34 A.U.L.R. 939 at 940.
- 73 Milovanovic, *supra*, note 28 at 100-106.
- 74 *Ibid.*, at 73.
- 75 *Ibid.*, at 81.
- 76 *Ibid.*, at 83.
- 77 *Ibid.*, at 75.
- 78 *Ibid.*, Derrida, "Force of Law", *supra*, note 63 at 925.
- 79 *Ibid.*
- 80 *Ibid.*, at 927.
- 81 *Ibid.*, at 939.
- 82 *Ibid.*
- 83 *Ibid.*, at 941.
- 84 Rosenfeld, *supra*, note 59 at 1233.
- 85 *Ibid.*, at 1234.
- 86 *Ibid.*, at 1235 ff.
- 87 *Ibid.*, at 1245 ff.
- 88 *Ibid.*, at 1266.
- 89 *Ibid.*, at 1256-1257.
- 90 *Ibid.*, at 1266-1267.
- 91 Ryan, *supra*, note 9 at 84.
- 92 Ryan, *ibid.*; for a more detailed analysis see: K. Marx, *Critique of Hegel's Philosophy of Right* (London: Cambridge University Press, 1970); also Preface to Second Edition, *Capital*, at 11.
- 93 Ryan, *ibid.*, at 85.
- 94 In reviewing this paper, I am not sure if I have been sufficiently clear about how these various factors translate into action in society. The fetishization of law and commodities is not simply decided upon by the ruling class and forced upon the proletariat. In this paper, I have suggested that law, economics and politics function together to preserve the social order. Yet, even this may mislead some; it might suggest that all three may be imposed as "a kind of false consciousness ... that will vanish when a socialist regime permits more human values to flourish." (Kennedy, p. 969) Rather, Kennedy argues, that to be successful, any ideology requires not only one class to impose it, but another class to internalize it. This dialectic should be kept in mind when reading the rest of this paper. For a discussion of hegemony, see: A. Gramsci, *Selections from Prison Notebooks* (New York: International Publishers, 1972).
- 95 Milovanovic, *supra*, note 28 at 122.
- 96 *Ibid.*, at 127.
- 97 *Ibid.*, at 141.
- 98 *Ibid.*, at 145.

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- 99 C.W. Mills, quoted in Milovanovic, *ibid.*, at 149.
- 100 Milovanovic, *ibid.*, at 833.
- 101 *Ibid.*, at 150.
- 102 *Ibid.*, at 161.
- 103 *Ibid.*, at 157-162.
- 104 Derrida, *supra*, note 63 at 943.
- 105 *Ibid.*
- 106 *Ibid.*, at 945.
- 107 *Ibid.*, at 951.
- 108 *Ibid.*, at 953.
- 109 *Ibid.*, at 969.
- 110 *Ibid.*, at 971.
- 111 Milovanovic, *supra*, note 28 at 167.
- 112 *Ibid.*, at 168.
- 113 *Ibid.*
- 114 *Ibid.*, at 175.
- 115 *Ibid.*, 176.
- 116 See Ryan, *supra*, note 9 at 159-193.
- 117 K. Marx, "Theory of Surplus Value" quoted in T. Eagleton, *Criticism and Ideology* (London: NLB, 1976) at 64.
- 118 This discussion is based upon G. Spivak's "Translator's Preface" to the 1974 English edition of *Of Grammatology*, *supra* note 8, and page references here refer to Ms. Spivak's preface rather than the text itself.
- 119 *Ibid.*, at xi.
- 120 *Ibid.*, at xv.
- 121 *Ibid.*, at xvi.