Philosophy of Law
An introduction

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5 Law and modernity

In this chapter we will be looking at some key aspects of the conflict between traditional legal theory and its more radical critics in recent decades. These disputes originate in the wider world of philosophical, cultural and political controversies that flared up in the last quarter of the twentieth century, and can only be understood against that backdrop. Unlike those dealt with in earlier chapters, the most representative and influential of the new theories are deeply confrontational in the sense that their explicit aim is to destabilise and overthrow a traditional approach to legal thinking in its entirety, rather than propose modifications of prevailing images of law. At the same time, it seeks to refocus legal studies on addressing fundamental questions of social justice. Despite this apparent breach with the established traditions, however, it is still the perennial question of justice, what it means and how it relates to law, that stands at the centre of these controversies. Socialist, feminist and race theory critics of law, for example, are concerned with the injustice towards subordinate social classes, repressed women and ethnic minorities, injustices that are argued to be perpetuated by legal institutions and reinforced by legal theory. At the same time, however, much of the criticism aims to undermine the very notion of justice, to expose it as an ideological façade, the function of which is to conceal the essentially oppressive nature of law. This tension – between the urge to broaden the basis of justice and at the same time to denounce justice as a fraud – runs right through the arguments for and against the new criticism.

The roots of modernity and the Enlightenment

To understand this, we have to look at the roots of what is now often disparagingly known as *modernity*. This is a concept with multiple layers of meaning that has become so pervasive today that it is almost impossible to pin down. In cultural terms, 'being modern' can mean anything from being tuned in all the latest fashions to a naïve enthusiasm for the most advanced technology. In a philosophical context its meaning is disputed – as are the related terms 'modern' and 'modernism' – but the sense most relevant here is

modernity as a body of thought (ideas, beliefs, values) or way of thinking that took root at the beginning of our 'modern' age, with the changes in mentality that brought about the scientific revolution of the seventeenth century and the political revolutions of the 1780s. Crucial to the contemporary debates is the period of Enlightenment that emerged from and consolidated the age of reason in science, philosophy and politics over the course of the eighteenth century. Much of the philosophy in Europe over the last century has been preoccupied with critically examining the heritage of this period of Enlightenment.

The imagery of light and enlightenment has permeated modern thought so thoroughly, especially with the idea of enlightened thinkers or politicians being the most civilised and morally advanced of their day, that one needs to be constantly aware that the Enlightenment as an intellectual achievement was only established as the result of an immensely complex struggle against ignorance and tyranny, and that it was itself by no means a homogeneous movement, with its leading advocates deeply divided over fundamental issues. It was less the agreement on any particular doctrine than a consensus on more abstract commitments that defined the Enlightenment, such as the belief in the power of the individual human mind to think rationally and arrive at objectively true and reliable conclusions without the assistance of traditional authority. Thus, the mark of enlightenment was described memorably by Immanuel Kant (1724–1804), one of its leading exponents, as humanity emerging from its childhood, as a process of reaching maturity, or the ability to reason independently. This was envisaged less as the abrupt casting away of tradition, more as a process of reaching the kind of maturity that would systematically subject all traditions hitherto received uncritically to the criticism of reason. It was not an enlightened age, declared Kant, but it was an age of enlightenment. Humanity was growing up. The autonomous individual became one of the principal symbols of the age.

Liberal individualism

What was taking shape throughout this period was the philosophy of liberal individualism, with growing demands for freedom of speech and freedom from the arbitrary acts of unjust despots. Universal values, true for every human society, were confidently proclaimed. Truth and reason were presented as the natural enemies of the abuse of sovereign power, an abuse that thrives on lies and irrationality. Above all, reason dictated that a society of free and equal individual citizens be subject to the rule of law, with everyone protected in their individual rights, rather than to the rule of an unchecked sovereign. This revolution in political awareness would not have been possible without the equally dramatic shifts in consciousness that had initiated the scientific revolution in the previous century. At the heart of this enterprise also lay the search for an elusive method to guarantee objective truth. In combination with the dispassionate study of empirical details, the

light of reason would eventually illuminate the entire world of nature, society and political morality. With the rapid advances in scientific knowledge, it was natural to believe that the trust in reason would ensure unstoppable progress in every field of inquiry.

Critics of the Enlightenment

These were the main features of the Enlightenment that made it so plausible and attractive to many of the leading philosophers of the day. The prospect was one of complete human emancipation from self-inflicted ignorance and suffering. In recent years it has become fashionable to echo its early critics and caricature it as an age of arrogant certainty coupled with a naïve belief in progress and a quasi-religious worship of Reason as the answer to every problem, ignoring the dark and irrational side of human nature. Many critics have seen it as the beginning of a long hubristic venture, leading ultimately and inevitably to the environmental disasters and dehumanisation associated with advanced technology and globalisation.

Marx and Nietzsche

The two most radical thinkers of the nineteenth century, Karl Marx (1818–83) and Friedrich Nietzsche (1844–1900), were diametrically opposed in their responses to modernity. If Marx represented the internal challenge from the radical wing of the Enlightenment, confronting liberalism with its failure to deliver on its promises of universal emancipation and equality, Nietzsche developed a comprehensive critique of its philosophical underpinnings, aiming to destroy what he saw as the democratisation and decadence of European culture. Both were concerned with exposing ideals as lies and masks for forms of social domination and oppression, but while Marx denounced liberal or bourgeois morality as the hypocritical expression of the interests of a particular social group, Nietzsche represented almost the entire history of morality as a long tale of pitiful self-deception, transforming the experience of human suffering into a magnificent edifice of objective moral values, the truth of which was imagined to be independent of their creators. Whereas it is plausible to interpret Marx and his communist followers as genuine heirs to the Enlightenment, seeking to take it to a higher level, Nietzsche saw in its central ideas, the 'enlightened' philosophers' belief in the universality of values, nothing but the projection of these philosophers' own cultures. Whereas Nietzsche regarded this belief in the objectivity of created values as the pinnacle of human folly, the Marxists never relinquished their belief in objectivity.

Overall, the influence of Marx on the twentieth century's political conflicts has been more visible, but Nietzsche's influence on Western thought and culture as a whole has been more profound and far-reaching. His diagnosis of the nihilistic 'sickness' of modern European civilisation and

his prophesy of the crisis that would engulf it in the following century had a formative influence on a number of crucial movements and figures of that century, notably Freud's theory of the unconscious, the development of abstract art and the philosophies of Martin Heidegger (1889–1976) and Michel Foucault (1926–84). The nature of this crisis lies at the centre of all the discussions of the *post*modernist rejection of modernity and Enlightenment.

Nietzsche's perspectivism

The single idea for which Nietzsche has been most celebrated by postmodernists and others is contained in his perspectivism. This should be understood as the opposite pole to the seductive Enlightenment dream of attaining a standpoint from which all truths – metaphysical, scientific and moral – would be visible at a glance. Nietzsche's perspectivism, at first sight, not only rejects this as impossible, but also swings to the other extreme, to the denial of all truths whatsoever. This kind of 'global' scepticism was not new to philosophy – it has always been present as an epistemological overreaction against claims to certain knowledge and can be traced back to the ancient Greeks – but Nietzsche's perspectivist version gave it a novel twist. All truth-claims, whether they relate to everyday perception, scientific theories or moral judgements, are held to be wholly dependent upon the position or perspective of the observer. When they are represented as more than a particular opinion, as representing the 'objective' truth of the matter, they are aspiring to a standpoint that it is logically impossible to occupy. There simply is no outside point of view. One can only look through one's own eyes. Accordingly, no point of view is closer to or further from the object it seeks to represent than any other. All our concepts and elaborate theories of the structure of matter or the requirements of justice are nothing but more or less elaborate and ingenious perspectives provided by interpreters of a world that is not graspable in itself. Every point of view is as good or as 'valid' as any other. In short, there are no truths, only interpretations.

There has always been a tendency to respond to such claims with exasperation, not only because they collide with so many of our intuitions about obvious truths and falsehoods, but also because they are so difficult to refute. There is a standard 'quick' refutation of global scepticism, which involves demonstrating that it involves an immediate contradiction. If there are no truths, then it is not true that there are no truths. Any statement asserting the complete absence of truth is thus self-refuting, because at least one statement must be true. By its own standards, perspectivism is itself only one perspective. Nietzsche's perspectivism, however, has retained its influence over modern philosophy, because those who can see its allure regard such refutations as verbal trickery. Also, it should be noted that on closer analysis Nietzsche's own position was not as extreme as this. He did not in fact reject truth as such, but he has been interpreted by many of his

postmodernist followers as having done so. Nevertheless, however one interprets it, it is Nietzsche's perspectivism that marks him out as the key source of the postmodernist attacks on the central pillars of Enlightenment rationalism.

The death of God and the will to power

Two prominent themes closely related to Nietzsche's perspectivism are 'the death of God' and 'the will to power'. The impending crisis of values was for Nietzsche the threat of cultural nihilism implicit in what he saw as the illusory rise of reason, science and democracy in Europe, creating a surface impression of progress towards ever higher levels of prosperity and social justice. This was an illusion because when reason turns its own critical light upon itself, it finds itself unsupported. Despite the steadily declining religious belief in an increasingly secular age, people were continuing to think and act as though God were still there as the basis of reason and thus the absolute source of all metaphysical and moral truth. It was only a matter of time before the moral values that were entirely dependent upon the history of Christianity would be seen as empty. According to Nietzsche's alternative to traditional metaphysics, all human life is driven by the fundamental urge that he calls the will to power, not only in the struggle for survival and dominance of nature, or in the explicit power relations between people, but also in its highest social ideals and cultural aspirations and creations, all of which are masks for the will to power. Taken together, these ideas about truth, power and the self-destruction of reason have had an immeasurable impact on contemporary philosophy.

The postmodernist attack on modernity

Postmodernism, as it emerged in 1960s French philosophy, was in large part a reaction against its postwar domination by Sartrean existentialism and Marxism, both of which were regarded as essentially modernist in their basic assumptions. The reinterpretation of Nietzsche that became the norm at this time was aimed at putting together a style of analysis capable of breaking the grip of Enlightenment modernity on philosophy, in order to initiate a way of thinking that was in turn as radically new as modernity itself had been at its inception. Every aspect of this old consensus came under scrutiny, and on all the key values postmodernist philosophy was asserting the opposite. Almost the defining characteristic of postmodernism is that it aims at constant disintegration, not in the sense of shattering or dispersing, but in the sense of dis-integrating apparently seamless unities. The objective was to take apart the systems and totalities of modernist philosophies and show how they are constructed, not out of naturally cohering elements but from either dissonant heterogeneous elements or from arbitrarily selected elements to the exclusion of anything that does not cohere. The circle either closes too quickly or it does not close at all. What

they were drawing attention to was the propensity of the knowledge-seeking mind, in its quest for the safety of certainty, to close the general and specific circles of knowledge in such a way that they become impregnable. This is what they mean by the 'closure' inherent in modernity. Hence their main concern was with the breaking up of smooth surfaces, the disruption of false patterns and above all the particularisation of universals. In real life, we experience multiple fragments and loose ends of stories leading nowhere in particular, and to make sense of this experience we impose constructed unities upon these fragments, not least upon our understanding of our own selves. Modernity, according to its critics, does something similar at every theoretical level.

This theme of closure as the principal target of postmodernism opens out into all the other prominent themes. In Jean-François Lyotard's (1924–98) famous formulation, postmodernism is defined as 'an incredulity towards metanarratives' (Lyotard 1984: xxiv), which is to say that it is quite unbelievable that anyone today should have any lingering faith in the greatest of the myths of modernity, the grand-narrative Enlightenment story of humanity's steady progress towards perfection, either in its liberal democratic or communist versions. All grand overarching narratives are regarded with suspicion by postmodernists, and even the micro-narratives by which we live are seen as constantly revisable useful fictions. The closure of the systems of modernity is also seen as being purchased at great cost for those whose histories and experiences are excluded from the closed circle. One of the defining projects of postmodernism is the attempted exposure of the marginalisation and exclusion of those who do not conform with the modernist picture of reason, rationality and justice. Critical attention is thus focused upon what lies beneath the calm surfaces of the false integrities that are subjected to the postmodernist dis-integrative techniques.

Foucault on power and knowledge

Foucault's original and distinctive contribution to postmodernist thought lies in the use he made of Nietzsche's philosophy to undermine the legitimacy of modernity. The most influential dimension of his critique is found in his treatment of power, knowledge and truth. There are several key points to be made about power. The first concerns its location. Foucault regards power as de-centred and scattered throughout society. There is no centre point from which it emanates downwards; there is only a multiplicity of lateral power or force-relations right across the social spectrum. This metaphor contrasts sharply with both the liberal and the Marxist 'modern' views of the location of sovereign power in the state, the central question for them being the legitimacy of this power. The second point about power at first sight contradicts this, because it suggests a central organisation behind the diffusion of power, in that Foucault asserts that power is intrinsically linked with knowledge in such a way that the latter can only be understood

as a manifestation of power, which would seem to suggest a central point behind the multiplicity of power–knowledge matrices. All claims to genuine knowledge at any stage in human history are said to be fraudulent, because they are simply the product of the political regime of the day. Thus the claims to objective and universal truths by Enlightenment liberalism are no more than masks for the political power that has successfully replaced the previous power. These two points do not in fact necessarily contradict, if one understands it in the sense that it is through the masking of power that it is diffused throughout society.

Taken together with Foucault's application of the perspectivist denial of truth, this creates the basis for a complete disruption of rational modernist thinking. Science and technology are reduced to power–knowledge complexes, uprooted from any relation to truth or reality. There is no disinterested knowledge, because the very idea of neutral and unbiased scholarship is merely a mask for power, all the more insidious because it represents itself as its opposite.

Derrida and deconstructionism

Jacques Derrida (1930–2004) above all is thought crucial to the emergence of postmodernist critical legal thinking. At the height of his influence in France in the late 1960s he played a central role in taking what was then seen as a philosophical language revolution a stage further. He is most famously associated with the philosophical method of deconstruction, a technique for analysing texts of any sort by taking them apart and revealing the deep instability of meaning in the words in which they are written. Although deconstruction in its very nature is said to resist definition – given the instability of all meaning – it is not intended to extend to any kind of negative critical analysis. It is a specific technique developed and refined by Derrida and his followers for specific purposes. The main purpose is to undo the apparently perfect stability and equilibrium of the concepts and conceptual schemes at the heart of modernity, by 'de-structuring' them and exposing these unnatural constructs as constituting an essentially repressive way of thinking, as an elaborate deception and self-deception on a grand scale. Derrida's central concept to illustrate endemic conceptual instability he calls *différance* (in deliberate contrast to '*différence*'), which has the double meaning of differing and deferring. This is supposed to indicate the impossibility of assigning a fixed meaning to any concept whatsoever. The differences that are found everywhere in a system of linguistic signs, the dissimilarities and oppositions between concepts understood as bearers of fixed meanings, are deficient compared with the *différance* that lies behind them. The concept of *différence* artificially narrows down and freezes the meaning of terms that are inherently unstable into a fixed core that does violence to their real nature, making the term represent something independent of language. The wider concept of *différance* points to the differences in

relation to their incessant insecurity and impermanence, which makes them subject to the endless deferrals of meaning implicit in the words and concepts that they differ from.

Derrida's deconstruction of law and justice

In a famous lecture entitled *Force of Law: The Mystical Foundations of Authority*, (Cornell *et al.*, 1992), Derrida's 'deconstructive interrogation' of law and justice was addressed to the perennial tension between established positive law and the timeless standards of justice as exhibited in the debate between legal positivists and natural lawyers. In a highly tendentious and arresting style, Derrida put forward in this lecture a number of reflections on the relation between legitimate authority, enforcement and violence in the law. He proposes a critique of modern legal ideology that involves a desedimentation of the superstructures of law that simultaneously conceal and reveal the interests of the dominant forces in society.

In the course of these reflections, he makes two distinct claims. First, in what he calls 'the ultimate founding moment or origin of law' there is only a *coup de force* that is neither just nor unjust, which cannot be validated by any preceding law. Second, there is no justice in contemporary law without the experience of *aporia*, a sense of paradox or impossible contradiction. The first claim involves the logic of justifying the authority of law. We obey the law, he says, not because it is just but because it has authority. If in our search for justification of this authority, we trace it back to the founding moment of law, 'the discourse comes up against its limit', in which 'a silence is walled up in the violent structure of the founding act'. This is the first sense in which he uses the term 'mystical'.

In the second sense, he discusses the experience of justice as compared to law. In this sense, the experience of justice is so alien to the legal order that it is equivalent to the sensation of a miraculous breach in the order of things, a rending of the fabric of time. What he means is that the deconstructive reading of law reveals the absolute irreconcilability of the smooth running of legal justice and its application of statutes and rules that exhibit the stable and calculable rationality typical of modernity, with the infinite incalculability and other-directedness of genuine justice. This paradox or impossible contradiction lies at the heart of the tension between justice and the law, generating further paradoxes in the experience of the judgement when the judge is aware that the law has to be both conserved and reinvented for each unique case. The judge is also aware that justice always 'cuts and divides', and with genuine justice must undergo an existential ordeal of 'giving oneself up to the impossible decision'. Without this ordeal, the decision can be legal in that it follows the rules, but can never be just.

How plausible is this analysis of justice and the law? The essential points in his argument for the mystical origins of law, on the impossibility of justice existing before or above the founding moment, are similar in structure to the

positivist accounts of the origins of law. The standard critical discussions of Kelsen's basic norm and Hart's rule of recognition – to which Derrida briefly refers – have been addressing the same question, some would say with greater acuity. Derrida's description of the founding moment as 'a silence walled up in the violent structure of the founding act' adds little of any substance to Hart's comment on the logical impossibility of validating the fundamental rule of recognition in terms of itself.

In presenting law and justice as necessary antagonists, on the grounds that law in its very nature closes up and congeals the reality of justice into the general rules, norms and values of legality, Derrida contrasts the letter and spirit of the law. In doing so, he highlights the contrast and tension that he claims is buried by judicial language, that is to say the opposition between the general rules and norms of precedent, on the one hand, and the unique particularity of individual cases and decisions by judges, on the other. The aim of deconstruction (real justice) is to recognise and wrest this particularity away from the generality under which the legal cases subsume it.

The internal inconsistencies in this critique are numerous, the most obvious one being the equivocation on the meaning of justice. There are nevertheless features of it that appeal to anyone who has witnessed or experienced the sporadic unpredictability or unfairness of the law. The apparent ease with which the singularity of hard cases can be elided by the application of universal rules is one of the legitimate causes of discontent and disillusion with legal justice. The problems with Derrida's account, however, are numerous. The main problem is that its plausibility is gained by its caricature of 'law and legality' as a justice-dispensing machine, mechanically applying rules and algorithms in the manner rightly criticised by the legal realists in the 1920s. Derrida's assumption is that this mechanical jurisprudence is dictated by the reason and rationality of 'the modern', but this mechanistic approach that he lampoons represents only one narrow line of modern legal thinking. Derrida projects this formalist image of the law onto the entire judiciary, in such a way that his mystical representation of justice as the recognition of the singularity of the individual case gains credibility too easily. Overall, his account must be seen as either too close to the mainstream discussions of the relation between justice and equity in hard cases to constitute a distinctly radical challenge, or as too eccentric to be taken seriously.

Critical Legal Studies

The emergence of Critical Legal Studies (CLS) as a loose-knit movement in the USA and Britain in the late 1970s owed as much to the earlier legal realists as it did to these critical developments in postmodernist philosophy. In large part, it was a conscious and deliberate revival and adaptation of the realist themes of rule-scepticism and indeterminacy to changing social relations and perceptions of justice in the late twentieth century, particularly on questions of sexual and racial equality and justice. The new legal radicalism

tended to be more explicitly socialist than the predominantly liberal realists of the 1930s, but most of them had broken clear of the closed dogmas of orthodox Marxism, while still displaying traces of the less orthodox lines of Marxist thought. The critical legal scholars were also well in tune with the assault on modernity, bringing some of the postmodernist methods to bear upon what they saw as the dogmas of mainstream legal theory.

The rule of law

One of the principal virtues of a liberal democracy is widely assumed to be its commitment to the idea of the rule of law. Within the scope of liberalism, there have been several competing versions or models of the rule of law, but what it basically means, in accordance with the long-standing doctrine of the separation of powers, is that politics is kept out of law, so that the legal process resists the political interference of government. It is adherence to the rule of law that is supposed to be the mark that distinguishes contemporary liberal democracies from totalitarian states. It is not merely judicial independence from overt political pressure, however, that constitutes the rule of law. Law is also expected to be independent in the sense that it rises above the special interests of the parties involved in civil or criminal proceedings and makes rulings and adjudications with neutrality and impartiality. That is the hard core of the rule of law, but in addition there are various models relating to the question of how this impartial legal justice should be delivered. There are different views – as we saw in earlier chapters – on the importance of the consistent application of legal rules and the principle of treating like cases alike, on the predictability and reliability of the law, and on the acceptability of judicial discretion. The general point, however, of adhering to one model or another of the rule of law, concerns the issue of legitimation. If the law is systematically haphazard and unfair, it is widely agreed, the state loses its democratic legitimacy.

This essentially political question lies at the heart of the disputes between the critical scholars and mainstream jurisprudence. According to the most radical arguments, the legal process does not have this kind of independence from politics at all. The claims to neutrality, impartiality and objectivity are, in the view of most of the critical scholars, deeply suspect on philosophical as well as political grounds. That is to say, they are conceptually incoherent as well as being empirically implausible. The empirical disputes over this question are essentially trivial. While there are those who will insist that every individual judge always displays these qualities and rises majestically above all trace of interest and bias, there are others who will insist upon the opposite. It seems clear that in most advanced legal systems most judges at least aspire to neutrality and thus to the setting aside of personal preferences – and it is equally clear that not all of them succeed. The more serious question is whether or not, as the radical critics claim, this general appearance of the fairness and neutrality of the law – even when it seems to be operating at its

best – is a veil or mask for the kind of partiality that, if established, would completely undermine the claim that judges draw exclusively upon purely legal resources to guide their actions, decisions and rulings. If this claim cannot be upheld, so it is argued, the rule of law is exposed as a pretence, and political legitimacy as little more than a confidence trick.

The critical legal scholars take up a more radical stance than their realist predecessors, whose rule–scepticism was directed in the first place at the early twentieth-century American formalists. Although the new critics have developed the old realist attempts to broaden the awareness of extra-legal factors influencing judicial decisions, these are not seen as sufficiently radical, because they allow for a core of legitimate legal determinacy. More importantly, the realist position on the question of the very possibility of neutrality and objectivity was never consistent or clear, because realism remained within the framework of modernity and liberalism. By contrast, the orthodox Marxist answer to this question was relatively clear. Their explanation is that the judges – trapped within the legal superstructure, which is determined by the base of economic class interest – are either willing or unwitting mouthpieces for the ideology of the ruling class. This approach – however rigid and mechanistic it might have been – did not question the very possibility of reaching objective and just decisions. What was probably decisive for the critical legal scholars' attack on liberal legal determinacy and the rule of law was the Nietzschean postmodernist stance on all problems relating to truth and objectivity. For perspectivism, as we have seen, there simply is no outside standpoint from which to make true and accurate judgements. The values associated with the ideal of the rule of law – neutrality, impartiality, objectivity – are the supposedly naïve and discredited ideals of modernity. From Foucault's perspective, there is no such thing as a disinterested search for truth, or indeed an independent truth standard at all, and all these claims to detachment and a desire for justice can be seen as integral parts of the power–knowledge networks permeating society.

The radical indeterminacy thesis

The critical scholars' arguments for the radical indeterminacy of law stand at the centre of the critical attacks on mainstream legal theory. The precise meaning of this 'radical' indeterminacy is one of the contested issues in this debate. In one sense it is merely an extension of the philosophical controversies in both analytic and postmodern philosophy of language into the area of legal theory. In contemporary philosophy it is generally recognised that a certain degree of indeterminacy is an inescapable feature of any natural language. Vagueness and ambiguity surround any concept, the meaning of which is open to more than one interpretation. Indeterminacy becomes radical when linguistic analysis seems to show that the meaning of virtually any concept or text can be interpreted in a multiplicity of ways. It becomes extreme when it is argued that there are no objective facts about meaning at

all, that all meanings are conferred arbitrarily and that any word, sentence or text can be invested with any meaning the interpreter prefers, and no interpretation is superior to any other.

Applied to the language of law, it is easy to see how disruptive the implications of radical indeterminacy would be. If it were true of language as such, all the more so would it be true of the legal language in which statutes are laid down, and the judicial opinions, rulings and decisions declared and written. Any interpretation of what the law requires would be as good as any other. Judges could interpret precedent in any way that suited their personal or political agenda. Critics who support radical indeterminacy in law argue that this is the alarming reality concealed by the rhetoric surrounding the ideal of the rule of law.

One distinction that should be drawn clearly, but is often confused in the CLS writings, is the distinction between indeterminacy and underdetermination. If a judge's decision is *over*determined, it means that there is an excess of reasons or causes for the decision; that there are more legal resources than strictly required. If it is *under*determined, it means that existing law allows for a range of possible outcomes, rather than one or none. The disputes within the mainstream between positivists and Dworkinians over hard cases are focused on the question of whether or not this represents a threat to the authority of law. The point here, though, is that such gaps in the law indicated by underdetermination fall far short of what the critics mean by radical indeterminacy. On this radical view, existing law does not determine any outcome at all. Judicial discretion is total. We can see how extreme and implausible this is by comparing it with the positions defended by the legal realists and by Hart. For the realists Frank and Llewellyn, legal rules were always deeply suspect, but not because they were inherently indeterminate in their meaning. As we saw in an earlier chapter, their scepticism towards rules was moderate rather than nihilistic, in as far as they asserted that the boundaries between judicial discretion and the application of rules was blurred in nearly every area of law, and that they were always open to influence by extra-legal factors. The rules, they were arguing, were usually less than decisive. Hart's 'open texture' argument was more concerned with the meaning of the legal concepts and much more cautiously or 'minimally' sceptical, in that he saw indeterminacy of meaning only at the periphery or penumbra of the core area in which the meanings of the concepts were thoroughly determinate. In their paradigmatic usages, the meanings were entirely fixed. The function of the judge in hard cases was to intervene and authoritatively fix the meaning of any contested terms. In sharp contrast to both of these theories, the radical indeterminacy thesis simply sweeps away this core belief in the fixity of meaning.

The contradictions in liberalism

The point of departure for all the leading CLS critics was the belief that legal and political liberalism had to be confronted and criticised root and

branch, rather than in a piecemeal reformist manner, however radical the reforms. Although there was initial uncertainty and disagreement over what they were trying to achieve, a purpose common to many of them was that they should conduct conceptual and historical examinations of prominent legal doctrines, in order to expose the political and social assumptions upon which they were based, to show how these were concealed by liberal ideology, and to reveal their origins as socially specific rather than natural and inevitable. Their main tactic to this effect was to locate and explain what they took to be inconsistencies and contradictions in legal doctrines, contradictions that lay at the heart of liberal modernity and its way of thinking as a whole.

One of the most influential early writings of this nature was Duncan Kennedy's historical analysis of the doctrines underlying legal adjudication (Kennedy 1976). Focusing mainly upon contract law, the analysis was intended to show that beneath the appearance of a coherent ideology rooted in Enlightenment modernity, liberalism is torn apart by inconsistencies and contradictory values and beliefs in such a way that they are always working against each other and preventing the settlement of a genuinely determinate body of law. For Kennedy, this inconsistency is exhibited primarily by the two principal modes in which legal reasoning is expressed: rules and standards. The contrast that he draws out between the clarity and rigidity of rules and the vagueness and flexibility of standards is similar in structure to Dworkin's rule–principle distinction, but while Dworkin was – at around the same time – using this distinction to demonstrate the underlying determinacy of law as the embodiment of both rules and equitable principles and standards, Kennedy was drawing the opposite conclusion, arguing that the difference between rules and standards is expressive of an ineradicable tension driving the law in different directions at once, thus making it radically unstable and stripping it of any unity of purpose or determinacy.

The success of this argument depends partly upon Kennedy's controversial linking of the rule–standard contrast with the wider political and social opposition between individualism and altruism, which he describes as irreconcilable visions of humanity and radically different aspirations for our moral future. The kind of linkage he has in mind is not conceptual but rather a *de facto* historical link, in as far as the legal rule form is congenial to furthering individualist aims, while the looser and vaguer standard is more suitable for communal or altruistic purposes. The advantages of clear-cut rules for the encouragement of business and commerce make it obvious why rules are naturally associated with individualism. Their presence restrains official arbitrariness and provides a degree of certainty. At the same time, however, their predictability makes it easier for the unscrupulous to 'walk the line' of illegality in commercial transactions. Counteracting equitable principles such as 'due care', 'good faith' and 'unconscionability', on the other hand, are standards that are also demanded by the altruistic or

communal side of liberal modernity. The main historical change that Kennedy identifies in this analysis is the shift in the balance between the two terms of this opposition. With the passing of the classical individualism of the nineteenth century, US law (in parallel with other common law systems) saw the steady expansion of the range and quantum of obligation and liability to such an extent that it could be called 'the socialisation of our theory of contract'. With the gradual erosion of formalism in law as a whole, the two poles in the conflict (individualism and altruism) have faced each other on increasingly equal terms, creating more awareness of the fundamental contradiction in the law.

This contradiction Kennedy regards as fatal to the coherence of liberal theory, because the way that it has evolved has created wide open discretion for judges who are increasingly aware that 'the presence of elements from both conceptual poles in nearly any real fact situation' undermines any attempt to determine the outcome of the case according to what is required by law. It usually goes unnoticed, he maintains, that this deep tension creates almost universal discretion behind the façade of judicial predictability and determinacy. The reality is an internal struggle between conflicting imperatives to apply rules in the true spirit of individualism or to appeal to standards in the communal spirit of equity, both ostensibly within the frame of liberal individualism. Accordingly, most areas of law in the liberal era should be understood in these terms.

Criticisms of Kennedy and CLS

Kennedy's arguments stimulated a long-running debate that raised many questions central to the dispute between CLS and mainstream legal theory. They drew out criticisms from other CLS writers, from positivists, natural lawyers and Dworkinians, too numerous to cover here. The most obvious one concerns the correlation of rules with individualism, and standards with altruism. If this is shown to be suspect, by producing counterexamples (that there are rigid rules, for example, protecting consumer interests), the argument clearly collapses. It was widely and wrongly assumed, however, that Kennedy intended this linkage as a conceptual one, rather than a contingent one of 'general tendency'. As such, it remains plausible, for the reasons initially given in his contrasts between the functions of rules and standards.

There are, however, more fundamental criticisms. Even if these modes of legal argument are that closely linked to the heart of the modern political struggle between individualist and communalist values, why should this lead to radical indeterminacy? Is it, to put it bluntly, such a bad thing that these values are in perpetual collision within the operation of the legal justice system? One can concede the plausibility of the deconstruction of the myth of judicial unanimity on such issues, without accepting the claim that this leads to complete incoherence in the liberal understanding of legality. One of the strongest positivist criticisms developed by Coleman and Leiter

(Marmor 1997: 203–79) challenges Kennedy's assertion that the oppositions he has described are typical of a liberal legal system rather than an inevitable feature of the human condition as such, and therefore of any conceivable legal system. According to this criticism, there is a balance to be struck between the pressures of individualism and altruism, the protection of privacy and the interests of the public, selfishness and sacrifice, and so on, and that it is the ability to strike this balance that makes us human. Furthermore, Kennedy traces the history of the evolving values of liberalism and modernity, which as a history of pragmatic compromise and moral progress is of the very essence of liberalism, rather than fatal to its coherence, as he maintains. Finally, many critics reject the use made by Kennedy and CLS generally of the term 'contradiction' to capture this idea of the tension between conceptual polar opposites. The term is used to suggest and heighten the sense of logical absurdity and literal incoherence, but it is only properly employed in logic to indicate a formal contradiction. It is only a contradiction in the formal sense to assert a proposition while at the same time denying it.

A more general criticism of all the leading CLS writings is that they set up too easy a target in order to demolish it more effectively. Too many of them take as the paradigm of liberal law the rule-fetishism that had been effectively demolished by their legal realist forebears, and to which very few contemporary mainstream theories subscribe. Even with the acknowledgement of the operation of standards in conflict with rules, the assumption is that there is no general awareness in mainstream theory of the complexity of the problems relating to the application of rules, when the truth of the matter is that these have been discussed extensively in the context of justice versus equity throughout the modern period. In particular, many of the early CLS writings ignored Dworkin's critique of rule-based positivism. Dworkin, however, soon became one of the main targets of their criticism.

CLS criticisms of Dworkin

Most of the CLS evaluations of Dworkin take the view that he was to be commended for pushing legal theory in a radically egalitarian direction, but criticised for the ultimately contradictory nature of this enterprise, which failed because he had a defective understanding of the sense in which law is thoroughly political. Although Dworkin is usually criticised from the right for his allegedly dangerous politicisation of the law, these critics from the left take issue with his conception of the rule of law as being set up to ensure that power remains within the hands of a political and judicial élite, to the exclusion of more democratic political participation.

There are two important lines of criticism of Dworkin. The first, argued by Hunt and Hutchinson (Hunt 1992), applies postmodernist critiques, especially those of Foucault, to Dworkin's overcentralised conception of power. His rights thesis is said to presuppose a legitimately all-powerful liberal state

legislating and adjudicating competing rights, creating and protecting sovereign individuals within supposedly power-free zones, as if the state were the only source of power. In the light of Foucault's analysis of the diffusion and decentralisation of power, the reality of the situation is that these 'free' zones are shot through with relations of oppressive power, in the family, the workplace and society at large. Dworkin is said to ignore corporate economic power, male–female power relations and other forms of oppression, because he is preoccupied with the kind of legal rights to which they are impervious. This is an important line of criticism, but it should be noted that these criticisms have a tendency to downplay or interpret negatively the progressive side of liberal legislation protecting tenants, the rights in employment and property for women, the introduction of a national minimum wage, and so on, all of which Dworkin, among other liberals, strongly approves of.

The second line of criticism by Altman (Hunt 1992) is addressed directly to Dworkin's theory of law as integrity as a more expansive version of the traditional liberal conception of the rule of law. The main charge is that Dworkin's conception of the rule of law, as judicial adherence to the law conceptualised as a whole, is a naïve distortion of real legal practices in the modern world. According to Altman, the real situation is that the courts enforce settled law that is in fact the outcome of a political power struggle beyond the courts, and that this does not match Dworkin's ideal of a political community thrashing out competing principles and conceptions of fairness and justice. It is also said to be dubious as an ideal to which law and politics should aspire, because Dworkin's 'law as integrity' would be completely undermined by his own political pluralism. Either ideal realised consistently would destroy the other.

There are two problems with this critique. First, it seems clear that contemporary democratic politics displays both features as described by Altman, on the one hand, a complex of sectarian interest power struggles, on the other hand, campaigns for the recognition of genuine rights both within mainstream politics and from pressure groups. In fact, it is difficult to see how there could be one without the other. Second, the criticism follows the usual CLS pattern of demanding the kind of perfect consistency in a liberal theory that it does not adhere to itself, expecting an unequivocal commitment to one of the poles in a conceptual opposition, rather than a recognition of the inevitable ongoing tension between them.

Justice modern and postmodern

If the case for radical indeterminacy as argued by the critical legal scholars and others were established beyond doubt, it would certainly add strength to the argument that the courts are the agents of systematic injustice. If determinacy requires observance of the rule of law in the sense that it reaches a certain minimum level of predictability and reliability, that it is accessible

and its content well advertised, that like cases are treated alike, then its failure to attain this standard in itself constitutes structural injustice and facilitates the judicial operation of personal prejudice and political bias. This minimum standard was the main point of Fuller's natural law criteria for the existence of a just legal system. It has never been clear, however, that the radical critics' case should rest upon the argument for raging indeterminacy. It is also entirely plausible that the body of law as a whole in any given system at a particular phase of its development can operate discrimination and bias, and effect the same kind of marginalisation and oppression, without appearing to violate any of these procedural principles. This is indeed one line of radical feminist criticism – that under the liberal rule of law, many individual laws, such as those governing marriage and divorce, ownership of property, rape and other offences against the person, may be substantively unjust without any hint of indeterminacy, and with the current state of the law plausibly represented as 'natural', so that determinate outcomes of legal decisions will only reinforce the injustice that reflects the male-dominated moral consensus of the day.

This ambivalence about the value of determinacy raises an important question about the relation of the new radicalism to traditional natural law theory. Given the justice-centred tradition of natural law, why do the new critics not simply merge with this tradition, confronting the specific injustices embodied in positive law with the independent standards of universal justice? One answer, of course, is that some of them do. Belief in natural human rights has had a continuing impact on critical race theory in particular, since the civil rights movement of the 1960s, and on campaigns for specific legal rights by liberal feminists. Others, however, are more sceptical of the idea of universal justice. Despite its premodern origins in Aristotle and Aquinas, natural law today is too closely tied up with modernity and liberalism, and with the natural rights proclaimed by the Enlightenment. The concepts of nature and reason as the foundational source of justice are thoroughly suspect to anyone influenced by postmodernism, and the idea that there is a standard of justice that transcends particular societies and cultures is seen as hopelessly abstract and non-situated. The last issue that we need to consider at this point, then, is the overall credibility of the relativist and perspectivist thinking that has brought about this scepticism towards the idea of universal justice.

Perspectivism and truth

The relativisation of all absolutes implicit in Nietzsche's perspectivism took hold of the philosophical imagination in Europe in the latter half of the twentieth century. Its main attraction in legal studies as elsewhere lies in its potential for the kind of critical analysis that exposes as fraudulent various theories and doctrines which do actually disguise specific vested interests as a natural and inevitable way of seeing things. First encounters with this

mode of criticism (and the deconstructive techniques that it engendered) are often experienced as a liberation. It has to be acknowledged, though, that perspectivism is a double-edged sword, not merely because its criticism can be turned upon the critic, exposing his or her own nefarious hidden agendas, but also because it levels down every angle or viewpoint to the same standing. Applied to the interpretation of history, for example, it serves the creditable purpose of undermining the false official histories of political powers that seek to manipulate the past in order to control the present. At the same time, however, it has the unwelcome implication that if there is no historical truth, only a multiplicity of perspectives masking various ideologies, it levels out all interpretations and raises problems relating to notorious 'histories' such as Holocaust-denial, which are elevated to the same status as the meticulously documented demonstrations of the real extent of the Holocaust, which are subject to methodological constraints and the systematic weighing of evidence. Deconstructionism in particular has been extensively criticised on these grounds.

Within the arguments for universal perspectivism there is nearly always an illicit move from the discovery that many claims to objectivity and justice are false, to the conclusion that all perspectives must be false and that there can be no objectivity and hence no impartiality or disinterested pursuit of justice. It always has to be remembered that this conclusion does not follow. Critical examination of the premises of Aristotle's defence of slavery as natural, or the modern pseudo-scientific theories of natural female and racial inferiority, exposes these theories as false; it does not show that there can be no objective truth on these matters. Assumptions such as these may well be built into the Western way of thinking, but this should prompt relentless rational criticism, aimed at revealing the true picture, rather than a nihilistic assault on the concept of truth. It is insufficient to deconstruct these theories and unmask the will to power behind them, showing how they are rooted in specific social circumstances, and it is misleading to direct this criticism indiscriminately at every theory of law and justice.

Universal perspectivism has often been criticised as self-defeating. On this reasoning, in order to show that some views lay false claim to objectivity, one already assumes that one view is truly objective. Without this assumption, the charge of falsity would not make sense. It has to be said that this criticism has never convinced universal perspectivists. Atheists might argue that there is nothing but an array of false images of God, but it would not count as a valid argument for the existence of God to assert that atheists thereby commit themselves to a true image of God. It is the same with the denial of all absolutes or all truths. Other criticisms highlight the excessive use of optical and spatial imagery in Nietzsche's often inconsistent accounts of perspectivism, and argue that the case is made only by illicitly reducing all forms of knowledge and understanding to inexplicable switches of perception and literal changes of standpoint. It has to be accepted that there are no conclusive refutations of universal perspectivism, but it can be

rendered less persuasive by focusing on the contrasts between concrete instances of justice and injustice.

Study Questions for Part I

General question: What difference has postmodernism made to legal theory?

Further study questions: What is the significance of the Enlightenment for critical theories of law? Do the arguments for radical indeterminacy undermine the entire range of liberal theories of law? Compare the rule scepticism of the legal realists with the radical indeterminacy of the critical legal scholars. How does Foucault's concept of power affect our understanding of law? Compare Derrida's concepts of justice and equity with those of Dworkin and the legal realists. Critically assess Kennedy's critique of the contradictions in liberalism. Can perspectivism be applied usefully and consistently to legal theory?

Suggestions for further reading

Recommended general reading on the critical theories are Morrison (1997) and Davies (1994). The best introductory books on postmodernism generally are the selections in Bertens and Natoli (eds) (2002) and the articles in the Cahoone anthology (1996). One of the most influential texts is Lyotard (1984). For the relevance of postmodernism to legal theory, see Stacy (2001) and the article by Douzinas in Connor (2004).

From the numerous commentaries on Foucault, Gabardi (2001) and Owen (1994) are recommended. Gutting's (1994) *The Cambridge Companion to Foucault* is also very useful. On Derrida's philosophy, see Royle (2003), Davies (1994: ch. 7.3), Murdoch (1992: ch. 7) and Culler's article in Sturrock (1979). Derrida's article on justice is included in Cornell, Rosenfeld and Carlson (1992), which also contains discussions by others of Derrida on deconstructionism and justice.

The best general books on CLS include Fitzpatrick and Hunt (1987) and Kelman (1987). Important general articles include Kennedy (1976), reprinted in Patterson (2003), and Altman (1986), reprinted in Adams (1992). Hunt (1992) is a collection of critical essays on Dworkin. For critical discussions of the radical indeterminacy thesis, see the essays in Marmor (1997) by Coleman and Leiter. For discussions of impartiality and the rule of law, see the essays in Dyzenhaus (1999) and Montefiore (1975).

On Nietzsche, truth and perspectivism, see Clark (1990), Robinson (1999), Hunt (1991) and Owen (1994). For an excellent overview of truth and perspectivism in general, see Campbell (2001). The best short introductions to 'continental philosophy' are Critchley (2001) and Solomon (1988). On the meaning of the Enlightenment, see the selections from Kant *et al*. in Schmidt (1996), and for defences of the values of the Enlightenment against postmodernism, see Wolin (2004), Porter (2000) and Porter (2003).