LEGAL PLURALISM:

TOWARD A

MULTICULTURAL CONCEPTION

OF LAW

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ABSTRACT

The increasingly cosmopolitan nature of the nation-state, plus an increasing scepticism toward the modernism that has informed the scientific-legal nexus of late-capitalist society, creates the conditions within which a "multicultural" conception of law might emerge. This thesis evaluates the extent to which the field of legal pluralism can contribute to the development of such a conception. To facilitate this, I distinguish between three epistemological perspectives through which legal pluralists approach the study of law: post-realism, post-modernism, and post-pragmatism. In order to identify the conceptual resources that they might contribute I interrogate each with three questions: what definition of law does each imply?; what conceptions of alternative legal-subjectivity does each contain?; and what prospects does each envisage for an alternative conception of law? Two fertile ideas emerge from legal pluralism as a consequence: that law exists within the field of socio-cultural diversity rather than over it, and that law is ontologically distinct from justice. An image of multicultural law emerges from these dimensions. This substitutes law's current emphases on the codification of normality and the justification of power with an exploration of how alternative conceptions of sociality, democracy, and law might be empowered to emerge. I argue that this conception does not fully escape the positivist paradigm against which it is set. Specifically, it tendentially creates pluralism into a totalising discourse. As a consequence, it is at risk of becoming another instance of an emancipatory project that mutates into a form of regulation. A naturalised account of regulation is built into my argument to alter that positivism in a way that allows the emancipatory impulse of legal pluralism's project to survive.

PREFACE

The process of writing this Ph.D. thesis has steadily progressed into an exercise in confronting the self. More specifically, it has become a confrontation with the existential uncertainty that appears to underpin the very notion of self-hood. Ostensibly, the subject matter of the thesis is legal-pluralist theory and the text is written in that vein. My treatment of the theoretical issues generated by legal pluralism has, however, been informed by a number of questions that the project has prompted me to revisit concerning self-hood, the construction of identity, and personal meaning. Legal theory, it seems, is particularly adept at prompting such questions. In that regard, law, philosophy, and theology seem to be synonymous forms of discourse. Possibly, this reflects legal theory's intimate connection with questions about how to justify decisions. Lawyers, because they ultimately rely upon violence to legitimate their definitions of reality, must also engage in this same pursuit of justification in order to authenticate their reasons for defining social relations as they do.

The pursuit of justificatory foundations in the socio-legal arena has been shaken by idealist assaults - in the guise of post-modernism and pragmatism - on the hubris of totalising explanatory theories. Liberal individualism, Marxism, and feminism, to name three of the main "culprits," have come under increasing pressure to jettison - or at least moderate - the mechanisms that gave them such explanatory force (for example, reductionism and functionalism). It is far from clear, however, what ought to replace these mechanisms as resources for constructing meaning and identity. One option, as post-modern and pragmatist accounts tend to do, is to employ pluralism as a totalising discourse. Following Fredric Jameson, I am not sure that this is possible (Jameson 1961: 195). The notion of pluralism only makes sense when it is positioned in relation to a non-contingent standard: God, industrialism, or humanistic utopias, for example.

At a personal level, the hubris of the orthodox Protestantism that informed my early emotional-intellectual development has likewise been shaken by questions about the limitations of totalising narrative. As will become evident through this thesis, my own position

has congealed around a confrontation with the prospect that silence lies beneath our attempts to interact with the ground of our being. This has developed through my growing awareness that a space exists between my consciousness of social embeddedness and an awareness that my consciousness of that embeddedness cannot be reduced to its historicity; consciousness is always situated but its form is not reduced to the content of its situation (in Sartre's terms, this irreducible aspect of consciousness is its *facticity*, the necessity that consciousness is situated but that the form that its situatedness takes is ultimately inconsequential). This dialectic between the consciousness of materiality and the irreducible awareness of consciousness, moreover, fails to explain the existence of the consciousness that is apparently aware of itself. All attempts to address the issue apparently meet with silence.

These matters, in turn, have prompted questions about how to proceed in the absence of categorical knowledge about how to continue. Following Charles Taylor, this is a question about how to find or found sources of morality that are not tied to the totalising extremes of either social engineering or individualistic expressionism (Taylor 1994: 510). This, I suggest, is also a question that lies at the heart of legal theory. It asks how the institution of law might construct, stabilise, and sanction meaning and/or identity in the absence of foundations for justifying those meanings and identities. The law's need to define "what is" is emblematic of the self's need to find personal identity and meaning.

In my engagement with this problematic I have not travelled the apparently popular route of post-modern/pragmatic pluralism (where-in the concept of truth is substituted with the situationalism of prevailing convention). My Protestantism has instilled too much realism within my subjectivity for that proposition to lodge easily. Pluralism cannot be a self-sufficient paradigm. In light of this - and again in sympathy with Charles Taylor's questioning about how moral horizons might be constructed without injurious effect to subjects or sociality - my personal problematic has become that of how to position myself relative to the concept of "totalising discourse." It is only the totalising forms of discourse, I sense, that give rise to meaning and identity. One possibility I find is to position myself relative to its opposite, to the

ephemeral fluidity of plurality. This is the realm that produces totally contingent forms of identity and meaning, that is, meanings and identity that cannot exist beyond the momentary context within which they are conceived. I find myself situated between these two extremes, theorising about what it means to "act" between them, drawing from each one tools to both forge meaning and to transgress that meaning. This, as I suggest in the body of the thesis, is also where the issue of multiculturalism is situated, within the pressure to both conserve socio-cultural identity and to relinquish static notions of identity. This is the domain where constructed socio-legal subjects reconstruct their form. It is the realm, as I like to think of it, of our *non-authorial authoriality* or, as Taylor refers to it, the domain of "personal resonance" (ibid.: 512). This, as both Taylor and the legal pluralists reviewed here suggest, is the realm from which we might expect to see emancipatory images of justice emerge. I now wish to explore that prospect.

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CONTENTS

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INTRODUCTION

1.1 Toward an Alternative Conception of Law

A need to re-evaluate the concept of law is emerging. It is being propelled, in part, by a new-found emphasis on identity. Through the activity of political movements such as the United Nations Working Group on Indigenous Rights and the popularity of theoretical movements such as post-modernism, decentered conceptions of belongingness are privileged over the universalisable ones that have dominated socio-legal theory (liberal, socialist, and feminist, for example). As a consequence, space now opens for debates on the meaning and role of concepts through which identity is reproduced, such as *law*. More specifically, the space rejuvenates an important question first posed by legal pluralists in the nineteenth and early twentieth century: to what extent can orthodox conceptions of law facilitate the recognition of socio-cultural identity and the fair adjudication of conflicts between differently-positioned communities? This thesis is an encounter with that question.

The emphasis on localised processes of identity-formation partially arises from a broad and disparate struggle for politico-legal affirmation that is being called "the politics of recognition" (Tully 1995: 1). This term encompasses the activities of a plethora of political movements that "jointly call cultural diversity into question as a characteristic constitutional problem of our time" (ibid.: 1-2). The range of demands are extremely broad. Nationalistic, linguistic, ethnic, intercultural, feminist, religious, and indigenous voices all now call for the right to self-determination. Their significance goes beyond their sheer number. Moreso, their diversity produces a "multiplicity of demands" for self rule that "conflict violently in practice" (ibid.: 6). The threat of violence propels a search for horizons of coexistence that are not tied to an overarching legal theory. The goal is to construct an approach that does not subjugate other perspectives to itself and, in the process, dissemble its own cultural

imperatives under an aura of neutrality. It is to realise a hoary political maxim - to eradicate "the injustice of an alien form of rule" and allow communities to aspire "to self rule in accord with [their] own customs and traditions" (ibid.: 6).

The emphasis on localised identity and self-determination accompanies a perception that expectations must be reformulated about the capacity of modernist explanatory-theory to facilitate the emancipation and self-rule of socio-cultural communities. Repeatedly, the emancipatory projects that have been inspired by modernist aspirations for human-perfection have produced thoroughly illiberal outcomes. Stalinism and the Chinese Cultural Revolution are two startling examples. Added to this are the countless wars that have been waged in the name of nationalist identity. Post-modern theory - with its scepticism toward the existence of metaphysical foundations and irrefragible knowledge - issues a severe challenge to the hubristic pretensions and disempowering policy implications of modernist (particularly positivist) theorising. According to this general argument, the plethora of language games through which identity and knowledge actually develop are dissembled by the meta-narratives that embody modernist thought. Moreover, the two main institutions of modernist meta-narrative - science and law - have clearly failed to manage the "excesses and deficits" that have accrued within modern social relations (Santos 1995: 3). In a duplicitous manner, those institutions have simply (and erroneously) applied the same sets of assumptions to solving social problems as gave rise to them (such as assuming the stability of social systems for the purpose of instrumentally manipulating them, of reifying undemocratic social relations in the process [capitalist, masculinist, imperialist, etc.], and of thereby limiting the parameters of political debate to that which has not been reified (Fay 1975: 57-64)).

In its rebuttal of modernist theorising, however, post-modernism is itself at risk of becoming a meta-narrative that threatens to coagulate into a form of social regulation. Indeed, its positioning as a binary-opposite to "modernism" signals its reproduction of the same classificatory tool that lies at the centre of modernist forms of regulation - the dichotomy (exemplified in oppositions such as guilty/innocent, bad/mad, and - most clearly - modern/post-modern). To this end, crude variants of post-modern legal theory simply mirror

many of the tenets of modernist legality that are supposedly up for deconstruction. In turn, these forms function as one form of legal critique vying for supremacy amongst others (such as positivist, naturalist, feminist, anti-racist, etc.). As such, they do not necessarily constitute a radically-different replacement discourse but, rather, symbolise a continuation of the modernist paradigm. Despite these somewhat generalised observations, serious regenerative theorising is being undertaken within law to ascertain the extent to which post-modernism can in fact provide an escape route from the policing effects that seem intrinsic to modernist social thought and policy. This thesis examines a number of these. Personally, I am sceptical that post-modernism *per se* holds the keys to such an escape, being an aspect of that which it repudiates. Rather, "answers" might come as much from the repudiated Other (modernist social theory) as from the particular insights to emerge from post-modern reflection. Post-modernism does usefully temper, however, the attitude with which we approach modernist theory; post-modernism highlights our inability to conclusively determine the verisimilitude of modernist presuppositions and thus signals their interminable provisionality.

Modernist forms of law such as liberal-proceduralism have accrued significant status through their apparently successful and impartial arbitration within conditions of intransigent and ambiguous conflict (such as above). This ability derives from legal-discourse's ascription of each subject with a decontextualised subjectivity, its respect for the formal equality of all subjects, and its reduction of conflicts to questions about the applicability of particular socio-legal rights to given contexts. So long as law adheres to an internally-derived set of procedural-rules, it is suggested, the value-commitments of its individual incumbents vanish and the issues at hand emerge for dispassionate debate. As such, liberal legality has attracted the image of an adjudicative-mechanism that is neutral with respect to the socio-cultural identities and ideological commitments of its participants.

The critical legal studies movement, in particular, has cast doubt on the extent to which law is neutral either in theory or practice. From the standpoint of socialist, feminist, and ethnic perspectives, for example, law's partiality toward bourgeois, masculinist, and Euro-centric ideals is readily apparent. This range of critiques suggest that the proceduralism of state-law

is clearly prejudiced toward particularistic visions of the social good. Within legal jurisdictions such as the United Kingdom, the United States of America, Australia, and New Zealand/Aotearoa, for example, the right to private property and to individual self-determination unmistakably cement bourgeois, masculinist, and Euro-centric notions of the social good within the common consciousness. This valorisation of individualism occurs in spite of the value that legal discourse can, on occasion, ascribe to the collective consumption of social goods (through the development, for example, of agreements between ethnic groups such as the New Zealand/Aotearoa Treaty of Waitangi), or the equalisation of access for marginalised groups (such as women, homosexuals, and the aged). The provision of access, however, does not necessarily correlate with the realisation of positive outcomes. Empowering legal provisions can all too easily be overshadowed by the enduring social inequalities that pattern the daily lives of those for whom the provisions are intended. Moreover, the abstracted nature of legal discourse has the potential to implicate law in the perpetuation of social inequality. It can fail to confront injustice in the multi-faceted and internally-differentiated forms that it takes in actuality. Legal discourses that should facilitate incisive deliberation on injustice tend, in practice, to congeal around sets of dichotomies that simplify the analysis of complex, social issues. In an unsophisticated manner they reduce analyses to the terms of the guilty and the innocent, the mad and the bad, and the deserving and the undeserving. To this end, according to the critical-legal account, the individualistic modality of legal discourse has the potential to perpetuate socially-constructed disadvantage.[1]

In light of such criticisms, and in keeping with the quest to equitably recognise localised identity, this thesis attempts to reconceptualise the concept of law so as to facilitate a just recognition of difference. Specifically, it evaluates the extent to which legal-pluralist theory can contribute to this shift by identifying conceptual resources that might assist in the construction of a multicultural conception of law. The goal, as it will emerge below, is a form of law that can stabilise meaning and identity without reifying them, and rupture

[1] Forms of this analysis can be seen in the works of Unger (1983), Goodrich (1987), Douzinas *et.al.* (1991), Cornell (1991), and Frug (1991).

meaning and identity without dissolving them into an aspectival and ephemeral fusion of images.

My approach in developing this project is to subject legal pluralism to a sympathetic reading (notwithstanding its significant foibles). I do so in the belief that this will yield far more insights into the field's worthwhile aspects than an overtly critical stance. While the critical approach might be easier and more dramatic, it would be counter-productive to my goal. Overtly critical stances tend to reduce interesting and progressive arguments to forms that ease their repudiation (often in favour of an undisclosed agenda) but that is not my intention here.

The positivist legal project, to return to the dimensions of the study, is one of my main opponents in this attempt to facilitate law's recognition of socio-cultural difference. It is important because it represents the most significant jurisprudential response so far to the quest for an impartial recognition of social difference. The multicultural conception of law contrasts with the positivist programme in a definitive way. It suggests that an autonomous concept of justice (a morality that exists beyond legal discourse) is imperative for the recognition of socio-cultural diversity. This, of course, departs from the positivist legal doctrine that no necessary link exists between law and morality.

The approach taken here also differs from the attempts that have been made from within socialism and feminism (during the 1970s, notably) and post-modernism (of late) to construct alternative conceptions of law. Unlike the former, my contribution is not written from within a particularist social position such as socialist, feminist, or ethnic-identity. That is not to say that my analysis has developed in isolation from the emancipatory horizons that have emerged from particularist-theory. Rather, my goal is to explore the extent to which a form of theory can emerge that does not privilege any one emancipatory project and thus risk its domination of others by transforming into an overarching mode of regulation (as has liberal legality).

The conclusion that I finally reach is that such a project cannot fully escape the positivist paradigm. It ultimately relies on an explanatory theory that functions in the same manner as legal discourse, delineating the composition and dynamics of "what is." The project also fails to completely escape the sense of uncertainty that is associated with pragmatist conceptions of knowledge. That is, any theoretical framework that is employed to construct meaning and identity must always remain indeterminate (and in a sense, pragmatist) if subjects are to avoid its reification and their subsequent entrapment by its prescriptions. The framework must be, as Clifton Hooker describes, able to organise and correct itself without denying the existence of that which lies outside its frame of reference (Hooker 1995: 18-19). The ability to keep positivist explanations open-ended is assisted by the awareness that all language "is forced into existence by the very silence which ought to take its place" (Jameson 1961: 204).

1.2 Chapter Sequence

Chapter 2 introduces and discusses key terms in the thesis, particularly *multiculturalism*, and a *multicultural conception of law*. In addition it demonstrates why positive legal theory is an inadequate vehicle for this alternative conception of legality. Chapter 3 maps contemporary legal pluralism by displaying its diversity *via* three epistemological positions from which legal pluralism is written: realism, post-modernism, and pragmatism. In addition, that chapter furthers the suggestion that the future of the concept of law is inexorably connected with assumptions about how subjects perceive materiality. Chapters 4, 5, and 6, respectively, explore the conceptions of law and legal subjectivity envisaged by different forms of legal pluralism, and the meanings that each might attribute to the concept of multicultural law. My goal is to identify the resources within each for developing a non-necessitarian conception of emancipatory legality that can assist subjects to acknowledge and discern between differently-positioned socio-cultural traditions. Two themes emerge from these chapters. The first is that post-modern legal theory is beset by an inability to stabilise alternative

conceptions of law. Attempts to justify those conceptions in terms of norms already in use meet with a resounding refusal to construct foundations upon which to base justifications. In the long run such discourses promote their own self-refutation, leaving no bases (not even themselves) upon which alternative horizons can be constructed. The sense of interminable fracturing that ensues undermines the prospect of there ever being bases through which meaning and identity can be stabilised, even temporarily. The second theme is that realist and pragmatist forms of legal pluralism converge on a search for bases upon which to ground justification. They are both informed by the assumption that an arcane materiality does in fact influence the eventual forms that knowledge takes, but that the epistemic processes through which that knowledge is formed are inherently fallible. This renders the development of conclusive knowledge impossible. In the absence of that ability, the very lack of definitive knowledge becomes a pivotal dimension of all attempts to found law.

Chapters 7 and 8 discuss the two dimensions of legal-pluralist discourse that contribute to the possibility of a multicultural conception of law. These are that law exists as an aspect of the socio-cultural diversity that it administers and, second, that law and justice are ontologically separate elements. Together, these provide a base upon which subjects can orient themselves toward the concept of law and do so in a manner that allows them to both conserve and transform meaning.

These discussions returns us in a way to a confrontation between natural-law and positivist conceptions of legality. My account of legal pluralism will, by this stage, have privileged a naturalised account of law over a positivist one. Stated boldly, it suggests that law should be subordinated to an arcane sense of justice. The basis upon which subjects can calculate the incalculable nature of justice is to name it, and invariably this occurs in a ways that reflect the particularist positions which those subjects inhabit. Their ability to manage a multi-faceted image of justice requires a form of regulation that can assist subjects to find and/or construct shared understandings about the character of that justice. The pursuit of such a regulatory form leads back to the question of law. The multicultural conception of law reinstates a view of regulation that stands above that which is regulated. As such, and

ironically perhaps, aspects of the positivist conception of law cannot finally be dispensed with. The grounds of law's being are the satisfactions that subjects gain from using it. Does this minimal rehabilitation of positivism, then, also require an open embrace of pragmatism? To an extent, yes. Human understandings must be "pragmatic" because human powers of perception and reasoning are too fallible to produce true and pristine representations of reality. However, this need not lead to a Rortyan form of pragmatism in which the concept of truth is substituted with that of conventionalised wisdom. The development of knowledge, rather, can be grounded in the *hope* that theoretically-informed convictions will ultimately converge on a unitary representation of the material dimensions that underpin human existence. We are, I suggest, confronted with a silence when we ask how to bridge the gap between our representations of the social divisions within which we are embedded and the irreducible nature of the consciousness through which we understand our embeddedness. This silence carries over into questions about how to found new forms of mutual regulation. In turn, our capacity for non-rational creativity becomes an essential aspect of the process through which we, as individuals and collectives, overcome that silence. That overcoming is essential if we are to successfully adapt to changes in our socio-ecological conditions that challenge our capacities to survive each others' differences. My critical synthesis of legal pluralist theory, driven by aspects of evolutionary epistemology, is designed to contribute something to the quality of that process of survival and moral growth.

2

THE MULTICULTURALIST CHALLENGE TO LAW

2.1 Multiculturalism

The concept of multiculturalism is an ostensibly progressive one that highlights the proliferation of socio-cultural identity within the contemporary nation-state. Quickly, however, the use of the concept has become contentious. A significant point of contestation concerns the extent to which it actually represents what is at stake in the reproduction of culture. Three positions emerge. A brief review of the first two will serve as a backdrop against which I evaluate the third - and in my view preferable - conception of the term. The first two responses describe the ontological terrain of culture in contrasting ways. Moreover, they do so in ways that cast a pejorative shadow over the concept of multiculturalism.

A recent essay by Russell Jacoby exemplifies the first position. Jacoby argues that the concept of multiculturalism dissembles the reality - the "unwelcome truth", as he terms it - that "cultural differences are diminishing, not increasing" (Jacoby 1994: 122). Within this situation, the discourse of multiculturalism is merely a "new cant" that - along with fashionable terms such as cultural diversity and cultural pluralism - represent "anything and everything" in an indiscriminate manner (ibid.: 121). The rise of the multicultural discourse has occurred for putatively laudable reasons, however. Principally, it provides a suitable vehicle for liberals to express a politically-correct form of tolerance towards populist notions of culture (and, thereby, overthrow the elitism of bourgeois aesthetic-sense). Tolerance has quickly led to a relativisation of the term *culture*, however, and this has prompted the development of conflicting perspectives on its meaning. The first is that every social group indeed has its own culture and that each warrants respect. Second, and in reaction to the

political naiveté of this position, it is suggested that all socio-cultural communities within late-capitalism are in fact subordinated by "a single consumer society" (ibid.: 123).

For Jacoby, the latter insight casts doubt on the efficacy of the concept of multiculturalism. Multiculturalism fails to adequately describe the cultural landscape of late-capitalist nation-states. Moreover, it is difficult to see how provincialist identity can displace the dominance of consumerist subjectivity. The communities from which localised identities develop tend to be small and lack the financial means and geo-political isolation needed to construct genuinely alternative notions of belongingness. As such, they remain indelibly marked by consumerist imperatives. Conversely, the cultural idiosyncrasies of these communities and the diversity that they collectively represent becomes a marketable commodity. As David Rieff asks, "(a)re the multiculturalists truly aware of how closely their treasured catchphrases - 'cultural diversity', 'difference', the need to 'do away with boundaries' - resemble the stock phrases of the market corporation: 'product diversification', 'the global market', and 'the boundary-less company'?" (cited ibid.: 123). To this end - and mirroring Jameson's argument that post-modernism is the cultural logic of late capitalism (Jameson 1984) - the concept of multiculturalism appears to have fallen prey to a supra-cultural form whose hegemony has become so complete as to render criticism of it passé.[1]

It is also argued, in opposition to the above position, that the concept of multiculturalism is too essentialist. It erroneously implies that cultures such as late-capitalism have distinct properties that separate them from others. In this vein, theorists such as James Tully and Wolfgang Welsch suggest that multiculturalism relies on a mistaken assumption that cultural forms are separate entities that interact by colliding with one another like billiard-balls (Tully 1995: 7-17; Welsch 1995: 7-9). Such representations are simply "descriptively incorrect" (Welsch 1995: 7). Cultures are, rather, becoming more transcultural in form and their identities increasingly characterised by internal differentiation, interpenetration, and

[1] James Tully's erudite description of the contemporary landscape - briefly outlined above - provides support for this conclusion. Class-based movements that struggle for a just distribution of material resources are conspicuously absent from his list of feminist, separatist, linguistic, religious, etc., social movements. The absence may signify that his work is, itself, enveloped by the hegemony of late-capitalism.

hybridisation. As a consequence, "there is no longer anything absolutely foreign" to any of us (ibid.: 8). Clearly, the billiard-ball metaphor should be replaced with an image of gases or fluids that mingle in a seemingly chaotic manner producing, in the cultural realm, unforeseen forms of identity and subjectivity. In turn, there are no stable epistemological positions from which the interpenetration of cultural identities can be analysed. Subjectivity is as potentially fluid as the cultural forms within which subjects develop. This requires subjects to develop an (enigmatic) ability to "transculturally cross over" the boundaries of their existent perceptions of selfhood (ibid.: 10).

The distance that exists between these two evaluations of multiculturalism is moderated by their mutual attempts to strike a similarly-positioned middle-ground. Jacoby, for example, concedes that a "certain multiculturalism" does exist that "should not" be ignored (represented, for example, by ethnically-appropriate school curriculums, racial diversity, and on-going immigration (ibid.: 125)). Welsch, in turn, moderates his position by suggesting that fluidity is not an ultimate good. "To be sure", he states, "there is still a regional-culture rhetoric" (ibid.: 8) and, moreover, the "integration" of "differing cultural interests" remains intrinsic to the process of identity-formation (ibid.: 10). Both positions, therefore, tendentially converge on an arcane middle-ground.

This middle-ground is an abstruse domain that the two conceptions of multiculturalism seem ill-equipped to theorise. This realm lacks the singular, stable dimensions needed to facilitate its representation in the forms suggested above (such as through the existence of a transcending immutability or a state of total fluidity). Rather, this middle-ground is influenced as much by subjects' capacities for self-reflection as by the ontological conditions that circumscribed those capacities.

A superior approach for this task, I believe, is one that attempts to theorise an epistemological positioning that empowers subjects to entertain both their embeddedness within interpretative traditions and their capacity to alter the terms of their embeddedness. I find this type of approach in the works of Fredric Jameson (Jameson 1961) and Charles

Taylor (Taylor 1989; 1992; 1994). This approach, I suggest, goes to the core of what is implicated in the construction of multiculturalism. It concerns the processes through which subjects negotiate alterations in their self-perceptions, both within themselves as individuals and as collectivities of people. As noted above, this is not synonymous with a celebration of expressivist creativity, nor of personality; "consciousness is consciousness *of*," as Jameson succinctly suggests (Jameson 1961: 194, original emphasis). Rather, the project entails a search for a form of theorising that identifies the sources of moral order, meaning, and identity that exist outside of the individual and, moreover, what it means for the subject to access, activate, and transform them.

Taylor's approach suggests that single-principle representations - such as Jacoby's and Welsch's - are inadequate for facilitating a just recognition of cultural identity. They both lead, at their logical extremes, to mono-cultural formations. The essentialist approach ultimately privileges a singular standpoint for evaluating change (such as the socialist individual). Conversely, the transcultural position privileges the total absence of fixed perspective. Alternatively, following Taylor's lead, a conception of multiculturalism should suggest how subjects might position themselves relative to the discourses through which they negotiate their co-existences. Their attempts to do so, for Taylor, are realised as moral discourses that resonate within the individual (Taylor 1992: 510). Morality is not a "publicly accessible reality" but, rather, is the process through which ethical discourse resonates within the subject (ibid.: 510). The tenor of that morality is then evident within the "epiphanic" discourses that subjects adopt to express themselves (ibid.: 512). As such, his approach shares little of the descriptive methodology found in the works reviewed above.[2]

At the centre of this conception of multiculturalism is a paradoxical observation that subjects possess a core self that is wholly undetermined in form. The core, to follow Jameson, is

[2] Taylor's own position, interestingly, has a unitarian tenor to it that mirrors that descriptive tendency. It is informed by a Catholic theology which suggests that humanity has the potential to share in a grand teleological vision. That said, he perceives considerable elasiticity in the forms that its outworking might take and, moreover, severe limitations in humanity's ability to comprehend the ultimate nature of that vision. As such, in my opinion, the unitarian nature of his perspective sits far enough in the background as to not stymie his appreciation of the considerable diversity that exists within the cultural domain.

founded upon the ability of self to recognise that a materiality exists outside of itself (Jameson 1961: 199). The act of recognition has no determining properties; it simply is and represents a capacity for "original choice" (ibid.: 193). What is recognised, however, exists prior to the self and, in turn, the particular materiality to which the self is exposed determines the range of possibility for self-hood. This contradictory picture of subjectivity does not explain how the conditions of both freedom (non-determination) and determination (the existence of a core being) come to coexist within the self. Rather, their combination is presented as a description; human subjectivity, apparently, cannot help but form around values that become the core of the individual's self-hood and, in turn, their reasons for acting (Taylor 1992: 505). The content of these commitments varies over the life-time of the individual, just as it does within groups of people. Over and above these changes, however, (or, perhaps, beneath them) the self continually and involuntarily orients itself toward some conception of the Good.

As might already be evident, this image of the self both draws upon and alters the liberal conception of self-hood. It mirrors that conception in that the self possesses a unitary core. This core enables the self to evaluate and to reflect on its own evaluations. It thereby empowers the self to exercise moral judgement. The image deviates from the liberal conception, however, in that it is not so robust as to be the vehicle upon which a comprehensive theory of society can be predicated (such as methodological individualism). The properties that are ascribed to the self are few and do not presuppose that the subject can achieve positive outcomes (such as being genuinely morally-autonomous). Rather, the self is merely ascribed with the negative ability of being unable to avoid forming itself around a conception of the Good. The distance that exists between the consciousness of the self's embeddedness and the irreducible nature of its consciousness (its facticity) draws that self into a "complicity" with that very facticity (Jameson 1961: 201). The silence that accompanies the awareness of consciousness forces the self to construct images of the Good in order to give form to that consciousness. In turn, those images assuage the silence.

A second of Taylor's propositions about multiculturalism also, paradoxically, destabilises and expands the liberal project. His target here are "single-principle" forms of liberalism that elevate freedom, as a singular value, over all others (Taylor 1994: 250). Single-principle proceduralist-liberalism inevitably marginalises communitarian values and exercises a *de facto* violence upon people whose material needs are consistently ignored as a consequence of the liberal adulation of freedom. In order to avoid this, Taylor advocates - following Rawls - the construction of an overlapping consensus between communities. To this end, a key goal in multiculturalism becomes the identification of "core demands" that all human beings could reasonably expect to see fulfilled by others (ibid.: 247). Typically, these are basic, socio-biological needs that correspond to the right to life. The next task then becomes that of identifying the areas of overlap between communities' perceptions of these core demands. The major epiphanic discourses of the cultural communities provide the clue to the nature of these areas, they being the vehicles through which subjects "realize" their contact with the sources of meaning and identity (Taylor 1992: 512). Those that are shared can become bases for coexistence while those that are not will, hopefully, be mutually tolerated.

This set of core demands imposes responsibilities on those who identify with them. This, in turn, dislodges tolerant-neutrality as a sole foundation for multicultural politics. Clearly, the existence of core demands gives subjects a universal licence to challenge forms of governance that disregard basic human rights. In some situations, therefore, intolerance of otherness is condoned. This undermines, in turn, the extent to which liberal principles such as freedom, tolerance, and neutrality, can become overarching and absolute.

Together, these two propositions - that human subjects cannot help but form around a core (though indeterminate) self and that scope does exist between cultural communities to develop an overlapping consensus on basic elements needed for life - provide a platform for theorising how subjects might negotiate with those from other cultural traditions. These two propositions, moreover, suggest that the notions of belongingness (instantiated within basic human rights) and freedom (that is, the indeterminate nature of subjects' conceptions of the Good) can be combined in a workable form. This can occur through the pluralisation of the

concept of liberalism, through an augmentation of its sole emphasis on freedom. To this end, these propositions ascribe subjects with capacities to form around sets of meaning and identities that are not in themselves fixed, underpinned by a set of commitments that uphold the value of life itself.

This, then, is the sense in which I use the term multiculturalism throughout the thesis; multiculturalism refers to a project that attempts to pluralise the terms through which subjects can understand their socio-cultural inter-relatedness. Taylor's work represents one form of this project and, moreover, it informs my own argument at various points. As such, I am not using multiculturalism to describe the ontological conditions of particular cultural communities within given nation-states (that they are, for example, dominated by a supra-culture such as late-capitalism or, conversely, are fully aspectival and fluid). Rather, I am referring to the pursuit of self-reflexive forms of knowledge about how subjects might mediate the discourses through which they negotiate their coexistence. Multiculturalism thus denotes a process rather than a product; it is a project rather than a condition. My goal is to evaluate the extent to which legal pluralism can reconfigure the concept of law in a way which facilitates that agenda.

2.2 Issues in the Development of a Multicultural Conception of Law

My overriding concern in developing an alternative conception of law is to avoid any pretension of going "beyond law" so as to announce its end. Conceptions of law that lie outside the domain of legality are logically impossible. The inescapability of law raises a number of issues about how alternative conceptions might be conceived.

The extent to which alternative conceptions of law might succeed in getting beyond law to a hither-to-undiscovered realm has long been a vexed question. Michel Foucault, for one, was optimistic that the socialist imagination - broadly conceived - could conceptualise a form of

legality that would dispense with "the table" that perpetuated a hierarchical conception of power (Foucault 1972: 28). Other variants of this affirmative position suggest that the ability of socio-legal orders to interpenetrate in a non-determined manner leaves the future of regulatory forms open. Stuart Henry, for example, points to the existence of various disciplinary-practices that have evolved through the interactions between line-staff and management within different organisational settings (Henry 1983). This leads, moreover, to the possibility that communal forms of organisation can impact upon capitalist systems in a way that ensures their own modification (Santos 1992b: 241-246). In a similar vein, the non-determined interpenetration of regulatory mechanisms associated with the state and the popular classes is seen to produce a form of legality that is characterised by an acentric complex of social networks (Santos 1980:392).

An internal contradiction haunts this affirmative position, undermining the extent to which its propositions actually represent positions that reach beyond law. The act of going beyond law will always reinstate law - in a new form - as soon as the position beyond has been sufficiently constituted. It simply re-positions the conceptual boundaries around what constitutes law, stipulating the classes of kind that belong to it and those that comprise its Other. In turn, it reinforces the very nature of law as that which reduces totality to itself. Jacques Derrida makes the point succinctly; all attempts to undermine and replace law are of the same ontological genre as law:

> What the state fears (the state being law in its greatest force) is not so much crime or brigandage ... . The state is afraid of fundamental, founding violence, that is, violence able to justify, to legitimate, ... or to transform relations of law, ... and so to present itself as having a right to law ... . For a critique of violence ... to be possible, one must first recognize meaning in a violence that is not an accident arriving from outside law. That which threatens law already belongs to it, to the right of law (droit), to the law of law (droit), to the origin of law (droit). (Derrida 1990: 34-5)

Law exists, therefore, as an irreducible violence that lies at the heart of all attempts to represent either what is or the very act of gaining perspective on reality.

This is a desirable state of affairs in a political sense. The impossibility of escaping law undermines the naive idea that the simple devolution of social power to a plurality of regional and local power-containers will create the conditions for a more communitarian and just society (O'Hagan 1984: Chapter 6). That anarchistic-formulae drastically over-simplifies the problem of how to ensure a universally-accessible process for protecting basic human rights. In light of the theoretical inescapability of law and the imprudence of attempting to go beyond it in practice, the most that might be hoped for in the reconfiguration of the concept of law is a form that empowers subjects to reflect on how they are positioned to one another by its prevailing forms and, in turn, alter these to meet their needs.

The all-encompassing nature of law raises questions about the types of relationship that might exist between law and the critiques with which it is confronted. All attempts to critique law would, if successful, become *de facto* law. My position is simply that it is sagacious to recognise this and avoid the delusion that a totally new form of social relation has been created by a new conception of law. Within the sociology of law this issue - of law's association with its Other - has traditionally been configured as the relationship between law's formal instruments (courts, policing, the administration of justice) and society (the social relations and voluntary associations of the civil arena). Analyses have then focused on understanding either the effects of law upon those social relations (in this vein Alan Hunt poses the simple yet penetrating question Does law matter? (Hunt 1993: 327)) or the impact of social relations upon the form of law (such as the effect of commodity fetishism on the shape of legal relations (Pashukanis 1978; Kerruish 1991)). In either event, law - conceived of as the generalised process of legitimating definitions of reality - remains pre-eminent. Either the institutional structure of law or the social sciences provide the conceptual resources for definitive deduction to take place.

Increasingly, however, the very terms upon which this model relies for its explanatory power - law and society, the state and civil society - are contested. Partially, these challenges are heumanutic. It is argued, for example, that contemporary definitions of the two categories are based on erroneous readings of their protagonists such as Hegel (Santos 1985: 304-5). A more correct reading demonstrates the intrinsic fluidity that has developed between the domains through their mutual penetration by strategies of power such as governance (Hunt 1993: 306). As a consequence, it becomes impossible to attribute law or society with properties that distinguish one from the other. Alternatively, it is also posited, the distinction between law and society fails to fully address the irreconcilable conundrum that law and society are autonomous-from yet dependant-upon each other (Fitzpatrick 1992a: 6). The tension can be resolved when the relation between law and society is represented as a field of mutually-supporting myths (ibid.: 146-80) but that prevents meaningful engagement with law. It presupposes that both the authority of law and progressive political action are simply mythologies that compensate for each other's insufficiencies.

Against the view that the law-and-society model is outmoded, its quest to identify the connections between legality and social relations retains some validity (Nelken 1986: 338). The very hope of thinking "otherwise" dissipates when the quest is abandoned for dimensions of social life that can alter legal relations or for knowledge about law's role in the production and reproduction of social relations. To this end, the retention of the model represents an act of resistance. Moreover, its deployment becomes a way of sustaining "political commitment to the respect that a viable civil society is an important feature of the health of a social formation" (Hunt 1993: 310).

The difficulties that have been identified with the binary foundation of the law-and-society model suggest that it needs reconstruction. This is imperative if the model is to escape the status of a heuristic device that has no hope of corresponding to the reality that it putatively represents. It is not that an alternative configuration of the model could correspond better to reality in some vulgar sense. Rather, the reconfigured model should be able to demonstrate why the goal of correspondence is a valid one, despite subjects' inability to fully step beyond

the textuality of representation in order to accurately measure the verisimilitude of their representations.

This thesis attempts to reconstruct the terms of the law-and-society model by presenting the concept of subjectivity as a fecund alternative to that of state-law (as the ultimate site of legality) and by suggesting that the notion of society can be usefully substituted with an evolutionary view of the struggles that subjects face in adapting to changing socio-biological conditions. Subjectivity succeeds formal law because it is the site within which metaphoric and metonymic re-orderings of reality occur, potentiating the creative amalgamation of emancipatory counterhegemonic projects. This fits, moreover, with my presupposition that the realm of *non-authorial authoriality* lies at the heart of multicultural social relations. The process of evolutionary adaptation succeeds social relations as the other unit of enquiry because it has the potential to broaden the analysis of social interaction beyond the terms given by particularist theory (socialist, feminist, liberal, etc.). The model's measure of success becomes the extent to which it can sustain a conception of law that exists within the socio-cultural diversity over which its actualised forms preside. This would amount to a generalised logic of emancipation within which the concept of law is an aspect of the very domain of socio-cultural diversity.

The decentering of law to the realm of cultural difference - and beyond, to the site of subjectivity - carries the risk that plurality becomes the sole organising principle of the new conception. To repeat the above warning, this individuation of social relations has the potential to implicate the concept of law in the maintenance of oppressive social divisions. This highly-decentered type of outcome lies imminent within forms of post-modern legal theory that subordinate human intention to a language-performance that escapes subjects' control. At the extreme this divests the individual subject of control over their own thoughts, associating the power to perform with an irreducible presence held only by *the concept*. This problem of unremitting plurality also plagues legal theory that locates law within the subject and then attributes that subject with an overly voluntarist capacity for expression (for example, Santos 1995, Chapter 8). That approach reduces the extent to which subsequent

alterations in law can be explained, reducing socio-legal explanation to the description of actions by notable individuals. Non-determined forms of subjectivity that are capable of imagining just emancipatory social relations are also developed from within particularist theoretical positions such as feminism (Cornell 1991, 1992) and Marxism (Hunt 1981). Their particularist origins have the potential to prevent subject-positions and categorisations from being thoroughly atomised and to thereby protect the possibility of sustained explanation. They do so by imposing boundaries on what constitutes the identity of the subject-position in question. Thus, for example, the domain of the feminine is made available to men but not those who are obviously masculinist (Cornell 1991: 204). Problematically, this involves a degree of policing and, in turn, diminishes the emancipatory potential that might be envisaged in the theory from within which those positions are developed.

Naturalised evolutionary epistemology provides a better framework for theorising the development of a non-necessitarian emancipatory logic. It explains the changes that subjects make to their methods of maintaining and reconstructing meaning (their *non-authorial authoriality*) in terms of subjects needs to adapt to diversifications in the material conditions of life (such as the increasingly cosmopolitan nature of modern society). The very processes through which subjects reflect on their methods of knowledge-construction - such as how they develop new conceptions of law - subsequently become new conceptual tools for empowering further adaptation. The imagination plays a large role in this process. The value of new conceptions of law can only be ascertained by comparing them to an imaginary yardstick (such as Justice) that exists beyond the form envisaged.

A problem emerges - following Derrida - about the source of this imaginary regulatory ideal. It is of the same genre as law given that it seeks to impact upon the naming of the real. Moreover, attempts to represent or explain the imagination through which it is constructed - in terms, for example, of voluntarist expressivism or the play of language that lies beyond subjects control - are *de facto* conceptions of law. This thesis suggests, in this same naming vein that the impetus for imagining alternative conceptions of law comes from subjects' struggles to survive significant environmental changes such as the increasing number of

claims for recognition by socio-cultural communities. New conceptions of law must be invented where existing representations fail to account for subjects' experiences. In positing this, the argument consciously relies upon an evolutionary metanarrative and is thus guilty of using the very concept of law to alter law. The particular evolutionary narrative that is employed - *naturalised evolutionary epistemology* - attempts to avoid the calcification of its informing metanarrative, however, by evaluating the merit of its various dimensions in terms of that which lies beyond the narrative.

To summarise this section, the framework upon which my discussion of legal pluralism is built reflects the law-and-society model. It reconstructs the binary terms of that model in an attempt to enhance its capacity to explain changes that occur within the institution and concept of law. Specifically, it substitutes the centralist conception of law that is normally associated with the model (state-law) with a decentered notion (subjectivity) and accounts for alternative images of law in terms of subjects' attempts to manage changes within the socio-biological environments within which they are embedded.

2.3 The Limitations of Positive Law in a Multicultural Environment

As briefly noted in Chapter One, orthodox jurisprudence is ostensibly the most successful form of adjudication in conflicts between differently-positioned subjects. In turn, it could be argued, a multicultural conception of law would merely require a reworking of basic jurisprudential theories. I disagree. A persistent difficulty permeates the concepts of law that are associated with the mainstream jurisprudential tradition (what I refer to as *positive law*). Each of the three doctrinal schools that I will identify - positivist, classical natural-law theory, and liberal-rights theory (Kerruish 1991: 79-107) - fails to generate in practice the degree of reflexivity (*non-authorial authoriality*) to which each aspires in theory. This undermines the ability of positive legal discourse to act as a vehicle for a multicultural conception of law.

For the renowned legal-positivist, H.L.A. Hart, the search for a reflexive form of legal development should be undertaken from the position of a disinterested common-language philosopher (Hart 1961). However, the quest is conducted from a point of view that is thoroughly internal to the legal tradition that is commented on and this entanglement inevitably compromises the reflexivity of the positivist position. The difficulties begin within Hart's famous definition of law, that it is a system of rules.

> There are ... two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. (Hart 1961: 113)

Thus, there exist rules that define the validity or otherwise of individual citizens' actions and, also, rules that confer power upon some to decide what counts as "true" statements about law. The pursuit of "truth" about law proceeds through the common-language assumption that words are tools that can be cleansed of incorrect meanings. Social and legal disputes, in turn, are defined as disagreements over linguistic usage, not the constitution (and re-constitution) of the social relations that give rise to particular systems of meaning.

Three tenets from previous positivist traditions influence Hart's conception of law as a two-tiered system of rules. The first is that the purpose of legal narrative is to represent reality in a doctrinal manner. The second is that the role of legal theory is to supply a universally-applicable and culturally-neutral answer to the question of "What is law?". Lastly, the answer to that question is pursued through three further questions: How is law related to coercion?; How is law related to morality?; and What are rules and to what extent is law a system of rules? (ibid.: 13). Their collective effect, as Hart sees it, is to demonstrate that law is, to a great extent, distinct from other forms of social ordering such as morality and

coercion. Advanced systems of law are thereby neutral toward all political regimes. Morality and politics may determine the content of law at any one time but they cannot determine its underpinning structure. Moreover, by demonstrating the intrinsic role of rules within law Hart intends to illuminate the distinctly *human* (rather than metaphysical or political) nature of law and legal obligation. In keeping with prior positivist thought, Hart maintains that law gives rise to obligation despite its detachment from morality and politics. That sense of obligation cannot be explained in terms of sovereign command (as Austin and Bentham suggested) or the threat of state coercion (as Kelson maintained). Rather, and pre-empting Foucault on this point, legal power is an enabling force that "immanently" produces social effects rather than "externally" represses social relations. It is the ability of law to empower subjects that prompts the development of obligation toward the rational-legal regime. Any sense of *moral* commitment that arises within subjects in the process of their legal empowerment is thus purely contingent and in a key sense "psychological." That said, Hart's approach does convey a minimal relationship between law and morality in the sense that a basic respect for the rights of others is needed as a pre-condition of social life. Strictly speaking, for Hart, this does not imbue law with any necessary content but, rather, merely identifies its pre-conditions. In a similar manner, the relationship between law and coercion is factual and contingent rather than necessary. Moreover, the contingency that exists between law and morality, and law and coercion, produces space for reflexive manoeuvring on the respective roles that law, morality, and coercion might play within any given context. This capacity for reflexivity thereby frees positive law from any singular self-perception or definitive repertoire of roles. Its capacity for self-reflexive and self-correcting development thereby appears almost illimitable.

In a similar vein to the minimalist relationship between law and morality, a minimal sense of justice is discernible within positivism. This marginalises law further from non-legal forms of social ordering, heightening its own capacity to reflexively develop independently of an exterior conception of justice. In a formal sense, justice refers to the equal treatment of similar cases. Given that no *a priori* standards exist for determining the meaning of "alike," however, the just exercise of legal rules amounts - tautologically - to their application to

subjects that fall within definitions given by those rules. The confinement of such questions to a self-referencing arena of rules also gives rise to the possibility of "pure" procedural justice. An outcome can be defined as just when it has conformed to the process that is defined by the rules as constituting a just form of adjudication. Moreover, given that the most extreme forms of human barbarism are censured by positivism's minimal connection with morality (conceived of as the basic standards of civility needed for species-survival) adherence to legal procedures will naturally result in a basic level of justice. To this end, law and justice share a common heritage in their mutual reliance upon a system of rules. The content of those rules will always remain open-ended given that a tremendous diversity of normative orders exists in actuality. Despite that plurality, the concept of rules remains the foundational and enduring aspect of the law. Significantly, the primacy given to rule-following subverts the reflexivity of positivist legal theory. This becomes evident when the positivist definition of *rule* is explored further.

At their most general level, for Hart, rules are standards against which acts can be defined as right or wrong (ibid.: 32). More specifically, as introduced above, they exist in two forms: those which impose obligations and those that confer a social power to recognise, adjudicate, and change rules of obligation. The latter - termed *secondary rules* - comprise rules *about* rules. In an enabling manner, they empower all subjects to expand their horizons of action with others in a risk-free manner by constituting those actions as legal relations (in marriage, business partnerships, etc.). In order to preserve the autonomy of law from other forms of social ordering - familial and political, for example - an *ultimate rule of recognition* is developed to constrict the boundaries of primary and secondary rules. In addition to policing those boundaries, this ultimate rule establishes a hierarchy of criteria for identifying different genres of rule. In this vein Hart states

> the foundations of a legal system consist not in a general habit of obedience to a legally unlimited sovereign, but in an ultimate rule of recognition providing authoritative criteria for the identification of valid rules of the system. (ibid.: 245)

The ultimate rule has no *a priori* source and only exists within the actual activities of those who employ it. With regard to this particular rule, then, Hart's position reflects that of the American Realists for whom law is that which lawyers do rather than how it appears in statutes (Frank 1930; Llewellyn 1931). Although Hart does not go as far as the Realists, this ultimate rule takes the form of a policy-making activity rather than the exercise of meta-legal thought. Moreover, all rules within the legal system are related to the ultimate rule by virtue of their need to have been recognised by it in order to be "legal." These various points suggest that rules ultimately exist as congealed social practices rather than as abstract representations of metaphysical, moral, or political necessity.

In order to be fully *social* the practices that rules give rise to - namely, rule-following - must be distinct from other forms of behaviour such as the following of habit or the avoidance of threat. The "real" social rules that comprise a positivist legal system must be respected for the simple fact of being rules. To this end, they must have an "internal aspect" of their own (Kerruish 1991: 53). This internal aspect is initially instantiated by participants in a community who "look upon the behaviour in question as a general standard to be followed by the group as a whole" (Hart 1961: 55). Their perspective, here, is an amoral one. It comprises an epistemological standpoint that is capable of generating (objective) accounts of what is normatively correct. To this end, the development of obligation is - in its primitive form at least - grounded in a belief in the objectivity of human perception. But the notion of *legal obligation* exists over and above these plebiscitary forms of responsibility. This undermines citizens' definitions of reality in that its form is decided by the designated officials of the legal system, through the identity that they ascribe to the ultimate rule of recognition. Moreover, its form reflects what those officials do in practice rather than any correspondence that it has with a transcending popular domain, moral code, or political necessity. Ultimately, therefore, the sovereign/subject duality that characterises juridical power is replaced with an official/citizen dichotomy that is dominated by those officials' practices.

The status of Hart's own epistemological position is interesting here, for it appears to lie between, and to mediate these two domains of the official (who is internal to law) and the citizen (who is exterior to it). His putative ability to straddle the two suggests a tremendous capacity on his part to exercise *non-authorial authoriality,* to both use the law to frame his world and to deconstruct that framing from the dispassionate position of the decontextualised observer. Within Hart's positivism, the internal point of view that he inhabits as an official of the system is associated with the promulgation of normative discourse. It is the epistemological position from which a subject derives the capacity to state that X ought to be done on the grounds that the position which they inhabit commits them to believing in the value of X. Within Hart's methodology, this internal and normative orientation to law must be distinguished from external orientations from which objective descriptions of the system can be constructed (Hart 1961: 13-16). An internal position cannot provide a platform for describing law due to the non-rational nature of the commitments at hand. The latter would simply contaminate the description, undermining its empirical veracity. Instead, descriptions can only be constructed from outside of law, from the position of the detached common-language philosopher who can discover the "real" meanings given to specific signifiers such as *law.* Positivist legal theory can thus only proceed "*with reference* to the internal point of view but *from* an external point of view" (Kerruish 1991: 55). In taking this position, Hart presumes an unproblematic ability to occupy both spaces, that is, to adhere to the description of law as a system-of-rules (and to whose defence the whole exercise is committed) while defending its validity from the exterior position of a philosopher of language. But this, I would argue, is an impossible thing to do and actually Hart provides no overarching justification for this most crucial of points in his system. He simply presumes the move can be accomplished on a presumption which simply and ironically demonstrates a lack of reflexivity on his part about the extent to which subjects can reflect upon conceptions of law, independently of the normative presumptions that prompt their enquiries. A multicultural conception of law cannot at any stage make that kind of "neutralist" and epistemically "superior" assumption. Rather, multicultural conceptions must explicitly highlight and reflexively overcome such assumed external/internal contrasts. In my preferred rubric, the multicultural conception of law should

seek to develop an understanding of the dynamics of the *non-authorial authoriality* through which that task of comprehension is attempted and, furthermore, in a way that definitely does not presuppose an unbridled capacity on the part of subjects for rational self-clarity about the mechanisms through which they are regulated.

In a similar manner to Hart's positivist legal theory, classical natural-law theory - as exemplified by John Finnis (Finnis 1980) - presumes a degree of theoretical reflexivity that cannot eventually be demonstrated. In this case his initial reflexivity comes from legal subjects' supposed abilities to correctly locate themselves between natural law and human law. For Finnis, natural law refers to a set of *a priori* moral principles. Despite their *a priori* status, these principles can be comprehended by the subject who has discovered the right epistemological positioning. The moral principles refer to general obligations to protect life's basic goods: life, knowledge, play, friendship, aesthetic experience, practical reasonableness, and religion. Moreover, morality refers to certain implied goals of practical reasoning: the development of a rational life-plan, a refusal to adopt arbitrary preferences, and refusing to undermine the validity of a basic good (cited in Kerruish 1991: 59). For the naturalist, these moral goods and principles are taken to be self-evident to the observer. In addition, they are universal in their applicability and indeed a general adherence to them will further facilitate the common good of humanity.

In the natural-law perspective, knowledge about what constitutes law comes from an understanding of how law is justified. Justification, in turn, proceeds from abstract knowledge about the foundations of law. In Finnis' case the foundations of law are held to lie within the associative nature of human interaction. In a neo-Aristotelian manner, friendship between individuals is presented as the primal form of association. In addition to the fulfilment of self that the institution of friendship brings, it creates a "third" perspective that is greater and more objective than the positions that parties bring to a friendship. As Finnis states, it constitutes a "unique perspective from which one's own good and one's friend's good are equally 'in view' and 'in play'" (Finnis 1980: 143). It represents, moreover, the social basis upon which subjects can reflect on the positions that they take

within and toward law. Clearly, then, natural-law theory aspires to a notion of reflexivity within a positive framing of legal judgement.

However, there are some problems that seem difficult to surmount. In particular, the capacity for self-reflexivity begins to wane as the classical-naturalist account defines law as a necessary condition of human well-being, as a mechanism for ensuring the morality and justice of social relations. This supports the development of overarching principles (listed above) that "naturally" exist between the natural law of the cosmos and the human law. Thus, human law inherits a necessitarian tenor from its inexorable connection with a natural law that comprises a singular and universalisable Good.

The necessity of law for the common good suggests that authority must be both exercised and accepted. The complexity and socio-cultural diversity of modern society conspire to ensure that unanimity of opinion fails to develop, underpinning the need for an overarching adjudicative institution whose authority to pronouncement judgement will be accepted (even by those that dissent from the judgements themselves). For naturalists such as Finnis, authority should be exercised in accordance with "natural" (liberal) requirements of justice, such that individuals be left to work out how to balance privilege and responsibility. Only where individuals blatantly disregard their responsibilities to others - such as by failing to distribute their wealth in accordance with the needs of others - should the state intervene. Quite apparently, disagreement can be anticipated about the rules through which decisions on such matters should be reached. Within basic or highly contested matters, answers only emerge through the exercise of power:

> The effort to bring everyone to at least an acquiescence in this judgement is usually very taxing and exhausting for all concerned, and makes clear to all what is indeed the case: that those general needs of the common good which justify authority, certainly also justify and urgently demand that questions about the location of authority be answered, wherever possible, by authority. (ibid.: 249)

At the formal level, therefore, law becomes coercive in its co-ordination of social relations *via* its deployment of a systematic set of rules. At a functional level, this process works well when those rules are comprehensible, widely understood, internally-consistent, and clearly reflect the principles of justice. Structurally, this system of rules is derived in an non-reductive manner from the natural law of the cosmos:

> ... in positive law we can find a mode of derivation of specific norms of action (that is practical reasonableness) by an intellectual process which is not deductive and does involve free choice (human will) and yet is intelligent and directed by reason. (ibid.: 146)

Finnis signals here that a variety of perspectives will exist on how natural law practically relates to human law. As much can be anticipated where a relationship "cannot be deduced" and yet is enigmatically "directed by reason." Moreover, not all perspectives on the matter are valid and it is possible for the relationship to be misrepresented. At this point, though, Finnis' solution to the problem of false perception leads to the collapse of the reflexivity that he hopes for in theory. Representation, for Finnis, is contingent upon the standpoint from which knowledge is developed. In keeping with the possibility of true and false representation he posits a hierarchy of epistemological positions at the apex of which are those for whom it is of "over-riding importance that law as distinct from other forms of social order should come into being" (ibid.: 15). These are the citizens who are committed to a conception of nation-statehood that is predicated upon the Rule of Law. As a further subset of this group are those who regard commitment to law as an intrinsically moral - rather than a pragmatic -obligation. These are not the opportunists for whom legal stability is a means to other ends, such as wealth-generation. Rather, these are citizens for whom law represents the purest institutional instantiation of *noblesse oblige*. Even within this group a further hierarchy exists, dominated by those who can develop the most consistent and comprehensive justifications for their positions. Indeed, it is through the translation of such positions into a formalist mode of reasoning that they can be further developed into binding

legal-prescriptions. It is not surprising that subjects who can achieve this outcome for law stand at the pinnacle of jurisprudence.

Interestingly, the classical-naturalist account does not presuppose that this groups' perspectives will be necessarily correct or objective as such. Finnis, quite apparently, appreciates the fallibility of human reasoning, particularly when it comes to understanding something as obstruse as the connection between the legality of the cosmos and quodotian law. Such groups may ultimately privilege nothing more than their - albeit considered - opinions. Neither, however, does he dismiss the possibility of objective knowledge. Knowledge is not "inevitably subject to every theorist's conceptions and prejudices about what is good and practically reasonable" (ibid.: 17). Scientific reflection on the empirical dimensions of the socio-biological world has the potential to develop accurate knowledge upon which legal thought can develop. This signals the principle source of legal reflexivity that Finnis envisages, a dialectic between the knowledge-systems of social science and law. The right answers to legal issues can be found by moving between the convictions of legal theorists and the objective findings of social scientists. Even though Finnis quite apparently envisages that this is an open-ened process - in the foreseeable future at least - his own ability to pronounce on the nature of that dynamic presumes that he has in effect realised the "correct" positioning between legal conviction and empirical objectivity. Ironically, therefore, his discovery of the process through which reflexivity can occur signals the end of reflexivity itself. He has putatively found *the* balance between opinion and objectivity through which reflection can proceed, a balance that will not alter over time. Once again, it is crucial to see that this conflicts with the multiculturalist conception of law being developed in this thesis. This is because any consideration of a multicultural conception of law suggests that reflexive positions can in no way be fixed for all time but, rather, are contingent upon the particular cultural struggles that subjects face in adapting to diversifying socio-biological environments. For all its sophistication and promise, then, the classical-naturalist view of law - and its view of supra-legal reflexivity too - cannot finally accommodate the multicultural impulse.

Liberal rights theory - as championed by Ronald Dworkin - represents a third and final attempt within positive law to construct a self-reflexive theory of legal relations. For Dworkin, law is a politico-moral principle (rather than a system of rules) that is propelled by "the purer form of law within and beyond the law we have" (Dworkin 1986: 407). It is a conception of law that seeks fidelity with previous legal rulings and an openness to the future, leading to a coherence between past and future and an overarching sense of integrity. Its minimalist connection with a system of rules is strong enough to promote the quest for "one right answer" to legal debates and it is this quest that ultimately undermines the reflexivity that accompanies its pursuit of the "beyond."

The foundation for the "one right answer" to legal disputes lies within the theory's grounding within a unitary Anglo-American conception of liberalism (Dworkin 1985: 181). As such, the impetus for agreement does not emerge from the process of political contest *per se*, or with an appeal to metaphysical dynamics. Rather, it is specifically tied to the role that Anglo-American liberalism plays in structuring this particular conception of law. Moreover, the answers that emerge from this account of law are apposite for all Britons and Americans, not only those who identify as liberals. To this end, Dworkin's approach takes on a normalising role, inculcating citizens into a positive attitude toward the very notion of law.

> What is law? ... Law's empire is defined by attitude, not territory or power or process ... . It is an interpretive self-reflective attitude addressed to politics in the broadest sense. It is a protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances ... . Law's attitude is constructive: it aims, in the interpretive spirit to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is finally a fraternal attitude, an expression of how we are united in community though divided in project, interest, and

> conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have. (Dworkin 1986: 413)

Quite understandably, the communitarian tenor of this approach resonated with left-wing thought during the early 1980s, providing a resounding challenge to the conservative hegemony that had amassed (Kerruish 1991: 67). Problematically, however, this conception of law dissembled socio-cultural difference under a nationalistic umbrella, suggesting that a simple inculcation into the right attitude would be enough to bridge the voids between differently-positioned interpretative communities. Moreover, the move firmly cemented the power of state-law, diminishing the ability of alternative socio-legal movements to challenge the meanings and purposes of law. This fidelity to a centralised conception of law is evident in Dworkin's proposition that the purposes of law can only be described by those that inhabit a point of view that is internal to law (Dworkin 1986: 13-15). The viewpoints of other observers are valid, such as sociologists and historians, but these must be interpreted from within legal doctrine. In a similar manner to Hart and Finnis, therefore, the liberal-rights perspective suggests that a hierarchy of standpoints exist with reference to law, culminating in Dworkin's account in the views of appellant-court judges. Thus, for all three traditions a professional body exists whose discourse can authoritatively denote what constitutes law, authority, and obligation.

In itself, this does not prevent reflexivity about law; it (merely) prevents the majority of the population from participating in debates about the nature and role of law. The reflexivity of liberal-rights discourse is stymied, nevertheless, by Dworkin's position on the nature of judicial disagreement. Disagreements originate in differences of opinion on the very nature of law, not on whether or not written law exists in a particular case. As such, legal debates are invariably about the foundations of and justifications for law. Given that Dworkin anticipates that the "one right answer" can be found to legal issues, the very existence of these disagreements is quizzical. Dworkin's answer lies in his perception of law's structure.

> Legal practice, unlike many other social phenomena, is *argumentative.* Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given a sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. (ibid.: 13)

Within the positivist and natural-law theories, disagreements tend to be over the interpretation and application of rules or norms to law. Within liberal-rights theory, alternatively, disagreements are perceived as being over how legal propositions (the grounds of law) are justified (requiring an account of the force that exists behind law). The very fact that argument is anticipated suggests that, for Dworkin, answers exist, and that they lie within the political environment. Legal rights - as the primary form of legal proposition with which the courts deal - can be justified simply because they exist as politico-moral artefacts. Their mere existence as consistent normative claims within the political environment thereby endows them with "force" within legal debate (Kerruish 1991: 72).

Problematically, politico-moral facts exist as facts only by virtue of their consistency within particular cultural contexts. Within the liberal Anglo-American context certain social institutions have been reified as immutable aspects of late-capitalist society and thus made politically incontestable (the patriarchal family, market-place, and nation-state, for example). Individuals are free to pursue their particular conceptions of the good only within the confines of hegemonic conceptions of those institutions. These politico-moral facts are further consolidated as statements about actuality, moreover, whenever they are valorised within particularistic narratives such as Anglo-American law. To this end, legal discourse cements conceptions and misconceptions of social relations by naming them as politico-moral facts to which legal-rights should be attached. The failure of rights-discourse to consistently represent the reality of social relations in an accurate manner is secondary to its success in firmly locating the power to define the contours of society within the legal profession.

To leave the analysis at this point would be unfair because Dworkin does not envisage liberalism in a positivist vein as a political force that enframes reality in a totalising manner. Rather, Dworkin imagines a "super" form of legal subjectivity that can envision the law beyond law, one that guides "the impure, present law gradually transforming itself into its own purer ambition, haltingly to be sure, with slides as well as gains, never worked finally pure, but better in each generation than the last" (ibid.: 400). This subjectivity is the site of reflexivity, the *non-authorial authoriality* that can both exist within law and imagine that which lies beyond. More importantly, this is the type of subjectivity that, in theory at least, has the capacity to find the "one right answer" to questions about how law might justify its rulings on contentious social issues. The beyond to which the law of the law reaches is thus still *Law* in the strongest meaning of the term; it is a beyond that is capable of conclusively defining reality (ibid.: 409). Significantly, although Dworkin is clearly of left-ish liberal sympathies, his notion of the "beyond" of law still falls within the horizons of the patriarchal family, the capitalist market-place, and the chauvinistic nationalism of liberal Anglo-Americanism. That social context continues to provide a non-negotiable background against which the subjectivity of Dworkin's super-judge decides the right answer. In contrast to Hart, for whom the rules-conception of law defines the contours of his project, it is Dworkin's liberal politico-moral horizon that limits the scope of his reflexivity. Clearly, in common with the positivist and natural-law perspectives, this position must also prove inadequate for a multicultural conception of law. It self-consciously reduces the play of different emancipatory movements to the socio-political horizons of actually-existing liberal societies. A multicultural conception - as envisaged here - must suggest an alternative base for the *non-authorial authoriality* that underpins a multicultural conception of law, all the while holding to the potentially emancipatory vision of a culturally-neutral form of regulation.

In summary, the three main traditions within positive law fail to realise the self-reflexivity that they envisage in theory. For Hart, the site of that reflexivity is the legal official who can adopt the position of dispassionate linguistic-philosopher. For Finnis, it is the moral point of view of the observer who moves between the tenets of natural law and human law. For

Dworkin, finally, it is the supreme legal authority who can authoritatively consider the findings of sociological and historical analysis. Each of these positions, whilst forcefully developed and nuanced, ultimately remains firmly within a specific school of legal doctrine that stymies their ability to critically appraise their own basic assumptions. The overall result is an inability on the part of positive legal theory to provide the degree of self-reflexivity required for a fully multicultural conception of law.

2.4 Legal Pluralism

2.4.1 Locating legal pluralism

The theoretical field that I explore for alternative bases upon which to develop a multicultural conception of law is legal pluralism. In this section I want to briefly locate the origins of legal pluralism in a nineteenth-century opposition to the rise of European positive law (specifically, to the legislative codification of law and the diminished status of case law (Cotterrell 1992a: 25-37)). Friedrich Karl von Savigny was an influential German jurist who opposed the codification of law (as had happen in France in 1804) and is recognised as one of legal pluralism's founding figures. He foresaw the injurious effect that codification would have on the customary practices that constituted plebiscitary life. A codified law, he reasoned, would become a professionalised one that would increasingly become distanced from the social relations that it would purportedly represent (Savigny 1831).

Eugene Erhlich, a notable Austrian law professor, furthered this ire against the rise of positive law. His primary insight was that law actually relies upon customary practice for its authority (Erhlich 1936). Positive legal theory erroneously assumes that its authority is internal to legal doctrine and practice. Erhlich's argument can be read as an attempt to unsettle the cloistral isolation that positivism was providing for the legal profession. Moreover, he suggested that law would increasingly rely on coercion for its authority as its maxims departed from popular sentiment and the everyday patterns of normative ordering

(the *living law*). In turn, its social authority would diminish relative to the power that would have to be exercised. That power, moreover, would distort patterns of social interaction, slanting it towards prevailing political sentiments. Thus, this early form of legal pluralism reasoned, positive law had the potential to undermine the very sense of sociality over which it presided. In order to retain a sense of authority, conversely, legislators had to maintain some degree of coherence between dominant sensibilities and the content of law.

Erhlich's approach was subsequently criticised for its failure to adequately discriminate between the forms of normative ordering that constitute civil society. In this vein, Georges Gurvitch replaced Erhlich's unsystematic schema of *living law* with an elaborate typology that outlined differing regulatory modes and their roles and interactions (Gurvitch 1947). In this way he was able to offer more detailed descriptions of the interpenetrations of law and non-legal forms of social ordering.

Despite their differences, these projects all sought to unsettle the self-organising authority of an increasingly centralist, professionalised, and insular legal institution. In contemporary socio-legal theory this goal has continued under the guise of the *critical legal studies* movement (CLS). This highly diverse school of critique has moved through three broad phases (Goodrich *et.al.* 1994: 7-16) that have increasingly substituted the empiricism, realism, and doctrine of early CLS analysis with deconstruction, pluralism, and "a politics of contingency and a creed of (gregarious) uncertainty" (ibid.: 8-9). Furthermore, the site of critique has progressively moved from sociology to legal pedagogy, from a position outside law to one that is immanent to it.

The first phase was heavily influenced by Marxist social theory, at least within the European (and to a lesser extent, American) context (Hunt 1986). Within this phase, liberal legality was portrayed as a superstructural reflection of a social order that was determined by economic relations. As such, it acted as a vehicle for class domination by transmitting the interests of ruling groups (Sugarman 1983), demonstrated its intrinsic dysfunctionality for proletarian interests (Bankowski and Mungham 1976), and demonstrated its affiliation with

the capitalist classes through the professional links enjoyed between law schools, judiciary, and industrial corporations (Mathieson 1980). Broadly speaking, the goal of critical legal enquiry during this phase was to identify the structural determinants of law's functions. The central field of socio-legal enquiry thus became the specific content of law and the political goal of study was to place law at the disposal of popular movements by removing it from the control of the ruling classes. In the process, it was moreover anticipated, law would become other than a liberal bourgeois-legality and increasingly take the form of a non-hierarchical type of mediation. The end of law was in sight.

The structuralism of Levi-Strauss, Althusser, Poulantzas, and Pashukanis propelled the second wave of critical legal study away from a focus on the content of law and onto the form that legal relations take. Pashukanis' suggestion that legal (contractual) relations reflect the capitalist commodity-form both exemplified this approach and was highly influential within socio-legal study (Pashukanis 1978). The contractual form of legal relations, moreover, became pivotal in explaining the construction of subjectivity. All subjectivity was seen to resemble the legal form and this was explained in terms of the proliferation of contractualism throughout society. In a restrictive manner, therefore, law was seen to play a key role in the ideological and political restraint of the subject (Edelman 1979). Toward a more generic effect, also, law was held to entrap subjects in an imagined relationship with the material conditions of their existence (Althusser 1971).

Writers in this vein also turned their critiques on the putative objectivity of positive legal theory. Systems of legal classification, the legal institution, and its hierarchy of office-bearers became the principal targets for criticism (rather than the overarching concept of law, as had characterised the first phase of critical-legal incursion). Rather than replace law as an organising concept, therefore, this second wave began to reconstruct the concept of law as a useful site of political constestation. A pivotal move in this was the jettisoning of definitions of law that highlighted rules and normative order and their substitution with one - following Foucault (Foucault 1977) - that portrayed law as *power*. All legal actions and practices thereby came under the socio-legal microscope as possible strategies of domination and as

sources of disciplinary effect. Each movement, activity, and spoken word within law thus became a political event, as instantiations of an infinitely productive power. As such, the second wave succeeded in making law political "in a sense very close to the feminist representation of the personal as political" (ibid.: 12).

At the centre of the third wave of critical legal pluralism is a reconceptualisation of law's political terrain. The "mechanism of domination" is now the legal text and the "avenue of transmission" is the "law school, the casebook ... the judgements of law" (ibid.: 13). This shift in focus signals a new site for critical legal enquiry - legal pedagogy - and reflects a hiatus within left-wing social theory that hampers sustained contestation from positions that are exterior to law. The most immediate political option in the presence of that political hiatus is an "institutional radicalism" that has as its focus the rewriting of law in accordance with the images and fantasies that permeated - but lay unconscious within - the writing of foundational legal texts. Significantly, this approach is very circumspect about its prospects, being both "more pluralistic" and "more substantive" in its orientations (ibid.: 12). It imparts a doctrine of perpetual escape through its pluralistic desire for non-necessitarian thought while cautioning that the possibility of escape is a fallacy. This realisation drives critical legal enquiry to re-examine the basis of legal axioms and the foundations of obligation and justification. This coupling of interest in originary forces and a conscious estrangement from their performative effects constitutes "the distinguishing feature of the contemporary politics of critical legal scholarship" (ibid.: 13).

2.4.2 Mapping legal pluralism

My own method for mapping the contours of contemporary legal pluralism originates in an assumption that is associated with philosophical idealism, that human subjects lack unmediated access to the materiality within which they are embedded. Rather, language and sensory experience provide imprecise and fallible tools upon which subjects must rely for constructing representations of that materiality. In light of that assumption, the starting point

for my analysis is the categorisation of legal-pluralist discourses in terms of the epistemological perspectives that appear to inform them. A discussion of these assumptions would seem to logically precede discussions about what exists in actuality. Moreover, such a starting point enables me to distinguish between the range of elements that subjects might be capable of discovering and those that they could reasonably displace to the realm of the ineffable, to the domain of elements about which they must exercise intuitive faith rather than reason.

This approach contrasts with overviews of legal pluralism that focus on the nature of actually-existing, socio-legal orders. As such, it differs from notable legal-pluralist contributions such as those of John Griffiths (Griffiths 1986) and Sally Engle Merry (Merry 1988). Both of those describe the empirical condition of socio-legal plurality. Griffiths, to begin, differentiates between legal pluralism as an anthropological empirical- fact and as a political circumstance that developed as a consequence of the western colonisation of non-European peoples. Merry continues this approach by distinguishing between the political conditions associated with colonial rule and those that arise from politico-legal domination within first-world nation-states. Both mappings, to reiterate the point, are organised by questions about what constitutes the empirical condition of contemporary legal plurality.

In my account, questions about how legal pluralists construct knowledge of law (and its plurality) precede descriptions of existing socio-legal diversity. This order of inquiry is ever-more important where we are concerned about the future of the concept of law. The plasticity of concepts such as law and justice ensures that purely empiricist methodologies are inappropriate for the study of social institutions. Rather, inquiry into their usage requires an examination of the assumptions that are brought to bear about the development of knowledge. Law and justice cannot be conceived as static objects of inquiry because they are capable of altering through the process of examination. As such, questions about epistemology prefigure ontology in this thesis. Moreover, premature descriptions of "what is" threaten to reify descriptions of legal plurality into law-like statements on the nature and future of legality. My quest for theory about multicultural law thus begins with an

enunciation and evaluation of the epistemological bases upon which descriptions of legal plurality have been constructed. Through that process, I suggest, a non-determined conception of law might begin to emerge.

Three such positions dominate contemporary legal-pluralist discourse: *realism*, *post-modernism*, and *post-pragmatism*. Realist legal pluralism, to begin, is predicated upon the assumption that a stable materiality transcends human subjects' discursive activities. That materiality provides a basis for the belief that foundations exist upon which knowledge can be constructed. That knowledge, moreover, develops through the exercise of reason (rationality) and/or sense perception (experience). This permits the further assumption that language provides access to that materiality, both its physical dimensions (that which can be represented) and its non-rational dimensions (that which can be expressed). As such, realism assumes that linguistic signifiers have a determinable relationship to that which they signify. On that basis it is held that language can convey the essence of that which is represented or expressed. In this vein, for example, Kayleen Hazlehurst suggests that the core research programme of legal pluralism should be the pursuit of empirical knowledge about the nature of "community reintegration" (Hazlehurst 1995: xxi). This suggestion assumes that "social interaction" possesses a fixed set of characteristics that correspond in a direct way to the signifier of "community." The identification of these properties will, in turn, facilitate the discovery of the processes through which disintegrated communities can be reconstituted.

In keeping with my emphasis on the problem of perspective, I focus upon those forms of realist legal pluralism that problematise the issue of epistemology. In that vein, I examine discourses that have incorporated representations of the processes through which perspective is achieved into their scientific analyses of law. These, I suggest, are more appropriately called a *post-realist* form of legal pluralism because they question - though do not totally dismiss - the proposition that foundations exist upon which knowledge can be developed.

The second epistemological position that I consider is *post-modernism*. As might be self-evident, I use the term to denote a particular perspective toward the possibility of knowledge rather than as an historical epoch or form of aesthetic critique (as can be the case). Post-modern legal theory focuses on the linguistic practices employed within law to construct images of reality. In order to critique these practices, post-modern legal theory deconstructs assertions made within law, uncovers contradictions within legislation and adjudication, and exposes the instability of the grounds upon which legal conclusions have been justified. In addition, under the rubric of post-structuralist analysis, the relationship of deconstruction to justice has also become a central focus of post-modern legal scholarship. Variously it has been argued that deconstruction presupposes an ethical relationship with otherness, that deconstruction presupposes an insatiable desire for justice, and that deconstruction demonstrates the impossibility of constructive legal debate (Balkin 1996: 371-3).

The final epistemological position that I explore is pragmatism, particularly a variant that I term *post-pragmatism*. Given the novelty of this term, it warrants a more comprehensive description than I have given to the more conventional positions of post-realism and post-modernism. Pragmatism is basically a philosophy about the absence of foundations upon which justifications can be constructed. In order to justify the norms that are used for justifying decisions, the very norms are turned on themselves. As such, justification is always internal to the socio-cultural milieu within which the justification occurs. There can never be any foundations that are external to the system for evaluating the norms used to justify decisions.

Two perspectives emerge within pragmatism about the norms upon which the quest for justification should focus. According to the first, associated with the work of Richard Rorty (Rorty 1991), the norms are those that are in actual use. These have no foundations except that they constitute existing practices. For the Rortyan, these norms need no other grounds in order to be acceptable. Truth, in turn, becomes that which is adequately justified according to the standards that are expressed by norms that are in use. This is the form of

pragmatism that has dominated pragmatist legal pluralism (Warner 1996: 387). The second approach, associated with the philosophy of C.S. Peirce, suggests in an alternative manner that an ideal form of justificatory norm can be envisaged even though none presently exists. This assumption is predicated upon Peirce's belief that the results of human enquiry will ultimately converge on the truth about the nature of socio-biological existence (Hookway 1985:39). An ideal norm is simply a conjecture about the end results of that rational enquiry. In turn, what counts as truth at any one time is simply that which will presumably end up in the final theory.

Post-pragmatist legal pluralism draws from Peircean pragmatism. Peircean pragmatism provides legal pluralism with a means of theorising about the existence of a materiality that exists beyond prevailing beliefs, without committing the theorist to a rigid correspondence theory of truth about the relationship of knowledge to that materiality. It leaves the development of knowledge about that materiality open, allowing also, for changes to occur in materiality as a consequence of human intervention. In so doing, this move takes post-pragmatism very close to post-realism. In a different vein, post-pragmatism also shares much with post-modernism, especially its critique of foundationalism and the deconstructability of meaning. This facilitates its open-ended reflexivity. Unlike post-modernism, however, post-pragmatist legal pluralism challenges the totally open-ended and ephemeral type of pragmatism, especially where ephemerality becomes an overarching principle. It does so by inserting a sense of epistemological positioning (for example, of woman) that provides a platform for sustained explanatory analysis. In this regard it closely resembles theoretical positions such as feminist post-modernism. Whereas feminist post-modernism represents an attempt to invigorate feminist theory with post-modern insight, post-pragmatism represents an attempt to moderate the pragmatism of post-modernism with the stabilising effects of materialist insight. Post-pragmatism also shares other characteristics with post-modern legal theory and on that basis could be deemed a variant of it. In my reading, however, its distinguishing characteristic is its attempt to undermine the fluidity of post-modern pragmatism with a longer-term sense of pragmatic development. This accepts that the pragmatist pursuit of warranted assertability is a more reasonable position to take than the

quest for Truth but suggests that the criteria for determining the meaning of warranted assertability are obdurate, historical constructs. As such, the position recognises that meaning does not exist a priori, not even the meaning of meaning. Material reality does, however, in the banal terms that geo-biological forms have preceded social life and that socio-biology imposes limits on the extent to which subjects can reconstruct their lives by purely discursive means.[3]

It might be objected at this point that my classificatory approach to this discussion of legal pluralism reflects an outmoded conception of science. It appears to assume the existence of a fully-reflexive subject that can determine the truth of propositions by finding facts that correspond to them (for example, that there are three distinct kinds of legal pluralism ...). To begin, the approach does convey that impression. I suggest, however, that classificatory kinds are at the heart of all knowledge, even those forms that putatively go beyond epistemology to focus on the tactical strategies through which knowledge is constructed (Hacking 1993: 304). Knowledge cannot, therefore, be developed within this modernist phase without the aid of taxonomic distinctions. This is a latent message in Michel Foucault's study of the development of taxonomies in *The Order of Things* (Foucault 1970); classificatory systems are common to all modern systems of thought. The case of the fictional Chinese encyclopaedia with which Foucault begins his text exemplifies this. That tome classifies animals as "(a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera,* (m) having just broken the water pitcher, (n) that from a long way off look like flies" (ibid.: xv). The difficulty with Foucault's position on taxonomies is that it decisively separates the

[3] In a similar vein to post-pragmatism's undermining and expansion of pragmatism, post-realist legal pluralism both impairs and expands realism. Specifically, it alters the materialist presumption that individual subjects are transcended by overarching dimensions of society. Unlike the vulgar forms of realism that make grand assertions about what constitutes those dimensions - and that periodically prompts outbreaks of political correctness - post-realism counsels subjects to be cautious about their truth-claims. Subjects abilities to conclusively validate their assertions are very limited indeed. This is not recipe for ambivalence but, rather, a call for distinctions to be made between those truths for which it can reasonably be claimed that corresponding facts can be found and those truths whose existence rely foremost on non-rational, intuitive foundations.

practices involved in classification from the material reality that is classified, leading to an exclusive focus on the strategies used for constructing knowledge of the real. The propositions contained in the example that he cites perhaps gives the modern subject some credence for taking that view. The position fails, however, to accept that a relationship could exist between the world of categories in which subjects work and the material world upon which subjects' categories impinge (Hacking 1993: 306). This need not lead to a reductionist view on the construction of knowledge (whereby material relations are held to determine the forms and content of discourse) but, rather, that the relationship merely need not be totally undetermined. Moreover, it is possible that the extent to which the relationship between reality and knowledge of reality is determined or non-determined is never fully disclosed in the present and instead only becomes evident retrospective of subjects' interventions in the material world.

Classifications are the basic elements, moreover, of generalisations about the world that is physically inhabited. Foucault's genealogy of punishment illustrates the point (Foucault 1977). The generalised notion of power that underpins that particular analysis is, in point of fact, predicated upon a dichotomy between disciplinary and juridical power (dichotomies being the purest form of classification). Only on that basis can the generic conception of power emerge upon which the text turns. Even Foucault's more diffuse notion of *governmentality* does not alter this (Foucault 1991). His description of the *art of government* from which governmentality ostensibly evolved is characterised by a taxonomy of three principles that were intrinsic to the state's functioning: mercantilism, the judicial theory of contract, and the savoir of population and production of statistics (ibid.: 97-100). Moreover, the concept of governmentality does not simply replace his existent taxonomy of power (of sovereign and disciplinary power). It adds to it: "in reality one has a triangle, sovereignty - discipline - governmentality" (ibid.: 102).

Even the actions of those that seek to go beyond the use of classifications - exemplified in this thesis by the post-modern legal theorists - can only make sense when under the description of a kind (Hacking 1993: 306). Thus, the anti-science tenor that they exhibit can

only be comprehended when distinguished from the forms of science that they repudiate (most notably, modernist positivism). Again, their form can only be discerned with the aid of a taxonomic distinction that, itself, belongs to the modernist thought that it attempts to stand beyond. To this end, a working assumption in this thesis is that categories are an intrinsic aspect of modern intellectual architecture. This assumption compliments the argument that also runs through this thesis, that is its not self-evident (at this juncture) how law - as the practice of classification *par excellence* - might be "gone beyond."

A final point about this use of categories is that it must be undertaken reflexively. The generalisations to which categories give rise ought to facilitate open-ended reflection on the appropriateness and sufficiency of the very classifications themselves. This matter is particularly apposite for the social sciences where alterations in taxonomies do have the potential to change human behaviour. This is most evident, for example, in psychiatry where re-classifications of mental illness result in subjects mirroring the new distribution of labels (Hacking 1993: 303-4). For this reason I locate my classification of legal pluralism within naturalised evolutionary epistemology, it being an open-ended and fallibilist framework that attempts to facilitate reflection on itself. Thus, the emphasis on kinds, categories, and variants that characterises the initial sections of this thesis is not intended to portray a Parsonian conviction that the "correct" taxonomy will yield the "correct" generalisations. Rather, it represents the more limited presumption that the development of new knowledge and instruments for developing knowledge can only proceed upon the basis of categories-of-kind.

3

MAPPING THE DIVERSITY OF LEGAL PLURALISM

3.0 Introduction

My primary goal here is simply to attempt to categorise the considerable diversity that exists within the legal pluralist paradigm. As previewed in Chapter 2, I distinguish between three forms of legal pluralism: realism, post-modernism, and post-pragmatism. These labels are intended to highlight the role that epistemology plays in the pursuit of an open-ended, multicultural form of legal theory.

In the discussion that follows I employ three dimensions of social experience to explore these three forms of legal pluralism: *epistemology*, *ontology*, and *politics*. *Epistemology* refers to assumptions that can be held about the grounds (or lack thereof) upon which knowledge is constructed. *Ontology*, in turn, refers to assumptions about what can and does exist. Lastly, *politics* refers to projects that use these various assumptions to change aspects of the socio-legal environment.

3.1 Realist Legal Pluralism

Epistemological realism - the proposition that subjects can access and comprehend dimensions of reality that transcend their own senses - has played a major role in neo-Marxist and feminist socio-legal theory, particularly. Realism is a "natural" foundation for these approaches because it presupposes the existence of enduring social patterns and processes that transcend the language through which they are represented. That proposition, in turn, facilitates the development of general theories about law. Broadly speaking, these suggest

that the state's class and/or masculinist properties manifest as forms of law that suppress non-bourgeois and/or non-masculinist social relations.

Within the Marxist variant this idea takes a number of forms: a conspiracy theory that interprets legal ideologies - such as "equality," "liberty," and "fairness" - as mechanisms that dissemble the class-character of law; a theory that identifies the discriminatory nature of bourgeois legality (namely its limited democratic horizons and inability to realise the values of equality and fairness in practice); the pursuit of popular forms of legality that substitute law's preoccupation with rules with the quest for substantive justice; and aetological theories that link the form and incidence of crime with the nature of capitalist social relations (Hunt 1981, in Hunt 1993: 95-8).

A similar range of propositions and concerns is evident within feminist socio-legal theory: the ability of masculinist legal relations to parade as neutral and objective representations of society (MacKinnon 1987: 55); the depreciation of (feminine) contingency within legal decision-making (Olsen 1990: 209); the failure of law to consistently recognise the specificity of women's claims and the possibility that women may receive greater justice from non-legal remedies (Kerruish 1991: 200); and the absence of women-centred study on the aetiology and meaning of crime (Morris 1987: 9).

The Marxist conflation of bourgeois social relations with formal law has produced an important political effect; it has created ambivalence within socialism toward law as a site of struggle. The emphasis on deviancy that law entailed, according to some socialist positions, had no resonance within the central conceptual categories of Marxist theory (Hirst 1975: 204). The very concept of law, it seemed, had to be superseded within the socialist state. This position reached its highest pitch in the New Criminology of the 1970s, where-in disorder and moral relativism were celebrated in the name of a radical deviancy (emblematic of this are texts by Taylor *et.al.* 1973 and 1975). Struggles at the margins of "acceptable" society by groups such as drug-users, gypsies, and the ethnic-unemployed were heralded as symptoms of a potentially (though internally disconnected) counterhegemonic social movement. Deviancy was read as a calculated response by subjects to the brutalising social conditions of free-market capitalism. The deviant activities of the marginalised thus became synonymous

with calculated resistance - a move that undermined, moreover, the dehumanising connotations of positivist deviancy-theory. Aside from the valuable roles that the *New Criminology* played in the politicisation of deviancy and the unsettling of non-reflexive positivism, its attempt to found an indubitable explanation for deviancy amounted to another attempt to construct a generalised and totalising theory of human agency (Sumner 1994: 278-97).

This reliance upon totalising forms of explanation was repeated - to differing political effect - within the "Left Realism" that emerged from the radical-deviancy movement. Crime and deviancy became dimensions of society that should be taken seriously. Their impact was to be understood from the perspectives of those who bore a disproportionate level of victimisation: women, children, and the working-class. Simultaneously - and in the names of those victims - the following crimes of the powerful were politicised: corporate tax-evasion and insider-trading, environmental pollution, racist and Fascist behaviour, women- and child-abuse. In the process, categories of behaviour that had been accepted as ideological categories (such as "mugging") lost their controversial status and, moreover, that belied structural explanation (ibid.: 307). Further demonstrating the degree to which this perspective assumed the status of a self-evidently correct position, its adherents appeared to suppose that the British state would allow large tracts of its territory to come under the protectorate of an ill-defined, working-class policing-force (ibid.: 307). In practice, however, the thrust of Left Realism was less pluralistic than this. It tended to focus on the development of a multi-agency regulation of crime that functioned firmly within a liberal-democratic framework, informed by a working-class/feminist/ethnicity-based victimology (Matthews 1992: 39). Despite that moderation, the perspective conveyed the same sense of political correctness that accompanied the *New Criminology*: crime must be taken seriously. It is not simply a matrix of ideological categories through which the working class is controlled and must be controlled using the coercive power of the liberal-state if necessary.

Mirroring, though not reducible to these shifts within Marxist socio-legal theory, realist-feminism has also viewed institutional law as a key site of social struggle. Exemplifying this position were the "Ordinance Campaigns" - championed by Catherine MacKinnon's *unmodified* feminism in the 1980s - that sought to exclude pornography from the "freedom of

speech" provisions of the American Constitution. This position is realist in two senses (Cornell 1991: 128-9). First, it suggests that the gender hierarchy exists as an *a priori* reality that can be brought to women's awareness through its theoretical representation. Colloquially, and second, women must confront the reality of the hierarchy and stop portraying their lives to themselves in terms of a mythical gender-equality. Problematically, adherents to this position cannot explain how they have managed to escape the hegemony of the patriarchal perspective and to cleanse their own consciousness (ibid.: 141). Furthermore, they have been unable to explain this without insisting upon a politically-correct positioning and process for the purging. In summary, a significant difficulty that emerges from both the feminist and Marxist forms of realist socio-legal theory is their potential to become as legislative and formalist as the legalities that they seek to replace.

3.1.1 Realist epistemology

Another way to understand the realist political-projects outlined above is to identify the positions they take on what constitutes a valid representation of social relations and law. Three positions are evident. These draw, respectively, on rationalist, empiricist, and rationalist-empiricist perspectives. An understanding of the assumptions employed within realism on the construction of knowledge places us in a better position to comprehend the trajectories of its theories and political commitments.

The rationalist approach attempts to construct non-contradictory representations about law's relationship to various categories of social interaction. These representations rely on classifications of social relations (class, gender, and ethnicity, for example) and use these to build rational deductions about how law and social relations interpenetrate. This rationalism is evident in the apparently definitive descriptions that emerged from the radical deviancy and Left Realist movements about the interactions of "deviant" subgroups, victims, and law. Despite the differences between those various neo-Marxist approaches, they shared the common goal of developing authoritative and irrefutable representations about the evolution of legal power within the late-capitalist state.

In a less rationalist and more empiricist mode, realism also supports enquiry into the role of subjective experience in the construction of socio-legal knowledge. This approach has drawn on a non-representationalist assumption that the existence of transcending dimensions, such as classes, cannot be portrayed directly as if they possessed invariant properties. Rather, entities such as class can only be demonstrated in the effects of political actions that have assumed the existence of class-relations. This suggests that subjects consciously appropriate class-based epistemological standpoints for the purpose of furthering their class-related interests. Such standpoints are developed from realist theories about patterns of enduring social relationships that transcend the individual. The approach does not require exact (as in "true") knowledge about the nature of class relations. Rather, theoretical knowledge is only created retrospectively of political activity. At each point in time, therefore, the verity of such knowledge is always contingent upon the circumstances within which it arises. As such, it can only ever be an approximate guide for future action. Moreover, knowledge can never be cumulative in the sense that it contributes to understandings about the future of a social division (such as the gender hierarchy or capitalist relations). Rather, the historical contingency of each attempted subversion of social relationships ensures that intransitive social relations evolve in an undetermined manner (Cain 1986: 255-67).[1]

As presented, this approach appears to privilege human observation and experience, portraying it as an unproblematic source of knowledge. It thereby minimalises the distorting effect that hegemonic social interests have upon subjectivity and the manner in which subjects subsequently perceive their desires and social locations. In a subsequent corrective to this, discourse and social relations become reciprocally-constituted dimensions of society. In this vein Maureen Cain suggests that discourses

> have constitutive potency but not primacy over relationships. Relationships constitute but do not cause discursive practices. It is necessary instead to

[1] In Maureen Cain's account of popular justice, for example, the people's legality emerges as having no particular direction or predominant relationship with state-law (Cain 1985). Rather, its future forms are contingent upon the manner in which subjects use "class" and "justice" to pursue forms of justice that correspond to their class-related interests. Cain's general conclusion is that populist, collective forms of justice can benefit from alliances that they form with *professionalised legal agencies*, especially during their pre-figurative stages. Professionalised agencies are able to provide institutional legitimacy to working class legal movements, in addition to finance. Alliances with *incorporated* and *populist* forms of law are counselled against for many reasons, including their disavowal of justice-related issues and lack of ideological commitments.

> think of *reciprocal constitution* and partially independent potencies. (Cain 1994: 45, original emphasis)

This argument hinges on the possibility that subjects can construct "non-causal" forms of theory that can describe, if not explain to *some* degree, the "articulations between relationships and knowledge/discourse." The development of this type of theory is putatively blocked by a distinctly European matter, specifically the inability of the western mind to transcend the "dualistic conflict" that constitutes western images of agency/structure and determinism/freedom (Cain 1995: 35). The difficulty here is thus that the western subject cannot theorise in a non-deterministic manner how subjectivity and social relations interpenetrate (that is, consciousness and facticity). Tendentially, in this rendition of the problem at least, the answer lies within non-European subjectivity.

Something - though not all - of these sentiments are reflected in recent realist publications. These include Colin Sumner's analysis of the sociology of deviance (1994), Boaventura de Sousa Santos' construction of a post-modern (though materialist) legal pluralism (1987, 1992a), Mason Durie's proposal for an ethnically-based reformation of New Zealand/Aotearoa's legal constitution (Durie 1994), Anthony Woodiwiss' construction of a non-representational analysis of law (1992), and Alan Hunt's theory of law as a "constitutive mode of regulation" (1993). I shall return to the works of Santos and Hunt in Chapter 4, presenting them as an emblematic examples of these realist attempts to resolve the dualist oppositions that lie at the heart of explanatory socio-legal theory.

3.1.2 Realist ontology

Realist attempts to escape the dualistic oppositions within socio-legal theory draw upon *relational* forms of social theory. These suggests that society is primarily composed of social relations rather than individuals. The approach relies on the use of non-formalist forms of reason - from the exercise of intuition, to "considered evaluation," to "leaps of faith" - to ground the existence of a reality to which the concept of *relation* refers. This step

underscores the role of non-rational intellectual activity in the construction of realist-legal analyses.

More immediately, the concept of *social relation* refers to "persistent ways in which individuals and groups of individuals relate and are related to each other" (Kerruish 1991: 27). In this way, the social relation can be seen as an elemental aspect of human existence. Indeed, the very possibility of human action depends upon the existence of a relation that melds subjects' constructedness with their capacity to construct. Moreover, the existence of the relation promises the possibility of "systematic" and, therefore, comprehensive social theory (Hunt 1993: 8). Stated boldly, the approach draws on the ontological claim that "social being exists within social relations" (ibid.: 8).

The thrust of the approach becomes clear when contrasted with those perspectives that it is intended to replace: *methodological individualism*, *collectivism*, and *institutionalism*. *Methodological individualism* draws upon the apparently self-evident fact that individuals exist as flesh-and-blood entities. This common-sense assumption is erroneously expanded within positive law to suggest that societies are "aggregates of human individuals held together by bonds of will or reason" (Kerruish 1991: 28). Rather, individuals are constructed within constellations of social interaction that exist prior to individual consciousness. This problematises the extent to which it can be claimed that human beings are autonomous and free-willed. In a similar vein, the relational approach is juxtaposed to collectivism. *Collectivism*, in the eyes of relational-realists, erroneously suggests that society possesses an "of-itself reality" that subordinates the role of individual agency to structural requirements (ibid.: 28).

Together, methodological individualism and collectivism construct a dichotomy that produces rigid classificatory modes of theorising. They invite theorists to categorise sociality as either the effects of free-will or determinism. This process is reinforced in the *institutionalism* of theory, where-in agency-oriented or structuralist representations are valorised by key social institutions. Law repeatedly does this. It reifies methodological individualism into a cardinal organising concept that determines the shape of legal decisions. Against this, relational theory is most fecund when used to identify the formations of social relation that have historically

constituted particular socio-legal institutions and practices (Ryan (1982: 34), cited in Hunt 1993: 8).

The central organising principle within this relational approach is a dualistic conception of society. Society comprises both liberalism *and* collectivism, freedom *and* constraint, individual agency *and* social relations. In this vein, Kerruish suggests that "(s)ocial relations are not reducible to individuals, but then neither are individuals reducible to, in the sense of being fully determined by, social relations" (Kerruish 1991: 27). This proposition is clearly illustrated by Marx's notion that "(t)he individual *is the social being*" (Marx 1964: 8, cited in ibid.: 28). Individual subjectivity and social relatedness thus exist as "two sides of the same coin."

The most significant feature of this relational approach is that the *relation* takes on a metaphysical presence of its own; there emerges an ontological entity that is *the relation.* Kerruish alludes to this in the following way:

> So when ... we speak of a relation, there is a tendency to think of it as reducible to the two things which are related. To ascribe reality in the sense of independent being to the relation seems somehow rationalistic or perhaps idealistic. And that intuition may be confirmed by saying that the notion of social relations is what enables us to explain the social and individual in terms of each other without circularity. (ibid.: 28)

In this somewhat circumspect description the relation exists independently of the dimensions that are related. This is synonymous with the way in which micro-sociologists such as Herbert Blumer posit that the *joint action* coalesces the actions of two subjects in a way that is more than the sum of those actions (Blumer 1969: 63). The relation thus exists over and above that which is related. As an apparently independently-existing element of human ontology the relation thus warrants explanation. This is particularly so if the relation is to be the core dimension of theoretical explanation within realist legal pluralism.

My central point is that realism's capacity to name the nature of the relation is under question. This becomes an important issue where, for example, realist legal theorists attempt to name the material "force" (the relation) that consolidates emancipatory socio-legal orders in their struggles against state-power (Hunt 1993: 9). Increasingly, materialist-realists have found it difficult to maintain an *atomistic* conception of reality's material dimensions, whereby reality ultimately comprises distinct and discernible forms of matter (Jary and Jary 1995: 399). Rather, the *energistic* dimensions of materiality are increasingly privileged, leading to a conception of reality wherein fluidity becomes the dominating characteristic. The phenomenon of weather provides an illustrative analogy. Weather patterns comprise distinct elements - cyclones, tornadoes, and rain - reflecting the process of "naming" that accompanies the atomistic conception of materialist-realism. These patterns are not fully determinate, however, as the unpredictability of weather attests. Rather, their behaviour reflects a non-linear, chaotic, self-organising dynamic, highlighting the pertinence of the energistic flows through which they exist. In a similar vein, the profoundly more complex field of the mind might be conceived of as a complex field of non-reducible powers more than a comprehensible pattern of casually-connected elements (Bhaskar 1979: 103). Clearly, when realism takes this direction its ability to identify causal connections within a system diminish. Alternatively, the realist model begins to portray systems as non-linear phenomena that comprise limited patterns of causality, dominated by "irreversible and functionally-irreducible" dynamics (Hooker 1995: 2).

As a result of the above matters a pivotal question emerges within socio-legal explanation; to what extent do the historically-given names to the relational-dynamics through which socio-legal arrangements exist denote the presence of any discernible "thing"? This is an important question if an answer is to be found on how to combine liberty and equality - or "political rights" and "social rights" - within a liberal legal-political constitution (Hunt 1993: 10). In this vein, Hunt proposes that it is wrong to distinguish between liberty and equality as if they were diametrically opposed elements of human ontology. That stance is common within liberal and communitarian political projects. Rather, materiality supports a singular "proper scope" to which each of these two "appropriate and desirable forms of social ordering" can be subordinated (ibid.: 10). If this is so, then the "proper scope" (that being the visible effect of the relation that mediates liberty and equality) should be theorised. Only then can subjects find

or construct a way of telling when liberty or equality are deviating from the limits that can be supported by the materiality of socio-biological existence.

Two possible directions seem to be available for theorising the content of the relation. The first suggests that the concept of the relation stands for something (an irreducible complex of powers) that is totally undecidable. For all we know, this approach posits, the fluidity that characterises materiality might mean that *the relation* does not exist in a stable-enough form for it to stand for anything outside of language. Language, moreover, fills the gap that is revealed; concepts such as the relation become ruses for the absence of fixed meaning that is exposed by the energistic conception of materiality. These concepts can then only refer to themselves, rhetorically. This option, however, strains the realist who wishes to remain firmly connected with a materialist orientation that can give names to that which they study. It is more apposite to the post-pragmatist position reviewed later in this chapter.

The second approach suggests that the relation has a distinct form that exists separate from the signifiers that are attached to it. Moreover, the relation is a metaphysical element that exists independently of the social aspects that are conjoined (such as agency and structure, liberty and equality, social claims and legal rights). In order for a materialist analysis of the relation to succeed, the relation must be portrayed as having either intrinsic properties that allow it to remain a self-sufficient dimension of sociality or, alternatively, a relatedness to other metaphysical elements (Butchvarov 1995: 491). The former requires, in turn, that the properties be named and the relation reduced to the motion and needs of those properties. Alternatively, the latter suggests that the relation ought to be understood in terms of a further relation and that that subsequent relation, moreover, be explained in terms of another. Quite apparently, this creates a process of "infinite regress" within which a relation can only be understood in terms of how it is functional for another relation, which in turn can only be understood in terms of the function it plays for a further relation, and so on (ibid.: 491). The regress toward infinity can only be terminated where a "final" relation is attributed with intrinsic properties. At that point the relation, and the whole chain of relations, is explained in terms of those attributes. Recourses to the use of God or neural activity to ground such explanation are good examples of this. Typically, realist analyses combine functionalist and reductionist features to provide a suitably complex representation of their objects of enquiry.

Moreover, explanation cannot arise without recourse to functionalist or reductionist argument (McLennan 1996: 55-65).

Given the abstruse and abstract form that realism's explanations ultimately take, considerable room exists for discursive struggle over their content. As much is suggested in the observation that debate remains open about the validity of different modes of regulation (Hunt 1993: 11). Intrinsic to each mode will be a form of reasoning that portrays reality in a particular way. It is never self-evident what constitutes the most appropriate form of functionalist analysis or reductionist argument for validating the choice that is being made. Rather, what is at stake are the very criteria as to what constitutes valid argument. In the absence of conclusive proof about the best way to represent the materiality of reality it becomes impossible to determine absolute criteria about what will constitute "valid argument." Rather, such decisions will be partially based on reasoning that cannot be justified by recourse to formalist logic. It will always include some intuitive and non-rational aspects.

To summarise the discussion thus far, it is apparent that relationally-based theories within realist legal pluralism give the *relation* the status of a rudimentary ontological element. In order to escape the movement into a post-structural position (in which the relation becomes a linguistic signifier of an undecidable realm) realist legal pluralists must use functionalist and reductionist argument to give the relation a substantive content. Ultimately, choices about what constitute "valid" bases for such arguments are grounded within the contexts of prevailing human situations and purposes. In addition to the "logical" deductions that subjects construct about how to proceed within these contexts their evaluations draw upon non-formalist moves: "speculative judgements," "canny intuitions," and irrational "leaps of faith."

3.1.3 Political projects

The various political projects associated with the realist position jointly attempt to identify bases upon which forms of law can be developed. These lie within the domains of the democratic state, populism, broad counterhegemonic movements, and particularist interests.

Support for a law that can be championed by a radical-democratic state is particularly strong amongst legal-pluralists in post-totalitarian societies (in addition to the Left Realists discussed above). Representational politics and the construction of legally-embedded rights are attractive to this group for a number of reasons: the prospect of personal security for individuals and groups (Sethi 1992; Sachs 1992; Paoli 1992; Michalowski 1992); the ability for social movements to obtain legally enforceable rights to health, welfare, and education (Paoli 1992; Santos 1992b); the right to obtain legal and political representation in order to pursue purportedly illegal struggles (Santos 1992b); and the right to trial or mediation before peers, rather than professionalised and class-based jurists (Gundersen 1992; McDonald and Zatz 1992; and Zatz and McDonald 1993). In keeping with this, realist legal-pluralists attend closely to the degree to which legal rights reflect the social claims of the cultural communities that struggle for their creation. The vitality of this position, moreover, depends upon the extent to which communities possess the political freedom to agitate for alterations to the law.

In a similar but less centralist vein, the quest for a foundation of law is sought in populist views of sovereignty and justice. Manuel Parraguez's text on legal power within post-Pinochet Chile illustrates this approach (Parraguez 1992). The pathway to sovereign citizenship, for Parraguez, involves the devolution of legal power to localised sites (through an "institutionalisation of popular consensus" and the translation of individual grievances to collective issues). As a consequence, formal legality becomes subordinated to a "higher principle of legitimacy," that of "the community" as sovereign citizen acting through a localised lay-judiciary (ibid.: 233).

Valerie Kerruish, writing from the context of a post-colonial democracy (Australia), supports this search for a decentered conception of law (Kerruish 1991). Her support derives from pessimism about the extent to which formal legal rights are universally valuable. Legal rights are always an inaccurate representation of the relationships that people inhabit because they fail to recognise either the cultural values of their subjects or the unequal social relations with which those subjects must contend. Rather, the judiciary tends to portray social relations from the standpoint of the educated, middle-class male and society is thereby presented as an arena of equally-equipped contestants. In light of this, subjects ought to evaluate the extent to

which law can meet their needs before they ever engage in legal proceedings. Alternatively, this variant anticipates the development of a broad-based emancipatory standpoint that encompasses a number of congenial counterhegemonic positions, and from which a non-legal conception of regulation and dispute-resolution might emerge. It assumes, at the very least, that some basis exists in the nature of things for the development of an inclusive emancipatory standpoint. Clearly, that base cannot be in any one of the counterhegemonic positions (giving rise to the political correctness that is evident within Left Realism or feminism *unmodified*), nor within the liberal legality that the position challenges. As such, theorising about this form of counterhegemonic legality begins with a search for the dimensions of social life that might lead to an undetermined form of law. In the case of the realists reviewed here that dimension is *the relation*. My own preference - as indicated in the previous chapter - is to focus on a subjectivity that might convey such a form of law (*non-authorial authoriality*) and to use an open-ended form of evolutionary theory to suggest the conditions under which that subjectivity might variously emerge and wane.

3.1.4 Summary

In summary, the epistemological and ontological commitments of realist legal pluralism appear to be diverse when examined in detail. So too are its political aspirations. Alternatively, when a less microscopic view is taken realist legal pluralism becomes preoccupied with the quest for ontological grounds upon which reflexive epistemological positions can be constructed (such as subject positions - woman, working-class - that exist within the context of specific social relations). These positions are valued for their abilities to facilitate critical engagement with law. In terms of realism's subsequent political commitments, it is characterised by attempts to construct democratic politico-legal frameworks and to theorise the relationship between counterhegemonic social claims and legal rights. This, finally, leads to a qualified acceptance of liberal legality as an, albeit, imperfect guardian of democratic social relations.

3.2 Post-Modern Legal Pluralism

Post-modern legal pluralism repudiates the realist presumption that legality can be represented in any sufficient way. As outlined above, realist-legal discourse presumes that particularist identities (working-class, woman, etc.) provide authoritative epistemological-standpoints from which law can be analysed. Post-modern legal pluralists argue against this by deconstructing the ideas upon which epistemology is based, particularly those associated with foundationalism.

The deconstructive methodology of post-modern legal pluralism mitigates against the classification of its forms (as was possible with realist legal pluralism). In light of this, the following section explores a number of themes through which post-modern legal pluralists destabilise law (namely, anti-foundationalism, anti-contractarianism, and anti-representationalism). In addition, it examines the forms of ontology that these themes presuppose (of the Other, Power, Destiny, and Difference). Finally, it outlines the forms of politics to which these themes and ontology give rise (deconstruction and the creation of discursive space). My own view is that post-modern legal pluralism is politically conservative due to its interminable sense of fracturing and individualisation. That position becomes more evident in Chapters 5 and 6. At this stage my goal is to simply outline the dimensions of post-modern legal theory.

3.2.1 Critiques of legal foundationalism

The primary strategy through which post-modern legal pluralism disrupts legal discourse, and thus paves the way for alternative forms of legality, is by critiquing the foundationalist doctrine upon which orthodox law rests. Foundationalism is, broadly, the view that verifiable knowledge can be established when reality is observed from the "correct" epistemological positions. As per the above, these positions comprise a combination of corroborative experience and formalist reason (Blackburn 1994: 145) .

Post-modern critiques of legal foundationalism emanate from Derrida's critique of metaphysical grand narratives. For Derrida, the doctrine of metaphysics is a post-religious *white mythology* that gave rise to a secularised trinity of Law, Reason, and Man (cited in Carty 1990, Chapter 1). Christian concepts such as these were repeatedly used to underpin Enlightenment social theory, despite the general disavowal of Christian doctrine. Significantly, the appropriation of metaphysical thought constituted the *question of law* into a search for foundations; law was to be either "founded" by wilful action or "based" upon tradition and history (ibid.: 3).

The Enlightenment's repudiation of religious dogma suggested that laws must be founded in reason rather than based in doctrine. This created a contradiction, however, in that subjects (as the sovereign People) became both the source and target of law. Subsequent efforts to overcome this paradox, namely through searching for the *grundnorm* of law, have given way to disillusionment about the prospect of ever finding social or metaphysical origins that can specify how law ought to be conceptualised. This has led to the view that law cannot have any foundations outside an irreducible violence (Derrida 1990: 56-7).

The post-modern deconstruction of foundationalism also highlights the finitude of Man in his attempt to explain the modes of regulation that he constructs to order his existence. In this vein, Man's attempt to grasp his (presumed) immortality and universality becomes a futile exercise. His ability to explain his existence takes the form of a myth, as does his capacity to be rationally self-reflexive. This has not thwarted the pursuit of rational self-knowledge, however. In the process of pursing self-knowledge Man becomes a "project" in the "progression" towards comprehensive knowledge about existence (Fitzpatrick 1992a: 36).

In partial completion of that project, social relations have been "sacralized" within humanistic ideas about the existence of Humanity, Progress, Society, and Law (ibid.: 38). As such, a false sense of reality has been fabricated. Ironically, the links that Humanity, Progress, etc., once had with the sacred have long been effaced but without that religious backdrop these discourses can only refer back to themselves, rhetorically. The concept of the "idea" (of humanity, progress, etc.) can now be seen as a "myth not very heavily disguised" (ibid.: 39). Law, as one of the primary myths through which Man attempts to grasp his universality, traps

its subjects within rigid explanations and classifications of human existence. These legal categories belie, however, law's lack of intrinsic substance and turn law into "a metaphor for the sense of absence of direction" in this search for knowledge about Man's universality (ibid.: 6).

Post-modern legal discourse expresses its anti-foundationalism most cogently through critiques of the social contract. Contracts are a significant instrument within western culture for securing the interpretation of future circumstances and thus for fixing meaning in advance (Goodrich 1994: 120). Accordingly, alternative devices for interpreting reality such as rhetoric, imagery, metaphor, music, and poetry have been superseded by a rational and notarial linguistics. Now, following Rousseau, there exists a "linguistic contract at the basis of the occidental juridico-political tradition" where-in each element in the legal lexicon contracts to stand for a precise meaning (Goodrich 1990a: 58). The existence of this linguistic contract, moreover, binds subjects to rational discourse. In turn, law becomes the ultimate institutionalised medium through which messages about the form of the social relations can move. The initial role of post-modern legal pluralism is to deconstruct the terms under which subjects have been contracted; that is, the singular manner in which they are made to speak within law. Its second goal is to discover the forms of communicative contract that have been repressed, presenting these as keys to alternative forms of speech, knowledge, and law.

The questioning of law's linguistic (contractarian) base challenges the extent to which legal language represents reality in actuality. Each representation (legal or otherwise) is simply an image (fantasm) to which subjects become emotionally attached. Their attachments, in turn, create subjective habitations that become "judicial categories" or ways of knowing (Hachamovitch 1994: 43). The connection between judicial categories and fantasms is problematic, however, as it makes all knowledge fantastic. If so, judicial categories become no more than "virtual objects" that almost, but never quite, exist. The gap between what exists and what might exist becomes most evident where knowledge is transmitted in an authoritative manner (in processes of "institutional reproduction" such as court proceedings). An imaginary "as if" is used to bridge the void between reality and representation, that being an assumption that the world exists "as if" it were of a particular form. This obscuring of knowledge's foundations is "essential" for the construction of authoritative language and does

not represent the existence of "a confused or indeterminate reality". Rather, it is essential in the sense that it reconstitutes subjects' consciousness of the real as a consciousness of "the certainty of belief" (ibid.: 44). In turn, knowledge is subordinated to belief but, importantly, in a form that makes belief appear certain. Moreover, there can now only exist knowledge *that there is*, not of *what there is*. As a consequence, subjects' images no longer represent the world. Rather, they merely demonstrate its existence. The *process* of demonstrating that materiality exists in a particular way then becomes the "hinge" between "representation and ... feeling" (ibid.: 50).

In summary, the epistemological thrust of post-modern legal pluralism is to deconstruct the notion of foundationalism. This goal confronts the relationship of language to materiality, severing it by suggesting that materiality can never be sufficiently *known*, only experienced *via* the representations through which it is animated by subjects. This reliance upon representations undermines the possibility of discovering *a priori* foundations upon which law can be founded. Instead, subjects can only discover the linguistic strategies through which legalese portrays reality.

3.2.2 An anti-foundationalist ontology

A range of ontological themes pervade post-modern legal pluralism. These include *power*, *the Other*, *destiny*, and *difference*. To the extent that there is any commonality between the ideas, it is that their meanings are always indeterminate. A further shared characteristic is the assumption that a non-interpretative point exists from which deconstruction can proceed. Ironically, this is touted as a fallacy to which positivist discourse is erroneously prone.

Power is a central post-modern concept for explaining the construction of legal subjectivity. Peter Fitzpatrick, for example, suggests that western law inculcates a sense of responsibility within its subjects through the profusion of disciplinary powers that Foucault identified: schedules, timetables, observations, surveys, corrective actions (Fitzpatrick 1992a: 122-9). A conundrum within this is how subjects can be given responsibility for the exercise of this power without a simultaneous licence to abuse it. An answer lies in the forms that disciplinary

power takes and through which the self-responsible individual is constructed. That power is a normalising discipline that identifies the repressed Other (the savage, the feminine, and the mad) within the subject (ibid.: 130-4). The subject thus comes to police itself according to the categories of the repudiated Other, creating its own self-knowledge and self-regulation. In this way, power reaches the intra-psychic domains that are inaccessible to formal legality. Through this the subject learns to be responsible for their own behaviour. Moreover, at a societal level this form of power enables law to dispense with constant displays of punishment (and become a distinctly liberal form of legality).

Power is a meta-narrative that speaks of the "macro-structural space of culture" (Leonard 1995: 145). Despite its "meta" status, its conditions of possibility lie within the micro-spheres of sociality, within the diverse cultural spaces where power's heterogeneous forms function. The illimitable diversity of these disciplines suggest that *power* has no fixed form except when spoken of in terms of that which it negates - universalistic representations of reality. Thus, p*ower* only begins to develop meaning when it is defined in terms of an equally indefinable totality. As Stuart Hall further notes, forms of pluralism that take the concept of power as their organising principle are inevitably parasitic upon monistic meta-narratives and fail to erase the "essential" starting points given to them by materialist theories (Hall 1983: 65).

The notion of *the Other*, as a second central theme of post-modern legal theory, corresponds to an uncategorisable range of contingent circumstances that urges legal tradition to go beyond self-repetition and to incorporate that which has never before existed. In the forms encountered above, the Other represents marginalised life-styles. It is the oppressed voice whose call ought to be heeded and the disenfranchised defendant whose pleas for justice are without precedent and incapable of being repeated because of the particulars of its case. As such, this Other must be treated as unique and not subordinated to the dogma of legalese.

Subjects follow their *destiny* by pursuing the call of the Other,. The whole of the common-law tradition can be understood in the quasi-religious terms of the call of destiny, this being the "law of the contingent" (Goodrich *et.al.* 1994: 1). The pursuit of destiny consists of a "refusal to issue ... [any] ethical code" that would mirror an ethical command (for example, codified law and totalising meta-narrative (ibid.: 218)). This refusal, furthermore, incites

subjects to demolish existing ethical and legalistic codes and to begin a renaming of themselves and their experiences (Rice 1990: 63). The price of this strategy might be "catastrophe" if it goes badly but it is the "precondition" of existence, of destiny (Goodrich *et.al.* 1994: 219).

Moreover, those who follow destiny face perpetual exile from existing intellectual paradigms. Destiny must always remain beyond the policing practices of current knowledge and thus "unknown" (ibid.: 222). To name the dimensions of destiny would be to reduce it to the conceptual language in current use. Destiny thus represents a power that is beyond the reach of either cognition or perception. Despite its ineffability "we must follow it" (ibid.: 222). Only through yielding to destiny can subjects assuage the feeling that they *must* follow the call of the Other. That feeling of *I must* is, itself, destiny. Moreover, it is *justice*.

Through the pursuit of destiny subjects construct identities, but identities that are indeterminate and unknowable. This construction of identity, furthermore, entails the continual re-establishment of *difference* between self and Other. Identity thus relies upon the recognition of difference. Within the post-modern celebration of interminable plurality, however, differences ultimately become innumerable. In turn, where everything is understood in terms of difference, no criteria can exist for determining the significance of any particular difference. Worse still, failure to recognise difference can be used as both a weapon *against* legal subjects (in that their specificity is ignored) as can the recognition *of* difference (in that subjects are denied rights because they, ostensibly, do not fit the requisite criteria (Hutchinson 1991: 1554)). This paradox is the focus of post-modern attempts to discover differences in law that might make "all the difference" for legal subjects (Minow 1990: 373).

To this end Minow suggests that law is the field *par excellence* for observing the manner in which power and knowledge are combined for the purpose of passing judgement. Two tendencies dominate within this, as indicated immediately above: either everyone tends to be treated the same (the equality principle), or people are judged according to their differences. The former tends to obviate genuine (and significant) differences between people while the latter overlooks people's sameness and intrinsic humanity. Even where difference is respected, however, each attribution of difference draws upon an ostensibly universalisable,

normative standard. In the New Zealand context, for example, attempts to define Maori identity (for purposes of distributing resources under the auspices of the Treaty of Waitangi) successfully differentiate between the claims of different tribal groups (that were differentially affected through the process of colonisation). That process, however, does not so easily recognise those Maori who do not affiliate with tribal identity and instead adopt identities of "urban Maori" or "gang-members." As such, the concept of difference fails to escape the normalising power of equalisation; even where "difference" becomes a concept for constructing decisions, norms develop that differentiate between "legitimate" and "illegitimate" genres of difference.

For Minow the solution to this irony (in which difference relies upon normativity) lies in the revitalisation of rights-discourse through its amalgamation with the realist insight that subjects are relational beings. The latter suggests that legal rights are based upon normative standards that reflect social relations. Rather than analysing the development of standards in terms of society's enduring patterns of relational power, however, Minow centres her analysis on differences that exist between individual subjects. She thus concludes that a relational form of rights-discourse would encourage "more debate" and highlight "as *human choices* ... the way we treat people" (ibid.: 216, emphasis added). Progress will occur, it is implied, through the enlightenment of the judiciary rather than its radical reform. Within the new environment judges would adjudicate according to standards that, from their "enlightened" positions, seem most ethical or practical. The difference that was meant to make *the* difference cannot, in the end, specify what that difference ought to be (beyond the pursuit of enlightened pragmatism). The question as to what constitutes difference thus remains elusive.

3.2.3 Political projects

The fracturing of identity and social relations promotes a variety of political projects within post-modern legal discourse.[2] The following two arise out of the foregoing discussions and

[2] It must be noted that the identification of distinct post-modern political projects is an effect of my methodology rather than a "natural" aspect of post-modernism. Rather, the very notion of "project" is alien to post-modernism in a way that is not to the realist and post-pragmatist positions (for which materiality exists as a comprehensible reality against and with which subjects act). My goal here, however, is to simply elucidate some of the purposes to which post-modern discourse is put within legal theory.

are emblematic of legal post-modern politics: the deconstruction of contractualism and its (re)presentation in non-jurisprudential terms; and the deconstruction of gender as a classificatory tool.

Popular pursuits within post-modern legal theory have been the deconstruction of legal tradition and its (re)presentation of law in non-jurisprudential terms. Two forms of legal tradition, particularly, have been targeted: contractarianism and the privileging of judicial discourse. In *Languages of Law,* Peter Goodrich pursues the political implications of deconstruction through constructing an alternative reading of law (Goodrich 1990b). This uses semiotic analysis to construct an interpretative-methodology that is subsequently applied to the art. That application suggests an alternative means through which we might understand the construction of legal subjectivity and "do" law.

The target of this approach is primarily Rousseau's contractarianism with its practice of binding signifiers to signifieds for the purpose of ensuring that the future is consistent with the present. Coupled with an erasure of memory about the unequal social relations within which legal precedent has been constructed, law's fixation with traditional (contracted) meanings leads to a lifeless form of legality. It is a law that is unable to construct anything that it has not been given in tradition. The political goal of post-modern legal analysis is to subvert the meanings through which law previously contracted its future. In this vein Goodrich frequently multiplies the meaning of words (thus destabilising them), recapturing lost forms of usage and re-interpreting legality in light of these. Moreover, the poetic and artistic frameworks through which Goodrich interprets the concept of law subverts further the linguistic representationalism to which jurisprudence has been historically bound.

The destabilisation of legal meaning and the construction of alternative forms of jurisprudential discourse also targets the legitimacy of judges; that is, those whose discourse ("storytelling") is privileged above that of other legal participants (Douzinas *et.al.* 1991: 110). For Douzinas *et.al.*, the goal of orthodox juridical analysis is the construction of unity out of a fragmented legality (following Derrida, to create "logonomocentrism" (ibid.: 147)). The ability to do so relies on the existence of settled epistemological positions from which juridical

interpretations can be made (a legal hermeneutics), and a structural semiotics through which meaning can putatively represent reality in an accurate manner.

Against this it is argued that no subjective positions exist through which law can be definitively interpreted. Furthermore, representational narratives are built on rhetorical tropes rather than real structure. "Irony" exposes the ambiguity of legal pronouncements and keeps the "storytellers [judges] on the move" (ibid.: 149). Exemplifying this, the text concludes with a novel (about a dispute over intellectual property rights) in which legal categories are conflated and confused through exploiting their semiotic excesses. The authors' intention is to both suspend and reinforce readers' expectations of what legal texts ought to be, asking "whether reading, writing and speaking about law can be undertaken differently" (ibid.: 200). As such it breaks with the contractarian traditions of legal convention and "hints" at possible forms of life "in the law and beyond" (ibid.: 200).

The nature of these forms, however, is far from clear. Consequently, the project simply identifies the existence of difference and suggests means through which further difference might be generated (that is, through the destabilisation of meaning). No particular differences are privileged and the project disavows any intention to provide grounds for adjudicating between dissimilar positions. As such, its primary political goal is to unsettle the classificatory systems upon which orthodox jurisprudence has historically rested in order to create discursive space for the development of (unknown) alternatives.

Christopher Norris challenges the type of approach taken by Goodrich and Douzinas *et.al.* in their deconstruction of legal semiotics, particularly the assumption that legal discourse is dominated by rhetoric (Norris 1988). For Norris that approach merely reverses the logic/rhetoric dichotomy, substituting one form of interpretative law (that legal text is to be read as rational language) with another (that legal text is to be read as a rhetorical, self-refuting, foundationless language). The ultimate effect of this reversal is the political disempowerment of theory. Socio-legal theories, rather, should engage legal discourse in terms the classical *trivium*: logic, grammar, and rhetoric (ibid.: 177). This genre of theory gives rise to "close readings" of texts that prompt a constant resistance to self-closure (to "theory"). Only in this way can subjects effect "any change in the currently prevailing

discourse of authority and power" and prevent law's collapse into an arbitrary pragmatism (ibid.: 186).

In addition to deconstructing law's unitary image, post-modern legal feminism questions the utility of law for women. Thus, it variously exposes law's gender-biases (Olsen 1984, Dalton 1991, Rhode 1990), the fractured nature of law's own "gender" (Mossman 1991), and undermines the functionality of legal rights for women (Smart 1989, 1990; Olsen 1984).

Two forms of politics are envisioned within such projects, each evaluating the effects of law upon women differently. First, law is potentially a social good whose gender-blindness can be overcome through the appropriate enlightenment of judges or the perpetual deconstruction of gendered legal discourse. It reflects Minow's position encountered above. Legal decision-making, in this vein, is represented as using both rational (male) and effectual (female) processes. Fields that are "personalised and contextualised" such as family and trust law - and thus characterised by high degrees of subjective opinion - are accorded lower status than fields within which discretionary elements are obscured (Olsen 1990: 209). The value of post-modernist legal feminism becomes its capacity to identify both rational and non-rational processes within law, and moreover, critique the strategies through which formalist law undermines feminist insight (such as feminist critique of the private/public dichotomy). Suitably reconstituted, law can become a vehicle for both feminine and masculine interests because law's gender is already fractured. The manner in which law might be reconstituted is obscure, however. As a generalised statement, this approach supports the "trashing" of law (to use critical legal studies argot) but not its abortion. In turn, it ultimately shares much in common with the realist position and represents a less strident form of post-modern legal theory.

Contrary to the preceding analysis, it is also suggested that legal decision-making is essentially iatrogenic for women (or "juridogenic" as Carol Smart terms it (1989: 161)); legal interventions cause as many problems as they resolve. A good example of this is the manner in which legal rights have usefully heightened the individual rights of women but unintentionally increased their surveillance. The source of this problem lies in the "androcentric" nature of law (ibid.: 160). Women who wish to use law must necessarily enter

its masculinist and regulatory culture. The degree to which women might succeed in altering law's masculinist underpinnings is never clear as such reforms are ultimately administered by personnel who are not necessarily committed to the androgynous ideals of post-modern-feminist legal reform. Aside from this matter, however, the utilisation of law for feminist ends necessarily enhances law's status as a privileged site of social order. The most destructive aspect of law's regulatory power is its ability to police non-legal discourses. Through that policing activity law moves beyond the status of being one discourse among many to that of a paramount discursive formation. Given this situation, feminism must attend to the use of law closely. Smart suggests that most feminist legal analyses simply react to aspects of law or use law to remedy sexist injustice (ibid.: 163). Post-modern legal feminism, however, must construct responses that reflect the "refracted" (contradictory) nature of law (ibid.: 164). Specifically, post-modern legal feminists ought to exploit the contradictions that enable alternative explanations of legal conflicts to emerge (for example, over what constitutes rape). Moreso, however, they ought to explore non-legal strategies for constructing legal discourse (such as campaigning for the desexualisation of gender and the eroticisation of equal social relations (rather than sex) - also see Olsen (1984)). Decisions about strategy need to be weighed carefully and law ought not to be the automatic choice given its instinctive policing of differently-positioned discourses.

From the perspective of post-modern legal pluralism, the non-legal strategies that are advocated (for constructing alternative legal discourse) should defy description in order to avoid their own reification into forms of regulation. Feminist socio-legal projects can - like all other emancipatory projects - easily become vehicles for policing the interests of differently-positioned women (Rice 1990: 63). The deconstruction of feminism should, itself, lead to the recognition of significant and legitimate differences between women. To a large extent, however, this emphasis on difference mitigates against the creation of grounds upon which women's common interests might be represented. Such attempts would require particular identities to be singled out as representative of others. The post-modern flight from epistemological privilege counsels against this, however, in the belief that privileging leads to power. As such, post-modern legal theory remains characterised by a deconstructive politics that destabilises the meanings upon which political identities can be forged. Moreover, it barely hints at possible directions for reconstruction.

3.2.4 Summary

Post-modern legal pluralism is characterised by a deconstruction of the grounds upon which epistemology and political identity are founded. Its goal is to destabilise the legal discourse upon which jurisprudential tradition has existed. This deconstruction, it is hoped, will create discursive space within which alternative legalities can arise. These can remain no more than imaginary horizons, however, as their institutionalisation would once again result in repressive forms of law. The post-modern legal project is thus an open-ended one, a politics of the "unfinished" (as Thomas Mathieson anticipated it (Mathieson 1980)) in which the future should only be hinted at and never categorically specified.

3.3 Post-Pragmatist Legal Pluralism

The third form of legal pluralism considered in this thesis is what I have labelled post-pragmatism. Post-pragmatist legal pluralists deconstruct law using *non-essentialist epistemological positions*. This deconstructive action mirrors post-modern concerns about law's lack of foundations. Alternatively, its use of epistemological positions reflects a modernist insight into their necessity for the construction of progressive political activity. Moreover, without political activity it would be impossible to develop interpretative positions from which to identify the significance of dissimilar systems of law.

Ontologically, the deconstructive move supports the idea that reality is decentered and that subjectivity is fractured. Post-pragmatist legal discourses moderate the processes of decentering and fracturing by suggesting (in a realist manner) that relatively stable categories of being, such as class and gender, do exist independently of the immediate uses to which language is put. Two forms of post-pragmatist legal project are considered with respect to this, the deconstruction of gender as a legal category and the reconstitution of sovereignty.

3.3.1 Epistemological constructivism

A significant characteristic of post-pragmatist legal pluralism is its resurrection of epistemology. Whereas post-modern legal theory attempts to abandon and undercut epistemology by adopting a more indeterminate deconstructionist approach, post-pragmatist legal pluralism reincorporates epistemology in order to stabilise political identities within the labile environment of post-structuralist politics. This development does not reflect a total disavowal of post-structural constructivism, however. Post-pragmatist legal discourses remain committed to the post-structuralist repudiation of a fully self-reflexive subjectivity and of Platonism. To the extent that Platonist notions of reality are incorporated, the explanatory theories to which they give rise are portrayed as conjectures that supply partial insight rather than veritable representations.

The amalgamation of constructivism and epistemological standpoint is captured in Niklas Luhmann's notion of "epistemological constructivism" (Luhmann, cited in Cornell 1992: 84); there can be no direct access to dimensions of the "real" except our awareness of the *difference* that exists between that which putatively *is* and that which it is not. "The difference that makes a difference", Drucilla Cornell suggests "is precisely that the status given to difference does matter" (ibid.: 84). A pivotal issue emerges from this; it assumes the existence of a position from which it can be seen that "difference does matter." This returns the post-pragmatist to questions about the identity of those that observe this phenomenon, to epistemological questions about the subject-positions from which knowledge can be constructed.

The amalgamation of constructivism and epistemological standpoint occurs through two moves. The first is a doctrine of non-foundationalism that creates a discursive space for constructing non-essentialist epistemological positions. Second, concepts such as revolutionary subjectivity," "subject of justice," "principled idealism," and "positionality" are created for sustaining open-ended political identities.

The construction of "epistemological constructivism" is predicated on a view that deconstructive methodologies need not repudiate foundationalism in its totality but, rather,

can inhabit positions through which they are simply not *for* it (Hutchinson 1991: 1562). As such, they can be *non*-foundationalist rather than *anti*-foundationalist. The difference is more than pedantic. The position of "not being for" foundationalism allows subjects to retain access to foundations, albeit reluctantly.[3] Essentialist foundations then become legacies that resist abandonment. Nevertheless, they should be escaped from and each speech-act promises to create something that is not quite "what-was."

Subsequent to the creation of discursive space around the idea of foundationalism, post-pragmatist legal pluralism reinstates and then destabilises the notion of epistemological identity. Foremost, identity is embraced by privileging experience as the basis of knowledge. This does not reinstate experience as a metaphysical foundation, however, because there is "simply no method that can validate the knowledge of any individual or collective experience" (ibid.: 1562). To valorise identity would be tantamount to valorising truth and both moves are untenable. Rather, the validation of experience recognises the political significance of selfhood and its fundamental role within deconstructive enquiry.

In the absence of metaphysical grounding, non-foundationalist legal pluralists view law, tradition, and theory as resources to be drawn upon for resolving difficult issues; they are not the source of answers (Hutchinson 1991: 1563). Answers, rather, emerge from the actions of politically committed subjects. Their commitments are contingent, unstable, and they coalesce around epistemological standpoints that are constructed and not found.

Post-pragmatist legal discourse grounds the notion of epistemological constructivism within identity through a range of concepts including "revolutionary subjectivity" (Milovanovic 1992), "subject of justice" (Leonard 1995), "principled idealism" (Carlen 1992), and "positionality" (Bartlett 1990). Dragon Milovanovic's idea of *revolutionary subjectivity*, for example, is built upon a deconstructive analysis of legal semiotics that attempts to provide subjects with non-determined positionings that reflect their contemporary social contexts (Milovanovic 1992). It is presented as a replacement discourse for modernist legal discourse,

[3] In contrast to non-foundationalism, pro-foundationalism celebrates the quest for absolute beginnings and of incorruptible methodologies. In a less extreme form, however, pro-foundationalism may suggest that agreement exists on assumptions that are generally recognised as being aporia, but which may be increasingly validated through incremental developments in understanding.

based upon the creation of "orderly disorder" (diversity within unity) and the psycho-biological analysis of subjective desire (ibid.: 236). According to that account subjects become revolutionised through their exposure to subaltern discourses whose words are multi-accentual and ambiguous. These signifiers, moreover, "resonate" with the interests of divergent groups and the emphases of diverse discursive formations (ibid.: 258). As a consequence, subjects have a profusion of alternative discourses within which to "momentarily" locate themselves for the purpose of furthering their "revolutionary" actions (and whose incoherence, moreover, precludes the "premature closure" of political standpoint and understanding (ibid.: 258)). These choices then offer numerous pathways through which subjects can express "desire ... in ever creative ways" (ibid.: 258).

The implications of these matters for law is that legal texts must become capable of "entertaining" truth claims without reifying them (ibid.: 257). Moreover, pressure must come upon dominant legal discourses to provide space for marginal discourses and for mediators within conflicts to recognise the peculiarities of differently positioned interpretations of the events in question. As a consequence of these changes the revolutionised subject would be provided with an array of validated legal discourses within which they can create temporary standpoints for the purpose of pursuing their interests in law.

3.3.2 The ontology of epistemological constructivism

A problem facing post-pragmatists is that the very notion of ontology must be repudiated without the act of repudiation, in a sense, occurring. The basis of this enigmatic move is the need to erase any notion of a foundational essence to human existence. All sense of such "being" must be abjured, however, through a move that does not, itself, presume the existence of an *a priori* interpretative position through which that move is formulated and, thereby, legitimated (as that, too, would signify the existence of a foundational form of being). Primarily, this is undertaken by imbuing the very language through which the interpretative position is stated with an irreducible sense of presence (particularly, as above, a sense of *difference* that forces the categorisation of things independently of human intention).

Any interpretative position (of woman, man, worker, etc.) is thereby absolved of the need to convey epistemological presence or agency.

The most significant move in post-pragmatism is its attempt to avoid both the undifferentiated sense of *difference* that emerges from this privileging of language and the sense of existential nothingness that arises from the total severance of representation and reality that accompanies thorough-going deconstruction. Its use of positions such as *non-foundationalism* signify the possibility that new lexicons can be constructed for imbuing social and political practices with varying degrees of value. They disarm existentialist-silence of its power by replacing the absence of conclusive knowledge with concepts that, while incapable of defining their own form, do act as vehicles for sustaining discourse while new meaning is generated.

The pragmatism that underpins this approach will now, I trust, become readily apparent. The obstruse nature of the materiality that underpins discourse means that decisions about how to address oppressive political practices can only be formulated according to understandings reached by those who wish to affect those practices. These communities are post-pragmatist rather than simply pragmatist in the sense that they define practices such as racism and sexism against a historical backdrop of political domination that has accrued identifiable material forms. This contrasts with representations that portray such practices as discursive constructions that can be "talked away" if politically expedient. This puts historical patterns of "power and subordination" firmly on the agenda of these communities and moves them away from merely being collectivities that define their realities according to what is in their prevailing interest (Hutchinson 1991: 1558).

To summarise this discussion on ontology, post-pragmatism is constructed upon euphemisms for the absence of corroborative knowledge. At worst, these euphemisms might be little more than strategies that subjects are forced to use for shielding them from the tyranny of the existential silence that may lie beyond "the text." More optimistically, however, they keep alive the hope that subjects can construct standards for evaluating differences between them that will not calcify into new sources of oppression.

3.3.3 Political projects

The political projects associated with post-pragmatist legal pluralism are characterised by a pursuit of egalitarian access to social resources. This contrasts with the political projects of post-modern legal pluralism, whose primary goal appears to be the interruption of any aspects of legal culture that stabilise meaning. In this modernist pursuit of egalitarianism the post-pragmatist project selectively resurrects essentialist categories as a basis upon which to form open-ended identities within which subjects can act. This is evident within two fields: the deconstruction of gender as a legal category and the envisaging of a new, Derridean choreography of sexual difference, and the reconceptualisation of legal sovereignty in terms of a divisible form of citizenship.

The deconstruction of gender is, for post-pragmatists such as Mary Joe Frug, essential for the creation of the social equality envisioned within liberalism. "Only when sex means more than male or female, only when the word 'woman' cannot be coherently understood, will oppression by sex be fatally undermined" (Frug 1992: 153). Ironically, as discussed above, the eradication of the gender hierarchy requires a certain commitment to essentialism. Notwithstanding this, it is evident that the constant goal of feminist legal pluralism is to create alternative sources of subjectivity for women to create identities that subjects possess beyond their sex. Only then can women hope for equality with men.

A pivotal issue within this approach concerns the extent to which subjectivities that constitute "women" can naturally coalesce into a political community that is capable of eradicating gender. Frug concludes that the asking of this question demonstrates a failure to appreciate that politics involves the process of adopting discursive positions for the purpose of subverting discursive formations. To this end, women need to unite within the category of "woman" during this historical phase in order to collectively challenge the manner in which *male/female* are presently manufactured as "natural" social categories (ibid.: 131). Women thus need to gain control over the use of the word "woman" and struggle against the means through which its meaning is created.

The agents for change are "out-groups" (feminist lawyers, women's movement groups, feminist penal reformers) who have analysed their own circumstances and who are embarking upon their own emancipation (Hutchinson 1991: 1564). Propelling these groups are members' explorations of their own differences and similarities. This process is integral to post-pragmatist politics because the incoherence of personal subjectivity, let alone personal relationships, perpetually threatens to dissolve any sense of shared identity. One source of similarity between feminist of diverse persuasion might be their collective vision of an androgynous society (Frug 1992: 151-3). Another might be a more open-ended search for similarity, beginning with the extension of women's own "limited perspectives" through the exploration of commonalties with those from other subject-positions (Bartlett 1990: 391). It is unclear to what extent either of these projects can embrace other perspectives before their feminist origins lose their particularist specificity. It is even more unclear what such projects might "be" during their transitional phases (as they move beyond their particularist origins) or whether those origins will remain obdurate discourses that resist their own redundancy. The very lexicons needed to comprehend such periods do not yet exist.

The attempt to reconstruct the concept of *sovereignty* also exemplifies the post-pragmatist use of orthodox subject-positions to construct non-determined forms of social relation (Yeatman 1995). It is predicated upon the assumption that the pursuit of separatism by subcultures reflects the same destructive "sovereign selfhood" that underpinned the subordination of indigenous peoples by colonising nations (ibid.: 197; refer also to Tully (1995) and Welsch (1995) for this form of argument). Any forms of sovereignty that are solely based upon notions of coherent selfhood necessarily subordinate that self's Other. In order to avoid this outcome, discourses on sovereignty need to assume that selfhood is multifaceted (being constructed by a diversity of relations) and that the political institutions that represent these fractured subjectivities must reflect the polycentred nature of selfhood. This recognises that a purely relational view of subjectivity robs the self of integrity. Instead, the self must also be understood as having a "room of its own" (ibid.: 198) and a capacity for sovereign selfhood. The bases upon which this selfhood could be constructed are its challenges to the hegemonic forces through which selfhood is defined. In this way, subjectivity includes both a decentered component and a more coherent "room of one's own" that is built out of struggles with dominant discourses.

Subjects who claim these multiple selves disturb the classical notion of indivisible subjectivity. Indivisible subjectivity (as exemplified in the identity of "citizen") has been the traditional basis through which the state has recognised its subjects and conferred on them both protection and subjugation. This foundation has progressively been destabilised through a form of political activism that facilitated universal-suffrage and now provides a platform upon which citizens refuse to cede their full sovereignty to the state. This empowers a new conception of politics and law that is based on a notion of *divisible sovereign selfhood*. Moreover, it appears to anticipate intensified competition for subjects' allegiances between differently-positioned politico-legal institutions (such as between national and international organisations), increasing those subjects' choice about how to define their citizenship. Like the example above of feminist legal pluralism it is unclear what will succeed "citizenship" as the project's organising principle if the project is successful in moving beyond its particularist, liberal origin. Indeed, it is not self-evident how the project might escape the policing effects of its particularist beginnings, namely the political power of the nation-state.

3.4 Conclusion

In addition to highlighting the diversity of perspectives that exist within contemporary legal pluralism (on issues of epistemology, ontology, and politics) this chapter prefigures a central theme of this thesis; the epistemological positions through which human subjects perceive social relations influence their conceptions of law. The process of discriminating between epistemological positions - achieved above - has isolated the assumptions that might contribute to the construction of an open-ended and multicultural conception of law. From the realist and post-pragmatist legal pluralisms, in particular, it is evident that human subjects face significant difficulties in establishing grounds for their judgements. Even the attempt to represent how subjects might gain perspective is deconstructible. Despite this, neither suggest that it is advisable to refute the development of such grounds - as the post-modern legal theorists appear to counsel - but suggest that the development of law should be predicated upon knowledge about the limitations of human epistemic ability. This assumption, I shall be

suggesting with increased vigour, must underpin any theory of law that foresees a form of legality that can both conserve meaning and remain open to counterhegemonic possibility.

4

POST-REALIST LEGAL PLURALISM

4.0 Introduction

This chapter is the first in a series of three that explore post-realist, post-modern, and pragmatist forms of legal pluralism in greater detail. As signalled in my previous chapter, each will be interrogated by three questions: "what identity is given to law?"; "what forms of legal subjectivity emerge from each analysis?"; and "what possibilities do each suggest for a multicultural conception of law?"

As indicated from the above, my focus here is on *post*-realist legal pluralism, not realist legal pluralism *per se*. This emphasis reflects my overall goal of exploring the effect that different epistemological perspectives have on the construction of legal-pluralist theory. Some "vulgar" forms of realism might be taken to oppose any kind of pluralism both in theory and practice. The post-realists that I am interested in, conversely, embrace a certain degree of pluralism and also problematise the issue of how subjects gain perspective on that pluralism. In this vein they question the assumption associated with "direct-realism," that subjects can obtain some degree of unmediated access to the realities within which they are embedded. Theorists such as Cain, Hunt, Kerruish, and Santos, for example, are sensitive to the nuances that arise from differing assumptions about human perception and rationality. Alternatively, questions about epistemology and the construction of knowledge are not such an issue for the more realist legal-pluralists. Kayleen Hazlehurst, for example, conveys the impression that the only - or most immediate - issue in socio-legal analysis is the description of how legal orders interpenetrate (Hazlehurst 1995: xxi). This effectively silences questions about the effect that different epistemological positions have on the construction of knowledge about that interpenetration.

It may be worth stating at this point that whilst I am receptive to legal pluralism in general, and to reflexive epistemologies too, my overtures towards post-realism should not be read as a precursor to a post-structuralist analysis of legal plurality (in which epistemology is problematised out of existence and law is reduced to an ephemeral play of linguistic tropes). As will become apparent (particularly in Chapter 6) I ground my analysis of legal pluralism firmly within a variant of realism. That realism focuses directly on the issue of epistemology, theorising it as an evolving dimension of the human socio-biological condition.

Three themes run through my analysis of post-realist legal pluralism, relating to law, legal subjectivity, and the possibility of a multicultural conception of law. The first is that the post-realist legal pluralism of the 1990s is characterised by a retrieval of explanatory theory (notably, Marxist theory). During the 1980s the quest for structural explanation had been substituted with an interest in the discursive processes through which legal regulation is constructed. This reflected the impact of post-modern critique, with its emphasis on questions about how subjects are given perspective. The explanatory theory that has re-emerged during the 1990s relocates law within a diffuse materiality. The post-realist picture of law that emerges is one in which knowledge about legal relations cannot be separated from reflection on the construction of socio-legal theory. As such, interest in the epistemological grounding of legal theory has become integral to the realist construction of the concept of law. Moreover, explanatory theory has become a vehicle for expressing ethical concerns about the class, gender, and ethnic interests that are implicated in law. Non-rational and moral commitments thus become a central component of post-realist legal pluralism. This undermines the rationalist assumptions found in scientistic forms of realism.

A second theme that develops in this chapter is that post-realist legal pluralism promotes an autonomous form of legal subjectivity. Its subjects are dominated by a sense of individual, self-sufficient responsibility. That sense is imperative in order for those subjects to participate "freely" in the discursive processes through which legality apparently develops. Importantly, the existence of that autonomy cannot be explained, it can only be assumed.

Finally, post-realist discourse is optimistic about the possibility of a multicultural conception of law. Procedural and communitarian forms of law have the potential to meld and create new multiculturalist modes of legality. The justice that is anticipated from these new forms of law frequently fails to materialise, however. As a consequence, law and justice are theorised as ontologically distinct dimensions of sociality. Moreover, the realm of justice lies within subjects' senses of what is right, within their subjectivity.

Two brief comments about my method in this chapter need to precede my discussion. First, I focus on the work of only two post-realist theorists: Alan Hunt and Boaventura de Sousa Santos. I do so in preference to exploring a diversity of contributors. Sustained exegesis of exemplary writers such as Hunt and Santos, I suggest, might achieve more insight into the substantive developments within post-realism than a wide-ranging, less immersed consideration of several contributions. This approach will also be taken in subsequent chapters. Second, the theorists have been chosen due to the manner in which their works encompass the major issues and debates within post-realism, as I perceive them. As signalled above, these include the role of theory in the development of representations of law, the role of legal and other subjectivities in the development of those images, and the relationship between state-law and counterhegemonic socio-legal communities.

4.1 The Nature of Law

Post-realist representations of law are inexorably connected with perceptions about the construction of socio-legal theory. As such, post-realists have answered the question What is law? in different ways, depending upon their perspectives on the role of theory. An effect of this has been that the meaning of *law* has changed from that of an institution that corresponds with (or remains autonomous from) society to include that of a social process that subjects use for relating to one another. This challenges assumptions associated with the law-and-society project and, also, with orthodox jurisprudence. First, post-realism questions the extent to which positive law is the only legitimate site for the exercise of judgement. It suggests that

law is a set of regulatory practices that occur in an array of sites rather than purely an institution. Second, it qualifies the common-sense perspective associated with jurisprudence that the institution of law is axiomatically "good" for society. Law can only embody "progressive" social values in an imperfect manner and, moreover, tends to perpetuate theories of society that sustain capitalism, patriarchy, and ethnic chauvinism.

4.1.1 Initial quests for explanatory accuracy

During the 1970s a number of realist studies into legal plurality were grounded in theoretical traditions that portrayed law as an institution associated with complex, stratified societies. Both Hunt and Santos, for example, used Marxist social theory to demonstrate that state-law reflects the needs of late-capitalist social relations (Hunt 1976; Santos 1980). This appropriation of Marxist theory also implied that counterhegemonic sectors within civil society had the potential to transform the meaning and substance of bourgeois positive law. At the same time, these alternative forms of legality could also be co-opted into the state. Santos' central thesis, for example, was that the state used law as a mechanism for dispersing capitalism's endemic class conflicts.[1] Struggles that occurred within structurally-important sites were thereby repressed by the state's violent and bureaucratic mechanisms (courts, imprisonment, etc.) while disruptions at the periphery were absorbed through the "rhetorical" mechanisms of local dispute-resolution programmes, mediation, and community development projects, etc. (Santos 1980: 380). Like Santos, Hunt also emphasised the ideological components of state-law, suggesting that these are more momentous than its coercive aspects. Moreover, Hunt represented law as a key mechanism of the state through which hegemony and capitalist subjectivities develop. Bourgeois state-law thus disseminated "attitudes, values, and theories" that maintained the "existing social order" (Hunt 1976, in 1993: 25) and thereby provided "a degree of certainty and predictability" to "capitalist functions" (ibid.: 26-7). This, in turn, reduced class conflict to technical matters, giving the appearance that legal positions on such conflicts were universally acceptable (ibid.: 29).

[1] Santos suggested that state power constantly changes in response to the perpetually evolving instability of capitalist social relations (Santos 1980: 381). The complexity of the state's dispersal mechanisms - rhetoric (persuasion), bureaucracy (authoritative persuasion through the use of "expert" knowledge), and violence (physical force) - provided Santos with conceptual capital for explaining how state power develops.

Finally, state-law portrayed legal rules as naturally desirable, turning disdain for such rules into a symptom of deviance (ibid.: 31).

An issue that emerged from these observations was of how best to represent the interaction between state-law and counterhegemonic communities (that is, the so-called "popular cultures" and "socialist classes"). The political agenda of these post-realists - reflecting Michel Foucault's interest in the strategies through which perspective is constructed - was to formulate tactics through which alternative forms of legality could penetrate state-law and thereby transform it from within (just as positive law was seen to hegemonically construct the legal subjectivity of the popular classes).

As a precursor to developing such an agenda it was important to understand how the state uses law to construct localised identities. Increasingly, Santos posited, popular cultures were being constructed by legal discourses such as "community justice", leading to the proliferation of "state produced non-state areas of social life" (Santos 1980: 396). The state's penetration of localised identities by legal discourses, moreover, threatened to erase the utopian hope of spontaneous "community." Ironically, the utopianism of localised communitarian thought was a pre-requisite for the state's penetration of the very socio-cultural communities within which communitarian thought developed. The community-justice programmes of the 1980s, with their emphases on localised crime-control and dispute resolution, thus relied on the vitality of subaltern visions of self-government.

In a reciprocal move it was also theorised that community-justice had the potential to transform procedural law. Bourgeois state-law structured the nature of class-struggle but was itself modified when class-struggle successfully altered the terms of social regulation.[2] This type of outcome suggests that law does not fully correspond to the economic imperatives of capitalist society. Neither, however, is it fully undetermined. Proceduralism thus has the potential to be other than a reflection of capitalism and to become something that is neither characteristic of, nor completely different from, capitalist sociality.

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[2] Classic examples of this type of interpenetration, for Hunt and Santos, are the British Factory Acts of the nineteenth century. The Acts demonstrate that capitalist and socialist legalities can interpenetrate; they assisted employers to construct a more profitable workforce *and* provided workers with access to legislative processes through which they could protect their labour power.

The undetermined outcomes that result within law from such developments appear to be overtly "fragmented and asymmetric" (Santos 1980: 382). Far from being so, post-realists such as Santos claimed, changes within law are always circumscribed by an underpinning reality; change is never completely open-ended. In this vein Santos suggested that three "structural articulations" consistently prescribe the range of powers through which the state manages the labile character of late-capitalist society (ibid.: 382).[3] This type of assumption - about a materiality that exists beneath capitalist sociality - allowed the post-realists to interpret the various trajectories of politico-legal power in an apparently definitive manner without resorting to crude deterministic explanations.

4.1.2 Assaults on explanatory theory

During the late-1980s the post-realists substituted their erstwhile quests for explanatory completeness with a perception that legal orders cannot be explained in terms of either their connectedness-to or autonomy-from material social relations (such as those associated with capitalism). This position signalled a change in the definition of *law* from that of a *social institution* that reflects social relations to that of a *social process* through which relations are constituted and contested. Despite this alteration it was periodically reasserted that law and society *are* connected in some (undisclosed) way and that law is, in part, an institution whose forms correspond to an enduring social reality such as capitalism.

Santos, to exemplify this point, severed the link between law and social relations by stating that possibly "no correspondence" at all exists between the two domains (Santos 1987: 281). Rather, law and society may relate in ways "other than through correspondence or lack of correspondence" (ibid.: 281). In turn, legal systems are products of cognitive processes through which subjects construct their sociality. These processes are, moreover, analogous with the "imagination, representation, and description of reality" (ibid.: 281). Legal systems, it

[3] The three axis of Santos' "structural articulations"are as follows: *quantitative co-variation* (the inter-relationships of bureaucracy, violence, and rhetoric within state-law); *geo-political combination* (the distribution of bureaucratic, violent, and rhetoric mechanisms in social space); and *structural interpenetration* (the manner in which legal mechanisms interpenetrate both each other and the social spaces that each inhabit) (Santos 1980: 382-3).

further followed, consciously misread and distort reality and can be distinguished by their idiosyncratic patterns of distortion.

This perception, captured by Hunt's proposition that "there is no direct or necessary correspondence between the realm of 'knowledge' and that of 'the real'" (Hunt 1985, in 1993: 125), encouraged the critique of theories that linked legal ideologies with social interests. Terms that are associated with such theory (for example, "mirroring," "distortion," "mystification," "reification," etc.) imply that a theoretically-explicable and "pre-given" relationship exists between law and society (ibid.: 125). In the absence of such a connection the primary object of socio-legal analysis should become the relationship between reality and representation (ibid.: 125). Socio-legal enquiry should thus become as philosophical in its orientation as it is sociological.

This perspective was used to different effects. Santos, for example, attempted to derive from it an analytical method that could identify the processes through which legal systems construct reality, irrespective of their structural position in society. This implied - in a Kantian vein - that all legal thought shares a common intellectual architecture irrespective of its socio-cultural location. Interestingly, this marked a shift within realist perceptions about the material underpinnings of law. Increasingly, materiality became synonymous with the fluidity of subjectivity rather than the matter of social structure.This approach thus implied that no material boundaries exist on the extent to which discourse can construct reality. Two of Santos' comments illustrate this:

> laws are maps; written laws are cartographic maps; customary, informal laws are mental maps. This is a strong metaphor and as such it will be taken literally, hence the subtitle of this paper ["Law: A Map of Misreading. Toward a Postmodern Conception of Law"] might very well be: 'on taking metaphors literally.' (Santos 1987: 282)

Furthermore,

> as rhetoric teaches us, the repeated use of a metaphor over a long period of time may gradually transform the metaphorical description into a literal description. Today laws are maps in a metaphorical sense. Tomorrow they may be maps in a literal sense. (ibid.: 286)[4]

This minimisation of materiality was not intended to repudiate the idea that reality remains a transcendental realm that underpins actuality, law, or consciousness, etc. Rather, the move signalled an intention to rework the role that the concept of materiality plays in the construction of knowledge. In contrast to the Platonic framework - in which a pre-discursive materiality invariably prefigures thought - post-realists embraced a moderated form of realism; subjects can influence some dimensions of socio-biological reality with the aid of reason. Reflecting this line, Santos suggested that the processes through which legal systems distort reality do not imply that the elemental dimensions of materiality (whatever they might be) are distorted. The assumption that discourse must correspond to socio-biological materiality in order to be true is merely "an illusion" of the correspondence paradigm (ibid.: 282). Discourse can function independently of materiality without reducing the quality of meaning. In turn, discourse, itself, becomes a dimension of materiality. Thus, where the formalist strictures of the correspondence paradigm are set to one side alternative conceptions will emerge about the materiality that exists beneath language. Moreover, alternative perceptions will surface about the roles to which law might be put in the development and regulation of human relations.

A good example of the ends to which the marginalisation of the correspondence paradigm can be put is found in Hunt's attempt to enhance the political viability of European socialism (Hunt 1981, 1985). His goal there was to incorporate liberal human rights into socialist law. This inclusion was important for the future of socialism within democratic western states given the abuse of human-rights within the socialist Soviet-Union. The primary task in this project was to disassociate liberalism from bourgeois law. As such, it had to be demonstrated

[4] The extent to which Santos' assumptions are warranted is debateable. First, the idea that "legal" thought within all cultural and intellectual traditions is informed and policed by a single cognitive architecture is almost an ethnocentric assumption. Second, given that the typology of "legal" forms which Santos employed (patriarchal domestication, capitalist exploitation, territorial domination, and systemic imposition of unequal exchange relations (Santos 1985)) encompasses a wide variety of processes through which social orders are formed, the range of "legal" thought-process involved is also very wide. Santos' assumption that they all stem from the same intellectual architecture thus needs further substantiation than he supplies.

that discourses such as *proceduralism* and *rights* had no essential (capitalistic) meaning. Rather, the content of all concepts was held to be contingent upon the outcome of struggles over their usage. Moreover, the combination of discursive elements would create innovative representations of socio-political reality, and thus, new legal forms. In this way it could be demonstrated that rights-based proceduralism (that was formerly associated with the state's dispersal of class-consciousness) was potentially compatible with an all-inclusive, emancipatory socialism.

Despite this overwhelming interest in the issue of theory-construction, concerns with material issues (such as the exercise of politico-legal power) were never totally abandoned. Santos, for example, periodically refocussed on the power of the state. Despite the acentric nature of the globe's interpenetrating legal orders, he suggested, the "fragmentation of legality is not chaotic .... In a polycentric world the centrality of the state law, though increasingly shaken, is still a decisive political factor" (ibid.: 298). At this historical juncture, he continued, state law retains the ability to define the correct scales, degrees of projection, and symbols for law. As such, it can still determine what counts as *law*. Hunt, also, was aware that any exclusive focus on the discursive dimensions of legality would be politically disadvantageous. Where law is represented as a purely discursive force (rather than a coercive one) its impact upon people would tend to be neglected. In this vein he warned "we must not loose sight, to paraphrase Marx, of 'the dull compulsion' of legal regulation" (Hunt 1985, in 1993: 131-2).

4.1.3 The retrieval of explanatory theory

The post-realists' scepticism toward explanatory theory and the correspondence paradigm has progressively declined. Santos, for example, has renewed his search for theoretical explanations of legal plurality while retaining his view that law is a decentered network of structurally autonomous and interpenetrated legal forms. In this vein he has begun to construct "a theory of legal pluralism and community justice wide enough to account for the variety of their manifestations across the world system" (Santos 1992a: 137).

Santos' reclamation of explanatory theory is evident, for example, in his description of struggles by the Brazilian poor to legalise their illegal occupations of land (Santos 1992b). These struggles are analysed in terms of state-power and of world-system legality.[5] As the context changes from the state to the globe, Santos validates his use of world-system theory through his personal values. This innovation signals a new role given to explanatory theory and a straining of the realist paradigm that informed earlier analyses; world-systems theory is to be a vehicle for conveying values. To this end, Santos concludes his analysis of the Brazilian land disputes with the following thoughts: "we all know that in our world-system coins don't flow to all pockets in the same quantities at the same time." That metaphor, he immediately adds "is obviously not value-free" (ibid.: 252). Rather, it reflects Santos' moral convictions about the ends to which theoretical explanation ought to be put. Within this reappropriation of explanatory theory, therefore, it is evident that Santos chooses his theoretical vantage points as much for their moral horizons as any superior explanatory account that they might be held (but cannot be immediately proven) to provide. In an even stronger voice he adds "realism has brought us to a situation in which emancipation cannot be thought but in a nonrealistic and moralistic fashion" (Santos 1995: 484).

In a similar vein, Hunt has revisited Marxist theory. Its theoretical systemacity, he suggests, is still an invaluable asset for speculating about law (Hunt 1991, in 1993: 249-252). Moral and political bearings are difficult to find without a systematic framework upon which to orient thought. In keeping with his criticisms of the correspondence paradigm, however, he rebuts the "formal conceptual model" of Marxism (whose arguments depend upon the discovery of the "correct" meanings of key concepts). Rather, he favours a more non-determined and Althusserian emphasis on the process of theory construction (Hunt 1993: 8). Illustrating this retrieval of Marxist theory and its focus on affirmative political action, he states:

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[5] Santos begins there by suggesting that the state is an "*un*natural and rather narrow" unit for socio-legal analysis (Santos 1992b: 249). States are not isolated entities but rather players in a "complex and hierarchical set of unequal exchanges" (ibid: 249). Moreover, they exist in a world economy characterised by "interdependence and exploitation" (ibid: 250). The position of countries within the world economy determines the extent to which their state-law is "ideology" or "utopia" (ibid: 251). By this Santos is suggesting that the bourgeois law within peripheral countries is impervious to the emancipatory thrust of liberal proceduralism. There, state-law assists transnational capitalism to colonise indigenous cultural and political movements. Thus, he concludes, procedural legality works to the advantage of core countries and to the detriment of the periphery.

> The implication is that a Marxist approach to law will be concerned not only with characteristically jurisprudential issues, but also with the potential contributions of legal strategies to achieving effective political strategies for the social movements that reflect the Marxist political and ethical commitment to the poor and the oppressed. (Hunt 1991, in 1993: 266)

In summary, post-realist legal theorists have apparently retrieved explanatory theory for two, related reasons. First, the problematisation of epistemology that occurred during the 1980s made it difficult to proffer definitive representations of the materiality that purportedly underpins legality. As a consequence, realist socio-legal theory increasingly focused on the processes through which subjects gain legal perspective. This situation, secondly, precipitated a moral and political crises within materialist critical legal theory. No indubitable justifications for legal critique could be found if materiality was itself inaccessible. Only the reintroduction of orthodox materialist concepts (from Marxism and feminism, predominantly), it seemed, could rejuvenate the political commitment that once characterised counterhegemonic legal enquiry.

4.2 Post-Realist Legal Subjectivity

The use of socio-legal theory to promote socially-responsible values calls for an exploration of the issue of "obligation toward otherness." Within post-realism, this obligation emerges as an autonomous form of legal subjectivity that is akin to the self-sufficient and responsible individual of liberal law. This, moreover, empowers subjects to generate the free discursive play through which counterhegemonic socio-legal systems develop. It is far from clear, however, why this freedom should facilitate (rather than retard) the development of progressive forms of law. Rather, the realist paradigm appears unable to indicate where a socially responsible form of obligation might come from. Two possibilities emerge, however. First, subjects' senses of obligation originate in an intangible transcendental realm. Second, the source of obligation is personal experience.

The first position emerges from post-realist interests in the impact that legal relationships (such as contractualism) have on non-legal forms of interaction (for example, on the development of responsibility toward otherness). "Does law matter?" Hunt asks; does it make "any difference?" (Hunt 1980, in 1993: 327). The contractual form of relating that arises from positive law is significant in that it provides a useful mechanism through which subjects can stabilise their multi-faceted selves. Contractual relations do this by portraying subjects to themselves as rights-bearing and morally autonomous individuals. They are selves that can, and indeed must, coalesce around a unified core, empowering them to interact in a stable and predicable manner.

A number of difficulties emerge from this form of legal subjectivity. It abstracts subjects from the lived relations within which they exist, atomises them from one another, and presumes that subjects possess essential features (Hunt 1981, in 1993: 105). Despite these problems, Hunt attempts to salvage a socially-responsible form of subjectivity from contractarian legal subjectivity by distinguishing between two forms of right through which subjectivity develops: legal (that is, individualistic) and social (relational (ibid.: 107)).

Social rights are the more powerful of the two in constructing a socially-responsible form of subjectivity. These function as a form of morality above law, grounded in subjects' relational understandings of themselves. Moreover, they propel the critique and reform of law. When these social claims become law, however, their meanings are frequently distorted by the interpretative stances adopted by the judiciary. Left in the public sphere, the meanings of rights (such as the freedom of speech and to demonstrate) remain open-ended and valuable resources for imagining change. Both spheres are needed, however: the law, to actualise rights in a manner that can redress subjects for wrongs committed against them; the public, to allow social claims against law to arise in an unregulated manner.

The ability of subjects to extend their legal rights raises a question about why subjects might feel obligated to use that ability in a responsible way. Positions such as Hunt's suggest that subjectivity has no essential features that could predispose subjects to do so. Neither can the existence of social rights determine the content of social claims. In a similar manner, there is

no answer as to why progressive counterhegemonic movements might evolve to challenge the hegemony of positive law. Either they do or they don't.

This is a difficult position for post-realists to retain in light of their realist underpinnings. The open-endedness that their position implies tendentially undermines the realist proposition that reality possesses stable dimensions that fix the boundaries of socio-biological existence and, moreover, that can be used to ground the standards upon which judgements are based. To counter this drift, the post-realist discourses point to the existence of a transcendental source of reasoning through which counterhegemonic movements might discover the right answers to socio-legal problems. Gesturing towards this, Hunt states:

> We are challenged to renounce the reassuring belief that our discourses stand in some relation of "correspondence" to a reality independent of consciousness. We are not asked to surrender our working assumption that such a reality exists but rather to give up the complacent assumption that our thought and talk can arrive at some verifiable or objective access to that reality. (Hunt 1987, in 1993: 214-5)

There is a socio-biological materiality, this position suggests, but no verifiable epistemological bases through which subjects can justify their senses of *what is* and of what they ought to do.

In contrast, Hunt also suggests that some struggles can be resolved when the "correct" perspective is obtained on an issue. This, perhaps, reflects the unremitting influence of his underlying realist commitments. His perspective on "men's rights" in the abortion issue is a case in point. With regard to this Hunt states that "putative fathers should be denied rights [on the grounds] that the nature of their connection is too distant if their claim is nothing other than that they claim to have provided the sperm" (ibid.: 243). Not that I disagree with the sentiment of Hunt's argument but it relies upon a spatial metaphor that - if Hunt is to validate the universalist position he takes on the issue - must be universally valid. Anti-abortionists might retort, in opposition, that arguments that are predicated upon *temporal* metaphors could validate men's rights. The male's sperm, for example, continues to live in the woman (in

the form of a foetus) and thus the man's involvement in the decision to terminate or not is legitimate.

My point is that Hunt presumes that the outcomes of some rights-disputes are incontestable; some dimensions of material reality are epistemologically accessible and allow subjects to formulate irrefragable judgements on issues that pertain to those domains. This contrasts with his position that social life has no epistemically accessible and essential features that can guarantee such conclusions. As such, the argument begins from the position that there are no naturalistic bases for constructing a sense of obligation, morality, or socio-legal rights; in practice, however, it suggests that moral judgements can rely upon particular dimensions of the transcendental realm for their validation.

In a similar vein, Hunt's position assumes that subjects can determine the value of counterhegemonic discourses that emerge. The determination of their value is important because the construction of new rights-based discourses always begins on "*old ground*" and the new rights may fail to escape oppressive assumptions that are implicit within the former discourses (ibid.: 245, original emphasis). In turn, they may simply reinforce the status of dominant social interests. Conversely, Hunt's goal - which is to rearticulate "discrete discursive elements into new configurations" - has the potential to create emancipatory ways of imagining social life (ibid.: 246). The question of *how* subjects might determine whether the new discourse will liberate or confine is apparently unproblematic. They simply will.

Santos' perspective is more instructive on this point, even though its answer - personal experience - is as enigmatic as Hunt's.

Santos' voluntaristic position on the source of obligation toward otherness is highly volunataristic and this begins to emerge in his analyses of the interpenetration of procedural and communitarian forms of law. It hinges on subjects' apparent susceptibility to liberal, utopian images of self-government. Their angst stems from insecurities that manifest as a range of "social and political anxieties and fantasies" (1980: 393). Utopian visions provide one means through which subjects can transcend these anxieties because they promise existential security. Each vision is, however, only a political "fantasy bribe" that is incapable of

truly resolving subjects' angst (ibid.: 393). Nevertheless, the hope that such anxieties can be allayed encourages subjects to actively embrace politico-legal discourses.

Subjects' capacities to evaluate politico-legal visions come from their abilities to measure the extent to which the reality portrayed by a particular discourse correlates with their lived experience. The experiential basis of this theory of knowledge reaches its culmination in Santos' justification for predicating his legal pluralism on world-systems theory:

> This expansion of the unit of analysis [from the state to the globe] leads us also to change the nature of our scientific and political interests in the aspects of social life we analyze in different countries as these analyses become directly relevant to understanding in our social life in each one of our countries. (Santos 1992b: 249)

The expansion of the unit of analysis (to that of the world system) leads legal pluralists to change the focus of their explorations. This shift will only occur, however, to the degree that it alters the observers' understandings about life in their own countries. In turn, the standard for evaluating the validity of a research programme (such as the contextualisation of legal pluralism within the world system) is the degree of transformation that the observers *experience* in their understandings about their own social space. Intuitive personal experience thus becomes the benchmark for evaluating knowledge. Subjects ultimately know a particular fact about the social world when they experience it.[6]

That said, Santos is sanguine about subjects' capacities to know their existence and to experience the world in an unmediated manner. He signals this in the following manner:

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[6] It seems, moreover, that new understandings of *others'* societies are insufficient bases to validate a research programme. This might be because such analyses can only be created vicariously; researchers have no unmeditated access to others' experiences. Others' realities can only be perceived through the mediating vehicle of language. In light of the inherent opacity of language, researchers have no decisive method for determining the authenticity of others' experiences. Conversely, the experiential tenor of Santos' discourse suggests that subjects' experiences can be known to them in an unmeditated fashion; they experience events, situations, relations partly as a result of the language they use to describe them but also through the affects of those events upon the non-cognitive means by which those subjects come to 'know' (such as intuition and feelings).

> In the social sciences, we often ask questions which are almost answers. In this case [that of enquiring into the nature of interpenetrated and global legal-orders], the questions are not even fully formulated, because we lack the methodological tools to be able to ask them in adequate forms. (ibid.: 249)

Subjects' abilities to know are apparently restricted by a lack of methodological tools. The exact nature of those technical difficulties are not clear. The issue is equally an epistemological one; elements such as law or experience gain a variety of meanings that reflect the multiple social processes through which they are constructed (Santos 1987: 288). As such, experience cannot be known through the use of simple atomistic sentences such as "experience is ..." Together, Santos' methodological and epistemologically-based explanations suggest that subjects face severe difficulties in understanding the realm and role of experience.

This focus on non-determined experience (in the case of Santos) and open-ended counterhegemony (in the case of Hunt) suggests that post-realism anticipates an autonomous form of legal subjectivity. Subjects' inability to categorically describe the extent to which their subjectivity is determined apparently provides them with a non-determined capacity for moral autonomy, for *facticity* to invoke Sartre's term.

4.3 Post-Realism and Multicultural Law

The post-realist position suggests two ways in which an alternative conception of law might emerge. The first assumes that normative understandings can be shared across diverse cultural perspectives. These, notably, are mediated by the legal institution and, as a consequence, the realm of *non-authorial authoriality* takes on a legalistic tenor. This legalism is moderated by the suggestion that *law* might also possess a decentered and non-institutional dimension. This is a form of subjectivity through which subjects limit their claims upon others by reviewing their own demands for autonomy in light of others' perspectives. This position returns us to questions about how subjects might develop an obligation toward otherness and, moreover, do so independently of a law that requires it of them.

4.3.1 Qualified optimism toward centralised law

Post-realism offers qualified support for an institutionalised form of multicultural law. This is evident in its exploration of interpenetrations between positive law and the legal codes of socio-cultural communities. The fact that support is *qualified* is interesting in that it suggests an equivocality toward institutional law.

Post-realist legal discourse expresses an optimism that legal orders can interpenetrate one another so as to produce standards of legal judgement that recognise and express the value preferences of several cultural communities. The origin of this process, for commentators such as Santos and Hunt, is the state's need to manage the socio-cultural diversity of late-capitalist society. To facilitate this management, mechanisms associated with the state's bureaucratic and repressive mechanisms are increasingly blended with localised forms of control. As a consequence, standards of judgement become increasingly isomorphic (Santos 1980: 391-2). This transforms the way in which core and peripheral areas of social regulation relate. Specifically, an "acentric" form of domination develops in which no singular standard of judgement predominates (ibid.: 392). Instead, social relations are increasingly characterised

by a diversity of cultural communities, each of which has its own standards of judgement (ibid.: 392). Quite apparently, a tremendous diversity exists amongst these social movements. Some of their demands are trivial claims upon the wider community while others are more substantive, reflecting broader-based social rights.

An important issue for the post-realist position with regard to the emergence of these new forms of legality concerns how the single-issue movements might coalesce into broader counterhegemonic socio-legal orders that are capable of transforming their politico-legal environment (Hunt 1990, in 1993: 232-5). Given that post-realism abjures the idea of fixed epistemological standpoints, it is clear that the favoured image of counterhegemony is "not some purely oppositional project conceived of as if it were constructed 'elsewhere,' fully finished ... to do battle with the prevailing dominant hegemony" (ibid.: 232). Rather,

counterhegemonic movements are always unfinished projects, having no fixed source and no criteria for identifying when they have "arrived." They are always indeterminate.

That said, however, the realist underpinnings of the approach limit the degree to which counterhegemonic movements can remain unconnected and decentered bodies. Hunt points to this in the following way:

> Outside the sphere of actual legal regulation "social rights" express social policy objectives and differentiate rights from mere claims, in that the appeal to rights facilitates the articulation of coherent grounds for the policy objective in terms of related sociopolitical conceptions. (Hunt 1981, in 1993: 107)

The desire to develop specific and broad-based social rights motivates subjects to find the "coherence" that is presumed to exist and through which the policy objective can be legitimated. Moreover, the coherence provides a basis through which counterhegemonic movements can be classified, namely, according to their compatibility with the policy objective in question.

A significant challenge for this project is to find a means for comparing the social value of different counterhegemonic claims, of finding points of coherence and grounds for coalition. In keeping with post-realism's decentered position on epistemology, the specific form that coherence takes at any time is the product of discursive struggle. In this vein, the post-realist account suggests that materiality is elastic enough to allow a melding of some boundaries between ostensibly different elements. This is evident, for example, in Hunt's pursuit of a socialist position on human rights; a centralised, socialist law *can* be conceptualised that is capable of recognising and protecting diverse socio-cultural life-styles and values. Notably, however, it does not endorse all. Racist movements should, plausibly, have their freedom of speech curtailed (ibid.: 242). This reasserts the assumption that some boundaries of socio-biological materiality are rigid. To this end, the accommodation of diversity is naturalistically limited; some dimensions are self-evidently *right* while others are *wrong*.

Even once established, the political positions that emerge within the field of counterhegemony do not fully undermine state-law. Rather, cultural communities reinforce the status of state-law whenever they seek politico-legal recognition through the courts. The attraction of law lies in the superior degree of legitimacy that it can bestow on social claims, a degree that other social institutions fail to match. In these ways the post-realist position recognises an (almost) inevitable role for a centralist notion of law in establishing outcomes: the coalition of social movements relies upon the successful classification (and adjudication) of movements as compatible or incompatible, as right or wrong; the subsequent validation of social movements relies upon their recognition, at some point, in law.

That said, it is not self-evident that cultural communities are always successful in their attempts to penetrate and alter state-law with their social claims (in the process, for example, of obtaining legal rights). Their claims may be modified by positive law more than they alter that law. In Santos' analysis this failure simply re-emphasises the autonomous manner in which structures and subjects interact. This affects the development of multicultural legal standards by placing the emphasis for change upon the volition of those who judge (Santos 1992a: 137).

This outcome is not necessarily problematic for the post-realist programme. One of its tenets is that legal rights always separate subjects from their lived relations and thus imperfectly reflect the collective nature of human existence (Hunt 1990, in 1993: 237-241). Moreover, the project acknowledges that claims made by communities against the wider society have no intrinsic validity. It cannot be proven, for example, that either the wider community is responsible for the welfare of its sub-groups or that the individual is absolved of responsibility for itself (ibid.: 245). The vulnerability of rights to judicial interpretation means that rights have their greatest influence when left in the civil arena, as demands that communities place upon law in light of their own interpretations of their circumstances. The power of rights only develops fully when the law fails to interpret particular rights in a manner that social movements have done so, motivating those movements to engage in further political action.

As a consequence of these matters, rights (justice) exist beyond law and the two represent separate dimensions of social relations. Where post-realist analyses do suggest that

procedural and communitarian forms of law interpenetrate they do not assume that law becomes just in the process. The melding of proceduralism and communitarian social claims, for example, merely produces new forms of *law*. These can never be definitive expressions of *justice*. The interminable separation of law and justice appears to reflect a boundary that is "naturally-imposed" by material reality.

In light of the foregoing, two assumptions emerge from post-realism that bear upon the possibility of a multicultural law. First, socio-biological materiality is elastic enough for different conceptions of law to interpenetrate (leading to new forms of legality). Second, it contains an inflexible dimension, however, that separates law from justice. The conservation of meaning and identity (law) *is* an ontologically distinct element from that which transforms meaning and identity (justice).

4.3.2 Toward a decentered conception of law

A further line of enquiry that arises from post-realist legal discourse concerns the ability of counterhegemonic forms of legal thought to sustain an open-ended and non-institutional conception of multicultural legality. This approach goes beyond questions about the viability of legal rights that might emerge from counterhegemonic social claims (as above). Rather, it inquires into the type of sociality through which an open-ended form of social relation (multiculturalism) can exist. This has the potential to prefigure a non-determined and reflexive form of legality but remains an uncompleted thread in the post-realist perspective.

This decentered thread privileges the elasticity that is evident within socio-biological materiality. Positively, this elasticity allows dissimilar dimensions of social life to interpenetrate (such as liberal and socialist forms of law). Negatively, subjects can no longer know the contours of materiality because "it" does exist in a fixed and stable form. This makes it difficult for subjects to understand how to live between the competing horizons of contemporary social life, such as liberty and equality. This issue is critical because, as Hunt suggests, "we are confronted not so much with a choice between alternative values, but with determining the proper scope or range of the different legal forms in a scenario in which each

has a necessary and proper place" (Hunt 1993: 10). The existence of a "proper place" implies that standards for deciding such matters can be universally agreed upon. These, moreover, provide a basis for measuring the efficacy of conflicting values within any particular context.

Post-realism clearly suggests that subjects do not have unmediated access to a pre-discursive realm that can illuminate how alternative values might, or should, relate. The realm of values, instead, appears to belong to a highly elastic dimension of materiality. This is evident, for example, in the apparently interminable contests over basic rights to life and death (concerning the death penalty, abortion, and euthanasia, for example). As such, questions about how to limit horizons cannot be answered solely from knowledge about the material conditions of life. In the absence of further insight, subjects are left with responsibility for decisions such as whether or not they ought to favour equality or liberty, and about whether or not to limit their claims upon others. The source of decisions on these matters, therefore, is decentered to the site of each subject and their ethical sense of obligation toward otherness.

One option that is available to subjects is to delegate their sense of ethical responsibility "upwards," to positive law. Even if decisions are referred to the courts, however, judges are left with the same question - on what basis can a decision be made about whose autonomy will be privileged and whose will be restricted? As I suggested with respect to Hunt's position on men's rights within the abortion debate, the answers to such questions always appear to be determined by the form of metaphor used to frame the question. Such decisions are, therefore, not self-resolving but contingent upon the conceptual frameworks and value commitments of those who judge.

Given that such decisions appear to be ultimately undecidable, the focus of attention falls to questions about possible sources of obligation toward otherness; what sources of obligation might exist, for example, that would require subjects to recognise others' perspectives? Answers to this query, I suggest, lie at the heart of inquires into the possibility of a multicultural law. They ask how subjects might arrive at a form of thought that enables them to judge the worth of diverse socio-cultural identities independently of a legality that prefigures the nature of their answers.

4.4 Conclusion

The post-realism reviewed here points to the necessity of asking about the source of obligation toward otherness but does not pursue it. Instead, it focuses on the role that an institutional form of law might play in the regulation of social relations (through, for example, the use of legal rights). It does so while acknowledging that law is an imperfect embodiment of those social claims. Its primary insight is that law must be kept open to counterhegemonic critique. The power of that critique, moreover, will correlate with the extent to which counterhegemonic movements can recognise their internal plurality at the same time as sharing a mutual identity. The capacity for these movements to do so is apparently contingent upon their members taking responsibility for recognising otherness and for decisions that impact upon others. Ultimately, therefore, a post-realist conception of multicultural law must focus upon the realm of subjectivity, beyond the institutional apparatus of positive law.

5

POST-MODERN LEGAL PLURALISM

5.0 Introduction

In this chapter, as in the last, I focus on a particular movement within legal pluralism; this time, post-modern legal pluralism. The movement is from a form of post-modern legal pluralism that, to coin Drucilla Cornell's phrase, gives rise to a *politics of suspicion* (Cornell 1992: 61) to one that prefigures an emancipatory form of law and a progressive form of politics. I am interested in the extent to which the movement can inform a multicultural conception of law, that is, a type of legality that can sustain a perpetual pluralisation of its form without falling into an abyss of interminable fragmentation. The first perspective is illustrated by Peter Fitzpatrick's noteworthy text *The Mythology of Modern Law* with its thesis that law is a *countermyth* (Fitzpatrick 1992a).[1] The latter perspective is encapsulated in the research project of Costas Douzinas, Peter Goodrich *et.al.* (Douzinas *et.al.* 1994). This second approach attempts to identify an overarching and open-ended *law of the law of the contingent* and develop it as a positive basis upon which to construct legal judgement (Goodrich *et.al.* 1994: 1).

Both approaches present a similar critique of law. Fitzpatrick's notion of law as *mythology* suggests that western law is predicated upon a denial of its own mythic foundations and upon the exercise of racist and logocentric practices. As such, it refuses to acknowledge either the role of non-rational aspects of reason in the construction of knowledge or the independent

[1] In suggesting that Fitzpatrick's work exemplifies the "politics of suspicion" I am not intending to totally repudiate his text. Rather, I evaluate that text within a limited context, that being an exploration of its value for the development of a multicultural conception of law. Even so, such an evaluation might seem unfair given that the purposes of our two projects are so different. Perhaps they even belie comparison. Fitzpatrick is demonstrating why we ought to be skeptical of western legal judgement; I am exploring legal pluralism to identify what it can suggest about the development of legal judgement within culturally-pluralistic settings. Fitzpatrick's work does, however, tacitly employ standards for evaluating law and I am interested about the degree to which these post-modern standards can be generalised beyond the text in which they emerge, to multicultural legal environments.

identity of foreign socio-cultural groups. In turn, the identity of positive law develops as it negates feminine (non-rational) perspectives and those formed by non-European communities. In a like manner, the *law of the law of the contingent* (hereafter referred to as *the law of contingent*) suggests that law is built on the practice of exclusion. Moreover, according to the *countermyth* argument, the foundations upon which orthodox jurisprudence have been developed (notably, through the work of H.L.A. Hart) are, in practice, mirages. In reality they do not exist. Consequently, positive legal judgement lacks any secure basis for its authoritative status over social relations.

As introduced in the previous chapter, each mode of legal pluralism advocates - tacitly or otherwise - a particular form of legal subjectivity. These preferred types are evident within the frameworks of post-modern legal theory. Specifically, they lie within the writing positions that are adopted. Common to both the *countermyth* and the quest for the *law of the contingent* is a proclivity to write from abstracted positions, reflecting a non-authorial form of subjectivity. These appear to transcend the foibles of the legal judgement that they critique. It is not evident, however, how these unsullied interpretative positions are achieved. My concern is that this abstract conception of legal subjectivity could be exploited by positive law, particularly its requirement that subjects portray themselves devoid of the social relations within which they have been configured.

Thus far, the discussion will have presented a high degree of similarity between the projects of the *countermyth* and the *law of the contingent*. These similarities dissipate in the final section of the chapter as we begin to explore their potential to inform alternative conceptions of law. The *countermyth*, to begin, contains an irresolvable paradox that precludes the establishment of a normative base upon which alternative standards of legal judgement might be developed. This paradox arises from an insoluble question about the extent to which the *countermyth* is an "alternative myth to the myth of positive law" or, simply, "against myth" (and thus against the stabilisation of discourses that might convey standards of judgement from one context to another). The interminability of this question causes the *countermyth* to become enmeshed in the "politics of suspicion."

Douzinas *et.al.* treat the issue of "suspicion" as a pressing political problem. As the title of their text suggests - *Politics, postmodernity, and critical legal studies* - the future of politics within post-modernism lies at the heart of critical legal concern. I agree. Interestingly, however, the authors are equivocal about whether post-modern legal theory can prefigure alternative forms of law. Rather, they are simply optimistic. This is signalled in a question they ask about the extent to which post-modern critical legal studies can escape the interminable fracturing that results from being centred within the problematic of *difference*:

> It is not certain that the perpetual fragmentation and splitting-off of critical legal discourses ... is an essential rather than accidental feature of critical legal studies. The theory of contingency around which the present work is based may entail a diversity of practices but it does not ineluctably lead to the uncritical adoption or absorption of every 'pattern of dissonance' or of an endless stream of dissent. While critical legal studies may well be marginal, the pursuit of marginality is not an end in itself nor is the status of outsider the only possible or even plausible existential fatality left to the critic of law. (Goodrich *et.al.* 1994: 14)

The authors are equivocal; they *hope* that the fragmentation is accidental and that post-modernism can encourage a progressive form of politics. That outcome is by no means certain, however. Interminable fracturing may yet prove to be an essential aspect of post-modernism. This project develops two horizons of post-modern law that may overcome the ceaseless rending. These search for an overarching "law of law" that might transform positive law and are grounded in the realms of the *feminine* and *destiny*. The degree to which concepts such as *feminine* and *destiny* can subsequently provide bases for an alternative conception of law determines the degree to which post-modern legal pluralism can be a viable source of alternative legal theory.

5.1 Post-Modern Critiques of Law

The two dimensions of post-modern legal pluralism outlined in this chapter - exemplified by the *countermyth* argument and the *law of the contingent* - share a common critique of positive law. In this, law has an "unconscious" that is class-based, racist, and masculinist (Goodrich 1994: 108). The *countermyth* and the *law of the contingent* expose it, displaying the manner in which it inevitably compromises the impartiality of law and lawyers. Their critiques go beyond a simple concern with the hegemonic biases of law, however, (for the realists, also, are concerned with as much) to express concern about the whole nature of judgement. To what extent, they ask, can a concept of judgement evolve that is beyond particularism? Or is law inevitably connected to an exclusionary force that is intrinsic to the modernist binary code? From where can perspective be gained that could facilitate an escape from that code and that could empower the envisaging of an emancipatory legality that is not tied to the necessitarianism of modernist positionings (of liberalism, Marxism, or feminism)?

The *countermyth's* thesis is simple and underpins both its own approach and that taken within the quest for the *law of the contingent*; questions about the foundations and the "beyond" of modernist law are obfuscated by a myth that law has no mythical origins. Law's denial of its mythical form, moreover, constitutes a "mythology of modern law."

The mythical foundations that fuel the construction of particularist judgement are Enlightenment notions such as the Subject, Progress, and Monism. Central to modern law is the assumption that there exists a knowing Subject - Man - who mythically transcends what is known about him (Fitzpatrick 1992a: 51-6). The need for this construct emerged within the Enlightenment substitution of God with Nature. As an aspect of Nature, Man became subordinated to that which could be rationally deduced about him. As a consequence, however, Man's rationality began to create its own realities and his discourse became absolute. In this way universal Man's "sovereignty" over himself, as project, was established.

The gap between this transcendental form of Man and his inescapable mortality is mediated by the mythical entity of Progress, the goal of which is the perfection of Humanity (ibid.: 39-42). This concern with endings (Humanity's perfection) is a hallmark of modernist

mythologies and contrasts with "premodernism" and its preoccupation with Man's origins (ibid.: 36). Endings and origins are similar, however, in that they both prescribe what subjects should do and how they should achieve those outcomes. Within the pre-modern mythologies, Man's origins lay in the Gods. "Modernist" mythology, alternatively, identifies his beginnings in the savage (ibid.: 63). This creates the possibility, indeed the need, for the discourse of Progress in which Humanity's development is calculated in terms of the degree to which it has substituted primitive traditions and superstitions for the transcendence of Reason.

The force and substance of Progress emanates from the practice of *negation*. Modernist mythologies, such as positive law, construct reality through negating what they are not: the savage, the foreigner, the feminine, the non-rational, the criminal, etc. This treatment of the foreign, femininity, and emotion has become a subliminal source of legal intuition that imposes itself upon legal subjects where they are subjected to legal judgement (Goodrich 1994: 107-113). Its primary effect is to exclude femininity, the alien, and the irresponsible etc. from the protection of law.[2] A significant consequence of this practice of negation is that it allows the judiciary to avoid the impossible task of identifying the nature of the law. Rather, law is simply the process of naming the Other against which, in turn, legal identity pejoratively sets its own identity. The beginnings of a post-modern conception of law are suggested here; in order for post-modern law to be more than or "beyond" positive law it cannot simply found its identity by negating the latter. This would merely reinstate the very conception of law that is ostensibly "gone beyond" (in that it would be using the binary form of positive law to subjugate that law). Post-modern law, therefore, must encompass *both* positive law and that which is "beyond" in order to escape the policing effects of the binary oppositions through which modernist identity is constructed; moreover it must reconstruct the gap that exists between positive law and itself if it is to avoid reinforcing positive legality.

Positive law, according to the post-modern account, is indifferent to questions about the "beyond" to law. The closest that it gets are its pragmatist variants (refer, for example, to

[2] Goodrich, for example, identifies this negation in the negative impact that contract-law has upon women, and in the complicity of the British judiciary in their government's repudiation of legal directives on the protection of refugees (ibid.: 120-126, 126-134). He also describes how the law has been used to further class interests through the negation of arguments for the collective provision of public goods (refer to Goodrich 1987, chapter 7).

Wells 1992; Lipkin 1993). Within this, law is perpetually open to the future because there are no foundations in theory that can fix it permanently to presently existing norms. Even within this openness to contingency, however, the existence of an Other that resides beyond law's sight fails to register. Rather, the sources of legal critique that emerge remain internal to law. They are existing legal norms that are "turned on themselves" in order to facilitate the development of new sources of order. In turn, however, they remain within the vortex of their hegemonic origins and, as a consequence, law remains an essentially conserving force. No mechanisms exist within pragmatist legality, moreover, for admitting counterhegemonic values in a way that allows those values to retain their specificity. Rather, counterhegemonic viewpoints can only be recognised to the extent that they mirror, in part at least, the prevailing orthodoxy. Their admission will be at the cost of those aspects that law cannot recognise, eradicating the radical edge that they possessed when outside law's horizons.

The maintenance of strong professional boundaries between law and non-lawyers has not assisted this situation. These have their origins in a form of legal writing that dissembles the contingency of legal judgement and the impact of counterhegemonic forces. The sense of realism that achieves this - and that has come to pervade legal discourse - is, however, "a fantasy" that "insists that its images are quite particularly true, so real that they barely warrant discussion" (Murphy 1994: 96-7). The process of legal writing "distorts the 'rules' of language by making them seem like a legal code" (ibid.: 100). As a consequence, the reality is dissembled that legal language is founded upon a sense of the arbitrary that remains firmly within the discursive limits established by legal tradition. This "more than anything, is the 'secret' of the alchemy through which the contingent or the arbitrary acquires the quasi-naturality that infuses the repetitive tautology of legal self-justification, that law is the law ... etc." (ibid.: 102).

The defining feature of positive law, to summarise thus far, is its denial of these various myths and attributes and its insistence that occidental legal rule is founded upon a definitive foundation that transcends the mundane world of human finitude. The purpose of the *countermyth* argument and the quest for the *law of the contingent* is to rebut that claim.

In addition to the myths through which modern law has been founded, modern legality has been "consolidated" through a number of intellectual and social processes (Fitzpatrick 1992a: 92-145). The construction of the evolutionary discourse in the eighteenth century, as the first of these processes, allowed western culture to transcend the knowledge that the human condition is a finite one (bid: 92). It suggested that law develops in a linear process as societies move from unsophisticated hunting/gathering communities to market-centred economies. This perspective gained purchase from the unfounded assumption that western law was the correct template against which to evaluate non-European legal systems. As a consequence, the dissimilarities between "primitive" and "modern" legal systems confirmed the superiority of western legal thought. In this way western law created its own "quasi-universalism" (ibid.: 107).

In addition to the development of the evolutionary discourse, colonialism also helped consolidate western law (ibid.: 107-110). From its beginning the colonial programme exhibited a contradiction that threatened this consolidation. It attempted to create order (a sense of perfection) through the use of violence (a strategy that is antipathetic to perfection (ibid.: 108)). That contradiction was resolved by the myth that indigenous peoples lacked the sense of self necessary for the exercise of government. The absence of indigenous social projects, particularly the quest to conquer other's lands, substantiated this claim. To the colonial mindset these lacuna legitimated the imposition of imperial authority and the rule of occidental law.

In keeping with the colonial programme, nationalism became another vehicle for consolidating western law during the eighteenth century (ibid.: 111-117). As with colonialism, the nationalist project was characterised by contradiction. Tensions repeatedly arose between indigenous attempts to retain localised identities and colonial quests to construct nationalist identities (ibid.: 112). Again, this antinomy was mediated by mythology, this time the myth of progress. Specifically, conflicts over cultural identity were assuaged by the development of an ideology that national identities were advantaging all the social groups within a given territory in a way that other nations were failing to do for their "peoples." The rule of law in each territory, as a unifying symbol for those nationalistic identities, was invigorated in the process.

Modern law, lastly, has been consolidated through its development of self-responsible legal subjects (ibid.: 118-140). Self-responsible subjectivity is the cornerstone of positive law, being law's first line of defence against deviance. This capacity for individual self-rule sits uncomfortably with the sovereign nature of law's authority, however. Conflict between them is avoided because law relies on legal subjects to police themselves to a large extent. Law is thus only required to respond to exceptional cases. In order for legal subjects to regulate themselves effectively - that is, to creatively respond to new aspects of themselves and to their contingent circumstances - they have to develop illimitable capacities to act. As such, they cannot be restricted to a robotic set of legally prescribed responses. Their capacity to "go beyond" law occurs as they learn to identify the internal Other that must be policed: madness, sexuality, non-rationality, criminality, non-responsibility, etc. Through this, the legal subject becomes a vigilant suppresser of self. They become perpetually responsive, responsible, and most significantly, thoroughly rational.

In addition, subjectivity is trammelled further when the subject is brought before law. Each one's analyses of the legal issues that confront them are potentially inadmissible in law. Rather, these subjects are made "powerless in the sense of being brought to speech in a formulaic place, in being subject to no more than an elective rite" (Goodrich 1994: 126). They find themselves faced, in law, with "a refusal to listen, a void or absence of speech in which the other is characterised not simply as without jurisdiction but as mendacious, demanding, inconsistent and without credibility or right to any further appeal" (ibid.: 134). To rephrase this point, law rules its subjects by constituting them as self-regulating, logical beings, thereby erasing the need to consider the contingent matters that are intrinsic to their humanity: their non-rational affections, their competing responsibilities, their incompleteness, and their sense of finitude. When they are permitted to speak in court their speech is circumscribed by conventions that reinforce their subservience to the sense of reality imposed by law.

This configuration of law by a field of mutually supportive mythical entities is most evident, according to the *counternyth*, within contests between dissimilar forms of law (Fitzpatrick 1992a: 141-179. Also refer to Fitzpatrick 1992b). The cases of administrative and popular justice provide good examples. Their primary role has been to provide law with definitions of the "nature of things" such as the domains of organisational procedure and community life.

The fact that law relies upon alternative legal systems such as these is obscured by the manner in which it constructs its relationship with them. The criteria that the judiciary use to decide if an issue falls within law's boundaries are wholly indeterminate. Also, and more importantly, the judiciary are the only body that can create the criteria. Thus, the act of deciding if law is relevant to an issue has been made a fully legal one. Restated with an alternative emphasis, the lack of definitive standards within positive law through which to judge the "correctness" of relations between legal systems is a necessary condition for positive law's interpenetration with - and sovereignty over - alternative legal forms. Contingency, to place yet another emphasis on the matter, is pivotal to the exercise of judgement. Its indeterminate nature is circumscribed, however, by the enclosure of legal judgement within the circle of judicial professionalism.

The post-modern critiques of law outlined above suggest two important matters. First, the act of legal judgement is an essentially contingent exercise. In using the law, lawyers both employ and judge the law; they can only be confident that previous interpretations of a law are apposite by judging them in light of lawful interpretations of contemporary conditions. Law, as such, cannot be reduced to the immediately-written law. Its directions will be largely contingent upon the judgements of those that judge, but only those that do so "within the law."

Second, law cannot be separated from the history of bourgeois individualism, masculinist oppression of the *feminine*, and exclusion of the foreigner from the protection of state-law. Western legal judgement cannot, therefore, command unconditional respect. Law is inexorably entwined with particularist viewpoints (bourgeois, masculinist, imperialist) that have repeatedly repudiated, repressed, and silenced the socially marginalised. Moreover, this history casts doubt on the very possibility of a non-particularistic form of law.

A series of questions about subjectivity and the future of law, I suggest, emerge from the above analysis. To what extent can post-modern legal subjectivity possess foundations that transcend their presumptions to pronounce judgement upon modern law? To what extent can these be put to service in the development of non-oppressive forms of law? I argue, below, that post-modern legal pluralism must presuppose the existence of some form of foundation

in order for its critiques to avoid self-refutation. Second, and somewhat ironically if the first point stands, they must repudiate themselves if they are to avoid becoming legislative forces in their own right. These become critical issues when we turn to explore the possibility of a multicultural conception of law in the final section.

5.2 Post-Modern Legal Subjectivity

The previous chapter portrayed post-realist legal subjects in a similar vein to those of positive law; they are self-generating individuals who develop their standards of judgement on the basis of personal experience. For H.L.A. Hart, the only people whose judgements count are professional judges. For Santos, alternatively, they are any and everybody. According to the *countermyth* argument, in further contrast, all western legal subjects are constructed by external discipline (in the Foucauldian sense of multiple techniques of socialisation) and by an externally-induced process of self-formulation (Fitzpatrick 1992a: 121, 127-9). The disciplines limit subjects' capacities for autonomous behaviour while the subjects' negation of their "primitive" elements produces an illimitable power for self-development. Importantly - for the purposes of my argument - this legal subject is portrayed by Fitzpatrick as an abstract being with neither moral commitments nor social ties. I suggest below that the subject-position assumed by post-modern commentators such as Fitzpatrick is similar to the decontextualised legal subject portrayed in the *countermyth* argument. This observation will support my contention that the *countermyth* gives rise to a "politics of suspicion." This occurs because the subject's abstract form precludes it from contributing to radical legal transformation; the countermythic subject cannot "authentically" suggest perspectives from which to develop alternative forms of law because it, itself, cannot place any firm value on them.

In contrast to this, the quest for the *law of the contingent* - that I also explore for insight - apparently does endow the post-modern legal subject with a progressive politico-legal identity. That post-modern legal subject is one who accepts responsibility for their judgements. In a similar vein to the legal subject of the *countermyth*, however, that subject remains a totally abstract being. Ironically, therefore, the post-modern positions reproduce the

same liberal subjectivity that they find and criticise in orthodox legal theory. It seems impossible to adjudicate between dissimilar perspectives without appealing to an abstract subject-position.

5.2.1 *Countermythic* legal subjectivity

The self that learns to police its own deviance is important in Fitzpatrick's work. This subject acts as a mythical mediator between his argument's dependence and autonomy from formal law; the *countermyth* both relies upon positivist law for a set of propositions that it negates in order to construct its own identity and, conversely, separates itself from positive law by presenting an explicitly "anti-law" thesis.

Mythical figures, such as the countermythic legal subject, transcend both sides of dichotomies (such as the *countermyth's* dependence on, and autonomy from, law) and carry characteristics of both (ibid.: 26). In this vein, countermythic subjectivity appropriates a number of characteristics from the orthodox legal subject. Its decontextualised nature is one such dimension. Conversely, the countermythic subject also demonstrates its autonomy from law by refusing to acquiesce to legally-determined terms. To this end, the characteristics that the countermythic subject adopts - its abstract nature and its sovereign self-sufficiency - allows it to mediate between the *countermyth's* dependence and autonomy on law. Together, moreover, these two aspects privilege the idea of a decontextualised and autonomous subjectivity.

In order to authenticate the identity of this self-referencing subject, the *countermyth* argument locates it in a fraught space between the sense of finitude that the modern legal subject experiences and its illimitable responsibility for its behaviour (ibid.: 129-134). Two problems arise from doing so, however (ibid.: 120-30). The first is that it is difficult to account for popular indifference toward the contradiction. It does not seem to arise as an issue within conventional sensibility. The second is that it is difficult to account for the deep subjectivity that must exist if the contradiction to be managed. The countermythic answer to these problems - as we shall discover - loads its subject with an enigmatic identity.

In answering both these questions the *counternyth* appeals to the existence of origins. Unlike the "pre-modern" mythologies that located their origins in the gods, the *counternyth* declines to name its origins. Nevertheless, it repeatedly acknowledges its reliance on their existence. The following passage exemplifies this:

> How can we link this contained individual as a case with the individual as self-constituting? ... . The subject exists, *as it were*, outside of and orders the diversity of powers brought to bear on it. The greater the number and diversity of these powers, then perhaps the more varied and complex, the more specifically mediated, the more 'individual' is the response to them. (ibid.: 121, emphasis added)

The clause "as it were" mediates the contradiction, in this case, between the constituted and self-constituting self. It does so by pointing to an arcane and transcendental source of selfhood. That source lies in an apparently interminable, unknowable past, the place and time that exists "as it were." This past-that-is-beyond-memory is the *counternyth's* source of deep subjectivity. It mediates the divide between the self's autonomy and dependence and, thereby, manages the array of competing demands that are made upon the self.

The absence of a name for those origins is significant in that it precludes the *counternyth* from having to endow that self with an essence. Moreover, the lack of essence enhances the ability of the self to act; it provides the self with an infinite capacity that would disappear if the self were laden with an essentialist identity to which it must conform (for example, of "woman", "Caucasian", or "working-class"). Indeed, the capacity comes to represent more than an illimitable ability but, also, a pre-requisite for the whole discourse. The absence of transcendental fixtures means that the post-modern legal subject must define itself in terms of the place and time signified by "as it were."

5.2.2 Subjectivity and the *law of the contingent*

If the *countermyth* argument correctly identifies the somewhat detached nature of post-modern legal subjectivity, the quest for the *law of the contingent* seeks to replace that abstractness with respect for an ethical dimension of human sociality (Goodrich *et.al.* 1994: 16-24). A fundamental problem within positive law, according to Goodrich *et.al.*, is the manner in which law is formally separated from ethics. In turn, the judiciary become technical functionaries who pronounce judgement upon issues whose roots are intrinsically ethical. Goodrich *et.al.* propose an alternative position. Law should be subordinated to ethics. In doing so they advocate a particular kind of legal subjectivity - what might be called *homo responsibilitus* - the one who is responsible:

> Critical legal theory cannot return to (legal reason) or to the subject as the measure or account of law. But similarly it can no longer accept with modern jurisprudence the complacent view that ethics is not a proper concern for law or lawyers. Caught between the call to justice and a lack of any determinate criteria for ethical action, critical legal studies is left with responsibility - indeed, one might say it is left with responsibility for responsibility. (ibid.: 22)

This conclusion, however moral, is interminably tautological. Responsibility is defined in terms of itself and, therefore, in terms of something that belies definition. It represents the absence of form. Moreover, the allusion to nothingness is not alloyed when it becomes evident that the list of those to whom the post-modern legal subject is to be responsible is open-ended:

> the stranger, the outsider, the alien or underprivileged who needs the law, who needs, in the oldest sense of the term, to have a hearing, to be heard. It is the responsibility of all law to heed the appearance of she who comes before the law (Cornell 1991, 1992). (ibid.: 22)

It is not clear to what extent, or even why, this post-modern legal subject is expected to warmly embrace all, including the Other who might be intolerant toward the openness

through which they have been embraced. The risk emerges that the post-modern subject will paradoxically become tolerant of intolerance. In so doing they risk their own annihilation and with them, their meaning of responsibility.

A considerable gap exists between this "responsibility to ensure that the outsider to law is recognised by law" and "criteria" for deciding what responsibility might mean in any given case. On this point Drucilla Cornell, whom the authors approvingly cite, suggests that the criteria for legal judgement cannot be specified prior to the moment of judgement (Cornell 1992: 116). Jacques Derrida makes the point clearly for her

> Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee completely. (Derrida 1990: 961)

Despite the indeterminateness that this appears to give the process of legal judgement, Cornell positions this stance *within* her belief that legal relations are structured by the gender-hierarchy (Cornell 1990, 1991, 1992). By suggesting this, Cornell is able to propose limits on who the Other are. Moreso, this enables her to propose women-centred guidelines upon which legal judgements might be based (Cornell 1992a: 91-116). Goodrich *et.al.* do not mention this. Indeed they cannot without placing their work within a specific and potentially limiting context (for example, a feminist analysis of gender relations). In not doing so, however, their Other - and that which the Other is not - fails to gain substance and identity. Like *homo responsibilitus* their notion of the Other too, is ultimately intangible.

To summarise this discussion on post-modern legal subjectivity; both the *counternnyth* argument and the quest for the *law of the contingent* advocate decontextualised forms of subjectivity. Within the *counternnyth* this conclusion has been extracted from the text and is not necessarily the intention of the author. Rather, *The Mythology of Modern Law* can be read as an inexorably ethical text in so far as it reveals the dangers of accepting jurisprudential portrayals of law. What it cannot *say* - that is, how it comes to exercise ethical judgement - it nevertheless *does*. The *law of the contingent*, in contrast, attempts to explain the basis for an ethics that could underpin positive law and so to escape the "politics of suspicion." It does so

by suggesting that post-modern legal subjects have a specific identity in that they are people who accept responsibility for responsibility. Without grounding this proposition within a social, cultural, gendered, or economic realm, however, this observation becomes tautological and its signifier (responsibility) incessantly bounces between its two appearances seeking something to signify. It's interminability is, however, the writers note, temporarily interrupted whenever specific legal judgements are made. Despite this, a question immediately arises; What bases exist for post-modern legal judgements? Furthermore, what form might those judgements take if they are to avoid the pretension of having transcendental insight into the "nature of things" or the ability to reify personal experience? These questions are opened up in the following section.

5.3 Post-Modernism and Multicultural Law

Thus far, the two projects of the *countermyth* and the *law of the contingent* have shared perceptions about the nature of law and of post-modern legal subjectivity. With regard to the possibility of an alternative conception of law, however, distinct positions emerge. The *countermyth* argument, to begin, appears sceptical about legal judgement *per se*. Moreover, the manner in which the *countermyth* is constructed appears to preclude the development of alternative forms of law. The quest for the *law of the contingent*, conversely, presents two possibilities for developing alternative modes of legal judgement. The first identifies a promissory space between Luce Irigaray's discourse on the *feminine* and Jacques Lacan's work on the open-ended textuality of existence (Pottage 1994). Through these writers, Alain Pottage suggests that the *feminine* is beyond the totalising reaches of law plus he posits a method to avoid the homeostasis that could accompany the privileging of a singularly feminine form of subjectivity. As it stands, however, the project leaves some vital questions unanswered about the space between Irigaray and Lacan's projects. Its value, here, is its introduction of questions that underpin the *post-pragmatist* legal research agenda that is reviewed in the following chapter.

The second project within the *law of the contingent* looks for the realm of justice within an abstruse realm of *destiny* (Douzinas and Warrington 1994). In an antithetical manner to the

first approach, this project threatens to lead the search for justice into a domain of incessant pluralisation. Individuals find destiny within them when they discover what is singularly most important to them. The idea of a universally-recognisable justice begins to lose meaning as a consequence, however. Justice, rather, becomes each person's understanding of their personal destiny. Standards of legal judgement, as a further consequence, become highly individualistic and ephemeral. This second post-modern research agenda holds less promise than the first for developing shared standards of legal judgement.

5.3.1 The impossibility of a *countermythic* multicultural Law

Fitzpatrick's *countermyth* contains an irresolvable tension that precludes the transfer of its own standards of judgement to other contexts. This situation emerges from the *countermyth's* positions on the meaning of "myth." On the one hand, the *countermyth* argument appears to be an "alternative myth" to that presented by the positivist jurisprudence of H.L.A. Hart. Conversely, the *countermyth* can also be read as being *against myth* and thus against the possibility of stabilised discourses through which standards of judgement could be transferred between contexts.

David Goldberg identifies the first, anti-law dimension of the *countermyth* in the following manner: "Peter Fitzpatrick seems to embrace in full a critique of the law the implication of which is a vigorous and relentless resistance to law" (Goldberg 1995: 551). Underlying the *countermyth's* anti-law stance is an assumption that the social world lacks any transcendental character. Fitzpatrick cogently expresses this in the following manner:

> The universal claims of modernity eliminate the godhead or any other external 'instituting moment'. The universal and scientific nature of those claims eliminate any enduring or certain moment of internal self-generation. Elevation of such moments - in such terms as economy, history, structure, language or psycho-sexual impulsion - have come and, eventually, gone.

> Society is sustained in its universality, not by these precarious positivities, by what it is, but rather by what it is not. (Fitzpatrick 1995: 108)

In this single statement the *countermyth* argument annuls the epistemological value of all transcendental fixtures, experience, and scientific explanations of existence. This statement is ironically presented as a *truer* understanding of the nature of things. No transcendental realms can now be held to exist - neither divine (God) nor profane (class, gender, race, the unconscious, or biology). Rather, what exists is a non-transcendental realm where-in entities exist only by virtue of their differences to other entities. The apparently non-transcendental nature of existence and the self-sufficient presence of *difference* thus become essentialised by the *countermyth* as the *new nature of things*.

This essentialising of non-transcendence requires, in turn, that the concept of *myth* be essentialised. Only in this way can the meaning of *countermyth* remain stable. Within this first dimension, *myth* ultimately and simply *is*. The title of the text - *The Mythology of Modern Law* - most notably draws upon this nuance. Modern Law *is* mythology.

Within the second dimension of *myth*, conversely, the *countermyth* argument rejects the idea that *myth* has an essential meaning. *Myth* is portrayed as unstable but, nevertheless, tied to its original metaphorical base. Two important ideas arise from this. The first is that the metaphorical origins of the concept must be accepted because they are inescapable. The second is that elements may be introduced to *myth* that are contiguous with its existing dimensions but dissimilar enough to shift its overall sense.

The idea that metaphoric foundations are inescapable emerges from Derrida's proposition that the metaphorical basis of metaphysics as a whole cannot be eluded. "Expressions of the very attempt to eliminate metaphor", he suggests, "are also found to be metaphorical in their force and origin" (cited ibid.: 32). As such, any attempt to escape the metaphorical construction of *myth* will inevitably draw upon alternative metaphorical constructions that, themselves, are wedded to the originating metaphor. Signalling the metaphorical nature of *myth*, Fitzpatrick suggests that *myth* is itself a myth (ibid.: 17-27).

The *countermyth* argument attempts to construct a foundation for its own mythology by developing the thesis that modernist thought is incapable of understanding itself. This situation, moreover, will continue so long as modernistic thought assumes that it possesses metaphysical foundations. In keeping with the very premises of the countermythic thesis this line of argument, itself, requires a metaphorical base. As suggested above, the *countermyth* repeatedly supplies such a base by tying its dominant arguments to an abstruse primordiality (with the oft-repeated phrase "as it were").

The *countermyth* argument does not appear content with this outcome, however. To be so would suggest that it is forever tied to a singular metaphorical base - perhaps a fixation with origins and/or endings. In order to free itself from the trappings of such essentialism the *countermyth* argument begins to push the boundaries of the meaning of *myth*. By doing so it reveals an antipathy to the concept as presently conceived. In reconstructing its meaning the *countermyth* again demonstrates the indefinite nature of the concept. It is portrayed as having a metaphorical base that temporarily anchors meaning but that does not preclude the extension of that meaning.

To summarise the argument thus far: the term *countermyth* seems deliberately ambiguous. On the one hand it stands for a real (non-metaphorical) entity and exists as an alternative narrative to the myth presented by positivist jurisprudence. On the other hand the *countermyth* argument is presented as a metaphorical entity that must be escaped from in order to avoid its form being essentialised (especially its characteristic denial of its metaphorical foundations). By not resolving the ambiguity, however, the *countermyth* argument leaves the concept of *myth* unstable and precludes the possibility that its form can ever be known. The lack of form is most apparent in the *countermyth's* determination not to name either its origins or endings - the previous hallmarks of pre-modern and modern mythologies. This repudiation is, importantly, what debars the *countermyth* from suggesting forms of discourse that could convey standards of judgement between contexts. As a consequence, all forms of law are destined to remain wholly fragmented and autonomous. To restate this with an emphasis on the guiding theme of the chapter, the arcane nature of the *countermyth* leads to a suspicion about its ability to offer a comprehensible and alternative to positive law and thus seriously impact upon the present form of legal judgement.

5.3.2 The hope of a *contingent* multicultural Law.

As introduced above, the *law of the contingent* supports two visions of an alternative legality. Both are sceptical about law's separation from ethics and both seek to construct ethical foundations upon which a notion of justice can be developed. To this end, both attempt to move beyond the "politics of suspicion" that seems to characterise works such as Fitzpatrick's. The first approach proposes *the feminine* as a site that is "beyond" law and from which justice could emerge (Pottage 1994). Pottage's approach threatens to inscribe the *feminine* with an essentialised identity, however. This threatens to return the quest for justice to irresolvable questions about the "correct" form of epistemological identity, with all the potential for discursive policing that is associated with the more vulgar realist positions. Pottage attempts to escape this by indefinitely deferring the construction of feminine identity. This seems to be a potentially useful direction of enquiry as it recognises the need to "name" the source of justice in a modernist sense, while refusing to contain that name with a fixed identity.

5.3.2.1 Justice and the feminine

The quest for open-ended representations of feminine subjectivity can be contrasted with totalising discourse that subordinates socio-cultural differences to its own categories (that is, *Law*). Within the latter, no sense of difference can exist that has not already been circumscribed by the law's power to define. Pierre Legendre's work exemplifies this approach and Pottage's allies against it are Luce Irigaray and Jacques Lacan.

Legendre is important for two reasons. First, he approvingly portrays law as a totalising discursive power. Second, and more constructively, Legendre identifies the limitations that subjects encounter in their attempts to understand their desires for law and grand narratives. Thus far, those understandings have primarily been shaped by psychoanalysis and structuralism. The result has been various images of law in which legality is a force that incites subjects to desire in ways that are prefigured within legalistic discourses (positive law, religion, and socialism, for example). Law, in Legendre's rendition, is a totalising and

expansive power that is, literally, "everything" (ibid.: 150). By appearing to be everything, law seduces subjects into believing in the possibility of absolute power and of an illimitable ability to define and act. It has no essence, however, because it is ultimately grounded in myth (ibid.: 164). Despite the purely discursive nature of this power, law is able to address questions about the nature of humanity and, moreover, definitively construct what it is to be human. As a consequence of law's representationalist pretensions no rational life is able to exist outside of the symbolic order. Only psychosis can (ibid.: 155). All subjectivity, it can moreover be noted, is juridical in nature because it is a product of judicial reason (ibid.: 151).

For Legendre, however, law is the adhesive that subjects need in order to be part of society's structures. Law's power to envelop subjects within this montage derives from those subjects' desires to assuage their senses of lack, a lack that originates from their expulsion from the womb (ibid.: 152). In contrast, the role of the father emerges as an "agent of the Absolute", appearing to promise a robust and reassuring representation of totality (ibid.: 161). This desire to obtain an overarching understanding of the world is, for Pottage, an effect of law's paternal nature. It promises that possibility and provides the necessary conditions for cultivating desire (ibid.: 161). Law plays upon the idea that the mother is forever lost, capitalising upon subjects' desires to bridge the gap between the irreplaceable womb and an encompassing god-like figure who can explain their existence. Most importantly, for Pottage, gender differences are thereby overlooked; male and female are structured as equal and separate subjects (ibid.: 168). Law is thus erroneously thought to structure *both* sexes, paternally guaranteeing each one's identity (ibid.: 173). As a consequence, maternity is erroneously held to be made in the image of the Father (ibid.: 178).

Such portrayals of law disconcert those who seek to undermine to totalising nature of law. Following Lacan, Pottage suggests that subjects exist simply because they take up speaking positions when uttering speech, not because they have entered the legally-prescribed realm of the symbolic (ibid.: 159). They are simply *because* they speak; their existence is not contingent upon *what* they speak. Moreover, Legendrean frameworks preclude the possibility of there being genuine differences between subjects (ibid.: 178). It is this "possibility of difference" that distinguishes Luce Irigaray, for example, from Legendre (ibid.: 178). For Irigaray, the masculine subject must experience a sense of dissonance (between the loss of his

mother and the desire for a paternal and omnipotent law) in order for his masculinity to be vibrant (ibid.: 179). The feminine subject, alternatively, need not experience that lack due to the possibility of woman-centred relations, of "love between mother and daughter" and "between women" (Irigaray, cited ibid.: 179). Such subjectivity - a woman-centred subjectivity that is beyond the paternal nature of the law - is obviously contrary to the symbolic order of the Father. It is a different form of life (a "specifically feminine energy") that is more attuned to "communication and growth" than male-centred "reproduction" (Irigaray, cited ibid.: 181).

This use of Irigaray's notion of the *feminine* to theorise the foundations of *difference* has the unfortunate potential to essentialise the "beyond" that (potentially) exists outside law. It has the potential to valorise particular types of women and marginalise others. The representation appears to include women who have been raised by mothers, or mothers who have daughters, and women who love one another but fails, however, to recognise those who have been nurtured by fathers (rather than mothers), who only have sons rather than daughters (or no children at all), and are purely heterosexual (rather than lesbian or bi-sexual). The non-appearance of these other women appears to preclude them from consideration. Moreover, Pottage does not acknowledge their absence, let alone the presence of males who might seek to rebut masculinist law (as he surely appears to do). Thus, he fails to firmly address the issue of how far feminist post-modernism can privilege its post-modernist tenor before it compromises its feminist convictions.

Pottage partially compensates for this lacuna and the subsequent essentialisation of the *feminine* by emphasising the textuality and ephemerality of social relations. Legendre's work, he suggests, erroneously subordinates subjectivity to conventional myths about the origins and causes of sociality. These myths instruct subjects about how they ought to relate and desire. Lacan, alternatively, suggests that it is "relations *in themselves*" that are important (ibid.: 183, original emphasis); they do not rely upon linear discourses for validation. The difference between Legendre and Lacan, Pottage suggests, reflects the different logics of Saussure and Hegel. For Hegel, as for Lacan, thought *is* action. Conversely, Saussurean analysis, as with Legendre, presumes that the theorist is inactive; they merely comment upon a world of closed relations. As such, structuralist theorists lack a sense of activity in the world

and of the impact that their activity has upon the observed (ibid.: 183-4). Supporting Hegel's sentiment, Pottage suggests that discourse is active. It is not, however, active in the sense that it is produced by creative, philosophical subjects. Rather, the subject is dead and it is *the concept* that "is restless", reflecting its own "quest for recognition" (ibid.: 184). This outcome is "rendered even more urgent and fluid by the absence of any final word from the Other" (ibid.: 184). Pottage conflates "the concept" with "the subject" at this stage, introducing the figure of a "partial subject" who appears to reflect the space that exists between the consciousness of embeddedness and awareness of an irreducible facticity. In a similar vein to Jameson's perception that the subject complicitly privileges its facticity - thereby activating its need to forge meaning from a world that is devoid of ultimate meaning - this "partial" subject is unable to "take its place in an established [symbolic] network" (as none exists) but rather demonstrates its "desire" in each "dislocated irruption" that it makes into the symbolic order (ibid.: 184). Expressed in other words, there is "no sense of order at all" within which subjects exist, only that which emerges from the subjects' confrontation with existential silence (ibid.: 184).

The importance of Pottage's repudiation of totality, outlined above, is that it moderates his earlier reading of Irigaray. Most notably, it diminishes the extent to which that earlier reading threatens to privilege particular categories of women. Pottage's amalgamation of Irigaray and Lacan seems to suggest that the development of a *feminine* subjectivity is perpetually deferred despite the inerasable quest for the recognition of that identity. The desire to create identity is, he suggests, like "the unstoppable in pursuit of the unattainable" (ibid.: 185).

Pottage's project has considerable merit. Put simply, it holds out the possibility that bases can be created for conceptions of justice that do not fall prey to the legislative effects of established symbolic orders. As such, it promises to move post-modern legal pluralism beyond entrapment in the "politics of suspicion." A significant question remains unresolved, however. This surrounds the status of the *feminine*. Pottage leaves *woman* as an essentialised subject. The distance needs to be closed between the particularist identities given to this subject who is to go beyond law ("woman") and facticity ("the subject who is perpetually deferring the establishment of identity"). The realm of language that Pottage uses to fill the void between them always "falls useless" between consciousness and facticity, Jameson

suggests, "when they are too radically separated" (Jameson 1961: 204). The emphasis that such projects place on language as the way of analysing the construction of perception is, therefore, insufficient to disclose the full range of issues involved in the development of alternative conceptions of legality. As such, the identity and capacity of Pottage's "partial subject" remains ambiguous (in that it is both feminine and beyond the feminine) and needs to be clarified further if it is to be the medium through which an alternative conception of law is to develop. I explore this point further in the following chapters.

5.3.2.2 Justice and Destiny

In contrast to Pottage's attempt to find a source of justice between the *feminine* and *textual contingency*, Douzinas and Warrington look for justice within the ontology of Being. Specifically, they look to destiny. Their pursuit is based in a reading of the Greek tragedy *Antigone*.[3] The tragedy reveals three matters: there can be no sense of law (*nomos*) without an overarching sense of justice (*dike*) (ibid.: 191-200); the universality of law is always "devoured by" the particularism of social interaction (ibid.: 190, 201-205); and queries about "originary ethics" are "haunted by" questions about the "destiny of Being and ontology," thereby bringing law in front of "the question of justice" (ibid.: 190, 212-223).

A single dimension that is common to all three themes is that justice, as destiny, is an enigma: justice is an impossible achievement that ultimately destroys those that seek it; it exists within the "diachronic time" that exists within the psyche and cannot be experienced in the present (and thus become known); it is the incessant call of the Other that is impossible to understand and against whose irrevocability subjects constantly erect barriers; and it is the "unknown" (ibid.: 222). As a consequence, standards of legal judgement - if standards are understood as

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[3] Antigone (the daughter of Oedipus) seeks to bury her slain brother (Polynices) against the dictates of the ruler (Creon). Creon has decreed that Polynices is a traitor and is not to be accorded a proper burial. Without that burial, however, Polynices is unable to enter Hades. Antigone refuses to respect the king's edict and is sentenced by him to a live burial if she proceeds. She argues that she is only respecting the laws of the gods and as such is duty-bound to break those of the king. Meanwhile, the city is ravaged by a plague and Creon reads this as the gods' displeasure with him. He relents upon the execution order only to find that Antigone has committed suicide after burying Polynices. Creon's son, who is also Antigone's lover, also kills himself. Moreover, Creon's wife upon hearing of the tragedy also commits suicide. The houses of Creon and Oedipus have been destroyed.

something that transcend the singular in order to reflect the universalisable - are impossible in both theory and practice. Neither can justice refer to shared visions that arise from commonly held beliefs and assumptions. It refers, alternatively, to the needs of the singular individual and the contingency of their circumstances.

Subjects' inability to fully know the meaning of justice is multiplied by their inability to discern the needs of those who seek it (ibid.: 211). In fact, Douzinas and Warrington suggest, the repeated interest in Antigone by literary, legal, and philosophical scholars points to our interminable quest to understand what is required of us. "Our own desire for Antigone is based on this impossibility to know what the other wants from us, to turn it into a law, a demand upon which we can act" (ibid.: 211). The law that subjects seek - the images they construct of justice - are always only fantasies; they are a "frame we construct to explain away the unknown desire of the Other but that at the same time constitutes and organises our own lack and desire for the Other" (ibid.: 211). Subjects' images of justice, to restate the point, are erected as shields against the sense of incompleteness that accompanies their inability to genuinely understand what the Other wants. As shields, these senses of justice are necessarily incomplete substitutes for the needs of the Other. As the call of the marginalised, justice remains misunderstood. Subjects are incapable of moving beyond their own conceptual frameworks to understand the Other but feel internally compelled to do so for those whose plights have become singularly important to them.

This portrayal leaves the destiny of Being without form. Subjects are left, rather, with the sense that they "can never know destiny" but, also, a feeling that they "must [nevertheless] follow it" (ibid.: 222). The destiny that they are to follow, however, is not a universal progression shared by everyone. Rather, it is a wholly singular and personal discovery of - and encounter with - those whose call resonates within them and compels (in a quasi-biological way) a response.

The ineffable nature of justice within this last attempt to go beyond law is by now (I hope) clear. Our senses of justice arise precisely because we are individualistically called to respond. It is because we are the only ones who can respond to the Other's call that we experience the sense of *I must*. Moreover, it is this very sense of *I must* that is at the heart of law. Its origins,

to summarise the above points, lie within the singular nature of the Other's call upon the singular subject. It is a call that each, nevertheless, is incapable of comprehending. Justice, in conclusion, only arises within us as individuals and once there remains incomprehensible.

5.4 Conclusion

Post-modern legal pluralism, as presented here, is characterised by both a "politics of suspicion" and an attempt to escape that representation. The two aspects have been exemplified, respectively, in the attempts to construct a *countermythology* and to found a *law of the law*. One of the research projects from the latter programme, in my estimation, holds more promise than the others for developing a multicultural conception of law. As signalled above, the issues and questions that it raises are taken up in the following chapter on *post-pragmatist* legal pluralism. For now I wish to consolidate my discussion of the other post-modern research projects reviewed here in order to expand upon why they are less useful platforms for an alternative legality. The dimensions of this discussion are relatively narrow because of the similar political directions that I perceive in both the *countermyth* argument and the quest for *destiny*.

The *countermyth* argument and the *quest for destiny* share a common refusal to advance a vision of justice. Both seem to suggest that such imaginings are, at best, vain hopes and, at worst, shields with which subjects avoid facing their inability to bring about a genuinely just world. As demonstrated above, the *countermyth* argument pursues this line by altering the notion of myth so as to preclude the search for origins or endings. Without stories of beginnings or endings - for example, stories of societies that are not stratified by racial or gender-based inequalities - hope also disappears of finding reasons for evaluating the worth of different conceptions of law. On the face of it the *countermyth* does have this purpose; it highlights the Euro- and phallo-centrism of positive law. Nevertheless, it fails to provide "aeuropean" or "amasculinist" visions upon which alternative standards of judgement might be developed. Stated simply, the *countermyth* argument cannot explain what it has done. The attempt to explain the *countermyth's* ethical base would force the enunciation of a social project. The *countermyth* cannot entertain such projects, however, particularly when they are

framed in specific terms such as a non-racial or non-gendered society. A countermythic fear seems to exist that the mythical nature of these utopias will be forgotten and that their visions will become indubitable blue-prints for the "nature of things," decrees about how things ought to be. Such projects may therefore imprison humanity in the same manner in which positive law has become its prison.

In like manner, the quest for justice through an unknowable *destiny* precludes the development of shared legal standards. This occurs because justice can only reside within individuals' understandings of their personal destinies. Charles Taylor decries such outcomes in the following bold terms:

> A society of self-fulfillers ... cannot sustain the strong identifications with the political community which public freedom needs ... . The ethic generated beyond self-fulfilment is precisely that of procedural fairness, which plays a big role in the instrumentalist outlook. Politically, this bit of the 'counter-culture' fits perfectly into the instrumental, bureaucratic world it was thought to challenge. It strengthens it. (Taylor 1992: 508)

In the same way that the *countermyth* and the quest for *destiny* are unable to suggest bases upon which counterhegemonic standards of judgement could be constructed, they are unable to suggest standards for evaluating their own value as discourses. This further underscores their inability to prefigure a multicultural conception of law. If either of these projects are to be taken seriously, their theses must be abjured as soon as they are understood. The thrust for this proposition can be clearly seen from the manner in which the *countermyth* opposes the concept of *myth*.

In one of its dimensions, the *countermyth* attempts to unsettle the meaning of *myth* in order to ensure that modern mythologies (such as law) do not deny the mythological natures of their own existence. This need to destabilise meaning requires the reader to dismiss the message that has been rendered to them - the *countermyth* argument - by distorting the very medium - again, the *countermyth* - through which they subsequently think. This need for perpetual destabilisation disrupts the ability of the reader to construct standards by which to judge the

validity of the discourse. The reader can never be certain which aspects of the medium ought to be retained. Certainly, the discourse itself cannot provide clues because it has no privileged dimensions through which its essence can determined. If the discourse could provide clues there would be no need for judgement; one would only have to follow those leads, culminating in a discovery of the appropriate answer.

The quest for *destiny* appears more secure but ultimately it, too, produces the same uncertainty about what status it ought to be given. The apparent security of the *destiny*-centred discourse lies in its grounding within the ontological meta-narrative on the nature of Being. Stated briefly, the meta-narrative suggests that humanity is founded in the violent naming of itself. Discourses about preferred ways of living then emerge pragmatically from the "constellations" of knowledges through which groups inhabit their worlds (Douzinas and Warrington 1994: 218). Within this environment, however, a community's assumptions about their identity must be kept open to review, to "an otherwise of Being" (ibid.: 221). This has the potential to free communities from assumptions that may entrap their members within rigid self-perceptions and that exclude others who have alternative views. It is far from clear, however, where standards might come from for evaluating the significance of alternative meta-narratives if those standards are to be more than simply the prevailing conventions of the community.

In the absence of transcendental fixtures that subjects could use to resolve competing claims between meta-narratives the only resource for deciding such matters within these two post-modern projects appears to be the abstract subject-positions from which they have been written. From the arguments presented thus far, however, it might be anticipated that the decontextualised post-modern subject is vulnerable to the regulatory power of positive law and thus may find it difficult to remain distanced from it.

To begin, the abstract nature of that subject means that positive law does not have to be weighted down with problematic concerns about the context or field of responsibilities to which a such subject might be tied. The "necessity defence" for example - that has been

successfully used to defend politically-motivated crimes on the basis that their moral foundations outweigh those of law - could be easily disregarded.[4]

Nor can principled resistance be expected against the law from the countermythic subject, unless that resistance is against law in its totality. In such cases the subject is liable to be met by the full force of law's exclusionary power. Judges possess considerable powers, for example, to incarcerate those that refuse to acknowledge their court's authority. This reflects the *countermyth's* insight that law ultimately defines the terms of its relationships with that which is outside it (Fitzpatrick 1995: 110). Law, in short, has the ultimate power to define. Its exclusionary power is not only exercised in overt ways. Goodrich *et.al.* for example, disclose the tension that they experience in teaching post-modern law within law schools that are required to equip students for employment in orthodox legal settings (in law firms, businesses, etc.). The legal setting *in toto*, in this case, tacitly threatens to exclude forms of legal scholarship (post-modern) that endanger the viability of law as a professional practice (Goodrich *et.al.* 1994: 12-16). The post-modern legal subject, therefore, is under pressure to resist law in its totality knowing the impossibility of the quest and the risk of being condemned to silence.

This confrontational stance against positive law is redolent of the relations that positive law engenders and is a manifestation of the way in which post-modernism remains wedded to the modernist paradigm. Positive legal systems are "self-enclosed hierarchies" that attempt to "fill the universe, and ourselves as containers for that universe", denying the existence of anything that they do not themselves perceive (Cornell 1992a: 101, 146). Once employed, positive law propels all participants into a struggle to exclude each other in the name of their own truths. Such a struggle between post-modern projects and positive law seems inevitable as the two converge within the terms set by the modernist paradigm. The quest for *destiny*, as one of these projects, ironically suggests that post-modern subjects should remain open to alternative ontological meta-narratives including, presumably, those of positive law. A greater possibility exists, however, that positive law will be perceived as a source of domination rather than as an Other whose need for a just hearing has to be heeded. In order to "succeed" in going

[4] See Bannister and Milovanovic (1990) for a discussion on the legal potential of the "necessity defense."

"beyond law," therefore, a post-modern legality would have to achieve just that; it would have to simultaneously inhabit and transgress positive law. As they are presently conceived, however, there seems little possibility of compromise or mutual ground between post-modern and positive law. Post-modernism's dedication to the destabilisation of meaning precludes it from participating in the institutionalisation of meaning. Together, the above matters suggest that the abstract post-modern subject might perpetuate modernist law through their intrinsic opposition to law more than subvert it from within.

In terms of the projects' political positionings, the above observations suggest two options. Post-modern legal projects can either dismiss law *tout court* or can attempt to reform the way in which the abstract subject appears before the law. The former leads to an anarchistic position and the reinforcement of the very concept of law that is abjured. Alternatively, the latter stance leads toward rights-based legal theory - the domain of Ronald Dworkin and the communitarian reformers such as Valerie Kerruish (Kerruish 1991). Unlike the communitarian reformers, however, the post-modern legal subject lacks an ability to talk optimistically about the construction of communities and shared standards of judgement. Indeed, to suggest that groups might form identities - as have nations and ethnicities - is not a cause for celebration. Rather, it is to prompt the question, At whose expense? The post-modern legal subject is left, as a consequence, with talking about the construction of selfhood. They are left, in other words, with defining the private in terms of subjectivity and the public as an homogenising authority dominated by law. The non-anarchistic option, in turn, returns post-modern legal theory to the classic problematic of liberal legal theory; the confinement of public power in the name of private freedom. This return occurs, however, via a theory that can do nothing but oppose the terms of that problematic.

6

POST-PRAGMATIST LEGAL PLURALISM

6.0 Introduction

Post-pragmatism is an epistemological position from which particularistic yet open-ended standpoints are developed. Its origin within the legal-pluralist literature is feminism and the title of "feminist post-pragmatism" appropriately describes the form that it takes within legal theory. Its defining characteristic is its repudiation of the positivism og realist-feminist attempts to alter the nature of law and the pragmatism of post-modern feminism. Positivism is repudiated on the grounds that it calcifies categories such as *woman* into static representations. Specifically, it stymies debate on the meaning of "womanness" and, in turn, dictates the form that a feminist legality should take. These classifications, in turn, become potential sources of domination that can be used to police, marginalise, or correct women who are "differently-positioned" to those that construct and legitimate the categories. Pragmatism, alternatively, is dismissed on the grounds that it undermines the foundations upon which feminist critique is made. Its repudiation of all metaphysical justification makes the social value of feminist critique contingent upon the tenor of populist sentiment. Neither approaches are satisfactory to the feminist post-pragmatist. Populist sentiment too easily becomes synonymous with the "community's latest 'whim'", to cite Cornell (Cornell 1992: 6), while the positivist approach is unacceptably reductionist.

The interest-value of feminist post-pragmatism lies in its determination to "go beyond" law *via* the use of its particularistic positioning ("woman"). Without the aid of materialist assumptions of some form, the approach suggests, women are unable to sustain theoretical and political engagement with the social dynamics through which they are marginalised. Moreover, post-pragmatist legal pluralism then attempts to "go beyond" the very positioning of feminism in order to avoid its own reification and transformation into a self-legitimating regulatory-discourse. In this way it portrays realist and materialist foundations such as feminism as *de facto* forms of legality that must be both employed and resisted.

The pivotal problem in this project concerns its own viability. The attempt to "go beyond" feminism (and all other legalities) *via* feminism - without jettisoning the very concept of the *feminine* - seems highly problematic. Its feminist foundation remains as an obdurate policing-agent that exacts a symbolic castration from all non-feminists who attempt to employ it. Thus, despite its laudable intentions, feminist post-pragmatism appears unable to facilitate a fully-inclusive and emancipatory conception of law. That said, its focus on the non-rationalist aspects of logic provide a fecund resource for developing a multicultural conception of law.

6.1 Analyses of Law

Feminist post-pragmatism represents both a confrontation and extension of pragmatist definitions of law. Prior to demonstrating its vitality, I wish to outline the central dilemma that feminist legal-pragmatism presents and to which post-pragmatist legal theory address itself.

6.1.1 Pragmatist legal horizons

Pragmatism portrays law as a contested field where normative spirit and legal method meet. The contestable issues for pragmatic feminists are law's gender-bias and the assumption that legal method is impartial towards cultural expression and value preference. The most promising way to contest these matters, pragmatic feminism suggests, is to develop feminist methods for determining what counts as legal questioning, reasoning, and knowledge (Bartlett 1990: 370). Bartlett suggests, for example, that a feminist legal-practice would involve three distinct "methods": an asking of the "woman question;" the use of "feminist practical reasoning;" and the construction of experientially-based knowledge (through "consciousness-raising" (ibid.: 371-383)).

The "woman question," to exemplify my point, refers to queries about how particular standards of legal judgement affect women. This question should be as integral to legal critique as is the use of conventional interpretative methods (such as those used to determine the precedential value of cases or the status of contending "facts"). To ask the "woman

question" in a legal case is a political act in that it assumes that gender bias exists within the putatively gender-neutral law. Pragmatic feminism is aware that the "woman question" itself propels legal judgement toward a particularistic partiality and is thus potentially contestable. In reply, however, it can be argued that the concept of women should be expanded to include all gender categories (ibid.: 376-7). The focus should then become a generalised field of oppression. As a consequence, however, inquiry into the gendered nature of social relations is severely diluted. Critique of law's masculinism is left in a pragmatist netherworld where no bases outside of prevailing and generalised notions of oppression exist for anchoring the meanings of gender-related concepts. The specificity and political thrust of feminism is thereby seriously adulterated.

The proposal to incorporate feminist practices such as these into positive law highlights a particular concern that can be levelled at pragmatist legal theory. It reinforces, rather than unsettles, the totalising nature of law. The previously radical insights brought by feminism to the critique of law are reduced to a non-specific critique of oppression that increasingly resembles those found in liberal legality. This is of no apparent concern to the pragmatic feminist. "Judicial reform", Bartlett favourably notes "has come about through expanding the lens of legal relevance to encompass the missing perspectives of women and to accommodate perceptions about the nature and role of women" (ibid.: 381). Law, to highlight the specifically Legendrean tenor of this point, can legitimately encompass both feminine and masculine perceptions. As a consequence, however, genuinely alternative (feminist) conceptions of legality will cease to exist when law successfully manages to encompass the feminine. The feminine "beyond" to law would, instead, become law and the source of critique would be annihilated. From my position, as I argued in Chapter 2, the failure to escape law is to be expected at this time. All attempts to do so are inexorably wedded to the modernist paradigm for their conceptual capital and it is not surprising that those attempts remain dominated by that capital. This was also my central point in discussing the *countermyth's* attempt to escape the modernist notion of *myth* (Chapter 4). Even though it attempted to obfuscate the meaning of *mythology*, the argument was forced to use the modernist perception that myths have origins. The *countermyth* argument simply dissembled their form, successfully preventing its own mythology from gaining a particularist meaning. In the process, however, it reified the unfathomablity of meaning. As a consequence, undecidablity simply becomes the underpinning principle of post-modern legal theory, a *de*

facto form of law. My concern, and that of the post-pragmatists, is that pragmatism's subsumation of all particularist identity beneath an overarching proceduralist law will prevent the possibility of any reconstructive political practice outside of the terms specified by that law.

6.1.2 Post-pragmatist legal horizons

Post-pragmatist legal pluralism is uneasy about the absence of a stabilising sense of ontology such as the gender-hierarchy (that is dismantled within feminist-pragmatism). It remains so even while aware that dimensions of materiality such as the hierarchy are inherently labile due to their socially-constructed nature. In this view, however, the dissolution of enduring social divisions into an interminable sea of difference eradicates all senses of justice with which subjects can collectively critique law.

The initial task of legal critique, according to post-pragmatist discourse, is to understand how law's ability to enforce meaning is enmeshed with masculinist symbolism. This masculinist positioning of law gives rise to a "juripathic" process in which legal judgements exclude and condemn on the basis of masculinist interpretations of events (Cornell 1992: 103-4). The law and the law of the Father "cannot be separated" (Cornell 1991: 151). Moreover, the law fails to recognise requests that are not framed within its masculinist symbolism.

The historic inability of law to recognise marital rape is a good case in point. The feminine voices that arose against such practices were relegated to a position of "pure externality" to legalese (Cornell 1991: 54). Through this marginalisation, law was protected from the potentially transforming power of women's critiques. Rather than face transformation, state-law reformed a small number of paradoxes that existed within its legislation such as its definitions of rape. This eradication of paradoxes is, apparently, the favoured jurisprudential option, allowing the judiciary to elude the possibility that genuinely alternative modes of law might have the potential to transform the meaning of law away from that of the sovereign command of the hegemonic symbolic order.

Radical transformation is only possible, post-pragmatists such as Cornell suggest, if a distinction is made between justice, the spirit of law, and legal method. Without that separation concepts of justice are too easily reduced to the community's pragmatic reasoning (ibid.: 3-6). In turn, societies with pragmatically-derived standards have no means for imposing limits upon the forms of life that they will favour. Without an over-riding sense of justice, their partialities may become partialities to everything, including intolerance and fundamentalism to echo Jürgen Habermas' concerns (Habermas 1994: 133). In order to overcome these dangers (that the post-pragmatist explicitly associates with pragmatism) the "rotten" nature of law's ability to deny its "mythical foundations of authority" - and to thereby parade as justice - must be revealed (ibid.: 167). Only by "forging a separation" between justice, the spirit of law, and its procedures can subjects address significant political questions such as how "tolerance of difference [is] to be combined with the requirements of living *together* under *common* norms" (ibid.: 181, original emphasis). This, to return us to a central theme of this thesis, is the pivotal issue within the development of a multicultural conception of law. Methods for combining "tolerance of difference" and "the imposition of common normative expectations" can only develop, for the post-pragmatist, when a particularist discursive-space (such as feminine creativity) is reserved beyond current legal convention and social sensibility.

To summarise this discussion, the central difference between pragmatist positionality and post-pragmatism concerns their sources of justice. For the pragmatist, justice arises from experience-oriented, oppression-sensitive, practical reasoning. The knowledge that emerges will enter legal thought and become emancipatory standards of legal judgement. As a consequence, the law becomes just. For the post-pragmatist, alternatively, the conflation of law and justice prevents alternative forms of legality from engaging with oppressive social practices in a non-determined manner and, moreover, avoiding their own calcification. Without an independent and particularist concept of justice (such as feminine creativity) the only bases for critiquing legal judgements and reforms are prevailing representations of "what is." In such circumstances law becomes a self-perpetuating system. "What is" becomes synonymous with "what will be."

6.2 Legal Subjectivity

Both the pragmatist and post-pragmatist positions suggest that communitarian and "ethical" forms of subjectivity should underpin an alternative conception of law. A shared sense of morality will emerge from the manner in which subjects reflect upon the unequal social relations within which they and others are embedded. In a manner that pragmatist representations begin but do not sustain, the post-pragmatist locates the development of subjectivity firmly within the social relations of the gender hierarchy. In order to gauge the value of post-pragmatism, I first wish to review the form of legal subjectivity that emerges from pragmatist *positionality*.

6.2.1 Pragmatist legal subjectivity

Pragmatist assumptions about legal subjectivity are evident in Bartlett's discussion about "what it means to be 'right' in law" (Bartlett 1990: 383-393). "Right" answers surface when the correct epistemological position is adopted, that being a position which Bartlett calls "positionality" (ibid.: 389-393). *Positionality* is a "synthesis" of the "rational/empirical position, standpoint epistemology, and postmodernism" (ibid.: 383). The synthesis, however, diminishes the role of reasoned theorising in the construction of knowledge and privileges experience and the undecidability of knowledge. As such, the notion that realities exist independently of thought is severely diluted. As a consequence, legal subjectivity is detached from categories that could stabilise legal discourse and is instead grounded within indeterminate feminist conversations about legal method and procedure.

The feminine-pragmatist is aware that their perception is limited by the social relations through which they have been constituted. Knowledge about the impact of those relations upon subjectivity is always partial "in that the individual perspectives that yield and judge truth are necessarily incomplete" (ibid.: 389). Subjects can, however, increase their knowledge by opening themselves out to others' perspectives. Moreover, the injunction to do so is an ethical one; it tempers subjects' (including feminists') tendencies to "stamp their own point of view upon the world" and thus police others' perspectives (ibid.: 390). Subjects cannot fully transcend their own perspectives in a rational manner so as to completely

understand the Other, however, and thus entirely repress those tendencies (ibid.: 390). Nevertheless, *positional* legal subjects are ethically bound to attempt an understanding of the other's perspective.

This ethical responsibility does not extend to the point of *necessarily* accepting others' perspectives, however (ibid.: 390). *Positionality* does not presuppose that all viewpoints can be reconciled. Rather, it "imposes a twin obligation" upon subjects to make "commitments based on the current truths and values" of feminist knowledge and to remain open to perspectives that might challenge those commitments (ibid.: 390). Moreover, the notion of positionality suggests that subjects cannot remain committed to a viewpoint and critique it at the same time (ibid.: 390). Subjects must, therefore, separate the processes of judgement and critique of judgement. Through this, *positional* legal subjects develop an "ideal of self-critical commitment" (ibid.: 390).

This image of a self-critical subject has much to commend it. What it cannot do, however, is point to criteria for evaluating others' perspectives that are not at the same time a pragmatic product of conversations that the subject enters into with their peers.[1] The marginalisation of rational-empiricism precludes the establishment of stable "truths." As the post-pragmatist position suggests below, the content of ontological presuppositions (about the nature of being) are not necessarily fixed and, therefore, do not necessarily wed subjects to dogmatic viewpoints. Their existence must at least be accepted in principle, however, if the community of enquirers is to have anything greater than the fluidity of collective experience upon which to anchor their reflections on others' perspectives.

6.2.2 Post-pragmatist legal subjectivity

The post-pragmatist legal subject - that exists at the centre of the post-pragmatist project - prefigures an alternative way of being. That new sense of being, as with pragmatism, pivots

[1] Or, somehow, in the conversations with those "others." In the latter case, criteria for evaluating perspectives would develop in a manner that is not determined by either party and thus in a manner that neither party could comprehend while the criteria were being formed. Only in retrospect could the parties identify the manner in which the criteria emerged.

on non-violative relations with those who are differently positioned (Cornell 1991: 141-164). This approach forms a "kind of person" rather than a tome on morality (Cornell 1992: 13). It advocates a position of "receptivity" through which quests for empowerment and self-assertiveness are superseded by the affirmation of carnality, love, care, and erotic passion; moreover, it is realised through the subject's "non-violative relationship with the Other" (ibid.: 154; Cornell 1992: 13). Stated in an alternative manner, post-pragmatism calls subjects to learn the "art of losing" so as to avoid "the illusion" of "self-containment" that characterises the quest for mastery over others (Cornell 1991: 164). This non-violative form of being is, moreover, the only "true foundation for morality", encompassing "compassion for the suffering of others" and recognising that suffering is a shared human fate (Cornell 1992: 28). It leads, moreover, towards a new, Derridean "choreography of sexual difference" in which the Other is neither male nor female, but singular and particular (Cornell 1991: 86). This, then, is the basis for a new conception of legality.

The pathway towards this non-violative and non-gendered form of being takes the following line. It begins with a recognition that knowledge of the pathway only begins from particularist positions within the social divisions, not from some mythical, decontextualised point outside of them.[2] Thus, Cornell states in relation to her own feminist analysis of law "we cannot just announce a new beginning, we must begin anew from where we are in the gender hierarchy, unable to confirm or state exactly where we are" (ibid.: 19). In contrast to the quest for the *law of the contingent*, reviewed in the previous chapter, post-pragmatism thus starts from within the context of particular social differences rather than of *difference, per se.*

Like the pragmatic feminist, the post-pragmatic feminist suggests that the gender hierarchy is a "prison" for both sexes but, however, that "the two genders do not suffer the same

[2] The basis for Cornell's point is that, following Jacques Lacan, the gender hierarchy exists as a discursive (rather than biological or ontological) structure that is imposed upon the unconscious during infant-socialisation. During that period, the notion of sex difference is firmly inscribed within the self. Thus, Cornell suggests, "(t)he recognition of 'sex' difference ... derives from a reading of the mother's desire [for the father's putative social potency - the phallus] .... Mother wants Daddy. She wants the phallus that she does not have. And, as the mother is devalorized, so that men can assume the identity of the not woman, so is the female child" (Cornell 1990: 72). Thus, because the gender hierarchy is embedded in our unconscious we cannot simply "shake it off" or presume to stand outside of it.

entrapment" (ibid.: 199). It "castrates" men with a "phallic" and "pregiven ideality", forcing them into pre-figured representational frameworks that preclude them from creatively exploring their worlds (ibid.: 86-7, 80, 9). Women, alternatively, are positioned as the Other to the masculine. As Other, their only significance is "as lack of the phallus" (ibid.: 80). As such, they appear to lack a self-generating creativity and an ability to forge an identity of their own (ibid.: 80).

The post-pragmatic feminist disputes this positioning. *Woman* has the potential to oppose the gender hierarchy in its entirety, not just the masculine (ibid.: 114). As such, *woman* is the "observer" of the gendered system (Cornell 1992: 117). In a similar vein, the *feminine* is humanity's "redemptive perspective" and the name through which subjects can escape totality (Cornell 1991: 117). This woman, *who is totally Other to the symbolic order,* "skirts" masculinism's castrating effects (ibid.: 179) by pointing to an "elsewhere not governed by [the] gender hierarchy" (ibid.: 11). Unhindered by the symbolic order's attempt to constrain its subjects within pre-figured categories, post-pragmatist subjects recreate their identities by "rewriting" what is said of them within that symbolic order (ibid.: 3). They do this by discovering the "repressed" within them, the "more" that has "yet to be rendered" (ibid.: 2).

The ability of *woman* to exist independently of law's symbolic order requires the deconstruction of the *essentialism* that has previously contained the concept of *woman* within fixed legal categories and role-expectations. The central target of this deconstruction, moreover, is the gulf that purportedly exists between the symbolic and imaginary realms. This space is the "as if" through which the imagination metaphorically explains events and circumstances and, furthermore, is the central device in "the very act of 'seeing the real'" (ibid.: 169). Representations of reality, in other words, always depend upon the use of imaginary connections between metaphors. Subjects cannot get beneath language to connect directly with material reality to find the "correct" connections and, as such, there can never be any final referents (names, categories) with which subjects can name the material aspects of life. Rather, the use of referents to describe "what is" always involves the imagination that straddles consciousness and facticity.

This stance does not abjure materiality despite its putative disavowal of a correspondence theory of truth. In this vein, the materiality of women's experiences are never "obliterated"

from the eyes of the concerned observer even though they are "undermined" by subjects' inabilities to determine their exact essence (ibid.: 2). The issue that emerges is how the properties of an event or element are made intelligible (that is, "real") to us. Post-pragmatism suggests that "reality" is created through the "metaphorical transference" of images between properties (ibid.: 31). This might suggest that the reality of an event cannot be separated from the "seeing" of an event but, rather, "it cannot be reduced to it either" (ibid.: 131). Instead, the property retains a material "secondness" - following C.S. Peirce - that "persists *beyond* any attempt to conceptualise it" (Cornell 1992: 1, original emphasis). It might seem, therefore, that it is impossible to definitively "know" the properties of events, subjects, etc. This is not totally the case, the post-pragmatist tempers, because "(t)here is always the possibility of slippage between seeing and what 'is', even if we can only understand the significance of the slippage from within another 'point of view'" (Cornell 1991: 131).

The opacity of materiality is not simply and purely a "problem" according to the post-pragmatist position. Rather, and in a similar style of argument to that put forward by the post-realists, subjects stand to benefit from their inability to conclusively define all the dimensions of material reality. If they were able to define reality to that degree they would be denied the ability to remain Other to the symbolic legal-order through which the process of defining proceeds. This is Pottage's concern with Legendre; attempts to give full and final meanings to categories such as "woman" would constrain those who identify with the categories. As might be recalled, this leads to the proposition that the contestability of legal rights is an intrinsic good. The opacity of materiality provokes an uncertainty that encourages the periodic evaluation of current sets of commitment. Certitude would annul this and instead legitimate regimes of political correctness.

The acknowledgement of materiality and its (ultimately) constraining effects points to a dilemma, however, that is associated with Jacques Derrida. Derrida wishes to acknowledge the materiality of life but is cautious about naming it for fear of legislating the terms of its existence (cited by Cornell 1992: 89). His solution, that post-pragmatism reflects, is to not allow the "Saying" to be "said" (ibid.: 89); that is, Derrida refuses to name his method, preferring to simply perform it, to "be." As might be recalled, this is what Fitzpatrick does within his development of a *countermyth*; an intrinsically moral text, the *countermyth* refuses to speculate on the source of its morality. This reflects Derrida's suspicion of metaphor, of

the manner in which metaphor can all too easily become a prescriptive force in its own right; it can too easily impose definitions upon events, identities, etc., that belong to the symbolic order rather than to the entity being defined.

Post-pragmatism suggests that Derrida's refusal to name what he does, even in metaphorical terms, is an ethical practice. It ensures that the Other retains the room to speak on their own terms. Post-pragmatism's goal, however, is *to name* what Derrida does, identifying the ethical force behind his deconstructive methodology. To do so, the post-pragmatist must consciously engage with the metaphors upon which identities are built (those associated with *woman*, for example) knowing that this can lead to a hazardous re-essentialisation of those identities. Post-pragmatism suggests, however, that the ethical force can be safely named when the limitations of language-use are appreciated. Once these are recognised, the ethical base can then be appropriated by subjects who wish to act justly. This leads Cornell to retitle *deconstruction* as the *Philosophy of the Limit* (Cornell 1992: 1).

This renaming of deconstruction builds upon Derrida's concepts of the *logic of parergonality*, *différance* and *diachronic time*.[3] By reworking these concepts a form of subjectivity can paradoxically be "known" in terms of properties that are ultimately ineffable. This, for the feminist post-pragmatist, is a *feminine* subjectivity whose principle property is the enigmatic realm of creativity. In turn, it underpins the legal subjectivity that prefigures the post-pragmatist conception of law.

This naming of the emancipatory subjectivity allows the *dérèliction* to be confronted that haunts the subject of positive law, the force that stymies radical action and the imagining of alternative forms of legality. It is the force that Luce Irigaray detects within women who feel

[3] Cornell uses Derrida's *logic of parergonality* to demonstrate that all conceptual frameworks, such as positive law, imply the existence of a reality beyond those frameworks (Cornell 1991: 104). Thus, in contrast to the Legendrean notion of legal symbolism, she suggests that reality "can never be completely enframed" (ibid.: 140). *Différance*, the second of Derrida's concepts, suggests that it is impossible to describe systems' boundaries (such as those of law). If this were possible it would be apparent that the system could incorporate descriptions of its limits and thus, in a *de facto* sense, define what is beyond the system (that is, that which is "not law" (Cornell 1992: 2). Conversely, there must always be an outside (a "remains") to self-enclosed systems such as law (Cornell 1991: 108)). Finally, *diachronic time* de-privileges the present, portraying it as an always postponed trace of the not-yet-of-the-never-has-been. This is important with regard to the construction of post-pragmatist legal subjectivity because it undermines the assumption that law is a self-constituting system that can define future and past identities as aspects of present language-use.

condemned to forever only speak in the terms prescribed by the masculine symbolic order (cited in Cornell 1991: 60). *Délèliction* is the place where "silence only awaits us" (ibid.: 200). The possibility of a "beyond" to that place lies within the celebration of *jouissance.*

Jouissance, following Irigaray, is "the so much more remembered within the feminine imaginary that can never be completely excluded at the same time that it cannot be grasped in 'their' knowledge of us" because it exists as an ineffable realm beyond the symbolic order (ibid.: 17). The source of *jouissance* cannot be traced. To name it, moreover, would be to contain it. Again, Fitzpatrick's position echoes here, wherein the origins of subjectivity are unutterable. Whereas post-pragmatism ultimately grounds creativity within experiences of rudimentary forms of social oppression, however, Fitzpatrick founds his work in the abstract domain of "as it were." The creative power that is *jouissance* operates as a "disruptive force" to the gender hierarchy (ibid.: 149), that reworks and restylises the metaphors upon which the feminine has been formed (the hysteric and sorceress, for example (ibid.: 106)) playing, in turn, with the "castration" that the gendered symbolic order imposes on language use and that none can avoid (ibid.: 105).

The post-pragmatic feminist is aware that women's *restylisation* of their marginalisation by the masculine code can either result in authentic "transformation" of the symbolic order or complicity in "ideology" (ibid.: 93-4). The subject can never be sure at the time of rewriting their identity if they are forging genuinely novel ways of being or merely reproducing existing ideologies with a new sense of flair. This situation exists because restylisation always occurs within the hegemonic symbolic-order and never fully escapes it (ibid.: 156). As such, the outcomes may remain hegemonic in form and fail to reflect a genuine departure from modernist conception of legality. Moreover, genuine departures from that state are difficult to detect, as is evident with the post-modern *countermyth* argument, because much of its conceptual scaffolding is reminiscent of the modernist theorising upon which it draws.

It is not the phallocentric and modernist origin of woman's identity that is important for the post-pragmatic feminist, however, but "the productive power of [the feminine subject's] poetic signification" (ibid.: 117). That power sustains the hope of transformation and gives feminine writing and restylisation the ethical significance of a "redemptive perspective" (ibid.: 117). Nevertheless, Derrida's warning must be observed, that remetaphorisation can lead to

the reification of essences, and moreover, to the erasure of memory about the metaphorical origins of all identities. This was a potential problem that I noted in the previous chapter with regard to Pottage's use of Irigaray's feminine categories. As Cornell notes, the danger exists that "Woman *as* still implies Woman *is*" (ibid.: 168). Can we create metaphors, she rhetorically asks, without believing "that 'is'?" (ibid.: 168). A trace will always remain of the metaphoric base from which that sense of being emanates. Thus, new narratives on woman will always retain a trace of the biological, ontological, or psychoanalytic assumptions from which they have emerged. In turn, moreover, all attempts to allow men entry into the feminine *en route* to the development of a new choreography of sexual difference will reduce them to the terms of feminist discourse. To that end, the particularism of feminism remains a policing-force whose foundations lie within the binary opposition that haunts both the male/female divide and the modern/post-modern distinction through which escape from the divide is attempted.

To summarise this discussion, the ethical and non-violative representation of subjectivity that forms the foundation of the post-pragmatist conception of alternative legality is predicated upon two insights. These concern the inability of the symbolic-order to totally determine the materiality of human experience. The material aspects of life (for example, injuries that women experience as a result of law's repeated failure to recognise their needs) spurs the post-pragmatist project to work towards a philosophy of language-use through which subjects can eradicate injustice. This philosophy is predicated on the assumption that a pre-linguistic reality exists beneath language (the gender hierarchy, for example, that is inscribed in a quasi-biological manner on the unconscious) that pre-figures subjects in the binary and legalistic terms of men and women. It will not always be so. The possibility of simultaneously writing from points both inside and outside the symbolic order promises a new choreography of difference, and with it, new notions of the legal subject and of law. That capacity emerges from the deconstruction of the space that putatively exists between consciousness and facticity. The concept that bridges the divide is non-rational creativity or, for the post-pragmatist feminist, *feminine jouissance*. Thus, it is not language *per se* that bridges the gap between the two domains but the ability of the subject to reconfigure language in a non-formalist manner (through their ineradicable complicity with their facticity). As Jameson suggests, the "distance between the sentence and its meaning must be filled with the subjectivity of the reader" (Jameson 1961: 201). It is this capacity of subjects to stop verbs

such as "to be" from simply reiterating "what is" and, rather, to use them to prefigure unforeseen possibilities that enables subjects to undermine hegemonic language-codes. In turn, the post-pragmatist legal subject possesses the freedom to rework identities with which it has been inscribed and, moreover, in that freedom loses the need to impose fixed identities and expectations upon others. That subject thus develops an ethical and non-violative relationship with Otherness; it finds a new way of Being.

One important issue remains unresolved in the post-pragmatist account of legal subjectivity. It concerns the question of why post-pragmatist legal subjects *must* adopt a non-violative relationship with the Other. This returns us to the question posed by Douzinas and Warrington (1994) about the source of *I must.* It prompts further questions about the extent to which alternative conceptions of law should be decentered or centred. A sense of obligation that comes from within the subject suggests the need for a decentered conception of legality whereas one that comes from outside - such as from an identity given to "woman" - suggests a more centralised and potentially regulatory source. The importance of these issues gains momentum in the following discussion on the possibility of a post-pragmatist conception of multicultural law.

6.3 The Possibility of a Multicultural Law

Both the pragmatists and post-pragmatists explore a similar range of issues when they contemplate the possibility of an alternative conception of law. These include, as seen above, the contexts within which judgement ought to be understood (the conversation of feminists Vs the gender hierarchy), the need to deconstruct the gap between the symbolic order and the imaginary, and the need to construct an ethical form of legal subjectivity. In addition, they deliberate on issues that relate more directly to the exercise of legal judgement. These include the following (and are discussed below): the degree to which subjects can "know" the Other on whom they pass judgement (and thus act ethically toward them); the manner in which these "ethical" standards of judgement can be legitimated; and the degree to which shared norms can be developed where a variety of emancipatory horizons are envisioned. Progressively, I shall argue for two propositions. The first is that post-pragmatist legal pluralism offers a potentially universalisable conception of law. It cannot, however, suggest

why subjects should adopt it without collapsing into a distinctly modernist privileging of the feminine position.

6.3.1 Pragmatist horizons for a multicultural Law

The issues listed above are fundamental to the pragmatist quest for legal transformation. Central to that quest is a concern about the extent to which subjects can know those upon whom they pass judgement. As noted in the previous section, all subjects rely on their own conceptual frameworks for interpreting, and thus knowing, other's perspectives (Bartlett 1990: 390). *Positionality* requires subjects, however, to move beyond current perceptions and to mirror the viewpoint of the other before pronouncing judgement on it. The depth of Bartlett's commitment to this point is evident in her following advice:

> When feminists oppose restrictive abortion laws ... positionality compels the effort to understand those whose views about the sanctity of potential human life are offended by assertion of women's unlimited right to choose abortion. When feminists debate the legal alternative of joint custody at divorce, positionality compels appreciation of the desire by some fathers to be responsible, co-equal parents. And (can it get worse?) when feminists urge drastic reform of rape laws, positionality compels consideration of the position of men whose social conditioning leads them to interpret the actions of some women as "inviting" rather than discouraging sexual encounter. (ibid.: 390)

Subjects are thus challenged to reflect on other's positions at times when they may feel the greatest moral justification for their particular stances. This, as also noted above, does not commit them to accept other's views. It is, rather, a call to an ethical way of seeing and, therefore, being.

The injunction to understand the perspective of the Other raises a profound question about the extent to which one can do so. Bartlett concludes "(t)o be sure, I cannot transcend my perspective: by definition, whatever perspective I currently have limits my view" (ibid.: 390).

It also raises a deeper, ontological issue about what constitutes a perspective, about what is it that stabilises discourses so as to allow viewpoints to develop. This, quite apparently, takes us back to questions about the nature of the space that exists between consciousness and facticity, the realm of *non-authorial authoriality*. For the pragmatist, the difficulty of the question is compounded by the apparent absence of a material reality against which standards can be constructed for evaluating answers to that question. To be sure, some standards are so attuned to popular sensibility that they seem to be axiomatically "right," putatively reflecting the requirements of an underlying materiality (prohibitions on murder and the value of democracy over totalitarianism are good examples). Too often, however, the list of standards go beyond what is commonly thought to be "right" (ibid.: 391). At such points, standards are merely imposed on the majority by hegemonic social groups whose linguistic codes match those of law.

Pragmatist legal subjects, in turn, must "question and improve" the grounds upon which their standards of judgement rest if they are to avoid simply imposing them on others (ibid.: 391). These grounds are "the actual experiences of individuals in their concrete social relationships" (ibid.: 391). Moreover, these experiences compensate for the lack of "external or pre-social standards of truth" (ibid.: 391). Subjects' descriptions of their experiences provide "facts" that opponents can debate about "what social realities are better than others" (ibid.: 391). The answers that emerge from such discursive struggles are important because they become "internal truths" that "make the most sense" of life (ibid.: 391).

Clearly, the pragmatist position privileges perception as a basis for improving law, over and above theoretical frameworks through which perception is experienced. This stance allows the pragmatist to elude questions about the impact of ideologies or discursive formations upon subjects' interpretations of their experience. Instead, the interpretation of experience belongs to the communities within which interpretation pragmatically occurs. In this vein Bartlett states

> social truths will emerge from social relationships and what, after critical examination, they tell social beings about what they want themselves, and their social world, to be. (ibid.: 391).

Quite evidently, it is impossible to disentangle the process of "critical examination" from that of "communal conversation" without some regulatory ideal (such as feminine justice) that can distinguish between critical insight and ideological complicity. This is the post-pragmatist's concern, however, and not that of the pragmatist. The latter merely hopes that criteria will emerge from the conversations that can provide "partial, locatable, critical knowledges" (ibid.: 391). These are standards, in other words, that provide pragmatist legal subjects with "some means of distinguishing between better or worse understanding" (ibid.: 391).

A final, significant aspect of pragmatic *positionality* is the manner in which it attempts to reconcile "the need to recognise the diversity of people's lives" with "the value in trying to transcend that diversity" (ibid.: 392). Since the work of H.L.A. Hart jurisprudence has attempted to identify norms that express the commonality of legal subjects. Unfortunately, the standards used to construct commonality have belied their masculinist partiality. Instead, those standards have been paraded as socially neutral and unavoidable. Feminists too, according to Bartlett, must be vigilant about their propensity to "unwittingly project their experiences upon others" (ibid.: 392). The way to avoid this is to recognise the overlap between diversity and universality. Diversity is what we all have in common. It is the sole dimension of our universality. As such, each has an interest in preserving the uniqueness of the other.

This stance, while ostensibly commendable, again begs the question about the extent to which all diversity is compatible. Clearly it is not. Totalitarianism, for example, can never be commensurate with anarchism. It is not evident, however, how pragmatist legal subjects can decide which forms of diversity they can be partial to and which they can not. Bartlett returns us to the core of *positionality* for an answer - her notion of feminist legal method. The "woman question," "feminist practical reasoning," and "experientially-based knowledge" are the devices through which standards will evolve. As I suggested above, however, in practice these methods open out into an omnibus critique of oppression undertaken from the perspective of individual experience with, moreover, no means for evaluating the meaning of experience. The only criterion for doing so appears to be that which emerges in discussion between those for whom particular, unspecified experiences seem valid.

This is a tautological situation that the pragmatist candidly acknowledges (ibid.: 383). That sense of circularity purportedly disappears when the construction of knowledge "makes sense" within "the social realities" that have generated it (ibid.: 383). Quite apparently, however, the "social realities" (of which the gender hierarchy is a significant example) are ontologically different from personal experience; experience *per se* cannot fully explain the social reality that has given birth to it. Nevertheless, as the pragmatist might (correctly) intimate, knowledge of those social realities can only ever be partial. Moreover, subjects' understandings about how to mediate diversity and universality are finite. For this reason pragmatists such as Bartlett turn away from scientistic theories that purport to tell us "how," to methodologies through which insight might be developed into how perspective is gained or given. As seen above, for example, she commends an inductive, contextualised form of reasoning to stimulate "new discoveries" that can lead to "improved partial insights, better law, and still further critical methods" (ibid.: 393).

It remains unclear, however, for what reasons a community of enquirers would choose to unsettle their preferred conclusions (that must evidently be "correct" for that community) and embark on the quest for new diversified discoveries. Where the community is the final arbitrator of knowledge they are at risk of coagulating around a fixed set of intellectual and moral commitments. Alternatively, their decisions may simply reflect non-rational and irresponsible whims. Pragmatist legal pluralism does not address these matters. They are central to the post-pragmatist's concerns about pragmatic legal horizons, however.

6.3.2 Post-pragmatist horizons for a multicultural Law

As with pragmatist images of law, the post-pragmatist is interested in how the Other can be known by those that judge, in how standards of judgement are legitimated, and how shared conceptions of legality can be developed within conditions of socio-cultural plurality. Whereas the pragmatist ultimately grounds their answers in communal conversations, post-pragmatists place theirs within the ontological context of particularistic, though arcane, realms such as the *feminine*. The ineffable nature of such realms problematises the extent to which subjects' can construct satisfactory categories upon which to base their judgements. Post-pragmatists recognise that this need for categories inevitably privileges a centralised

conception of law. The very concept of law may yet, in fact, ineluctably privilege the categorisation of elements over subjects' attempts to transform the processes through which elements are classified.

It is this tension - between the need for a basis upon which judgements can be made (the *feminine*, for example) and the need to have a thoroughly decentered conception of that basis (in order to avoid the transformation of that basis into a mode of regulation) - that stands at the centre of the post-pragmatist conception of an alternative legality. Ultimately that tension (that also reflects the "distance" between consciousness and facticity) is reconciled through the concept of a non-rational creativity. Even then, however, the tension is not fully resolved. In order for a post-pragmatist conception of law to enhance the situations of specific marginalised groups the very identity of the non-rational imagination must be particularised (becoming, for example, *feminine jouissance*). In turn, it fails to completely prefigure a fully decentered conception of law and the problem remains of how to reconcile the particularistic and emancipatory claims of post-pragmatists with the particularistic and emancipatory claims of, for example, socialist post-realists. Despite its apparently decentered injunction for openness to other emancipatory projects, post-pragmatism does not resolve this dilemma.

In order to pursue the "impossible" and forestall this state, post-pragmatists focus on a decentered conception of justice and, through that, issue a decontextualised meta-rule for subjects; *be just with justice* (Cornell 1992: 182). Like the post-modern decree to *be responsible for responsibility*, this edict is tautological. The terms return to each other in an interminably circular motion, unable to find anything to signify except themselves. In turn, they signify nothing and highlight the absence of substantiveness that apparently exists beneath subjects' images of value and worth. Moreover, the gap that is identified cannot be filled by reason, theorisation, or eloquent explanation, as some realists might suppose. No amount of "philosophical gymnastics" - as Zygmunt Bauman describes such exercises - can bridge the gap between tautologically-linked concepts (Bauman 1996: 90). Rather, the distance between just action and justice can only be filled by the "remains" of the symbolic code. This is the non-rational, the leaps of faith that post-pragmatist subjects exercise in order to perceive the goodness of particular Others (women, for example) that, moreover, will inspire them to obligate themselves to the needs of others.

Although diffuse, the imperative tenor of *be just to justice* moves post-pragmatist legal pluralism back toward a legal-centralist position. This is not a necessarily bad move. It is not evident, however, how such an edict can be "grounded" independently of norms that are currently in-use. A weak-pragmatist reading of this is to place the source of the problem within the limitations that are inherent in language-use (such as between the meaning of "centred" and "decentered") and on the role that the non-rational plays in compensating for this. In this vein it could be argued that pluralist conceptions of law cannot exist without a centralist conception of law. Without that centralist aspect, the process of pluralisation becomes interminable and, as Santos notes, law ends up everywhere (and as everywhere, nowhere (Santos 1987: 281)). Conversely, centralist representations of law cannot exist without a decentered conception of legality. Without a self-organising form of subjectivity law becomes a simple and unjustifiable imposition of constraint. Concepts of law must, therefore, combine its violent and centralist foundations with dimensions that allow it to recognise decentered forms of regulation. This simply reiterates the insights of early legal pluralists such as Savigny, Erhlich, and Gurvitch; centralised law is capable of destroying the very sociality that it is supposed to protect. What the post-pragmatist position adds to this insight, however, is that the decentered foundations for law have no rational content of their own (as is evident with decrees such as *be just with justice* and *be responsible with responsibility*). Thus, a post-pragmatist conception of law must acknowledge that there are no conclusive foundations upon which to base judgements. They ultimately draw upon an irreducible faith in the significance of a particular Other: on woman, the working-class, indigenous peoples, separatist-activists, etc. In order for this position to be sustained, however, the post-pragmatist must demonstrate that the subject will be opened to otherness through their faith in that Other. They do so in the following way.

In common with the pragmatists, post-pragmatists hold that alternative forms of law rely upon the ability of those that judge to perceive the judged (the Other) in the terms given by that Other. Those that judge must put aside their own conceptual frameworks in order to allow those of the Other to emerge (Cornell 1992: 57). A number of phrases associated with *mimesis* are used to connote this ability: the responsibility to heed "the call of the Other"(Cornell 1991: 113); the embracing rather than absorption of the other (ibid.: 147); and "letting one's self be taken over by the object" (ibid.: 149). Despite the hope that the Other can be understood, it is an "impossible" task (Cornell 1991: 115). This is especially so

within conversations between men and women; "(T)he very condition of conversation is that we let the other be Other, and it is precisely this reconciliation with the Other that is rendered impossible by the gender hierarchy" (ibid.: 203).

Beyond this problem of masculinist hegemony lies an additional reason why the judging subject is unable to fully recognise and understand the Other. This concerns - as reviewed above - the inability of the subject's language to correspond with the material reality of the Other. They are unable to entirely connect with that which is outside of them, either through their language or "raw" experience. The most stark example of this, following Derrida, is that of death (cited in Cornell 1992: 72-3). "(D)eath does not *literally* exist *for us*, only mourning exists" (ibid.: 72, original emphasis). Death cannot be directly experienced, only the death of others. Even then, however, it is not the other's death that we experience but our mourning for them. Mourning, moreover, is an inadequate substitute for their return and the inadequacy of mourning is what compels us to fidelity in our memory of the other. The same situation prevails with the issue of how subjects can "know" the Other who seeks justice from them. The Other can only be "known" if the subject mourns for the fact that they can never genuinely "know" the Other. Mourning thus encourages the subject to be faithful to the Other (ibid.: 73).

One final reason precludes those that judge from fully recognising the uniqueness of the Other. This is the subject's own need to heed the call of their internal Other, a call that may conflict with that of the external Other (ibid.: 24-35). As Theodor Adorno notes, the ability to go beyond oneself requires an ability to gain access "to the other in oneself" (cited in Cornell 1992: 25). This is an internal Other that has been "denied" (ibid.: 30). For Adorno, as for the post-pragmatist, this release of the internal Other is a significant source of subjective freedom. It raises an irresolvable aporia, however, in that no standards exist for determining the extent to which a subject ought to be responsible to their internal, as compared to their external, Other. The temptation for subjects is to relegate their external Other to a position of "pure externality", preventing it from being heard (ibid.: 54). Conversely, absolute responsibility to the external Other will mean "violence" to one's own Other (ibid.: 89). The issue apparently lies as a conundrum within the art of judgement and can only be lived through and never resolved.

The inability of legal subjects to genuinely recognise the otherness of others leads the post-pragmatist project toward that ultimate command of *be just with justice*. It is not self-evident, however, how such a tautological law can be legitimated or where the directive originates from. Cornell addresses these matters - as introduced above - by constructing a quasi-transcendental narrative about law. Through this, law is deconstructed in the name of an Other that exists beyond the legal symbolic-order. The difficulty with determining whether a legal reform is a genuine transformation or merely a reformative eradication of paradoxes is that answers can only be decided retrospectively. "No cognitive assurance [is] available in advance of action, only responsibility for what we do" (ibid.: 168). This "infinite responsibility" of "undecidability" reinforces the role that an emancipatory form of subjectivity plays within post-pragmatism's vision of alternative legality (ibid.: 169).

In suggesting that subjects must take responsibility seriously, the post-pragmatists are positing that their own particularist sense of responsibility must become a universal prescription. Their justification is that subjects lack ultimate criteria upon which to evaluate judgements and must, therefore, adopt some tangible definition of responsibility. This position reasserts the significance of Douzinas and Warrington's question about the source of responsibility to the Other. It prompts questions about where the sense of "I must be just to justice" comes from within the post-pragmatist conception of alternative legality. For the post-pragmatist, it must come from a particularist (rather than decontextualised) source such as the *feminine*. The singularity of that source promotes a specific reading of the decree to *be just with justice* wherein the capacity for creativity is given a particular identity. This contrasts with the decentered answer given by Douzinas and Warrington that, significantly, cannot guarantee positive outcomes for any particular cultural community. That, as seen above, is the post-pragmatist's concern with the pragmatist position.

Despite the formalist tenor of the post-pragmatist decree, it differs in form from the edicts that are associated with orthodox concepts of law. The source of the post-pragmatist decree lies beyond the ostensibly rational dimensions of sociality upon which centralist conceptions of law are founded. Rather, its origins are the imaginations and value commitments of those that judge. This, as I suggested at the beginning of this section, highlights the intrinsic role of the non-rational within the post-pragmatist conception of law. That said, the identity of post-pragmatist creativity is not fully decontextualised as is the case in the post-modern

representation. It is thoroughly particularist and must be so in order to become a source of shared, normative order. As such, it does not fully escape the confines of its particularism and become fully open to otherness. But, neither can that be its intention because to do so would make it impotent in the face of oppressive gendered social-practices.

6.4 Conclusion

This discussion demonstrates the shared ground between post-realist legal pluralism and post-pragmatism. Despite their respective emphases on materiality and expressivism, both highlight the role that an irreducible non-rationality plays in the mediation of consciousness and facticity. Creativity enables the subject to alter the discourses through which it has been constituted, expanding, furthermore, the ways in which it can represent to itself the irreducibility of its consciousness. The difficulty that emerges from this is that an alternative conception of law that is predicated on this will seem voluntaristic and expressionist. The dynamics through which *non-authorial authoriality* will then function - that is, justice - will appear a wholly private affair. Both positions, therefore, have a common individualistic tenor that must be supplemented with a collectivist thrust. Feminism supplies that for the post-pragmatists discussed here, as has Marxism for the post-realists. The use of particularlist positions raises, however, a second problem; particularisms have the potential to police alternative expressions of counterhegemony, enframing the latter within the conceptual parameters that they themselves set. Again, this common problem must be addressed if post-realism and post-pragmatism are to be prevented from transforming ostensibly emancipatory projects into new modes of regulation. Conversely, something of their distinctive political interests must be preserved if they are to avoid absorption and obliteration by superintendary, liberal conceptions of law.

7

LOCATING LAW WITHIN DIVERSITY

7.0 Introduction

The primary purpose of this chapter is to introduce the first of two dimensions within legal pluralism that together have the potential to alter the concept of law toward that of a multicultural law. The alteration, following my discussions of the post-realist, post-modern, and post-pragmatist legal pluralisms, is needed because those three approaches fail to develop an alternative conception of law that is non-voluntaristic in its form. In each of their attempts to "go beyond" law and facilitate an open-ended conception of emancipation the legal pluralisms rely upon an expressivist form of subjectivity to propel change. At their extreme - exemplified by the post-modern position - the impetus for change is so deeply embedded within subjectivity as to render it ineffable. Within the more moderate versions - post-realism and post-pragmatism - this subjectivity is comprehensible but remains highly voluntaristic. In the terms suggested by these approaches, the future of an alternative conception of law - especially one that embraces the "certain kind of multiculturalism" depicted in Chapter 2 - depends upon the will of "right-minded" people. I wish to go beyond this expressivist tenor over the next two chapters and construct an alternative perspective on the subjectivity that would play such a pivotal role in the development of a multicultural conception of law.

The first dimension that I draw on from legal pluralism for this reconstructive task displaces law from a position *above* socio-cultural diversity to one *within* diversity.[1] Law becomes an aspect of the materiality that it administers. This reinforces the legal-pluralist argument that an alternative conception of law must be predicated upon a form of subjectivity rather a centralist institution. The location of law within subjectivity signals most clearly this move to decentralise legality. A profound problem with this move, however, is that it threatens to reduce the concept of law to voluntarist-selfhood, mirroring liberal representations of the morally-autonomous self. In this chapter I wish to augment the legal-pluralist search for a

[1] The second dimension - the separation of law from justice - is discussed in the following chapter.

decentered conception of law with a body of theory - *naturalised evolutionary epistemology* (NEE) - that might thwart this disintegration of legality into expressivist caprice. Before I elucidate on this, however, I wish to review the legal pluralisms outlined in the preceding three chapters. This pause is necessary in order to consolidate my discussion. That overview reminds us that for all their differences and nuances, the post-realist, post-modern, and post-pragmatist legal pluralisms still hold in common four general themes: the continuing dominance of centralist conceptions of law, the progressive role of legal-rights discourse in the development of law, the distinct identities of law and justice, and the arcane origins of justice.

A problem emerges from my account of those themes. It is one, moreover, that threatens to limit legal pluralism's capacity to provide a basis for theorising the conditions of a multicultural law. That problem concerns an incommensurability that exists between the goal of recognising socio-legal diversity and the construction of universalisable standards of legal judgement, so necessary for shared social life. It reflects the problem of decenteredness and centredness. This, as noted at the conclusion of the preceding chapter, is the problem faced most acutely by post-realist and post-pragmatist discourse.

To address this issue the second section of the chapter introduces three concepts from NEE that facilitate an alternative form of theorisation by locating the quest for decenteredness within a naturalist evolutionary framework. That framework is, itself, permanently incomplete and open-ended. The theoretical development that ensues suggests that the concept of law must alter significantly if legal institutions are to both recognise socio-cultural diversity and sustain the development of universalisable standards of judgement.

7.1 Legal Pluralist Themes

7.1.1 Theorising state-law

During the 1990s legal pluralism has rejuvenated *state-law* as a pivotal theoretical concept. Importantly, the severe criticisms of legal centralism that characterised earlier legal pluralist

discourses, such as Griffiths' (1986), have moderated. Rather, the concept of a centralised legal power is regarded as being as indispensable as it is problematic. Legal pluralists recognise that state-law continues to dominate the conceptions of socio-legal order that arise from social movements both below and above the level of the state. In this vein, for example, Hunt and Fitzpatrick suggest that state-law remains a global phenomenon that polices the boundaries of discursive formations through which non-state socio-legal movements interact (Hunt 1991, in Hunt 1993: 257, 1993: 225; Fitzpatrick 1995: 110).

That said, as Santos notes, there is too much diversity in the movements involved to construct a singular explanation of how law functions on a global scale (Santos 1992a: 133-40). The legal power of the state, for example, can both impede and facilitate socio-legal movements in their quests for recognition. Moreover, where state-law does recognise the legitimacy of alternative socio-legal orders it alters in the process. As both realist and post-modern commentators suggest, however, law cannot acknowledge that this occurs without undermining its own legitimacy (Santos 1980: 393; Fitzpatrick 1992a: 181). Nor can a judiciary admit that it relies upon other modes of regulation to perform tasks that it cannot itself achieve (such as regulating localities and bureaucracies).

The primary insight that emerges from this scant overview is that centralist forms of law are relatively autonomous institutions that alter as they host struggles by counterhegemonic movements to gain recognition. They cannot recognise the legitimacy of these movements as independent socio-legal orders, however, without becoming something less than the centralised Rule of Law.

An understanding of legal pluralism's retention of legal centralism requires the construction of sophisticated theoretical frameworks. These typically merge explanations of state-power (in terms of the state's embeddedness within enduring social relations) with decontextualised descriptions of the social processes through which legal power is exercised. To this end, for example, Marxist and feminist concepts (that portray the relational dimensions of law) have been blended with concepts that illuminate the social processes through which law functions. This is exemplified, for example, in Alan Hunt's attempt to meld the Marxist notion of "relative autonomy" with Foucault's concept of "governmentality" (Hunt 1993: 309-13, 324).

Drucilla Cornell's Lacanian analysis of the gender hierarchy, coupled with Derrida's concept of parergonality, is also emblematic of this approach (Cornell 1991: 1-20, 104-18).

Legal pluralists merge these *relational* and *processual* concepts with at least two political goals in mind. The first is to eradicate legal practices that preclude lawyers from acknowledging particular aspects of socio-cultural diversity. Second, they attempt to develop standards of legal judgement that have a wide socio-cultural base. The first approach is used, for example, to suggest that the gender hierarchy precludes law from recognising forms of gender that lie outside the male/female distinction (Cornell 1992: 11, 97, 103-4). The second goal supports liberal procedural-law in its role of protecting human rights and civil liberties.

7.1.2 Theorising legal-rights discourse

In keeping with this attention to legal centralism, post-realist and post-pragmatist legal pluralists, particularly, explore legal-rights discourse for its potential to develop law into an institution that recognises and protects socio-cultural diversity in a collectively agreed-upon manner (Hunt 1990, in Hunt 1993: 228, 236-48; Cornell 1995: 33-4). This has, moreover, raised the possibility that legal-rights discourse can assist law change from a procedural process to an institution that can incorporate communitarian perspectives. As emerges below, this raises questions about the extent to which law can genuinely reflect communitarian interests.

Legal-rights discourse, as theorised by writers such as Hunt and Cornell, is primarily a protective tool (rather than an axiomatic social good). Specifically, it enables cultural communities to defend individual members' legally-endorsed claims upon their wider societies. In addition, the transformation of social claims into legal rights provides socio-cultural movements with a degree of legitimacy that does not develop from interaction with other types of social institution (Hunt 1990, in Hunt 1993: 245). Moreover, the pursuit of legal protection is a strategy that socio-cultural movements can use to conserve energy, particularly where their struggles for social recognition become protracted (Cornell 1995: 33).

Writers such as Hunt and Cornell predicate this *strategic* conception of legal-rights discourse upon the belief that law cannot accurately represent the aspirations of socio-cultural communities. The outcomes of court proceedings are all too contingent upon the interpretative positions that judges adopt to decide the applicability of legal rights. This inherently fallible aspect of legal-rights discourse leads some legal pluralists to advocate a wholly utilitarian use of law. Valerie Kerruish insists, in this vein, that people can justifiably claim their legal rights without ever feeling that they must respect law (Kerruish 1991: 200). In a similarly critical tone, Colin Sumner takes umbrage at the fixation that some societies have developed with legal rights (Sumner 1994: 311-14).

According to such legal pluralists, legal-rights discourse also presents substantial dangers for those who use it. First, legal rights are inherently individualistic. They abstract the subject from the social relations within which they exist (Hunt 1981, in Hunt 1993: 105; Hunt 1993: 28; Kerruish 1991: 142). As such, law is unable to entertain the competing responsibilities that subjects might experience, particularly where these clash with responsibilities to the Rule of Law. Second, legal-rights discourse presumes that the self has essentialist elements that provide stable criteria for grounding legal judgements. Subjects are assumed, for example, to be morally autonomous beings that are free to exercise volition and responsibility. Where the subject does not act "responsibly" their behaviour is cast as either pathological or contemptible. Lastly, legal-rights discourse assumes that formalist logic is the only appropriate form of reasoning for law. Formalism (discussed below) supports a belief that foundational truths and invariant inference rules exist for deducing "correct" legal conclusions. This approach tends to ignore styles of reasoning that incorporate non-rationality, assuming that only formalism is synonymous with reason (Hooker 1995: 22-5). In spite of all that has just been said, however, legal-rights discourse can offer counterhegemonic movements strategic advantages in their struggles for recognition and cannot, therefore, be discounted.

7.1.3 Theorising law and justice

In light of the foregoing analysis, all of the legal pluralisms reviewed here separate law and justice. They are theorised as being non-contiguous elements of social relations. Moreover,

law is regarded as only being an imperfect representation of justice. A substantive problem that arises from this position, as various legal pluralisms suggest, is that no methods can be found for categorically determining the justice - or otherwise - of judicial perspectives. The main task for post-realist and post-pragmatist legal theorists is to stop this from collapsing into a pragmatist justification for wholly-contingent forms of decision-making.

In this vein, legal pluralists suggest that it is politically dangerous to conflate law and justice. Conflation of the two invariably reduces justice to the level of pragmatically held convictions. Rather, each social group must retain an independent concept of justice that can function as a source of legal critique. Without such a concept the only sources of legal critique that are available are internal to law. Law then becomes *positivist* in the strongest sense of the word in that it constructs self-enclosed, self-generating frameworks that presume an ability to define totality. Life styles, ethical commitments, and modes of reasoning that exist outside such frameworks cannot, in a sense, be recognised. In turn, the absence of an independent concept of justice leaves subjects without sources of meaning with which to create new forms of life, new senses of responsibility, and innovative styles of rationality.

These legal pluralisms suggest, moreover, that the tools needed for an alternative conception of law (such as new interpretative canons) can only emerge outside of law, within counterhegemonic socio-legal movements. As such, legal theory must look beyond positive law to understand the conditions under which a multicultural conception of law can emerge. These points are discussed further in the following chapter as they constitute the second critical feature in my account of legal pluralist theory.

7.1.4 Theorising the origins of justice

Post-modern legal pluralism has significantly advanced the exploration of counterhegemony with its enquiry into the nature of *obligation* (especially Douzinas and Warrington 1994). This centres upon an examination of subjects' sense of "I must ...". The post-modern account suggests that subjects' perceptions of obligation emerge from their idiosyncratic perceptions of what is singularly most important to each one. This contrasts with perspectives that

attempt to locate the origins of obligation within foundational narratives such as religious and political texts. According to the post-modern approach no foundations exist upon which subjects can develop perceptions of worth because the whole of Being has itself only been founded in the *process* of being named. The image of legal subjectivity that emerges from this account is thoroughly decentered. The subjectivity of each subject is developed as they attribute value to elements in their socio-biological environment. As a consequence of this idiosyncratic development of meaning, no stable bases can exist for developing shared normative expectations. Rather, all shared perceptions will be *ad hoc* in nature.

A politically progressive and "positioned" version of this legal subjectivity emerges from the post-realist and post-pragmatist legal pluralisms. It begins from the assumption that subjects are constructed by both discursive formations (beliefs) and substantive (bio-social) constraints. The material conditions of subjectivity are thus both interior and exterior to the subject. The discursive dimension of this subjectivity ensures that selfhood is never fully fixed. Both post-realist and post-pragmatist legal pluralisms stabilise that subjectivity, however, through the use of open-ended and non-essentialist forms of identity. Drucilla Cornell's positioning as "woman" typifies this (Cornell 1990: 87). Labels such as "woman" do not necessarily denote a prefigured subjectivity that entraps subjects within an essentialised identity. Rather, they refer to positions from which subjects construct identities that are always yet to emerge. The subjectivity that emerges is a perpetually unfinished and aesthetic achievement. Moreover, this *feminine* subject is an Other that stands outside of the totalising order of hegemonic representation. It positions itself as the Other to totality that stands, nevertheless, within totality. That is, law defines this subject (in that the legal category of "woman" identifies her) yet she escapes law by refusing to let her "womanness" be named conclusively. To this end, Cornell's notion of *woman* relies upon positive law for an identity but refuses to respect law's presumption to define the totality of her existence.

This decentered (though located) form of legal subjectivity provides a platform through which a conception of law could emerge that both responds to socio-cultural diversity and develops shared normative understandings. As a decentered being, this subject is located firmly within the sea of socio-cultural diversity. As a located being, however, it is positioned within legally-prescribed categories and thus reliant upon law for that portion of their identity. This

development heralds a significant advancement in legal theory. It allows theory to move beyond the assumption that the realm of justice is completely decentered within an ephemeral play of discourse and thus, ultimately ineffable. Rather, it suggests that the realm of justice can be given a number of explicit identities such as *socialist culture* or *feminist community.* Moreover, these identities can be kept open-ended through the unfinished form of subjectivity that emerges from post-realist, post-modern, and post-pragmatist legal pluralism. This research programme promises to develop socio-legal analysis in a direction that can enable the construction of a multicultural conception of law. As will become evident below, however, a difficulty must be overcome in reconciling its attempt to recognise diversity and to construct shared normative frameworks.

7.1.5 Theorising incommensurability

The amalgamation of socio-legal diversity and universal standards of legal judgement is a conceptually difficult, if not impossible, enterprise. Within the account of legal pluralism being developed here it is unclear how the proceduralism of positive law might be merged with the relational perspectives that are needed to allow law to recognise the claims that arise from diverging counterhegemonic movements. The goal in amalgamating these is to develop a form of law that can impartially adjudicate between competing interests within a communitarian ethos that can enhance proceduralism's capacity to recognise socio-cultural difference.

Legal-pluralist discourses do not address this problem in the terms presented here. Rather, the issue appears in different guises. A clear example is Hunt's exploration of how single-issue counterhegemonic movements might expand so as to incorporate wider ranges of concern (Hunt 1990, in Hunt 1993: 235-48). Such developments are necessary if the normative frameworks of these alternative forms of law are to embody expectations that are wider than their initial sectarian interests (socialist or feminist, for example). Their task is to find a discourse that facilitates a range of emancipatory movements, generating a more universal concern about the appropriate adjudication of diversity. The extent to which a counterhegemonic socio-legal discourse can achieve this appears to depend upon the extent

to which it can recognise the diversity that exists within its own identity. In turn, its success at this level might have a direct bearing on its ability to enable a multicultural conception of law.

All socio-legal orders (hegemonic or counterhegemonic) inevitably congeal identities into artificial and homogenised forms. Indeed they must do so in order to gain identities of their own. Clearly, the imposition of identity impinges upon a movement's members in so far as it overshadows those members' unique attributes. Moreover, that *supra*-identity might even suppress those attributes where they threaten its own stability. Post-pragmatist feminism acknowledges that this is an ever-present danger in the rewriting of feminine identity (Cornell 1991: 156, 167-68). The danger is that phrases upon which "womanist" metaphors are based, such as "woman *is like* ...", easily transform into the propositional statement that "woman *is* ... ". Quite apparently, this is not a desirable outcome as it reinforces the validity of totalising discourse.

In addition, this congealing of identity has the potential to marginalise other counterhegemonic identities. Cornell, for example, comes close to implying that masculinist movements - amongst which socialism might be counted - are inevitably unjust. She does so by suggesting that the only source of justice is the arcane domain of *the feminine*. That, however, is not her intention (Cornell 1991: 204). Rather, she understands that males are capable of acting justly. According to the terms of her discourse, however, they only do so when they function in a manner that is synonymous with *the feminine*. As such, non-feminine subject-positions cannot be *truly* emancipatory and can only approach that status as they emulate *the feminine*. In a similar manner, Hunt is pessimistic that feminist and Marxist notions of counterhegemony can be combined (Hunt 1993: 264). At best, the attempt to do so is an incomplete project that awaits the necessary (but illusive) conceptual framework, or, conversely, the very task is inconceivable and political identities are locked in unending struggles for supremacy. A significant consequence of this incommensurability is that counterhegemonic socio-legal movements appear to inevitably coalesce around particularistic identities: class, gender, ethnicity. In so doing they reinforce particularistic assumptions about society and its prospects. In turn, their images of law reflect those assumptions.

It appears, from the above, that legal pluralism cannot theorise how counterhegemonic forms of law can balance their recognition of socio-cultural difference with their quest for universally-applicable identities and norms. The shared identities will always violate attempts to give localised identities equivalent recognition. This is the unresolved issue in the legal-pluralist pursuit of a multicultural conception of law.

In the following half of this chapter I present a perspective on *reason* taken from NEE that has the potential to reconfigure this problem in a way that makes it more accessible and partially resolvable.

7.2 Naturalised Evolutionary Epistemology

The central, organising tenet of NEE is that the processes through which subjects think alter as those subjects reflect on their interventions with materiality. Reasoning, therefore, cannot be said to have essential features (as do formalist prescriptions that define it in terms of deductive and inductive rules). Rather, the nature of reason must be held open, allowing for adaptive changes that might be required in subjects' conceptions of the processes through which they think about bewildering changes to their environments. In turn, this disrupts the binary oppositions of subject/object and facticity/consciousness. Knowledge about how consciousness of objects is constructed becomes susceptible to itself. It generates questions about the distance that exists between subjects' consciousness of objects and their awareness of a consciousness that cannot be reduced to those objects. NEE suggests, moreover, that the space is "filled" by representations of *ideals* (of goodness, beauty, justice, reason, etc.) that subjects cannot realise but to which they can aspire. In the process of experimenting with alternative ways to realise these ideals, the relationship between subjects' consciousness and facticity (their *reason*) changes. The process through which knowledge develops (epistemology) thus becomes an evolving aspect of human social life. Moreover, the epistemic tools through which subjects interact with their environments *must* modify if those subject are to survive significant socio-biological changes that occur. This approach mirrors one of Habermas' major propositions; our concept of rationality must expand - in his case, to encompass a non-instrumental and communicative rationality - if subjects are to escape the

confines of the instrumentalist reasoning that sustains oppressive social arrangements such as free-market capitalism (Habermas 1984: 390-2).

More specifically, NEE provides my account of legal pluralism with two dimensions that assist it to contribute to a multicultural conception of law. The first, outlined below, is that it provides a realist foundation for representing the plurality of law. The second, that follows, is that NEE becomes a tool for reconceptualising law as an element of social relations that exists *within* socio-cultural diversity rather than *over* it. This provides a way of theorising about the status of subjectivity that is so central to the legal-pluralist and multicultural conceptions of law being developed here.

7.2.1 NEE's realist foundations

NEE is both ontologically realist and epistemologically post-realist. Ontologically, NEE assumes that a socio-biological materiality exists independently of human thought. It assumes that "there is" prior to human experience. Even our mental capacities to reflect on the materiality within which we are embedded exist prior to our knowledge of reflexivity. As such, the capacity to develop knowledge exists prior to language as a natural aspect of the socio-biological environment.

The assumption that an exterior materiality exists independently of human thought enables NEE to retain a correspondence theory of truth. The fact that "there is" a world (or worlds) beyond human cognition allows human subjects to assume that they might progressively come to understand the conditions of their material existence. Although humanity's capacity to irrefragably understand that materiality is limited, the correspondence theory of truth remains central. Most importantly, it acts as a regulatory ideal that ensures that human knowledge is not reduced to the level of pragmatist conviction.

The ontological context within which NEE places human activity is a socio-biological environment that comprises multiple systems and subsystems. These vary in composition and organisation from the simple to the very complex. They include basic organisms (such as the

biological cell), complex patterns of social interaction (such as the gender, class, and ethnicity hierarchies), and institutionalised power containers such as the state and centralised law. Human subjects are thereby confronted with an array of socio-biological systems within which they are embedded. In order to gain control over the conditions of their existence subjects must objectify the very dimensions of socio-biological organisation through which they have learned to become reflexive subjects. In this vein, the patterns of interaction and social institutions that give form to social life must become subjects' foci of enquiry.

An important characteristic of the human system is that its elements (human subjects) are an epistemologically-challenged organism. Their epistemic tools (perception and reason) lack the power and refinement needed to "make full sense" of their socio-biological environment and their existence within it. This fallibilist representation of human nature problematises, though does not dismiss, assertions that can be made about the impact of higher-order dimensions of human organisation upon individual humans' existence. Genders, classes, ethnicities, and other power-containers, for example, quite evidently do impact upon human social life. Significantly, however, NEE questions the extent to which humans can categorically know the conditions of these higher-order dimensions. Humans might legitimately strive for understanding - in order to gain mastery over the social processes that subjugate them - but they can never categorically know the extent to which their understandings correspond with the material reality of those dimensions. At best, perhaps - following Ian Hacking - subjects can only "know" dimensions of that reality in an indirect manner, through measuring the extent to which changes have been induced in other sub-systems by interventions that assumed the existence of those dimensions (Hacking 1983, Chapter 16). As reviewed in Chapter 3, this reflects the perspective that subjects can only determine the meaning of *class* as a consequence of using it to change aspects of their socio-political circumstances.

The reason for this inability to definitively "know" is, as suggested above, that humans' epistemic tools are limited. Our capacities to perceive and to reason cannot "go beyond" themselves so as to verify our knowledge of materiality independently of those very capacities. An intuitive "leap of faith" is always involved in the act of describing "what there is," particularly where the object is an obtuse transcendental element of social relations such as social class. For this reason NEE is epistemically post-realist in the sense that it assumes

that a materiality exists beyond discourse but that subjects' capacities are inadequate for the task of definitively "knowing" it.

An association can now be constructed between the realism of NEE and developments that have occurred within post-realist legal pluralism (reviewed in Chapter 4). Post-realist legal pluralists, as noted, have progressively augmented their scientistic analyses of law with various sets of value commitments. Both Hunt and Santos, for example, predicate their analyses upon their desires to see marginalised social groups have their claims realised within specific legal rights. These value-based stands, moreover, compensate for the inability of theory to provide indubitable foundations for their representations of reality. Rather, their value-orientations become an indispensable aspect of the process through which their analyses are legitimated. The values provide justifications for pursuing particular lines of reasoning. These post-realists thus accept that their analyses are, at best, contestable representations.

To summarise this point, the first dimension that NEE adds to an analysis of legal pluralism is its ontological realism and epistemological post-realism. The social world comprises epistemically-limited humans whose attempts to construct knowledge of that world's dimensions can never be conclusively validated. Their knowledge is informed as much by their non-rational aspirations as theoretical insight.

7.2.2 Reconceptualising law's plurality

The second contribution that NEE makes to the study of legal pluralism is that it provides tools for locating law within socio-cultural diversity. This contrasts with perspectives that position law above that diversity as a socially-neutral arbitrator of difference. In this sense NEE provides resources for a continued challenge to legal centralism. An account of legal pluralism that is informed by NEE thus questions the extent to which a centralised and formal law can adjudicate between dissimilar horizons of the Just, while itself remaining autonomous of any particularistic vision of those elements. As noted in Chapter 1, the salience of this issue has been heightened as nation-states become characterised by cultural diversity and political contestation. In conjunction with this, the legal power that is used to mediate between socio-

cultural difference is increasingly recognised as particularistic and partisan. As Bartlett notes, few, if any legal theorists would now argue that legal methods are neutral in their orientations toward issues of moral commitment and life-style (Bartlett 1990: 374).

Within NEE, the concept of law becomes a ubiquitous *organising principle* through which organisms adjust themselves to, or attempt to gain control over, their socio-biological environments. Each form of organism uses some type of law to regulate its position. The complexity of each reflects the socio-biological sophistication of its constituent parts. An elemental organism such as a single cell, for example, is regulated through relatively simple stimuli-response mechanisms that correspond to the "laws" of bio-physics. In contrast, complex organisms such as human beings who are located within culturally and politically-differentiated territories require a sophisticated form of law that can recognise and accommodate normative diversity. Moreover, they need a form of law that can alter as the social composition of those territories changes.

Clearly, a conception of law cannot be left at this very generalised level. This would make the very concept of law redundant as a category of social forms. Rather, NEE provides a way of differentiating between various types of law. The criterion used to distinguish between them is the role that each plays within a sub-system's adaptation to its socio-biological environment. In turn, these insights have the potential to significantly alter the legal-pluralist conception of law.[2]

First, a central tenet of naturalised evolutionary epistemology is that all systems of bio-organisms (including humans) attempt to optimise the conditions of their existence. They do so by amplifying the processes they use to regulate their environments. This involves two regulatory processes: the refinement of existing administrative practices and the creation of higher-order forms of regulation. Together, these constitute a process of *superfoliation*.

[2] My goal in this section is only to demonstrate the utility of three NEE concepts for the development of legal pluralism. It is not to defend NEE or augment its conception as an inherently fallible and (partially) self-organising theory. That has occurred elsewhere (Halweg and Hooker 1989; Hooker 1995) and participation in that task is beyond the scope of this chapter. Importantly, however, it must be acknowledged that the idea of inherently fallible and (partially) self-organising systems is still in its infancy (Hooker 1995: 1-12).

Superfoliation proves to be a particularly fecund concept for theorising the social significance of the different legal-pluralisms reviewed over the preceding chapters.

Second, NEE presents a *decision-theoretic conception of rationality.* This challenges the universality of formalistic models of reason (upon which sciencing institutions such as law have been built). This concept will provide a way of theorising about the incommensurability identified earlier, between law's need to recognise socio-cultural difference and to construct universalising standards of judgement.

Third, NEE posits that entities such as law are usefully represented as *epistemic institutions.* These institutions regulate debates over how incommensurable elements, such as the above, should be managed. They are fundamentally decentered forms of organisation. Their unified imagine (unified, for example, in the insitution of *law*) is maintained by the types of issue to which their "members" attend rather than the existence of a centralised body that regulates the boundaries and conduct of the institution. These three concepts cumulatively suggest that the image of law must change from an institution that finds the "right answer" to disputes to one that manages patterns of consensus and dissensus. This again raises questions, as have been posited through the previous chapters, about the roles of subjectivity and institutionalisation in the formulation of *law.*

7.2.3 Distinguishing between legal pluralisms on the basis of *superfoliation*

Superfoliation describes the non-linear (undetermined) manner in which systems increase their adaptability to environmental diversity. It thus describes how systems *regulate* themselves in self-organising ways. How systems do this develops context by context, according to the forms of reason that each employs in response to environmental change. As will become evident below, legal pluralism reflects a superfoliation of law.

The driving force behind superfoliation is the restoration and/or maintenance of environmental stability (Hooker 1995: 73). Human agents stabilise their environments by imagining and creating the optimal conditions for their existence and, then, struggling to

maintain these conditions. This process of imagining involves an ongoing development of concepts (of *justice, feminine jouissance* and *counterhegemony*, for example), of research problematics (such as "theorising the conditions of a multicultural conception of law"), and proxies for the attainment of objective knowledge (like the pursuit of comprehensive descriptiveness, explanatory and predictive ability, etc.).

Post-pragmatist discourse demonstrates this pursuit of stability, for example, in its concern about the erosion of feminist legal reforms in the 1990s (Cornell 1990: 68-9). Legal abortion, as one of those reforms, is heralded by feminists such as Cornell as a successful adaptation of law to meet the needs of women. Latterly, however, a portion of the American judiciary have reversed that adaptation, arguing that the interpretative-rules used for constructing abortion-rights were erroneous. Subsequent attempts by feminist-legal activists to reverse that revision furthermore exemplify the attempts by a (feminist) sub-system to restore and stabilise its own environment.

Human beings attempt to stabilise their environments through a variety of feedback mechanisms (Hooker 1995: 73-4). *Negative feedback* alerts subjects that the wider system is failing to meet the needs of its sub-systems. It is the principal catalyst for promoting change. Feminist revelations that US state-law was consistently failing to protect women who felt in need of abortion services is a case in point. *Positive feedback*, alternatively, amplifies change within a system, leading to further alterations of its form. Following the above example, feminists sought an enlargement of the right-to-privacy provisions of the American Constitution in order to extend the rights of American women to decide the futures of their pregnancies; pregnancy was, thereby, successfully interpreted as an intrusion of personal privacy. *Forwardfeed*, finally, develops higher forms of regulation. These mechanisms overcome obstructions that subjects experience in pursuing change. The post-modern and post-pragmatist quests for an ultimate legal command - *the law of the law* - is an apposite example. It attempts to elevate debates over legal method beyond questions about interpretative style to inquiries about the sources and meaning of ethical judgement.

The pursuit of environmental stability, moreover, requires the construction of "invariances" (*objective* measures) through which deviations from desired states can be measured (Hooker

1995: 73-80). Changes to an environment cannot be evaluated without some conception of what that environment *is*. Quite clearly, this aspect of NEE draws specifically on its ontologically-realist assumptions. This quest for objective knowledge is intrinsically linked with attempts to control the socio-biological environment, either to reverse problematic states or to facilitate changes that are beneficial to particular sub-systems. The attempts by post-pragmatists to *name* the ethical force behind the *law of the law* (as *feminine jouissance*) illustrates this. These identities supply ostensibly "objective" foundations for evaluating the extent to which law addresses the concerns of marginal groups such as women.

According to the naturalist account, however, human subjects cannot attain objective measures of their environment. They are too embedded within that environment - being an aspect *of* it - to achieve the type of non-interpretative position required to construct genuinely objective knowledge. The state of objectivity is, thereby, beyond their finite capacities to perceive and to reason. Despite the impossibility of pure objectivity, the *concept* of objectivity remains important because it prompts subjects to anticipate a socio-cultural world that is beyond their ego- and homo-centric perspectives. In this way, concepts - as ideals - become an integral aspect of subjects' materiality through which they attempt to gain a workable knowledge of their environments. "Ideal" objective measures, thus conceived, take the form of "higher dimensional" meta-discourses that portray subjects' particularistic and theoretical viewpoints as "possible lower dimensional projection[s] of themselves" (ibid.: 75). To relate this to earlier themes, the NEE position on objectivity corrects the pragmatist belief that reality can be reduced to the outcomes of intersubjective agreement. Aspects of socio-biological reality will always exist (or will be created) beyond those that are represented by currently-held convictions.

In light of subjects' inability to directly access reality they are forced to employ proxies for developing "objective" knowledge of the material realms. The most common proxies originate in the spatio-temporal frameworks used by physical scientists. These suggest that invariant elements have either three-dimensions (in the case of physical elements) or produce similar representations when interpreted with a triangulated methodology (for non-physical elements).

Even when reliable proxies are used to construct "objective" accounts of complex systems - such as law - considerable variability emerges between them. This is clearly evident, for example, in the differences between the Marxist and feminist analyses reviewed in chapters 4 and 6. These variances between perspectives are *as* important for naturalists, however, as the putative objectivity of each one's representation. Moreover, the variances highlight the dissimilar ends to which an ostensibly objective reason can be put and of the need to theorise how the various insights might be accommodated within a singular framework.

Despite the importance that NEE attaches to variance it also conveys a strong realist impression that the variability between perspectives can ultimately be stabilised and, moreover, that different perspectives can be unified. This, to revisit Chapter 2, mirrors the Peircean view of knowledge; if enquiry proceeds for long enough it will converge on the one truth. Within the account given by NEE, the variety of theoretical perspectives that can be involved with a problem (realist, post-modern, and pragmatist perspectives, for example) demonstrates the existence of a "mutually regulating system tuning itself to its environment in a complex way so as to achieve local cognitive improvements" (ibid.: 79). Behind this position lies an assumption that material existence is *ultimately* more fixed in form than fluid. To invoke the meteorological example used in Chapter 3, the non-linear and chaotic patterns of weather-flow ultimately belong to the planet. This assumption, in turn, enables dissimilar theoretical approaches to converge on the singular reality (socio-biological existence) in a way that transcends the more immediate, and various, dimensions of that materiality (of class, gender, and ethnic-based patterns of social interaction, for example).

When this insight is applied to the concept of reason the NEE position becomes most equivocal about the extent to which objectivity can be achieved. At this point the concept of objectivity loses its status as an ontological element completely and becomes a theoretical concept with no definitive content. Instead, it becomes an *ideal* to which cognitive activity aspires. Positively, however, the lack of content allows the concept of objectivity to become a source of open-endedness for the process of theorising. The retention of an ideal-measure that is not accessible through personal sensibility - as Charles Taylor refers to this position (Taylor 1992: 513) - ensures that enquiry remains interminably incomplete. As a "deliberately imperfect" measure, the concept of the *ideal* allows human enquiry to be admitted into the

evolving nature of the world rather than standing "in rivalry" to it (Jameson 1961: 196). Moreover, this mirrors insights generated within legal pluralism, namely that theoretical inconclusiveness is an important feature of democratic society. *Objectivity* becomes an unattainable ideal that is to be pursued rather than an end-state that can be turned into a source of regulation.

The diversity of "objective" measures within a system also reflects the variety of reasoning styles used by it to increase its adaptive capabilities. The most basic reasoning processes are the static states that reiterate a system's previously successful adaptations to its environment. The "necessity" attributed to the practice of *judgement* (for ending irresolvable disputes) could well be a first-order form of reasoning. Second-order reasoning processes are those that adapt first-order processes to new environments. The development of international forms of human rights to regulate the actions of nation-states is a case in point. Finally, third-order processes are those that enhance the ability of second order processes to further their systems' power of adaptation. An example is the philosophical enquiry into the ability of *judgement*, in its role of conserving meaning, to accommodate the proliferation of diverse socio-legal identities within the modern nation-state.

The conditions that are needed for revolutionary change within sciencing systems such as law begin to emerge when existing regulatory orders fail to stabilise the environmental dimensions that are diversifying. The diversification of socio-cultural identity within nation-statehood, as mentioned, is a prime example of this. In such cases the systems substitute existing regulatory orders with modes of regulation that can respond to diversity. These new forms accommodate a more expansive range of data and spur evolution in the concepts used to comprehend the data. Without such developments systems would continue to respond to their diversifying environments with regulatory tools that are increasingly inadequate. The likely outcomes are, at best, iatrogenic systems whose interventions cause more problems than they solve (legal methods that cannot recognise the value-systems of those they judge) and, at worst, the demise of that whole politico-legal system (and the onset of civil war, for example). The legal-pluralist project can be understood as a response to such a situation. Legal pluralism has been motivated by the failure of orthodox jurisprudence to recognise counterhegemonic socio-cultural identities as equivalent in status to that of the abstracted

subject of liberal law. Popular dissent against the suppression of gender, class, and ethnic identities, for example, plus the associated celebration of diversity, strains the legitimacy of discursive formations that fail to recognise the pluralised nature of the contemporary socio-cultural world. Revolutionary changes are possible in such environments.

Within the NEE account revolutionary changes tend to rely on incremental developments (rather than sudden disruptions) within orthodox theories and practice. They emerge when subjects combine elements from different conceptual frameworks to form innovative hybrids or apply existing frameworks to new contexts. The post-realist and post-pragmatist interest in legal-rights theory, to cite one example of this, is heavily indebted to the work of orthodox jurisprudence (Hunt 1981, Kerruish 1991; Cornell 1992, 1995). In a similar vein, the considerable interest that some post-modern legal pluralists invest in the study of common law (as compared to Roman law) reflects the apparently superior, though suppressed, potential of common law to respond to human contingency (Douzinas *et.al.* 1991, 1994; Goodrich 1990b).

What has been laid out thus far is background discussion to the following principal concepts that NEE uses to classify the forms of regulatory development that subjects employ to enhance their fittedness to their environments: *regulatory refinement*, *regulatory ascent,* and *superfoliation*.

Regulatory refinement refers to processes that increase the range and capacity of a system to regulate its environment. Notably, this occurs "within the existing regulatory architecture available to [that] system" (Hooker 1995: 88). Regulatory refinement is essentially a conserving force. It assumes that the system's conventional modes of reasoning are the most appropriate bases for widening that system's power to regulate its environment. The process thereby entrenches the wider system by embedding its axioms within new arenas of regulation. Post-modern and post-pragmatist legal pluralisms are particularly critical of legal reforms that solely do this. According to one facet of these arguments, positive law functions through a form of reasoning that mirrors the phallocentric linguistic order (Cornell 1991: 151; 1992: 11). Within this order there is no reality that is not masculine in form. In turn, positive

jurisprudence defines the feminine in sets of terms that are given by the phallocentric order and masculinist discourse thereby regulates the identities of women.

Regulatory ascent, in contrast, occurs when subjects append innovative, higher-order forms of regulation to a system. Notably, these "override and conditionalize those already in place" (Hooker 1995: 88). Rather than act as conserving forces, ascending forms of regulation disrupt entrenched patterns of theorising and substitute them with forms of logic that provoke lines of thinking that are inaccessible from orthodox standpoints. For Taylor, such moves allow subjects to access alternative sources of moral order within nature and social interaction, so necessary in order "to make crucial human goods alive for us again" (Taylor 1992: 513). To varying degrees, and in dissimilar ways, the post-realist, post-modern, and post-pragmatist legal pluralist projects attempt do this (discussed below).

Together, the processes of regulatory refinement and regulatory ascent produce a complex dynamic of *superfoliation*, of horizontal regulatory expansion and vertical differentiation. As is intimated above, neither refinement nor ascent exist independently of one another. In a negative vein, the impetus for ascent only ever develops where attempts to refine existing forms of regulation fail. In a positive vein, the nature of such failures provide the starting points for developing ascending forms of regulation. As suggested above, the most significant motivation for superfoliation within law (that, also, equates with the development of legal pluralism) has been the failure of law's regulatory refinements to recognise and accommodate socio-cultural diversity and the variety of emancipatory projects contained within.

The legal pluralisms presented in the preceding three chapters enunciate the dimensions and direction that the ascending forms of legal regulation are taking. Post-realism, as reviewed in Chapter 4, suggests that socio-legal orders interpenetrate one another in a non-determined manner against the backdrop of a material reality. This materiality, it is assumed, sets boundaries against which single-issue interests coalesce into counterhegemonic socio-legal movements. It thereby sets limits upon the compatibility of various actions, meanings, and identities. An assumption behind this is that the materiality contains a number of dimensions, some of which are incommensurable, some of which are less distinct and potentially osmotic. Moreover, post-realism has moved close to the position that the discourse of legal rights can

assist law to arrive at the "one right answer" in contests between competing interests. This approach assumes that the material reality of social life is accessible and, also, stable enough to support the development of singular answers to complex questions. Moreover, it assumes that the materiality is "active" enough to constrain excesses in subjects' descriptions of it. Clifton Hooker skirts around this set of assumptions in a way that demonstrates our lack of knowledge about the nature of that materiality; it is "an open question how pliable the universe is. It is as yet unclear how much of its structure can be transformed into human artefact at all" (Hooker 1995: 104). Post-realism legal pluralism has not encouraged an exploration of the metaphysical domain implied in Hooker's comments. It thus remains unclear what a post-realist account of non-discursive and discursive materiality would look like. Post-realist legal pluralism does suggest, however, that the metaphysical assumptions of legal thought is a fertile ground for developing ascending forms of legal regulation. This is the task to which post-modern legal pluralism is devoted.

The significant contribution of post-modern legal pluralism to the development of superfoliation is its enquiry into the existence of an *ultimate command* - the *law of the law* - that functions prior to and beyond the repetitive rituals of judicial judgement. In the terms suggested by NEE, the post-modern project attempts to construct a form of regulatory ascent that moves beyond the refining programmes of orthodox jurisprudential research. It holds two associated premises. First, positive legal judgement has no axiomatic ethical authority. Rather, it is based upon masculinist, racist, and class-based premises that the collective memory of law suppresses (Goodrich 1994: 107). As such, reforms that refine positive legal judgement can only perpetuate injustice. Second, *judgement* exists independently of positive law; law has no prior claim over the practice of judging. Only the ascending forms of regulation, however, provide vantage points for understanding judgement's independence from law. This autonomous realm of judgement has its origins in the intrinsically violent beginnings of Being, when originary subjects imposed order upon their environment by constructing language that depicted similarities and differences between elements (Douzinas and Warrington 1994: 215-16). Through this, humanity imposed its first acts of judgement.

A fundamental issue that arises from this particular portrayal of law concerns the bases upon which subjects now construct judgements. At centre is the identity of the *law of the law*. As

reviewed in Chapter 5, post-modern legal pluralism suggests that the *law of the law* is - at the logical extreme - that which subjects decide is singularly most important to them. The criterion for deciding this, however, is totally ineffable, being a quasi-biological voluntarism. Nevertheless, it exists as an element to which subjects feel an obligation to respond. Two prominent containers for these sources of obligation are *mythologies* that have neither source nor teleology (Fitzpatrick 1992a) and an irresistible *destiny* (Douzinas and Warrington 1994).

Post-pragmatist legal pluralists, as reviewed in Chapter 6, take umbrage with post-modern legal theory because of its fixation with regulatory ascent. On its own, regulatory ascent creates scepticism toward political activism. It fails to engage with gender/class/ethnicity-based oppression in a systematic way that offers strategic directions for politico-legal action. Such systemacity, the post-moderns fear, will become the bases for new modes of regulation that are constructed by subjects who seek ostensibly conclusive narratives to fill the voids they sense between their consciousness and facticity. Moreover, each narrative will reflect dubiously sectarian interests.

Post-pragmatism is also cautious about socio-legal theories that only pursue regulatory refinement. The latter, as suggested above, uncritically support existing modes of legal reason. This is unproblematic in relatively homogenous environments where legal thought might be synonymous with other areas of human endeavour. Within societies that contain a number of reasoning-styles and social horizons, however, a singular socio-political perspective may marginalise social groups that value alternative forms of sociality and rationality. Moreover, instrumentalist forms of adjudication can easily gloss over questions about their own ethical grounding. This issue is pertinent to arguments that suggest that the laws of nation-states ought to be subservient to international law.

Bartholomew and Cornell argue, in this vein, that the United States of America ought to ratify the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW" (Bartholomew and Cornell 1994: 155)). That convention, they suggest, could provide feminist lawyers with precedential arguments that are superior to

those of their municipal laws.[3] International law indisputably has that potential. That said, such stances neglect questions about the grounds upon which international laws are admitted into municipal law. In turn, it ignores questions about their stability. The refusal of the United States of America to ratify CEDAW pointedly reflects the ease with which a nation-state can ignore the morality of an apparently progressive form of law. Rather, international covenants - such as CEDAW - are too easily accorded a "foundational" status on the presumption that the only work that needs to be undertaken is finding the appropriate form of deductive argument to extrapolate its principles to municipal law. Post-pragmatism problematises this on the basis that deductive, formalist argument is not sufficient to confront obstinate bodies such as the US legislature. While applauding the over-all goals of projects such as CEDAW, post-pragmatist legal pluralism suggests that legal argument must emphasise the moral dimensions of the issue-at-hand as much as its formalist ones. Indeed the two are inseparable because each formalist principle always refers to ethical and non-rational positions.

In keeping with these concerns, post-pragmatist legal pluralism appears to represent a blend of regulatory ascent and regulatory refinement. In keeping with post-modernism's purely "ascending" project, post-pragmatist legal pluralism contends that the *law of the law* is the most fertile research field for developing an ethically-based form of positive law that is sensitive to diversity. As such, it is committed to developing regulatory ascent. As discussed in Chapter 6, it does so by attempting to name the ethical force behind the *law of the law*. The act of identifying that force allows a form of ethics to emerge that can be used for critiquing judgements made within positive law. In keeping with the open-endedness of regulatory ascent, however, post-pragmatism names the ethical force in such a way that its identity will always remain incomplete. As such, ethics must be kept indeterminate and allowed to develop through an interminable process of rewriting. In the example given by Cornell, morality is the *feminine*. This equates with a creative power (*jouissance*) that stands both within the phallocentric social order of positive law and outside, as an ideal realm that defies the descriptions given of it by law.

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[3] Namely, such conventions provide stronger bases for arguing that women's perspectives are equivalent to those of men's. Moreover, they do so in a manner that does not reduce the criteria for determining "equivalence" to the masculine perspective.

In an alternative vein, post-pragmatist legal pluralism also attempts to refine existing forms of legal regulation. Its use of legal-rights discourse to enhance the welfare of women and other marginalised socio-cultural communities exemplifies this. Thus, while post-pragmatism is critical of law's inability to be impartial it maintains some commitment to a centralist conception of law.

Post-pragmatism's commitments to regulatory refinement and ascent illustrate the contradiction, outlined above, between the conservation of meaning (through the exercise of legal judgement) and the transformation of the processes through which meaning is constructed, namely through the location of law within subjectivity (and, more explicitly, within the space that Jameson identifies as the distance between consciousness and facticity, the symbolic and imaginary). The contradiction is pointedly evident in the post-pragmatist's attempts to recognise socio-cultural diversity while constructing shared normative expectations about how judgement will proceed. As discussed above, post-pragmatist feminism comes close to subverting the whole project by suggesting that *the feminine* is the only position from which diversity can be understood. As a consequence its use of a particularistic (feminist) standpoint to name the ethical force of *the law of the law* (woman) fails to fully escape the legislative power of the realist foundation that it must adopt in order to pronounce judgement. Despite the approach's openness to otherness, therefore, it has the potential to remain a modernist and sectarian perspective.

From the vantage-point given by NEE tensions between incommensurable elements (such as regulatory refinement and ascent) can only ever be managed, never resolved. Refinement and ascent pursue different goals. Thus, tensions will always exist between successful innovations in regulatory refinement (such as the recognition of CEDAW) and projects that pursue the more arcane worlds of regulatory ascent (such as the meaning of ethical legal judgement). In a similar manner, different perspectives on the origins of justice (that emphasise, for example, *counterhegemony*, *feminine jouissance*, or *voluntarist expressionism*) will each suggest alternative foundations for the development of regulatory refinement. As such, tensions will also always exist between many of the projects that seek both regulatory refinement and ascent. The following section offers an explanation of this, drawing upon an NEE conception

of reason. Leading on from that I consider a possible solution to managing the incommensurability, namely the reconceptualistion of law as an *epistemic institution*.

7.2.4 Theorising the incommensurability between legal *ascent* and *refinement*

NEE's approach to the issue of incommensurability emerges from its *decision-theoretic conception of reason*. That perspective takes formalist conceptions of rationality as both its source and its foil. Formalism implies that reason possesses a "non-naturalised" quality that enables cognition to transcend the world of which it speaks (Hooker 1995: 22). The senses (that perceive environmental stimuli and that provide the information upon which reason acts) are, in a like manner, assumed to be infallible and beyond nature. Sited above nature, formalism is able to offer a normative epistemology that is grounded in "self-authenticating terminators of analysis" (foundational tenets) and invariant rules of inductive logic (reified interpretative-canons (ibid.: 22)).

In contrast to formalism, naturalism suggests that cognition is embedded within the multiple bio-social processes through which subjects adjust themselves to their environments. The only foundation it offers for its propositions is the assumption that subjects have no ability to transcend their capacity to think. This is another way of saying that no encyclopaedic and non-naturalist sources of knowledge exist. Moreover, it holds that formalist logic cannot explain the non-rational choices that subjects make within the inductive processes they use to comprehend their environments. Non-rational "calculations" are an integral aspect of reason and, as I shall be arguing in Chapter 8, an evolutionary adaptive-mechanism for subjects facing bewildering changes in their environments (such as the problem of "multicultural" diversification). In turn, the indeterminacy of reason makes all rules of logic controversial and the NEE theory, itself, inherently fallible. That said, NEE regards formal logic as a "partially useful" element whose utility can be determined "context by context" (ibid.: 24). Reason is, to synoptically summarise the decision-theoretic approach, an element of intelligence that encompasses decisions that cannot be reduced to formulae proposed by formalist logic.

The decision-theoretic conception of reason questions the status of normative claims (the "truth"), such as might arise from legal judgement. It suggests that no infallible foundations exist - neither perception (empiricism) nor rationality (logicism) - for deciding the status of competing normative claims. Naturalists recognise, however, that normative claims need a degree of status in order to command legitimacy. Moreover, claims must have some form of correspondence-based relationship with *the truth* if the notion of *norm* is to avoid becoming synonymous with the ephemeral and pragmatist conception of *right*. In order to overcome this, naturalism retains a correspondence theory of truth as an *ideal*. This suggests, in turn, that a portion of materiality always remains beyond our attempts to represent it. The remaining portion has the potential to destabilise current convictions.

In turn, the goals to which truth-finding are directed must be formulated in terms of epistemologically attainable "proxies" (ibid.: 21). Commonly used proxies for scientific truth include empirical adequacy, explanatory comprehensiveness, and predictive power. These are not necessarily compatible and may conflict within some research contexts. Thus, for example, non-linear socio-legal frameworks such as post-pragmatism may offer explanations about the nature of law but be unable or unwilling to predict its futures.

For naturalists, there are simply "no self-evident sets of proxies" for reason that subjects can rely upon in any given situation (ibid.: 323). Each set depends upon the institutional context within which the rational activity occurs. This produces "a variety of context-delimited conceptions of rationality" (ibid.: 327). Moreover, what counts as total or appropriate evidence within each set of proxies will depend upon theories held about the world's coherence and "connectedness" (ibid.: 324). Positivist legal perspectives, for example, assume that some degree of unity exists between the physical and discursive domains. These judge the reasonableness of theoretical conjectures with different standards than constructivist perspectives such as post-modern and post-pragmatist legal pluralism, for whom connectedness does not *necessarily* exist or, alternatively, for whom discursiveness becomes the definitive aspect of materiality.

In the absence of self-evident epistemological bases subjects make choices between proxies on the basis of undetermined and non-rational *judgements*. For naturalists, judgement thereby

involves both rational and non-rational thought processes. The relationship between the two is inaccessible, being "for the most part either unconscious or only vaguely expressible" (ibid.: 312). Judgement is simply the site where fact and value mesh. This is the realm of *non-authorial authoriality*, the space between consciousness and facticity. In turn, the inability of either logic or non-rationality to solely fill the gap and become the determining force within judgement makes it a *self-organising* element of human cognition.

The self-organising nature of judgement demonstrates that reason is a *process* rather than an *outcome*. In a circular manner, however, reason is a process that seeks to perfect rationality (conceived of now, however, as an *ideal* and unattainable outcome). More immediately, however, reason (as a process) ensures that the *content* of rational thought remains open-ended. As Hooker explains, reason is

> a capacity to modify, organise and extend judgement formation so as to be able to make progress in transcending limitations and imperfections through moving toward realising the principle regulatory ideals, truth, goodness, beauty, and reason. (ibid.: 313)

As such, reason has a self-reflexive and self-organising character plus a capacity to develop its "own objective understanding" in a non-linear manner that reflects the overarching fluidity of human history (ibid.: 313). This representation of reason points to the undetermined space between consciousness and facticity that will, as circumstances require, generate new understandings of itself. This contrasts with other ideals whose goals are to produce *the outcomes* of perfect beauty, goodness, etc. The function of reason, rather, is to conceptualise itself as a *process* through which knowledge evolves.

For naturalists, reason is an inherently risky enterprise. It has no predetermined direction and is undertaken by subjects with neither perfect perception nor flawless logic. These finite subjects are required to predict the consequences of their judgements even though their ability to understand began, as a species, in a state of "evolutionary ignorance" (ibid.: 25). Furthermore, as individuals they began as unknowing infants and as adults live as subjects with an implacable sense of anxiety that emanates, as Jameson notes, from the unintelligibility

of the space between their consciousness and facticity (Jameson 1961: 197). Risk, therefore, stands at "the centre" of all "rational procedures" (Hooker 1995: 25).

Adding to this problem are the limited resources that subjects can bring to any judgements. These limitations curb the extent to which subjects can test hypotheses in order to explore the consequences of alternative strategies. In the face of resource constraints (of time and money, for example) subjects must exercise "risky but intelligent (canny) judgements" about the extent to which any particular ideal ought to be pursued (rationality, beauty, etc.) and the appropriateness of particular proxies for the project at hand (explanatory complexity, predictive ability, etc. (ibid.: 26)). In a contiguous manner, post-pragmatist legal pluralism suggests that subjects do not possess the perceptual and reasoning capacities needed to predict the outcomes of their judgements. Moreover, they are always under pressure to construct a judgement; there is always a sense of urgency within law. As such, judges are left with responsibility for their responsibility.

Subjects have only two main proxies with which to evaluate the risks that accompany their judgements: formalist logic and efficiency (ibid.: 328-332). From the above, it is evident that NEE dismisses formalist logic as a potential basis for evaluating consequences. This is because formalism fails to consider the non-rational aspects of decision-making. Moreover, notions of "consequence" and "risk" have no place within formalism. Rather, formalism substitutes them with the pursuit of coherent interpretative rules and foundational principles. It is as if foundations and self-evident interpretative rules thereby guarantee the "safety" of judgements.

Efficiency is also a difficult concept by which to gauge the value of judgements. Its main problems are its rigidity and non-creativeness. Measures of efficiency rely upon static sets of values and facts. Furthermore, reliance upon unsophisticated notions of efficiency obfuscate the socio-political reasons why particular environments were created in the first place (such as capitalist markets, nation-states and positive law). Despite these difficulties, both logic and efficiency continue to play central roles in refining existing modes of regulation. Feminists' uses of international covenants to develop municipal legal reform is a good example of this (discussed above). These rely upon both formalist modes of reasoning (in that the covenant

documents are ascribed foundational status) and measures of efficiency (in that the measure of success is the enhancement of women's well-being at the least possible personal cost to individual women). Naturalists can live with imperfect "refinement" tools such as logic and efficiency because the potential also exists to create ascending forms of regulation through the valorisation of ideals to which subjects aspire. The pursuit of these ideals has the potential to improve knowledge about the processes through which regulatory refinement occurs.

Naturalists face a difficult problem in accounting for the non-rational creativity through which agents construct judgements, such as in choosing between sets of ideals, proxies, and measures of efficiency. This occurs even though a physical materiality can (theoretically) be relied upon to confirm the appropriateness (or otherwise) of judgements. In practice, however, considerable latitude exists in interpreting sensory data of that realm; "ineliminable ambiguity and insufficiency of evidence" are the norm rather than the exception (ibid.: 106). It follows that an account must be given of how the "human spirit" arrives at creative decisions in the midst of interminable indeterminacy (ibid.: 293). This, quite apparently, is the central question within the quest for a multicultural conception of law; it asks in a direct manner about the nature of *non-authorial authoriality*. I shall put this to one side for the moment, returning to it in Chapter 8.

Aside from being a conceptually challenging element to account for, creativity is "the most intricate expression" of a more expansive problem, that of why systems superfoliate (ibid.: 334). The concept of superfoliation raises difficult questions about why systems move from conventional problem-solving approaches to foreign modes of reasoning. The issue is significant for understanding the rise of legal pluralism, conceived of as the superfoliation of law. The legal pluralisms reviewed over previous chapters suggest that the drive for regulatory ascent has developed where the refinement of legal method has failed to address the experiences of those whose identities are consistently disregarded within the courts: women, the underclasses, and aliens. Restated in terms that I shall expand upon in the next chapter, the motivation for change comes from a system's need to adapt to environmental changes that threaten its very existence.

Legal pluralists attempt to achieve two goals with regard to this. The first is to explain law's inability to recognise diversity (for example, by referring to jurists' reliance upon precedential rather than ethical argument). The second is to develop standards of judgement that are appropriate for a diverse range of socio-cultural environments (the exploration of legal-rights discourse by the post-realists being a good example of this). Like NEE, however, they face the problem of accounting for the creativity that actually superfoliates legal theory. An additional problem arises in constructing an account of creativity in that it should not does not exclude those who are dissimilarity positioned to the standpoint from which the account is written (as occurs in the feminist marginalisation of male-centred perspectives, and *visa versa*). This returns the problem facing legal pluralism's superfoliatory programme to the tension between the pursuit of shared standards of legal judgement and the attempt to grant diverse socio-cultural identities equivalent recognition.

NEE, as noted, does not categorically describe, explain, or predict creativity. Rather, it redesignates creativity as a non-determined substance that is the internal mechanism for change within self-organising systems. NEE's more immediate theoretical task becomes, rather, to describe how creative diversity can be co-ordinated in a way that heightens a system's overall "epistemic gain" (ibid.: 107). NEE suggests a particular type of institution for this role, the *epistemic institution.*

7.2.5 Law as an epistemic institution

Epistemic institutions are social entities, such as science and law, that yield normative claims about what ought to occur. They thus presume an ability to construct normative claims that correspond with *the truth*. As per the above, however, this function is complicated by the inability of any normative claim to gain irrefutable status and legitimacy. Epistemic institutions compound this problem by utilising sets of proxies (for the truth and reason) that are incommensurable. Institutions attempt to increase the veridicality of these sets by assessing their truth-tracking capabilities against feedback gained from interventions with their environments. That said, all normative positions remain fallible because the facts and arguments through which they are sustained can never be perfected. For naturalists, therefore,

there can never be a definitive proof for determining the appropriateness of proxies; stances are totally dependant upon the institutional context from which answers are presented.

Within these constraints the quest for *reasonable* normative claims equates with the pursuit of a *process* for arriving at *truth.* In the absence of infallible argument naturalists thus look for specific processes that can institutionalise the pursuit of intersubjective judgement. As I shall be arguing below and in the following chapter, this search for processes cannot simply mirror the orthodox positivist search for the correct *grundnorm* or procedural rules. Rather, it must equate with an understanding of how changes occur within the realm of *non-authorial authoriality*, of how the processes through which perspective is constructed change. Moreover, in accounting for these, a multicultural conception of law cannot reduce these changes to voluntarist expressivism for, in that move, law would again be reduced to "everything." In the process, the possibility of shared emancipatory struggle would be severely - if not terminally diluted - and hegemonic forms of social relation would endure unchallenged.

The construction of processes for regulating intersubjective judgement also become a means of managing risk. Risks inhere within all situations where there is no guarantee of resolving differences of opinion on what counts as the most appropriate method for constructing *truth.* Faced with the impossibility of constructing conclusive agreement the goal becomes the "distribution of risk and effort across the entire institution" (ibid.: 31). As becomes evident below this affects the image of law; it alters law from being a centralist institution that finds the "right answer" to that of a decentered and internally differentiated field that manages risk.

Epistemic institutions manage differences in perspective by regulating patterns of consensus and dissensus. The achievement of consensus, to take the first element, is necessary in order for institutions to increase their epistemic reserve. Without agreed-upon positions (consensus) institutions lack knowledge-bases upon which to make judgements. Law as we know it would cease to exist without a history of epistemic gain as it would lack precedential cases upon which its arguments could be founded.

Environments with too much consensus, conversely, may encourage participants to become uncritical and to dogmatically accept the status quo. In such cases institutions might become unreflexive and progressively lose their adaptive capacities. Post-modern and post-pragmatist legal pluralists suggest that positive law risks this where judges rely primarily upon precedential argument. In such situations legal decision-making reduces to an act of uncreative calculation and ceases to be judgement.

The reconceptualisation of *objective truth* as an *ideal* also demands the promotion of dissensus. Dissensus spurs the critical evaluation of currently-held knowledge. It does not require widespread dissatisfaction with current paradigms in order to proceed. Nor does the community of enquirers have to agree about what might be wrong with existing approaches in order for the exploration of alternatives to be "epistemically useful" (ibid.: 108). Where such dissensus becomes an institution's pervading spirit, however, "idiosyncratic speculation and methodological fragmentation" may result (ibid.: 108). In turn, subjects may fail or refuse to adequately assess and synthesise others' works in the belief that there are no verifiable standards through which to do so. This concern mirrors post-pragmatist criticisms of post-modernism's apparently relentless suspicion toward forms of political activism that draw upon particularistic epistemological positions. That suspicion may obfuscate important developments within the theories that underpin that activism.

The degree to which an institution's pattern of consensus and dissensus can adapt it to the diversification of its environment is the measure of its "epistemic institutional rationality" (ibid.: 108). Rationality, in this context, refers to the ability of an institution to diversify its range of adaptive processes, that is, to superfoliate. The legal pluralisms reviewed here suggest that the superfoliation of law means more than the refinement of its already highly-developed systems of judicial appeal and review. Rather, the issue becomes that of how law might itself be located *within* rather than *over* diversity. Each of the legal pluralisms reviewed here signal this through their interests in the role that a subjectivity-centred form of legality might play in the reconfiguration of law. This is implied, for example, in the *ultimate commands* that are, clearly, personalised edicts: *be responsible for responsibility, be just to justice*. This stimulates the exploration of the attitudes, or spirit, within which judgement

occurs. Clearly, moreover, this decentering of law to the subject destabilises the centralist status of positive law.

According to these legal pluralisms, therefore, the *epistemic institutional rationality* of law cannot be developed solely from perspectives held within law. The extent to which judges can recognise socio-cultural diversity (that is, can act ethically) does not depend upon their location within the centralist institution (Law) nor solely with the possession of legal knowledge. Rather, the morality of law is contingent upon the spirit within which judges interact with the social claims presented by counterhegemonic socio-legal movements. For the naturalist these alternative viewpoints equate with "public, shared epistemic values" (ibid.: 110). These act as "counterweights" to the professional and "sectional" interests held within the centralised dimensions of epistemic institutions (ibid.: 110). In a similar vein to the legal pluralist proposition that counterhegemony is an interminable process rather than political outcome, the epistemic bases of these "local acceptances" are also perpetually open-ended (ibid.: 110). As a consequence, legal pluralism suggests that positive legal theory can only respond ethically to diversity where it embraces the open-endedness of counterhegemony. This undermines the sanctity of the formalist reasoning through which centralist institutions function and opens legal decision-making to modes of rationality that are dissimilar from precedential argument. It is never self-evident what outcomes will emerge from such changes.

Superfoliation, it thus transpires, is a risky endeavour. Subjects do not necessarily possess the theoretical models necessary to predict the outcomes of revolutionary changes they impose upon their intrinsically non-linear, social systems. The Bolsheviks' inability to predict the emergence of Stalinism is a salutatory reminder of this. This is a salient issue with regard to whether or not our understandings about ethics are incisive enough to construct a tenable, wholly-decentered conception of law (as is advocated, for example, in the pursuit *destiny* or a *law of the law*). As seen in Chapter 6, the post-pragmatists criticise post-modern legal theory for taking this approach, arguing that the latter's decontextualised sense of ethics promotes political impotency. In its own endeavour to avoid that outcome post-pragmatism attempts to name the ethical force of the *law of the law* with a particularist signifier, *woman*. As I have argued, this approach is likewise fallible. The feminine identity that post-pragmatism attributes to ethics tendentially undermines the development of an ethical code that can give all identities

due recognition. The apparent intractability of this problem seems to undermine the development of situated ethical positionings that can fully encompass diversity. That outcome, however, is perhaps characteristic of all current attempts to bridge the distance between ethics and diversity. It might transpire that the gap can never be traversed and that only imperfect - and inherently risky - compromises between them will ever emerge.

The argument for epistemic institutions, as presented here, can be read as a tentative and imperfect solution to the problem raised by legal pluralism's superfoliatory programme. The tension that exists between legal pluralism's attempt to both recognise socio-cultural diversity and construct universally-applicable standards of legal judgement is interminable. Rather than resolve the strain, NEE suggests that epistemic institutions such as law should be reconfigured so as to manage the various approaches that are used to alleviate the tension. Each approach must be understood as a potentially risky venture conceived by finite beings with limited capacities to calculate the consequences of their judgements. This involves the development of patterns of consensus and dissensus through which the socio-political effects of each mode of reasoning can be periodically evaluated.

To bring this point to its logical conclusion, this suggestion alters the notion of law. Law's image changes from that of a centralist institution that definitively resolves conflicts to one that distributes the socio-cultural risks associated with particular conceptions of reasoning by promoting the pursuit of various emancipatory projects. The potential for human social systems to adapt to changes in their environments is heightened where a number of diverging programmes can be pursued. Each offers an experimental situation where human interventions can be observed and analysed using a variety of proxies for objective knowledge. Quite apparently, this proliferation of emancipatory projects has the potential to undermine the very institution that has facilitated them.

The naturalist "secret" in fostering this proliferation of emancipatory programmes is in comparing the "changes induced" in a system to the "adaptabilities possessed" by members of the system (ibid.: 112). This raises questions about the extent to which westernised human subjects can live without *law*, conceived of as a centralised "Rule of Law." Law has become a pivotal institution through which western subjects have adapted to what Michael Ignatieff

tellingly refers to as an increasingly heterogeneous *society of strangers* (Ignatieff 1983: 87). Within such a society the self is endlessly confronted with a seeming array of Others whose simple otherness prompts subjects to value a mechanism (law) that can objectify the Other in order to classify and distinguish between its forms. Moreover, it is not readily apparent that subjects desire to live in a fragmented world without an epistemic institution whose judgements and ethical positions on such matters can be trusted. Neither is it self-evident that subjects wish to live amidst intellectual confusion without "grand" legal narratives that provide anchors for developing moral perspectives. In order for legal pluralism's superfoliatory programme to succeed, therefore, the desire for *Law* must be confronted as much as the need to locate jurisprudence within an ethical spirit that promotes the recognition of diversity. As such, the focus of theoretical inquiry must shift from questions about the form that a centralist and institutional law might take to questions about the type of subjectivity needed to sustain the decentered form of legality prefigured by legal pluralism and NEE. This, moreover, must theorise about the social conditions under which such a subjectivity would emerge and endure. I explore this in the following chapter.

7.5 Conclusion

I have argued here that *law* should be reconceptualised as a process for managing consensus and dissensus that is, moreover, an aspect of the evolving materiality that it administers. As such, institutionalised notions of law are replaced with ones that focus on the role of subjectivity within the constitution of legality. This position also suggests that all value-positions and decisions that subjects take are imbued with risk because those subjects lack the epistemic tools required for calculating the efficacy of their decisions. Rather, the utility of such judgements can only be known in hindsight, through a reconstruction of events. The reconceptualisation of law, as a form of risk management, represents a plausibly useful way of realising and distributing the variety of value-positions, moral commitments, and scientific perspectives that are brought to bear on important socio-political questions.

A difficulty emerges in this reconception of law, however. It has the potential to reintroduce a sense of rigidity into the image of law. Despite its ultimate decenteredness (to the realm of

subjectivity) this conception of law could take on a conservative and functionalist tenor, mirroring the discourse of neutrality that characterises the positive procedural-law that it substitutes. In this vein, the rules by which an NEE-configured law manages consensus and dissensus may adopt a non-controversial and self-sufficient image. They might take on an aura of neutrality, suggesting that dissimilar horizons can be managed in an impartial manner by the suitably configured (tolerant, liberal) subject. As such, this approach would closely resemble the idea that a positive conception of law could be developed for adjudicating within heterogeneous cultural-settings. This position would have to deny or marginalise the suggestion, however, that a multicultural conception of law is interpolated by enduring patterns of social division. Moreover, it would erroneously assume that multicultural Law is beyond, or above, social life. As with suggestions that positive law is socially-neutral, this proposition is untenable.

8

DISTINGUISHING BETWEEN LAW AND JUSTICE

8.0 Introduction

The functionalism of a multicultural conception of law can be moderated where it is accepted that a reconceptualised law only emerges by virtue of the fact that a variety of valid explanations exist about how and why law and social relations interpenetrate (for example, Marxist, feminist, bourgeois, post-imperialist, and post-modern explanations). A multicultural form of law is thus envisaged simply because these competing conceptualisations undermine the self-sufficiency of positive legal method (and thus, the assumption that law does not have to embrace the diversity of the socio-cultural environment within which it is embedded). If that tenet is accepted, the issue for debate becomes the composition of (meta) rules that can ensure that a variety of legal analyses develop and, moreover, that these will develop in a manner whereby no single perspective dominates for all time (leading to the re-establishment of positivist legality). The separation of *law* and *justice* is, in my account, one such pivotal "rule" and is the focus of the following chapter. My discussion of that will lead into a re-evaluation of how subjectivity might be theorised to support a multicultural conception of law.

8.1 The Undermining of Liberal Conceptions of Law

The need for a new conception of law arises, in part, from two problems associated with the construction of normative standards within conditions of socio-cultural plurality. Together they suggest that liberal conceptions of law are unable to accommodate multiple socio-legal horizons. The first is that demands for the recognition of personal and/or cultural identities (of *difference*) have spawned antagonistic political and legal needs: the protection of *universal*

human rights and the recognition of *difference* between cultural identities.[1] The tension between these demands has, moreover, become institutionalised within two, dissimilar forms of liberalism. The first ("fundamental liberalism") comprises a set of basic and legally enforceable human rights (Taylor 1992:59). This apparently offers a culturally-neutral and proceduralist vision of the public good. Alternatively, the second, "non-procedural" form of liberalism is collectivistic and openly espouses culturally-specific standards of judgement (ibid.: 63). These preferences emerge as positive-discrimination policies - as sets of "privileges and immunities" - for protecting marginalised cultural communities (ibid.: 59). Taylor's own preference is for an amalgam of the two wherein individual cultural identities are protected within a wider politico-legal context of inviolable legal rights (for example, basic freedoms related to the preservation of life, of expression, and of association etc.).

The second difficulty relates to the incommensurability of divergent standards of judgement and the absence of self-evident criteria for adjudicating their relative worth. The basis for resolving such conflict lies not in law, for Taylor, but in a civic culture that endorses the "equal worth" of dissimilar cultural identities (ibid.: 70). This civic culture, ironically, values ethnocentrism; cultural communities have to know themselves before they can explore the meanings and worth of others' cultural identities. In the absence of self-reflexivity communities tend to either ingratiate other cultures or believe that their own ethical and aesthetic measures are the axiomatically-correct standards for judging the worth of others' life-styles. Within a civic culture of mutually-respectful and cross-cultural dialogue, however,

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[1] Both of these needs originate from the modern and widespread acceptance that personal and group identities "are formed by recognition" (Taylor 1992: 64). The following ideas lie behind this observation. First, individuals have equal "dignity" (ibid: 27). This idea developed from the eighteenth century notions that individuals each have an aspect that is unique to themselves, that it is morally imperative to live as oneself, and that the model for one's life can only be found within the self (ibid: 30). Second, the source of this self (of identity) is not in the self, however, but is constructed in "dialogue" with others (ibid: 32). This dialogical construction of identity points to an essential "dependence" that exists between all people (ibid: 33). The self cannot exist independently of communicative interaction with others. Third, and given this level of interdependence between people, the failure or refusal to recognise the inherent dignity of another's authenticity results in severe psychological damage for that other. In turn, misrecognition by others will progressively result in misrecognition of self. For this reason, systemic misrecognition of cultural identity takes on the "rank of a harm" equal to "inequality, exploitation, and injustice" (ibid: 64).
Recognition/misrecognition of cultural identity thereby becomes a moral issue. Fourth, this overall concern with dignity and the recognition of identity has given rise to a universalisation of basic human rights.

this ethnocentrism would be transformed into a trans-cultural *fused horizon of standards* (ibid.: 67).

To the extent that diverse communities of tradition could construct a "fused horizon" of standards it is evident that this would not be the same as a singular and overarching normative code such as positive law. Rather, the emphasis on mutual respect and uncoerced dialogue is apparently more ethical than it is legal.

For Jürgen Habermas the whole notion of *trans-cultural standards of evaluation* is problematic. The source of the problem lies in the suggestion that "equal worth" is a legitimate basis upon which endangered communities might be granted legal privileges and immunities. That process will valorise cultural identities and entrap community members within rigid subject positions. Moreover, notions of "equal worth" and "trans-cultural aesthetic standards" rely upon consensual beliefs (religious or humanistic) about the possibility of a tolerant civic attitude toward otherness (ibid.: 72). This appears to be a utopian dream that cannot be fulfilled. Alternatively, only an individually-based and rights-oriented liberalism can provide a political framework within which collectivist communities are free to evolve according to the interests and needs of their members. As such, it is improbable that collectivistic notions of freedom will enhance the vitality of cultural identity. Rather, an individualist politico-legal culture is the better protection against cultural homeostasis.

Despite their differences, these two positions share an important assumption; proceduralism's standards of judgement are culturally-biased. They are inexorably infused with culturally-specific "ethical" commitments. The significance of this for the present argument is that positive conceptions of law must qualify their accounts of proceduralism's overall value to a society. Law reflects culturally-specific horizons of justice, goodness, and beauty etc. every bit as much as politics.

Habermas makes two remarks about how subjects might resolve the tension between their need for a procedural law and its infusion with culturally-specific values. First, liberal forms of law and politics will only work to the extent that its members *rationally* accept that others

have the right to exist. Moreover, *reason* is the only legitimate basis upon which such agreement, or agreement to differ, can be reached. Second, immigration and the revival of indigenous cultures do influence the substantive commitments of procedural law. They create the need for new horizons of shared aesthetic standards. As such, it follows, the content of law does progressively alter, reflecting the socio-cultural composition of the society within which it operates.

It remains to be answered, in Habermas' work at least, to what extent proceduralism can change within multicultural settings before it becomes *illiberal*; that is, to what extent it can continue to advocate neutral tolerance when not all of the society's cultures might value tolerance. Habermas' own benchmark is the rise of *fundamentalism*, that is, intolerance to others' rights to autonomous existences.[2]

In a move that reflects Taylor's position rather than his own rationalist perspective, Habermas suggests that the primary answer to illiberal development is the inculcation of respect for a political culture that encourages subjects to be tolerant toward others' rights to exist (expressed as a "constitutional patriotism" toward procedural liberalism (ibid.: 135)). *Respect*, quite apparently, is not a purely rational attribute of selfhood. Rather, it implies that a non-rational *attitude* is required. Only through this can liberalism survive. This position differs, however, from Taylor's call for a civic culture based upon tolerance toward difference. Subjects, rather, are to respect the legal constitution that encourages them to be tolerant rather than to directly respect the other subjects. Subjects are thereby distanced slightly from one another but put in close proximity to the constitutional order that melds them.

This privileging of law over ethics assists liberalism to defend itself. Reflecting the insight that not all difference is benign, procedural liberalism must be a fighting creed, capable of

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[2] Even within this, however, it is evident that Habermas envisages degrees of fundamentalism of which he is primarily concerned with the intolerant brand. This is the form that eschews reasoned debate and the possibility of "reasonable disagreement" (ibid: 133). Lesser degrees of fundamentalism appear essential for the existence of the public sphere (within which strongly held "convictions" are debated by discursive "co-combatants" (ibid: 133)). These elements imply that spirited struggle exists between protagonists, but always within the attitude of tolerance for the other's right to express their point of view - despite (as Amy Gutman puts it) disrespect for it (Gutman 1992: 21-4).

legitimating the use of violence against others. Without periodic defence, liberalism has the potential to become an impotent doctrine that absorbs all, including intolerance (and in the process become intolerant to difference). The politico-legal order provides subjects with an impersonal "buffer" through which they can legitimate their aggression toward intolerant forms of culture. A higher good thus exists beyond the Other, one that can always reduce the Other to its own terms if needed, namely the legally-constituted social order.

The value of right-oriented approaches such as Habermas' is that they portray liberalism as a workable institution for administering the dissensus that arises between dissimilarly-positioned socio-cultural communities. As such it warrants close inspection.

Habermas doubts that consensus is always possible within multicultural settings and the task of law must become one of managing dissensus. The use of procedural law to administer socio-cultural diversity thus represents a rational choice. As noted, this does not deny the cultural specificity of legal decisions. It suggests, however, that the notion of "neutral adjudication" is a valid ideal to which law might aspire. In addition, this position envisages that the substantive content of procedural law will alter through its contact with counterhegemonic socio-legal orders.

Despite the apparent potential of proceduralism to promote a multicultural concept of law a major difficulty exists with it. Proceduralism appears unable to acknowledge its cultural-specificity and to purge itself of entrenched ethical and social commitments. These might include, for example, commitments to masculinist, capitalist, or imperialist tenets. As such, procedural law has difficulty creating genuinely trans-cultural standards of judgement and is likely to reflect the traditions of the socio-cultural settings within which it operates. Six issues contribute to this.

First, cultural communities that struggle for legal recognition do so within a field of asymmetrical social relations. Habermas recognises this and suggests that equitable competition between communities can be facilitated by protecting a free public space within which their discursive struggles for recognition can be played out. In particular circumstances grounds may exist for positively discriminating within that public space in favour of

disadvantaged groups. This assumes, however, that standards of judgement can be constructed from within proceduralism to judge the relative worth of cultural communities.[3] Apparently, however, no such criteria exist in a self-evident manner. Whatever criteria emerge will be political evaluations (rather than legal) because no *a priori* reasons exist as to why any particular set ought to be accepted. Moreover, however, the "neutrality" of proceduralism would more likely favour juridical non-intervention in such "political" matters. A clear example of this in the Aotearoa/New Zealand setting is the judicial decision to abstain from ruling on the legality of same-sex marriages and its definition of that issue as a political rather than legal one. Only a politically active judiciary would determine otherwise.

Habermas recognises that legal rights are easily negated where the unequal nature of social relations is not acknowledged. This insight does not lead to a renewed support for the "'normalizing' interventions" that characterised state-welfarism (ibid.: 114). Rather, individuals can only control the way in which their identities are constructed to the extent that they can participate in the development of laws that regulate them. In practice, therefore, those who seek legal rights must struggle to make legislators contextualise those rights within the social and historical backgrounds that are meaningful for those activists. Only in this way can legal rights adequately address the needs of the communities that pursue them. This seldom occurs, Habermas appears to assume, and legal rights only imperfectly reflect the social claims of cultural communities. As a consequence, the situations of groups that seek legal recognition of their identities is immanently precarious. Procedurally-oriented liberalism might facilitate the recognition of individual identity but it cannot ensure the survival of any community's sense of value. The asymmetric nature of the social relations within which counterhegemonic groups struggle for recognition is thus an unavoidable obstacle that is likely to thwart success.

Second, the existence of - or prospects for - a free public space (a civil society) are strongly contested (Santos 1985; also refer to Barron 1990, 1993; Pateman 1983). Santos, for example, suggests that the idea of an independent civil society only emerged from a contradiction in Hegel's work on the state. Moreover, this spawned two readings on how the

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[3] Will Kymilica (1995) and Daniel Weinstock (1996) usefully debate whether or not such principles can be developed from proceduralism. The outcome of that debate is, at present, inconclusive. Usefully, I suggest, it is pointing in the same direction as this work, toward the internal differentiation of key concepts upon which liberal social orders are predicated.

state and civil society have developed. The first, which survives today, reifies the state/civil dichotomy as two equal but contradictory entities. The second and more Hegelian thread depicts civil society as a transitional stage between familial-based rule and state-based rule. Accordingly, civil society and the state were never "two identical self-autonomous concepts" (Santos 1985: 304). Moreover, the public space has progressively been constituted by an increasing number of interpenetrating legal forms - patriarchal marriage, capitalist exploitation, state-based territorial domination, and the unequal exchange-base of bilateral/multilateral agreements (ibid.: 309). These multiple legalities establish a variety of superimposed legal "spaces" through which "different legal objects" are created "upon eventually the same social objects" (Santos 1987: 287). Increasingly, therefore, the social objects of civil society become obligated to a diversity of legal powers functioning within that "free" public space, each power impacting upon different aspects of those objects' lives. As a consequence, it becomes increasingly difficult to categorically differentiate between civil society and the state. The public and private spheres have merged within an array of regulatory strategies.

Third, *procedural-neutrality* is an *ideal* whose meaning can only be understood in terms of the dominant culture's linguistic code. On the face of it, Habermas might contend, this is unproblematic; liberal legality is neutral in so far as it reflects the overarching identity held in common by its society's communities. This mirrors Dworkin's perspective, that positive law protects the principal forms of social life within which it is embedded (Dworkin 1986: 114). Within that account the ultimate goal of procedural law is to recognise and protect the standards of each of its main, constitutive communities. This does not mean, for Habermas, that proceduralism embodies those standards. Rather, positive law should reflect the commitments made by each cultural community to liberalism in the belief that procedural law is the most appropriate device for administering cultural diversity.

The acceptance of procedural liberalism under these conditions if problematic; cultural communities are required to accept liberal legality (on the understanding that it is the "best" means of administering the cultural diversity to which those groups contribute) even though procedural law cannot acknowledge each group's cultural integrity. At the same time, the dominant cultural standards that have become lodged within proceduralism are protected.

Unless the new cultures fair well in the discursive struggle for recognition the dominant cultural standards of judgement will continue to prevail over them within law.[4]

Fourth, arguments for procedural positivism such as Habermas' erroneously assume that proceduralism has the capacity to incorporate communitarian-oriented standards of judgement. This assumption defies an objection that Brian Tamahana raises about the incommensurability of standards; culturally-specific standards of judgement are an ontologically different form of social regulation to the procedures through which universal rules are identified, encoded, and enforced (Tamahana 1993: 206). Tamahana suggests that their meanings are so incommensurable that they cannot be melded into a single discourse. Thus, proceduralism cannot fully recognise counterhegemonic standards of judgement unless those standards include proceduralism's rules for distinguishing between customary and positive law. Where counterhegemonic standards are incorporated within law they acquire a subservient status relative to the prevailing legal standards of judgement. In keeping with Ronald Dworkin's reflections on liberal legality, Habermas concludes that this is what indeed happens; the legality of a liberally-constituted society is inexorably infused with a number ethical standpoints that reflect the balance of cultural power within that society (Dworkin 1986: 114). As such, liberal legality is caught in a schizophrenic position arising from the incommensurability of culturally-specific and positive standards. On the one hand, it is required to exercise impartial judgement over conflicts between legal rights that are brought before it. On the other, liberal law is infused with culturally-specific ethical standpoints that cannot be considered because of its commitment to a neutral proceduralism. The incommensurability that thus exists between procedural law and the culturally-specific standards of judgement that infuse it stands as an insurmountable impediment to the neutralisation of procedural law.

Fifth, liberal law is tendentially assimilationist. This situation develops most notably where judges fail to recognise the cultural-specificity of their standards of judgement and require

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[4] Habermas' stance, moreover, assumes that all cultural communities actively commit themselves to the liberal polity (Habermas appears to have immigrants in mind here). He erroneously suggests, however, that those born into a society also make the same conscious decision (they "have *implicity* ... agreed to pursue a preexisting constitutional project" (ibid: 126, emphasis added)). Alternatively, it might be suggested, they are required to accept a procedural legality in the presence of unequal social relations to which they are also subject.

others to understand themselves in the terms set by their "judicial" assumptions. This problem, as Taylor notes, is endemic to all attempts to judge those who are differently positioned. Taylor's own preference, as noted earlier, is to encourage a form of ethnocentrism; participants must recognise their own distinctiveness before they can recognise the identities of others. Only from that position of self-reflexive awareness can they hope to develop shared standards of judgement in dialogue with those from alternative communities of tradition. Habermas is not convinced that such outcomes are always possible, however. Groups may not share enough cultural capital to make this possible. This can be seen, for example, in the conflicts that occur between communities over the meaning and validity of abortion. Moreover, the assumption seems overly decisionist. It assumes that decisions *can* be made that accommodate alternative viewpoints. Alternatively, Habermas highlights, subjects have to accept that a plurality of incompatible yet "authentic truths" exist. In turn, they must accept that there will always be a measure of "reasonable disagreement" on some issues (ibid.: 133). There is thus no rational way of ensuring that competing standards of judgement can be reconciled. What does constitute a *thoroughly logical* proposition, for Habermas, is that cultural communities can rationally embrace procedural liberalism as their common, superintendary culture.[5]

Habermas' attempt to diminish the assimilationist tendencies of liberal proceduralism - by focusing on the rationality of decisions that favour proceduralism - is problematic. The apparent logicism of that decision implies that proceduralism corresponds with an *a priori* order of things; it assumes that liberal procedural legality is the world's *natural* form of politico-legal organisation. This may give rise to an unjustified and hubristic attitude by procedurally-oriented subjects and, thereby, to legal imperialism.[6] Moreover, as noted, formal legal rights are meaningless if they are not accompanied by an appreciation of the unequally structured patterns of social relations. Procedural law cannot generate propositions that

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[5] This, quite apparently, reflects Habermas' commitment to specifying the nature of an ideal speech community. In light of the inevitable dissensus that arises from the existence of different standards of judgment it becomes *rational* for cultural communities to agree upon a mutual submission to a procedural form of law. Each community must have an equal ability to influence the standards of judgment employed within that law and access to law must be protected through the cultivation of a free public sphere.

[6] See, for example, Yves Dezalay's discussion of the colonisation of European law by American 'Wall-Street' legality (Dezalay 1990).

analyse these inequalities without undermining its claims to neutrality. It is, in turn, bound to perpetuate patterns of cultural inequality. Decisions to accept proceduralism as a superintendary culture are not, therefore, necessarily rational for those that are disadvantaged within the socio-cultural order.

Sixth, proceduralism threatens the survival of counterhegemonic communities. The attempt to ensure that proceduralism is neutral with respect to different cultural communities ensures that it cannot become a vehicle for promoting the well-being of any particular one. Habermas believes that this does not necessarily mean that endangered communities will become extinct. Instead, enough conceptual capital appears to exist between divergent cultures for them to negotiate long-term approaches to survival.[7] In turn, this avoids the contamination of proceduralism with culturally-specific privileges and immunities.

Taylor's discussion of survivance suggests otherwise. Minority communities and hegemonic cultures will not necessarily have enough values in common to formulate joint standards through which survivance can be ensured. Without immediate legal recognition of their rights to exist, minority communities may well face extinction. Habermas' principle insight - that future generations ought not to be fettered in their abilities to transformation cultural identity - thus seems to miss the point. Without immediate protections and immunities members of marginalised cultural communities may loose their original identities, being forced to take on liberal subjectivities. For cultures that feel they need to defend their identities short-term survival through time-limited legal protections may be preferable to potential annihilation. As a consequence, different opinions on whether short- or long-term autonomy is more important will result in differing standards for judging the needs of a cultural community.

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[7] That capital appears to include the following: that the existence of a constitutional-legal nation-state is the primary framework within which social life is to be understood; that the constitutional state recognises people as rights-bearing individuals whose dignity, equal respect, and autonomy is demonstrated in their possession of legally-enforceable rights; that the central issue within the recognition of collective identity is the ability of individuals to retain a degree of autonomy necessary for the long-term adaptability of their collective identities to future social environments; and that claims for the recognition of cultural identity ultimately get settled within the legal domain (within claims for recognition of rights) rather than in public discourse about the validity of particular cultures. This capital further validates the central role of procedural legality within society.

These six points cast doubt upon the extent to which procedural liberalism and positive law can address the asymmetric nature of the social relations within which cultural communities struggle for recognition and legal protection. Habermas successfully demonstrates why advocates of proceduralism must attend to the communitarians' concerns. His prescription, however, fails to identity either how proceduralism can eradicate prevailing hegemonic interests or produce standards of judgement that can decide which cultural identities ought to be facilitated.

An alternative approach to procedural liberalism for distributing the social risks posed by law's infusion by culturally-specific standards of judgement is to suggest that *both* procedural and substantive notions of liberal law ought to be utilised (Walzer 1992: 100-3). In this way no society ought to become entrapped within any one conception of liberalism. Questions about its form ought to remain agape in order for society to remain open to alternative standards of judgement, and thus, innovative conceptions of law. Walzer demonstrates this by suggesting that proceduralism may be preferable within contemporary America, given both its heteroglot nature and the absence of any one dominating cultural identity (ibid.: 103).[8] Within less heterogeneous societies, however, particular cultural identities ought to be recognised. Thus, for example, positive discrimination ought to be the political norm for endangered indigenous communities and aspiring minority cultures, as has been the case with native Indians and Afro-Americans in the United States of America. Subjects must be able to live with the tension of incompatible ideals if this position is to remain viable and they are not to simply go through cycles of superseding one form of liberalism with the other. Within Taylor's account, this ability to entertain alternative viewpoints is synonymous with a civic attitude of respect for otherness, including the "otherness" of alternative conceptions of liberalism.

To summarise this point, an openness to alternative notions of liberalism ought to be encouraged. In this way, culturally-specific standards of judgement are less likely to remain entrenched within a society's politico-legal institutions. In this same vein, the principle upon

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[8] Here, however, the narrowness of Walzer's definition of culture becomes apparent. Notably, he ignores the impact of consumerist culture on the construction of subjectivity. His work, too, seems to reflect the nascent hegemony of late-captitalism.

which a multicultural conception of law is predicated must itself have an intrinsic plurality. Specifically, the concept of law must have an irreducible "beyond" that undermines the self-sufficiency of legality and ensures a perpetual state of reflexivity. This is found in the distinction that the legal pluralisms make between *law* and *justice*.

8.2 Separating Law and Justice

The three legal-pluralist positions distinguish between law and justice to slightly differing effect. Post-realist legal pluralism, to begin, employs the distinction to highlight the way in which counterhegemonic socio-legal orders transform positive law. Post-realist legal pluralists portray counterhegemony as an element of society that can never be reduced to law. The point of intersection between post-realist and positive law is legal rights discourse. Through this, counterhegemonic movements campaign to have social claims translated into legal rights. Legal rights, however, imperfectly reflect social claims. They abstract the claimants from the social relations within which they are embedded thereby dissembling the social conditions that made the claim necessary. In addition, the outcomes of court proceedings depend heavily upon the perspectives brought to bear by the judiciary. Rights-based law, in short, is often less than just. Justice, rather, must reside outside law, within the pursuit of counterhegemonic claims upon society. As such, subjects should never assume that law accurately reflects the aspirations of those whose social claims gain legal recognition.

Post-modern legal pluralism, likewise, suggests that justice exists beyond positive law. In this sense, however, it is an ineffable *law of the law* rather than a material realm of counterhegemonic social movement. The need to theorise this arises because positive law fails to acknowledge its own masculinist, imperialist, and classist "unconscious." Rather, it relies on (non-existent) foundations such as Reason, Science, Society, etc. Positive law thus falls short of being a liberal institution that impartially adjudicates between contrasting perspectives. Rather, law is infused with socio-cultural legacies that it is unable to acknowledge for fear of disclosing its own partiality. Against this, post-modern legal pluralism theorises an ineffable realm of justice that prompts subjects to question the morality of their personal stances toward otherness. Two descriptions of this realm are given in this

thesis: *destiny* and a mythology without origins or ends. These suggest that morality, or justice, can never be known. Nevertheless, its pursuit lies at the heart of law. It is the source of obligation, the place from which the sense of "I must ..." originates. Moreover, this ineffable sense of justice must be installed above law if legal standards of judgement are to avoid entrapment within precedent and tradition. If not, law will remain unable to recognise that which is genuinely different from itself because it remains entrenched within conventionalised legal method.

Post-pragmatist legal pluralism, also, uses the distinction between justice and law to develop an ethical platform to counter the purportedly amoral tenor of law's analytical positivism. According to this perspective, analytical legal positivism reduces totality to that which can be comprehended by legal method. This must occur if law's identity as supreme social authority is to remain intact. The Rule of Law, in other words, depends upon the capacity of law to determine the dimensions of reality. Ironically, the framing of reality by positive law suggests that an outside exists to that framing, a beyond that cannot be specified or legislated for by law. That "beyond," for the post-pragmatist, is the source of justice. It is the place that positive law cannot speak of because it is, literally, outside its purview. Unlike the post-modern legal pluralists the post-pragmatists do attempt to identify this "beyond" using already-existing legal categories. They do so in order to give form and content to the political practice through which they critique the amoralism of positive law. To not do so would empty the concept of justice of content and render it politically impotent. Justice, it follows, both reflects law and is beyond it.

The distinction that each of these positions makes between justice and law is problematic, however; the two poles appear to refer to incommensurable elements of social life that require subjects to live by incompatible principles. Legal discourse, first, suggests that stable knowledge exists through which subjects can derive a sense of identity and belonging. Alternatively, the concept of justice suggests that subjects possess a capacity to unsettle received wisdom, current theoretical conventions, and prevailing moral commitments. Whereas law speaks of the power to conserve, justice speaks of the power to transform.

This distinction between law and justice, I suggest, is contiguous with a tension that exists between the more generic notions of "belonging" and "critical freedom" that lie at the centre of debates about multiculturalism (Tully 1995: 202-7). Their value for this discussion lies in the way they illuminate what is at stake within the distinction between law and justice. Subjects must be enabled to create a sense of belonging in order to differentiate between their own and others' groups and to construct images of self-identity. In turn, notions of "belongingness" empower subjects to defend their own social arrangements as legitimately different ways of being. It is through the maintenance of this power (to discriminate and to construct enduring identities) that law also functions; law relies upon the existence of bodies - individual or corporate - to whom identities, rights, and obligations can be bestowed and withdrawn. Without those, law has nothing on which to attach itself and, thus, with which to function.

Conversely, subjects must be able to act independently of their communities of tradition if they are to transform the categories of identity that support oppressive social practices. Critical freedom thus refers to the ability of subjects to choose conceptual frameworks, ethical commitments, emancipatory projects etc., that do not exist within their communities of tradition. If the critical freedom of subjects were, conversely, reduced to the conceptual horizons of their communities of origin, freedom would be reduced to those communities' own capacities to alter themselves. In that scenario, critical freedom would be no more than a uncritical reworking of prevailing ideologies.

Critical freedom and belongingness are synonymous with justice and law. Critical freedom represents the open-ended pursuit of that which is denied by hegemonic ideologies; belongingness represents the attempt to conserve identity for the purpose of giving human interaction substantive content through which collective action can develop. Critical freedom and belongingness thus appear to express incommensurable ways of living. Alternatively, as I suggest in the following section, they might also reflect differing aspects of a singular whole. Whichever, a way must be found to theorise their relationship.

In order for the distinction between law and justice to be of any value to legal subjects a method of theorising the formulae must emerge that allows subjects to utilise it toward

emancipatory ends. The distinction should enable them to control the directions of their collective existences. Three approaches can be developed from the tenets of the legal pluralisms reviewed in this thesis. The first, following that of post-realist legal pluralism, replaces the dichotomy with a non-contradictory discourse. In the second (post-modern) approach the dichotomies between freedom/belonging and justice/law are resolved through a "privatisation" of justice. Finally, a discourse of *attitude* is suggested from within post-pragmatist legal pluralism. This implies that subjects can be enabled to live with contradictory values such as critical freedom and belonging, of justice and law.

Of the three threads, I shall argue, the last appears most able to sustain the distinction between justice and law. Even then, however, it remains highly problematic. The discourse of *attitude* is strongly voluntarist and thus it requires substantial materialist support if it is to remain a fertile ground upon which to build collective and emancipatory conceptions of law. Again, I look to naturalised evolutionary epistemology for conceptual capital to achieve this.

8.3 The Pursuit of a Non-Contradictory Replacement for Law and Justice

The first approach - compatible with post-realism - contemplates the possibility of a non-contradictory discourse that can replace the binary oppositions of justice/law and freedom/belonging. This approach is predicated upon the assumption that it is possible to reduce concepts such as justice, law, critical freedom, etc., to more elemental parts. Beneath the signifiers that represent objects, therefore, there exist stable and unobservable mechanisms that causally connect those objects. These, it then follows, can be identified using simple propositional sentences. This highlights the metaphysical assumption underpinning realism; identifiable mechanisms transcend the phenomenal realm of appearances through which life is experienced. Moreover, a modification of this position suggests that discourses about those mechanisms can be recombined so as to configure new and insightful conjectures. As innovative configurations, these latter discourses open up new vistas of possibility, new horizons of social organisation and relatedness, and new foci for political engagement. All that is required for this project is an assured estimation of what is true, valuable, or central

within the discourses, a creativity to recombine their elements, plus a set of political convictions against which to evaluate the prospects of each combination.

Two examples of this attempt to combine dissimilar legal discourses appeared in Chapter 4. The first sought to isolate the valuable aspects of liberal legal-discourse and combine these with important socialist tenets (Hunt 1981). Its goal was to create a socialist legality that could protect civic freedoms and human rights. In a similar vein, it was also anticipated that judiciaries could combine dissimilar forms of legal-discourse to create novel legal standards for judging disputes between dissimilarly-positioned communities (Santos 1992b: 244-46). At the heart of these two enterprises is the assumption that autonomous legal discourses can interpenetrate and develop epigoni that both reflect and remain distinct from their origins.

Within this approach the interpenetration and recombination of legal discourses is a potentially interminable process. There is no end to the movement between the construction of discourse (the establishment of law) and its reformation (the pursuit of justice). That said, the process is a politically progressive one. It points to an incremental increase in the degree to which knowledge corresponds to the object of enquiry. The difficulty with this, as suggested in Chapter 7, is that human subjects appear to lack the epistemic tools required for constructing fully definitive forms of knowledge. As such, the construction of knowledge becomes interminable. Rather than being a vice however, as David Held suggests, inconclusiveness of this type can be seen as a virtue; it ensures that social groups will not pragmatically coagulate around premises that their members assume are correct (Held 1995: 216). Rather, groups will progressively develop forms of self-regulation that are ever more appropriate to their increasingly heterogeneous character. Where collectives do, however, repeatedly return to particular premises, this might reflect the manner in which those premises correspond to intransigent aspects of the material realm.

According to the post-realist account the open-ended nature of this process is evident in the central role that rights-discourse now plays within law. Legal rights are a tool that counterhegemonic groups strategically employ to consolidate their claims against their societies. Once these rights are won, however, they can always be contested by alternatively-positioned groups. A prime example of this is the resistance to legal abortion. The on-going

contestation of legally-embedded social rights is, as Alan Hunt notes, an axiomatic public good (Hunt 1981, in Hunt 1993: 107-8). It ensures that no particular legal right gains the status of a self-evident truth. Each legally-entrenched conviction must be periodically revisited to estimate its current truth-value.

This position assumes that legally-entrenched rights can be evaluated with standards that are more definitive than pragmatically-derived conventions. Rather, these standards correspond in some measure to an invariant (though arcane) reality. This reality transcends what is spoken about it and is, moreover, the source of justice; it ultimately structures what subjects can say and do. Subjects are, therefore, not free to say what they will, believing that their pronouncements are the ultimate cosmic authority; no amount of discursive play can make some simple propositions true.

Examples that draw upon "obviously" physical properties of elements are relatively unproblematic (such as where "the cat sits on the mat"). Where the properties are also discursive, however - such as is the case with social life - finding "reality" becomes problematic. Changes to psychological categories, for example, appear to affect subjects' behaviours as much as alterations in the psychological states that purportedly condition behaviour (Hacking 1993: 303-4). The difficulty is that human subjects cannot measure the elasticity of their socio-biological environment and as such can never ascertain the degree to which materiality imposes boundaries on discourse or to which discourse structures existence (Hooker 1995: 26, 104). Moreover, subjects cannot tell at what point materiality will rebound on them as a consequence of their having altered their activities beyond what the socio-biological environment can sustain. The numerous ecological crises that have arisen from scientistic interpretations of the environment perhaps demonstrate this point. As naturalised evolutionary epistemology suggests, all interventions in the socio-biological sphere are infused with risk because human subjects lack the epistemic tools with which to categorically predict the outcomes of their actions. Only in hindsight is it possible to estimate the degree to which discourse has come up to the limits that are fixed by the physical dimensions of reality.

Our inability to comprehend the proximity (or otherwise) of the limitations that material reality imposes upon our standards of judgement is demonstrated in my review of Alan Hunt's

position on abortion (Chapter 4). Hunt opposes the rights of prospective fathers to challenge women's decisions to terminate their pregnancies. Whereas he appears to believe that reality underwrites his viewpoint, a change in dimension completely alters the picture. Rather, I suggest, it is impossible to estimate the degree to which our pronouncements correspond with reality at the time they are made. Reality is multidimensional and our abilities to comprehend it are too finite.

The degree to which discourse is limited by an intransigent materiality may be easier to ascertain, however, with issues that are more immediate to subjective experience than the imminently contestable arena of legal rights. The socio-biological elements of freedom and constraint may be cases in point. Using such examples it may be possible to ascertain the extent to which such elements can be represented in an irreducible manner within singular and potentially totalising discourse. This line of thought is not directly approached within the legal-pluralisms reviewed here and, as such, I draw on the work of Zygmunt Bauman to illustrate my argument. Generally speaking, I shall be suggesting that a *direct* form of realism gives rise to a legislative and totalising form of discourse. That is evident within one dimension of Bauman's work. This is not a necessary outcome of realism, however, particularly where an *atomistic* view of metaphysics is substituted with a more *energistic* perspective. This second form of realism is more *indirect* and reflects the philosophical positions taken by the post-realist legal-pluralists. The implications of this position for managing law and justice are that subjects' perceptions of their responses to law are a pivotal aspect of their theories about law. This outcome qualifies the extent to which a non-contradictory discourse can subtend the distinction between law and justice.

Bauman demonstrates two ways in which the reality of political life can be represented (Bauman 1996). These approaches, respectively, view freedom and constraint as incommensurate elements of society and, conversely, two aspects of a singular whole. Bauman's argument that freedom and constraint are incommensurable elements emerges from the premise that communities of tradition must be protected so that future generations will have conceptual capital with which to construct their lives. Such communities appear, however, to be little more than substitutes for the failed project of the nation-state; the state's inability to provide inclusive identities has now rekindled a quest for localised communities

that can provide people with a sense of security (ibid.: 87). As such, communitarianism is liable to inherit all the authoritarian constraint of statist power.

Communities, on the other hand, also require individualism. They must be "fortified by each individual, using his [sic] skills, reason and will"; as such, the evolution ("fate") of collectives occurs through "*voluntary* efforts" (ibid.: 82). Encapsulating the cleft between his notions of constraint and freedom, Bauman states

> Communitarianism is not a remedy for the inherent defects of liberalism [and *visa versa*]. The contradiction between them is genuine, and no amount of philosophical gymnastics may heal it. (ibid.: 90)

To condense this dimension of Bauman's position, some elements of human existence (such as freedom and belongingness) appear to be irreducible. They are noumena that exist beneath the discourses used to map the political possibilities for social life. That is not necessarily the case with all concepts, as the discussion on legal-rights discourse showed. Elements can be recombined at higher levels of abstraction, demonstrating the flexibility of language and human organisation. When these are reduced to more fundamental levels, however, an intransigence becomes evident that reflects an apparent rigidity in the materiality of human existence.

In an alternative vein, however, Bauman's work also suggests that freedom and constraint are two aspects of a singular whole. Subjects' senses of belonging can only develop where individuals choose to belong. Without an element of choice belongingness amounts to no more than entrapment within ideology. The apparent inextricability of the two concepts is evident in the way in which belongingness constructs freedom:

> the group in which I feel at home ... sets limits to my freedom ... . Having trained me in its ways and means, my group enables me to practice my freedom. Yet by the same token it limits this practice to its territory (Bauman 1990: 23).

Freedom and constraint, therefore, appear to be inseparably entwined. One cannot be thought of without the other.

Both threads of Bauman's position, I suggest, draw upon the realist premise that dimensions of human interaction exist independently of the thought processes through which subjects represent them. Moreover, the threads seem to imply that the "knowing" of these elements is unproblematic. As a consequence, subjects can construct representations that accurately reflect the nature(s) of freedom and constraint. As accurate statements, these representations have the potential to become blueprints for constructing political life. These, to repeat earlier themes, are the forms of discourse upon which law relies, definitive descriptions of politico-sociality.

The first dimension in Bauman's work portrays freedom and constraint in atomistic terms. They are distinct elements that exist separately in time and space. Moreover, they suggest incommensurate ways through which subjects might relate to one another. This first dimension draws upon *direct* realism. Direct realism suggests that objects can be perceived as they are. The perceptions that subjects obtain correspond to the objects of which perceptions are sought. Those perceptions thus have a direct relationship with the properties of the objects.

Direct realism is pitted against idealist claims that objects only exist as artefacts of subjects' thoughts about them (Hirst 1967: 77-8). While the latter position may be untenable because it implies that objects cannot exist independently of thought, idealism does raise some significant objections that direct realism must accommodate. First, subjects' knowledge-bases are necessarily limited to insight about the sensations that they experience while responding to external and internal stimuli. As a consequence, all cognitive activity is the process of judgement-formation rather than a neutral process of description-formation. Second, whatever can be known is contingent upon the mind that knows it. As such, subjects cannot discover what an object is independently of their own thinking. Their cognitive processes indubitably impinge upon the representations they form of the object. Both objections, to highlight their commonality, problematise the relationship between subjects' "sense data" and the material elements that constitute their objects of inquiry.

Bauman's atomistic representation of freedom and constraint fails to adequately deal with these issues. In that account, freedom and constraint are unproblematically portrayed as elements of society that can be "captured," isolated, and used as political blueprints. As *essentialised* elements, freedom and constraint have the capacities to become totalising discourses. Totalised constraint (totalitarianism) is thus pitted against totalised freedom. When portrayed in this manner, total freedom seems to be an unquestionably preferable option to that of total constraint. The unsophisticated nature of this choice is an artefact of the way in which it has been represented. Bauman's second dimension ostensibly overcomes this problem.

In Bauman's second dimension the elements of freedom and constraint are melded to become related entities. If the first dimension is predicated upon an atomistic analogy, the second draws upon an energistic one. Freedom and constraint are seen to intermingle in a fluid manner. Moreover, the form that such intermingling takes emerges from the manner in which subjects interpret the two elements. Freedom, thus, is both *given* within the constraints of particular socio-historical circumstances and *exercised* by the subjects to whom it is given.

The linkage that this second dimension envisages between freedom and constraint appears to be analogous with the notion of *joint action* used by Herbert Blumer to describe the primary unit of analysis within interpretative sociology, as outlined earlier in the thesis (Blumer 1969: 16-20). The concept of joint action refers to the outcome of interactions between two subjects. *Joint action* is more than the separate actions of the two subjects from which it is formed. Rather, it exists independently of those subjects and causes the two subjects to stand in some form of relation to itself. As such, the joint action exists as a transcending reality over and above the meanings that subjects negotiate through their shared actions.

This view of the joint action pivots on the insight that entities exist by virtue of the connections they have with their own properties and/or with the relations they have with other entities (Butchvarov 1995: 490). In this vein, therefore, joint actions can only exist by virtue of their own intrinsic properties or their relations with other social elements. Clearly, *joint action* can have no properties of its own, otherwise human interaction would be

determined in directions established by its very nature. That possibility negates the tenets of symbolic interactionism. Where enquiry turns, rather, to the nature of the *relations* that joint action must have in order to exist, an infinitely regressive form of explanation begins (ibid.: 490). In turn, connections between elements such as freedom and constraint, law and justice, become relationships that must be conceived in terms of something else. Only two possibilities apparently exist for describing these secondary relationships: the connectedness that elements have to their own essential properties or their relatedness with further entities. Those latter relationships, moreover, must then be explained in terms of their relatedness to other entities, and so on. The only way in which such regress can be halted is to suggest that particular properties are essential and causal (at the extremes, they being biology or God) or that the object exists by virtue of the way in which its relationship with another object performs an essential social function.

This second, interpretative vein is implicit in a suggestion made by Bauman, that subjects have the ability to find ways of avoiding the extremes of freedom and constraint:

> Community without freedom is a project as horrifying as freedom without community. For better or worse, the life of the autonomous individual cannot but be navigated between the two equally unattractive extremes. For better or worse, steering clear of both is all the chance of meaningful and dignified life human individuals may reasonably hope for ... (ibid.: 90)

Aside from the somewhat pessimistic tenor of this statement Bauman is suggesting, positively, that subjects can find intermediary ground upon which to construct notions of community. This is not an idealist position; freedom and constraint exist as intransigent and material elements of social relations. Discourses of freedom and constraint police the acceptability of content that arises within joint actions. Subjects will interpret the value of those joint actions, in other words, in terms of how they relate to the equally unattractive alternatives of unbridled freedom and total constraint.

This is the type of realism, I suggest, that the post-realist legal pluralists pursue. It attempts to meld two assumptions. The first is that objects such as law and justice, freedom and

constraint, "act" independently of human thought. They are thus capable of generating datum to which human subjects respond. Human perception of external objects thus occurs "by means of", is "guided by", or is "mediated by" independently-existing datum (Hirst 1967: 82). The second assumption is that subjects should be cognisant of how their perceptions of personal sensations (that they experience while "receiving" datum) affect the interpretations they place upon the external objects to which that datum is imputed. The interpretations given of external objects are thus heavily influenced by the subject's perceptions of the sensations they experience while engaged in the act of interpreting (of frustration, anger, joy, elation, etc.).

It is for these reasons, I suggest, that realist legal pluralists such as Hunt and Santos predicate their analyses of law upon their moral convictions. This is apparent, as reviewed in Chapter 4, by the way in which they have progressively moved away from "scientistic" analyses of law (that reflect assumptions found in direct realism). Rather, they are increasingly predicating their analyses upon value-explicit convictions about the inequity that positive law imposes when it reinforces class-based, masculinist, and imperialist inequalities.

My own inclination is to support and develop the reasons for which they appear to do this. A primary justification, I suggest, is that the assumptions of direct realism lead (in an unhelpful manner) to the construction of a totalising form of positivism and, in turn, to political correctness. Direct realism thus gives rise to legislative images of social life that are contiguous with those of positive law. This, quite apparently, is the basis of criticisms that are levelled at monistic forms of Marxism, feminism, and liberalism. In light of their totalising form these explanations have to be tempered. If not then they, too, stand to become alternative prescriptions for law that are as inflexible and unreflexive as the worst imaginable form of positive law.

The way in which the realists such as Hunt and Santos have moved to temper the positivism of their original analyses of law is, as I have suggested, to locate them within their own perceptions of the sensations they experience while in the process of interpreting law. Thus, I suggest, the process of theoretical interpretation used by the realist legal-pluralists might be theorised as follows: it is a combination of the datum that positive law generates plus the

theorists' interpretations of their emotional-cognitive sensations as they experience that datum.

This movement within realist legal-pluralism moderates the development of totalising discourses and, to reintroduce terms with which I began this chapter, the collapse of justice into law. It thwarts any moves toward the closure of critique imposed by totalising meta-narratives. The pivotal issue within this concerns the role that subjects' introspection of their own sensations plays in the interpretation of the datum generated by the object of enquiry (in this case, positive law). That issue is not highlighted by the realists reviewed here. It is, however, by the post-structurally oriented post-pragmatists. As such, I return to it when exploring the implications of the post-pragmatist position for managing the distinction between law and justice. Prior to that, however, I wish to review the approach that I infer from post-modern legal theory.

8.4 The Privatisation of Justice and the Collapse of Law

A second way of managing the distinction between justice and law emerges from the post-modern legal pluralism reviewed in Chapter 5. In contrast to the position implied by direct forms of realism - that tendentially subordinate justice to law - this second approach threatens to subordinate law to justice. In a similar manner, therefore, it collapses the distinction between the two. Moreover, the form of justice that emerges is a highly privatised one. The logical consequence of this position - as clearly demonstrated by Douzinas and Warrington - is that each individual has their own valid horizon of what is just (Douzinas and Warrington 1994). As I will argue, this diminishes the possibility of shared standards of judgement and is an inadequate way of managing the distinction between justice and law.

The approach begins by firmly drawing a distinction between justice and law. Law is the law of the courts, of positive jurisprudence. The quest is for a conception of law that transcends analytical legal positivism, for a *law of the law*. It is the pursuit of justice, in other words. Two ways of pursuing this emerge from my review of post-modern legal pluralism. In the

first, justice is synonymous with the *countermyth*, a metadiscourse that is constructed to replace positive law (Fitzpatrick 1992a). The *countermyth* announces that the foundationalist underpinnings of positive law are vacuous. Law's only real bases for maintaining authority, rather, are its denials that it relies on mythologies and its exercise of power to defend its own underpinning myths.

The concept of the *countermyth* is itself ambiguous, however. This ambiguity diminishes the capacity of the *countermyth* to act as a vehicle for managing the distinction between justice and law. On the one hand it is a mythic narrative that opposes the mythology that "modern law has no mythical foundations." On the other it stands against the very concept of myth. No concept, it suggests, has a necessary meaning. In keeping with this the *countermythic* notion of myth draws on traditional conceptions of mythology while simultaneously altering them so as to ensure that the concept remains unstable. In this way the *countermyth* disqualifies itself from becoming a legalistic narrative and an alternative form of law. Rather, the *countermyth* ensures that it remains Other to law and, as such, becomes a synonym for justice. As a representation of justice, however, it does not exist in a form that can be appropriated by subjects. It is apparently, and purposefully, without form and thereby permanently destabilised.

The difficulty with this approach is that it cannot be a focus for political action that aspires to produce emancipatory conceptions of law. It is sceptical of all such efforts. These, it seems, are always infused with power interests that cannot, ultimately, be legitimated. In order to avoid that same outcome, discourses such as the *countermyth* refuse to convey a sense of collective political purpose, identity, or conviction. Without any such foundations, however, they lose their ability to provide subjects with identities from which to argue for social rights and political transformation.

A movement has occurred within the post-modern school that - unsuccessfully in my opinion - attempts to overcome its political nihilism. This quest for a *law of the contingent* attempts to identify, and thus stabilise, the concept of justice. This quest is important if the post-modern movement is to realistically subordinate legal decision-making to some sense of what is just. To subordinate law to something that is interminably unspeakable, as in the case of the

countermyth, is to reduce it to nothingness. In that event positive legal method would continue unhindered by post-modern attempts to infuse it with a sense of ethical obligation. Conversely, the identification of an intrinsically ethical realm would significantly disturb the hubris of legal methodology. Law would then become less of a technical process and more of an ethical engagement with those whose contingent life circumstances are brought before the court. In the tradition of natural-law theory, law would be subordinated to justice.

Contingency, in this context, refers to the manner in which horizons of justice emerge from each site of social struggle. There are as many horizons as there are emancipatory discourses. Moreover, these horizons can be further reduced to that which each person understands to be the singularly most important call upon them. This is the logical outcome if we are to understand where the sense of "I must" comes from that propels all emancipatory discourse. In a text that clearly demonstrates this argument, Antigone's unique call upon her was to bury her dead brother; no one else would do so (Douzinas and Warrington 1994: 188). Her brother's prospect of a safe transition to Hades depended upon her actions. His justice was her fate.

Within this quest for a *law of the contingent*, justice is ineffable in addition to being contingent upon the singular nature of each individual's circumstances. Various aspects of justice conspire to ensure its anonymity: it ultimately destroys those that attempt to fulfil it (just as Antigone perished in her quest to bury her brother); it exists within the psyche in diachronic rather than linear time (as with dreams); as such, it cannot either be experienced in the present or "known" in empirical terms; we can never fully understand what the Other is saying they need from us; as a consequence we erect barriers to protect ourselves from the discomfort of their enduring need; and finally, justice cannot be known because it is, ultimately, *destiny* (ibid.: 191-223). Justice, to summarise these points, lies within the singular nature of the Other's call upon us; it is a call, however, that we are incapable of comprehending. We are simply left with the sense of obligation toward those Others whose calls, for some enigmatic reason, lodge within us.

The singularity of each horizon of justice, compounded by the ineffability of each, ensures that justice remains fully privatised within the individual. Each individual, it appears, is

destined to orient themselves toward justice. The form that the orientation takes, however, is determined by circumstances that are so far beyond our understanding that they seem either wholly nondetermined or fully decided by arcane forces such as fate. The discourse of *destiny* is one narrative that is evoked to suggest that people *are* oriented toward the Just, as an ontological fact, but that the form of that orientation is beyond comprehension. It is locked within subjects that lack the epistemic tools to discern its form. It is thus fully privatised.

In light of the ineffability and privatisation of justice, no shared standards of judgement can emerge for evaluating the worth of individuals' orientations toward justice. Such standards cannot be known; individuals can only know that they feel obligated toward a particular horizon. Moreover, they do so without ever fully knowing what it is to which they sense an obligation. In such circumstances it is difficult to imagine how those individuals can begin to articulate their positions toward the Good in a way that can assist them to construct shared normative expectations with others. Rather, this approach appears to atomise justice within wholly individualised subjects and in this way act complicity with the instrumentalism of liberal politico-legal thought.

This approach appears inadequate as a way of employing the distinction between justice and law. At the outset its goal is to separate the two, to ensure that justice is not reduced to legal method. Moreover, its purpose is to subordinate legal method to justice; proceduralism is opened to critique from horizons and mythologies that cannot be comprehended and thus restrained by law. Post-modern conceptualisations of those horizons, however, are ultimately embedded within individual subjects who lack the epistemic capabilities for representing them to others. Alternative emancipatory-mythologies, moreover, deconstruct themselves thereby ensuring that they have no existence outside their own frameworks. As a consequence, law - as the possibility of shared standards for evaluating common problems and issues - ceases to exist. Moreover, those forms of law that do somehow survive are subordinated to a genre of justice that is privatised and enigmatic. Law is thus collapsed into a conception of justice that is devoid of content. It cannot suggest how subjects might construct visions of peaceful co-existence.

8.5 The Mediation of Law and Justice by a Discourse of *Attitude*

The final approach reviewed here builds upon developments begun within the realist perspective, discussed above. It highlights the view that subjects' representations of the datum that is generated by law are mediated by those subjects' emotionally-intelligent responses to that datum. Reality cannot thus be known by subjects outside of the way in which they interpret it. The same situation prevails for subjects who wish to retain a distinction between law and justice. In contrast to the realist and post-modern approaches, reviewed above, the post-pragmatist form of legal pluralism introduces a discourse of *attitude* as a basis upon which to undertake this task. This discourse suggests that a particularly constructed self can treat law and justice as incompatible elements and can do so in a way that avoids the privileging of one over the other. In treating them as incommensurate elements, also, that self can avoid constructing a non-contradictory and legislative replacement discourse. More significantly, the notion of *attitude* signals the need for an ethical form of selfhood. These points are developed below.

Within this third approach law is synonymous with systems of thought that purport to portray reality in singular, non-contradictory discourses. Positivist law is the archetypal form, supported by phallocentric and ethnically-chauvinistic linguistic-orders. These discourses reduce all social elements to their own terms, presuming that the totality of social life can be reduced to the horizons prescribed by their own representational schemes. Anything that does not conform to these frameworks cannot be recognised and, in a sense, does not exist. Those aspects that do remain beyond the positivist terms of reference only begin to "exist" when they identify themselves through the latter's conceptual frameworks. In turn, positivist systems of law become primary sources of identity. These reinforce categories of identity that originate in other totalising discourses, such as phallocentrism, leading to the naturalisation of binary oppositions such as male/female.

In a manner that is akin to the post-modern position this third approach suggests that justice exists beyond our attempts to discursively represent reality. This alerts subjects to the possibility that realms of reality exist beyond the descriptions given by positivist discourses.

This is the realm of justice, the remains of the materiality that has been categorised by legal discourse. This is also the world of those whose self-identifications partially lie outside the representations of reality given by law.

According to this third perspective elements can remain beyond an all-encompassing representation of reality for the following, Kantian reason. Each framing of reality by a positivist representation presumes that a portion of reality exists beyond the frame and thus, beyond the ability of that representation to encapsulate it (Derrida 1987, cited in Cornell 1991: 104). A materiality thus always exists beyond our attempts to signify it. This realm of the "beyond" is self-evidently beyond description and is, therefore, permanently ineffable. The ineffable nature of its form does not mean, however, that it does not exist. It is real; it is material. Our inability to name it demonstrates, however, the limits of philosophy and the finitude of the human capacity to comprehensively map reality with representational schemes. The unspeakable space of the beyond is, according to this perspective, that which allows human subjects to interact with the positivist frameworks in ways that are not prescribed by those frameworks. The process through which this occurs is, generically, *creativity*, the exercise of imagination. It is the only element of social life that can bridge the distance that exists between our consciousness of materiality and awareness of an irreducible consciousness. Its existence suggests that humans subjects can escape the confines of their discursive construction because those constructions are unable to represent the fullness of human existence. A remnant of our materiality always remains beyond what has been disclosed to us as being real.

Viewed in this light, law and justice are autonomous though partially-overlapping elements. Law refers to positivist representations that purport to describe the form and content of reality. Justice, conversely, is that which the positivist representations perpetually fail to fully capture. This third approach attempts to ensure that justice and law are not collapsed one into the other as tendentially occurs in the realist and post-modern approaches (leading to single-principle imperatives such as a "non-contradictory discourse" or "total contingency"). Rather, the purpose given to this third approach is to assist subjects to accommodate the incompatibility between law and justice in a way that does not invoke an overarching and necessitarian law.

The refusal to resolve the contradiction between justice and law has at least two prominent effects. First, no singular standards of judgement can be found or created for evaluating the value of legal and political reforms. Rather, a plurality of potential standards arise. These might originate from the positivist discourses that subjects use to understand their lives or from their critical and creative interactions with those discourses. There is no way that subjects with finite epistemic tools can conclusively determine which type of standard is better. The conclusions that they will inevitably arrive at perhaps simply reflect the extent to which they understand themselves as conservative beings (who tend to follow conventions that correspond to established positivist truths) or adventurous (who interrupt those conventions with creative restylisations (Wettersten 1995: 88)).

Second, subjects are left with responsibility for their judgements. This occurs because they are unable to definitively calculate the veracity of their standards of evaluation. In a sense they are left with *responsibility for responsibility* (Goodrich *et.al.* 1994: 22). More specifically they are left with the responsibility for enunciating their lines of reasoning so that others might understand their rationales. Even then, alternative positions will always exist for critiquing judgements because, as seen above, a plurality of perspectives must exist wherever the distinction between justice and law is retained. Only where one pole of the distinction has been collapsed into the other - such as in a fully positivist law or a purely contingent form of legality - can singular standards of judgement develop.

The focus on responsibility that emerges is, moreover, responsibility for the deployment of violence; violence exists, latent, within all judgements that are worthy of the name (Derrida 1990: 6). The naming of a particular element necessarily means that alternative conceptions of it must be repressed, by physical force if necessary. Nowhere is this use of violence to legitimate particular viewpoints more evident than within judgements - worthy or not of the name "judgement" - that issue from state-law.

The focus on responsibility that emerges in this third approach prefigures its organising theme, the discourse of *attitude*. This discourse ostensibly provides an alternative method for managing the distinction between law and justice. It suggests that subjects might construct a way to *live* with the distinction rather than feeling bound to annul or resolve it. Moreover, it

suggests that subjects can coexist with the contradiction through a spirit of tolerance toward the incompleteness and uncertainty of their own and others' existences. They are empowered to do so when they become comfortable with the anxiety that the space between consciousness and facticity elicits. In turn, subjects are provided with an alternative approach to managing law and justice than the simple reinstatement of a necessitarian law.

Moreso, for legal pluralists such as Cornell, the discourse prefigures a form of "ethical relation", an ethical way of being (Cornell 1992: 13). Subjects remain open to otherness when they retain an open-ended distinction between law and justice. Quite apparently, this conception of ethics differs from those that portray ethical thought in legislative terms. Conversely, the form of ethics that is implicit within the discourse of *attitude* has a non-necessitarian tenor. It pursues a conception of normativity that would - if constructed - encourage subjects to recognise critiques of legality that are different from their own, without foregoing their own.

The discourse of *attitude*, particularly in the hands of Cornell, suggests that subjects need at least three particular attributes in order to maintain the distinction between justice and law (Cornell 1990: 87-8). To begin, they must adopt an *asymmetrical* relationship with Otherness. Following Emmanual Levinas, the self should relate to the Other on the basis that the Other is more than the singular person before them; the Other is, rather, an epiphany of humanity (Levinas 1981: 213). Each face thus stands for the totality of human existence. The responsibility that the self then feels is not only to the individual before them but to the weight of human experience and tragedy. Viewed in this way, the self cannot expect the Other to repay anything that is given to it because its relationship with otherness is neither reciprocal nor symmetrical. Self cannot even expect to be recognised by the Other. Rather, the self understands its interaction with the Other as an asymmetric immersion within the greater relationship of humanity with humanity.

Second, the discourse of *attitude* suggests that the subject must comprehend itself as Other in order to live with the distinction between justice and law. That is, the attitude of obligation to otherness requires that the subject be aware that they are themselves repressed objects (either of "themselves" or of a totalising linguistic code such as phallocentrism or ethnic-

imperialism). Only through an awareness of their own otherness can the subject understand that an experience of objectification is to be had. Moreover, through this they will become sensitive to the varied forms that objectification takes within themselves and others. Through that awareness they may be less inclined to view others as objects - as "It", as Martin Buber suggests - and rather, relate to otherness in terms of *subject to subject* (Buber 1970: 11-2). The experience of objectification fosters this desire to treat the Other as an equal subject, as "Thou," to again invoke Buber. Being positioned as a subjugated Other within a totalising socio-linguistic order can, therefore, assist the self to form in a manner that can recognise and respond to the needs of others.

Finally, subjects must accept that the maintenance of the distinction is an interminable process. There is, literally, no basis for creatively resolving the distinction. In turn, subjects must manage it without definitive knowledge of how to do so. The self is thus embroiled in an unending process of moving between the legal categories through which it composes itself and exterior perspectives that it uses, creatively, to critique its own identity.

To summarise this position, the discourse of *attitude* apparently bypasses the interminable quest for non-contradictory replacements for the binary oppositions of justice and law, freedom and belongingness. Rather than overcome that contradiction the attitudinal discourse suggests that the preservation of incongruity is necessary for an open, democratic society. In this vein the discourse of *attitude* appears to provide subjects with a potentially fruitful way to avoid reinstating a necessitarian and single-principle form of legality (that might occur either through the reduction of justice to a particularising [though ostensibly universalising] legal method, or the subordination of law to an ineffable moral realm and, therefore, to nothingness).

That said, the discourse does appear highly voluntarist. It seems, at its logical conclusion, to be characterised by what Brain Fay terms an "ontology of activity" (Fay 1987: 212). It assumes that subjects possess at least two features that enable them to critique law in a manner that is solely determined by how they construe the meaning of law. The first is that subjects are able to attain states of *rational self-clarity*. As such, they are able to construct narratives of their relationships to law unfettered by the perspectives given to them by their

communities of tradition. Moreover, these subjects give the appearance of being unaffected by threats of coercion and physical duress that may result from resistance to hegemonic legal power. Second, these subjects appear to have the capacity to construct *collective autonomy*. They are able to develop notions of mutuality and community that are free from the forms of compulsion imposed by enduring patterns of social division. As such, they are seemingly able to free themselves from the effects of inequalities that transcend social groups.

Notwithstanding these problems the discourse does offer two useful insights that I wish to draw on. The first is that non-rational creativity is an intrinsic aspect of the "middle-ground" of *non-authorial-authoriality*. The enigmatic ability of human subjects to restylise their environments in non-determined ways thus stands as a central dimension of justice. This non-rationality, moreover, is the "hidden" dimension in post-realist legal theorisation. The capacity for "non-rational thought" allows the realists to consciously append moral convictions to their theorisation of law. This provides them with an alternative form of justificatory norm, one with which they can fill the "non-foundationalist void" that has emerged from the idealist, post-modern assault on the totalising pretensions of explanatory theory.

The second insight that emerges from the discourse of attitude is that human subjects can, in fact, centre themselves. They can develop a singular and overarching disposition that constitutes an explicit *attitude*. This, perhaps, is merely a vernacular way of enunciating Taylor's position on selfhood, introduced in Chapter 2. For Taylor, the power of the self to exist is most evident in its ability to ask the question Who am I? independently of its capacity to answer it (Taylor 1989: 30). Moreso, the existence of a core self is evident in the way in which the question lingers despite the subject's inability to conclusively address it. It is as if our ability to ask the question - Who am I? - independently of our ability to answer it is a foundational aspect of the "modern" human condition. Moreover, this suggests that our ability to pose the question presumes we are able to anticipate a state of psychological completeness. For Taylor, our actual inability to realise this creates intolerable angst. This does not allay our quest, however; it merely accentuates the imperativeness that we attribute to the theoretical and cultural traditions with which we attempt to fill the void of our incompleteness. This susceptibility to meta-narratives is especially acute for those whose identities are formed within social orders that are dominated by science and law. Under these

conditions science and law strongly influence subjectivity; their rational style of inquiry prompts reasoned responses from the self. In turn, the self can only understand itself as a rational being that is singularly responsible for the answers it gives. The formalist mode of scientific-legal reasoning thus prompts rationalist understandings of self. In turn, the subject's rationalist interpretation of selfhood becomes inexorably entwined with legal subjectivity. To the extent that the self interprets self, it *is*.

This does not explain how the self manages to gain the freedom to orient itself toward answers about existence and justice. Rather, it merely supports the concept of a self by observing that the self cannot help but coalesce around sets of value-preferences and thus become enabled to make judgements about itself and others. Indeed it must if it is to be a *self*. This negative argument for the existence of a core self diminishes the extent to which a liberal discourse of voluntarist selfhood can be upheld. The self cannot be celebrated as a self-evident reality. Rather, the self is not immediately evident to the subject. Selfhood only becomes apparent as the self poses questions about its existence that the subject cannot answer.

8.6 Toward a Naturalised, Multicultural Conception of Law

The above discussions demonstrate three ways in which legal pluralists have approached the separation of law and justice, a separation that stands as a pivotal dimension of their attempts to construct alternative conceptions of law. In this final section of the thesis I wish to use their insights to explore the possibility of a naturalised, multicultural conception of legal order. Within this, the management of procedural law and the Good - of the powers to conserve and to transform - *becomes* the domain of justice. Their management *is* the very articulation of a multicultural conception of law. This is the realm of *non-authorial authoriality*. By focusing on this realm I substitute the emphasis that positive legal theory places on the codification of normality and the justification of power with an exploration of how alternative conceptions of social relations, democracy, and law might emerge. It suggests that an emancipatory field of regulation exists separately from the modernist conception of law through which subjects and

collectives are constrained within reified images of selfhood and belongingness. In order to explain how that plethora of possibility might come to replace positive law as the dominant conception of legality I must attribute that field with properties and dynamics. It is not enough to simply theorise that field as an internally-diverse realm of plurality in order for it to exist. In order to construct such an explanation I draw upon the following two ideas associated with naturalised evolutionary epistemology: that social evolution is synonymous with the adaptation by systems to alterations in their socio-biological milieu, and that non-rationality is a pivotal adaptive-mechanism in these processes of adaptation.

Santos has recently articulated an alternative form of legality that mirrors much of what I envisage to be in a multicultural conception of law (Santos 1995). His vision emerges from the "paradigmatic transition" that he perceives to be occurring within theoretical thought (ibid.: 477). The dominant, modernist paradigm (through which instrumentalist forms of science and law reify a global capitalist world system) is giving way to a more decentered paradigm through which emancipatory forms of struggle are being reconceptualised.

Modernist social theory (such as Marxism, feminism, and anti-imperialist discourse) provides the conceptual capital out of which these struggles emerge but the modernist framework is, itself, incapable of providing either the "architectural design" or "energy" through which the "transitional" subjects will subsequently act (ibid.: 482). In keeping with my own concerns about the realist management of law and justice (outlined above), Santos is also concerned about the repeated collapse of emancipatory projects into static systems of regulation. Only by instigating a "paradigmatic rupture" within realist philosophy, he suggests, can a distinction be retained between emancipation and regulation (ibid.: 477).

The representation of law that emerges from Santos' project is both my source of discussion and my foil. It presents an image of legality in which a realm of unconnected social struggles unite to champion communities' rights to position themselves relative to their particularistic conceptions of justice. At the heart of this project, as will emerge, is the quest for subjectivities that have both the ability and the desire to conceptualise such a form of law (ibid.: 482). I question the extent to which Santos' account has the ingredients necessary to

make it a fully emancipatory one. My goal is to augment it with the naturalised account of evolutionary epistemology in a way that does enhance that possibility.

The tenets of Santos' conception of multicultural law are most clearly encapsulated in his representation of human rights (ibid.: 359-365). These rights outline the resources that subjects need to reconfigure their lives out of the detritus of an increasingly precarious collection of modernist social arrangements. At their core is the right to knowledge, particularly to forms of knowledge that counter the received wisdoms of scientistic analyses. These are the knowledge-bases of the marginalised, the images of utopia that have been suppressed by a scientism that promised - but failed to produce - the eradication of contradiction and the fulfilment of a universalised good. Supporting this central provision are a series of rights that provide those subjects with the material resources needed for discovering those knowledges and for experimenting with the counterhegemonic conceptions of social relations that emerge from those knowledges. In keeping with this, subjects are also protected by rights that can ensure their participation within the political processes that they subsequently erect for their collective regulation.

In keeping with these rights, a number of alternative, institutional forms must emerge to challenge the hegemony of present modes of organisation. "Co-operative domestic communities", eco-socialist" forms of production, and experimental modes of consumption, for example, provide subjects with forums within which they can construct innovative modes of co-existence (ibid.: 484-5). Within this, quite apparently, the notion of the state increasingly becomes "anti-state" as it empowers its subjects to experiment with forms of governance, law, and identity that are not grounded within its own concepts of citizenship (ibid.: 486-7).

This representation of law is, self-consciously, a utopian one. Utopianism, for Santos, is the "only" conceptual basis through which society can be reconfigured (ibid.: 479). Images of utopia are, by virtue of their future-orientation, creatures of the imagination. Their goal is to envisage "new modes of human possibility" and to envision innovative "styles of will" (ibid.: 479). Quite evidently, images of utopia function in a synonymous manner to the regulatory ideals at the heart of naturalised evolutionary epistemology. Their value is not so much what

they inform about an ideal future, however, as what they illuminate about the aspects of current social life that must be excavated in order to imagine that future. These aspects are quite prosaic but are necessary if subjects are to again learn the art of "reinventing the future" (ibid.: 479). They include the refusal to forego possibilities and to conform to the *status quo* and, in turn, a willingness to struggle for alternatives (ibid.: 481). In so doing the idealist tenor of utopian thought thwarts the calcification of prevailing discourse. Moreover, these aspects are located within the subjectivity of the self. In order for utopian projects to proceed, therefore, a form of subjectivity must be construed that desires the pursuit of open-ended emancipatory knowledge.

The pursuit of a utopian-seeking subjectivity is both the beginning and the end point of this programme. Mirroring a central theme of my own thesis, the organisational and institutional aspects of this legality are secondary to the shape of its epistemic core (ibid.: 518). This utopian-seeking subjectivity is the mechanism through which law can be devolved from centralist institutions and relocated at the extreme level of localisation needed for the development of nondetermined forms of emancipatory action. Clearly, this proposal draws strongly from the anarchist tradition (ibid.: 514-5). Moreover, the subjectivity of this emancipatory agent must be fragmented, decentering its form further. Specifically, it must be empowered to hold three impulses in balance: to live in a state of abeyance, testing the limits of knowledges that constitute the "frontier" of presently-conceived possibility (ibid.: 491-9); to live in a state of perpetual incompleteness - and thus of autonomy and creativity - (ibid.: 499-506); and to form solidarities with others on topics of emancipation that transgress the boundaries between the local and global, the particular and universal (ibid.: 507-15). This constellation of subjectivities is, for Santos, the "transitional subject." For me it is the site of *non-authorial authoriality*.

It is far from clear, however, how this form of subjectivity comes about. The "energy" that will propel emancipatory action apparently emerges from some undisclosed dimension of the subject. As such, the core of this "transitional" subjectivity is similar to the post-pragmatist notion to an enigmatic "attitude." In this vein, for example, Santos suggests that "(i)t is up to the new subjectivity to make itself at home in the frontier" of presently conceived knowledge (ibid.: 491). Agency lies fully, somewhere, within the subject. The strength of a subject's

willingness to undertake incursions into the unknown appears to correlate with the degree of "uneasiness" that they experience about their circumstances (ibid.: 490). I wish to develop this vague concept of "uneasiness", it being "the point of departure not only of our desires and wishes, but also of our thinking and judging, willing and acting" (ibid.: 490). Without a clearer articulation of what might constitute the state of "uneasiness," however, the multicultural conception of law is destined to remain pure utopia, an image that lacks a source of propulsion. In order to develop this concept, however, I must rupture the decentered form of theorising within which it is located. It cannot be developed without recourse to an overarching narrative that identifies that state's properties, relations, and dynamics, etc., and, thereby, superimposes the plethora-of-possibility with a singular and ordering discourse. Conversely, for Santos, it is enough to theorise plurality in order for it to occur. I disagree.

Without a robust mechanism through which emancipatory subjectivity can develop it is difficult to gauge the likely role of "transitional" subjectivity in sustaining the open-ended development of an alternative form of legality. This becomes evident, for example, in the project's own stance toward its conception of multicultural human rights (outlined above). The lack of a mechanism leads to an underestimation of the intractable tension that will emerge between those that take an internal point of view to the human rights (those that identify with them) and those that are externally positioned to them (that do not identify with them). For those who are internally-positioned, the rights empower subjects to experiment with the boundaries of social life, turning that experimentation into a legitimate mode of being (ibid.: 481). Those that are external to the rights would disagree and seek to substitute this anarchistic open-endedness with definitive grand-narratives that prescribe the limits of what is socially acceptable. For Santos, the goal of a fully-emancipatory legality is to rescue all parties from the prison-houses of these totalising perceptions, both those who are oppressed by them and those who use them to oppress (ibid.: 516-7). Within this, however, the legacy of modernism's regulatory pretensions hangs over Santos' enterprise. His project is liable to eradicate the possibility of stable meaning if its pluralistic orientation is allowed to indiscriminately subjugate all totalising discourse to a single principle of fluidity (ibid.: 482). This mirrors my concern with the post-modern management of law and justice, reviewed above. At its logical extreme, it has the potential to thwart the construction of identity and the development of shared meaning. Ephemerality then stands poised to become a new source of

oppression. Under such conditions, it would not be any more self-evident than it is now why subjects might alter their subjectivities to resist that new and interminably destabilising form of regulation. Again, the vague sense of "uneasiness" that subjects may or may not develop is the only mechanism within Santos' conception of alternative legality through which change can be theorised.

The favoured "internal" stance to these difficulties is to accept that the absence of a robust mechanism creates an environment where political struggles are always precarious and "highly risky" (ibid.: 488). Those who might benefit most from the freedom to forge creative life-styles must have the unconditional right to refuse, and thereby undermine, that freedom. The imposition of freedom from "above" is, notwithstanding the value of freedom, an imposition and may, as Zygmunt Bauman suggests, create an interminable "anguish of uncertainty" that will devour "the psychic resources of the postmodern individual" (Bauman 1996: 87). For this reason Santos abjures the use of explanatory narratives that might justify the imposition of a particular notion of freedom, either liberal or communitarian. Instead, he focuses on the construction of subject-positions that desire non-determined conceptions of freedom and that, moreover, can survive the ambivalence that must surely accompany an acceptance of provisionality. In turn, the emancipatory potential of social struggles will depend upon "the intensity" with which subjects allow themselves, in an unidentified way, to be "guided by" the three forms of subjectivity outlined above (ibid.: 518).

Even at this stage in the argument, however, it is not evident why subjects might move out of the security of totalising discourses to position themselves within the netherworld of an internally fractured and contested subjectivity. Answers invariably exist "in the future" - in *destiny*, as the post-moderns say - thus problematising the question of why subjects might choose to make such a move *now* and to live *today* in the hope of a utopia (ibid.: 490). Silence surrounds this question. This reflects the position reached by the post-pragmatists in their elevation of the "ethical attitude," reviewed above. Either subjects do or they don't. Those that do are inherently more ethical than those that don't. That is all that can be said. The thorough-going pluralism of Santos' position, to re-emphasise my point, precludes an explanation.

That said, Santos' representation of a multicultural conception of law mirrors the tenor of what I have been trying to express through this thesis. It attempts to reconfigure the "problem of law" in the following ways: first, the articulation of a subjectivity through which a *non-authorial authoriality* can function; second, the search for conceptual capital (from Marxist, feminist, and anti-imperialist theory) through which those subjectivities can reconfigure forms of emancipatory action that avoid the adulation of any singular counterhegemonic project (and, thereby, its transformation into a system of regulation); and third, it seeks to describe the social institutions that would be needed to sustain such a subjectivity (sets of human rights, for example, that guarantee economic and pedagogical self-determination). This displaces the orthodox problematic of law, that being the cultivation of the "norm" and the construction of justificatory norms through which the power to define normality is legitimated. Quite evidently, the concept of a norm does not completely disappear in the "transitional" project, as its appeal to human rights attests. It disappears, however, as a fulcrum for law. In turn, it signals the demise of a centralised notion of legality, providing space for an alternative conception to emerge. This is conception of law within which decentered forms of regulation emerge from subjectivities that are attuned to the open-ended and collectivist pursuit of emancipation.

Santos' attempt to describe the contours of such a (multicultural) conception of law can be usefully augmented, I suggest, by a naturalised account of the mechanisms through which such a form of law might develop (introduced in Chapter 7). The naturalised account provides a representation of regulation that is abstract enough to avoid the valorisation of any single image of legality. Moreover, it defines law as an internal aspect of the materiality that it (law) administers. This decentering of legality supports Santos' suggestion that the precedence of socio-legal movements cannot be determined by reference to their structural location - by their positioning relative to gender, ethnicity, class, citizenship, the state, etc. - but only by the "intensity" with which they are informed by the emancipatory subjectivity (ibid.: 517-8). I intend, here, to bolster that abstruse notion of "intensity" by locating it within the context of the evolution of epistemology.

The primary resource from NEE that I bring to Santos' conception of multicultural law is the idea that systems change when forced to by life-challenging alterations in their environments.

Conceptions of law do not simply alter when their members "will" those changes to occur, as is implied by voluntarist accounts of counterhegemonic law such as the above. Rather, processes for constructing meaning and identity (that is, law) alter in response to their members' needs to survive. As described by Tully, a constituent aspect of the contemporary socio-biological environment that prompts human systems to change is the proliferation of competing claims by a variety of socio-cultural communities, movements, and institutional powers (Tully 1995: 6). Each attempts to have its voice heard and their self-professed rights to self-determination acknowledged. Moreover, if a peaceful solution is to emerge from the determined struggles that occur between them, each one must be given due recognition. In practice, however, as Tully notes, their claims and the political visions to which they give rise can violently conflict. The collapse of erstwhile colonial territories over the last decades (and the subsequent rise of competing centres and conceptions of belongingness and identity) provide good examples of such conflicts.

The desire on the part of subjects to avert their annihilation when in conflict with others stands at the core of the naturalised conception of multicultural law that I am presenting here. The quest for a non-violent adaptation to the increasing heterogeneity of socio-cultural co-existence is, in turn, the goal of this conception of legality. Within this, the desire by subjects to survive the inevitable struggles between their differently-positioned communities of tradition is the principal mechanism through which alternative subjectivities and conceptions of legal order are stimulated. Tully expresses this sentiment bluntly:

> if the world is not to become hopelessly enmeshed in ever more terrifying conflicts, it has only one possibility: it must deliberately breath the spirit of multicultural co-existence into the civilization that envelops it. (ibid.: 211)

It is as if the threat of existential nothingness - on a continuum from subordination to death - forces subjects to break beyond the boundaries of prevailing perceptions of self and other.

Clearly, this situation can only develop where all parties to a conflict share a common understanding of themselves (for example, that they share a problem of adapting to their mutually increasing proximity, interpenetration, and imposition of demands). That is, a

climate that is favourable for negotiation will only endure so long as the parties share a common perception that they are jointly responding to an increasing diversification of claims for socio-cultural recognition (made variously to them, within them and, in response, by them). The prospect of agreement, therefore, depends upon the existence of some prior degree of shared understanding between parties. As Alex Callinicos argues, mutual understandings cannot simply be the outcome of communication (as linguistic theories of communicative action - such as Habermas' - appear to presuppose). Communication can only proceed on the basis that participants perceive a "common nature which guarantees a considerable overlap in perspective", like their mutual desires to survive (Callinicos 1989: 107).

Where parties fail to find self-evident common ground - and they wish to avoid the escalation of conflict between them - they are forced to forge images of their *common heritage of humankind* out of ideals such as justice, fairness, goodness, beauty, etc. The fearful prospect of existential silence, as it were, compels subjects to imagine what has hitherto been impossible for them to understand. They must attempt to innovatively erect a basic set of "core demands", as Charles Taylor refers to them, that each can recognise as being a valid basis upon which they can make claims upon the other (Taylor 1994: 247). These, moreover, become the points around which social struggles coalesce. They move counterhegemonic movements beyond their singular-issue platforms to become revolutionary blocks that pursue a narrow set of demands that express something of each. Quite apparently, considerable struggle will occur between such groups about what should constitute the common core of these demands, as to how far the range of demands should extend from the core, and as to whose interests should be encompassed in that process of extension. The success of social movements such as Amnesty International may partially reflect their ability to restrict their focus to - and concentrate their energies on - a small number of basic issues surrounding the right to life (ibid.: 247).

As the horrifying number of inter-state and intra-state wars demonstrate, the pursuit of even a small set of shared rights and responsibilities between differently-positioned parties is a precarious venture. The evolutionary dimension of the "survival of the fittest" appears, all too readily, to dominate human affairs. It is at such points, however, that the evolutionary

potential of non-rationality comes to the fore. Conflict between groups appears to become inevitable where no self-evident bases exist through which participants can perceive their common humanity. In the process, the Other is reduced to an inhuman other - to Buber's "It" - that blocks the fulfilment of one's own goals. In the absence of such foundations it is only the imagination that can begin to transform existing conceptual capital into images of a shared humanity that are apposite to the warring factions. Even then, however, it is not certain that this will occur easily. Most apparently, it will be stymied where one party senses that they have sufficient resources to subordinate the other. In such situations the conflict may escalate until either one overcomes the other or both parties reach a shared understanding that neither will win, that each risks ongoing suffering at the hands of the other, and that the construction of shared "core demands" will be mutually beneficial. Such might be the only source of resolution for apparently intractable conflicts such as exist within the Middle East and Northern Ireland.[9] To summarise the point, the development of a willingness to recognise the Other (that stands at the centre of a multicultural conception of law) depends upon subjects perceiving the need to configure their subjectivities in a way that allows them to imagine links between their own emancipatory quests and those of others (even their foes). That need most acutely emerges under conditions of imminent peril.

An explanatory theory such as this, that attempts to account for mechanisms through which changes to the concept of law occur is, in itself, a potentially legalistic narrative. It is inescapably jurisprudential, in the widest sense of the word, and fails to escape the modernist paradigm. Such a narrative sits above the decentered concept of legality that is being developed, presuming the ability to define its dimensions, its boundaries, and thereby determining what does not belong within it. In that sense, also, the narrative has the potential to become fully positivist, defining the totality of the phenomena at hand and relegating that which falls outside the frame to a status of non-existence. This need not necessarily be the case, however.

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[9] That said, the need is also frequently perceived for humanitarian intervention in such struggles on behalf of innocent parties. The authority to intervene presumes that a centralist body has the right to do so. David Held proposes this in his argument for regional, democratic institutions (Held 1995). This stance, in turn, assumes that such institutions will respect the autonomy of their member-communities (ibid: 216). Moreover, the device for stimulating this recognition of autonomy is an ethical sense of "obligation" (ibid: 217) that stands as the "unambiguous starting point" in democratic politics (ibid: 218). To this end, even a strong argument for centralised politico-legal power such as Held's turns upon the existence of a subjectivity that is prepared to recognise and privilege otherness.

In order for this narrative to explain core aspects of the emerging conception of law it must ultimately define those aspects in terms of an overarching mechanism (and, thereby, establish its positivist form). For example, in order to explain the development of a subjectivity that desires non-determined forms of social relations the narrative has to define that subjectivity in basic terms such as the needs that all organic systems have for survival; all organic systems are faced with the need to enhance their adaptive capacities within conditions of significant socio-biological alteration. In turn, and following Butchvarov's insights into the nature of metaphysical argument, such a mechanism would then need to be explained in the reductive terms of an essential property (neurones or God, for example) or of an infinitely regressive set of socially-functional relationships that constitutes the element's reason for surviving (Butchvarov 1995: 491). Only in this way could the existence of an emancipatory form of subjectivity - that favours the pursuit of evolutionary adaptation and open-ended forms of society - be privileged over one that favours a fight for survival and the imposition of its own totalising conception of social life.

I am not sure that a proposition such as the above can be justified in the ultimate senses proposed. The further from the issue at hand that the justification extends, the more conjectural will the subsidiary propositions become about the nature of the essential properties or, conversely, the functionality of the relations used to ground the justification. The epistemic tools with which human subjects perceive their objects of inquiry work most proficiently with human-sized elements and their adequacy grades off as those elements become smaller or, conceptually, more otiose (Hooker 1995: 33). It may not, therefore, be possible for human subjects to define the ultimate and essential properties of something like an emancipatory subjectivity, nor expedient or financially viable for them to map the intricate web of functional relationships that might explain its existence. Rather, non-rational calculations play a dominant role in decisions about whether or not particular propositions should be accepted. For this reason I am not convinced that a singular approach to human development - whether that be the construction of new adaptive subjectivities or, conversely, the survival of the fittest - can be privileged solely through the use of reasoned enquiry.

Razian positivism provides an alternative basis to the positivism outlined above for justifying the use of particular conceptions of law, such as a multicultural form (Raz 1979). This

approach is grounded in a "moderate" form of functionalism that justifies a conception of law so long as it expresses the vision of the Good aspired to by those that position themselves internal to that law. To this end, the authority of law is contingent upon the degree to which it successfully maintains subjects' "schemes of co-operation" (ibid.: 238). These schemes range, for example, from the instigation of taxation systems to the construction of basic human rights. To these schemes "independent motivation then attaches itself" (ibid.: 247). In this way the moral force of these co-operative ventures does not depend upon their location within law. Rather, any sense of necessity that is attributed to them occurs by virtue of their "existence as social practices of co-operation" (ibid.: 249). In this vein, subjects from dissimilarly-positioned communities can validly maintain a shared identity - of participants engaged in the pursuit of common understandings about the use of bio-social resources, for example - so long as they collectively believe that it expresses who they are or wish to be.

This is, quite apparently, a pragmatist position, but of a particular kind. It suggests that subjects' perceptions about law will emerge from the conception of the Good to which they aspire. Rortyan forms of pragmatism suggest, in keeping with this, that there are no foundations for the Good upon which forms of law can be justified. The only norms available for doing so are those that currently prove to be efficacious for those subjects. The realm of possibility (that is, the Good) is thereby circumscribed by contemporary practice and perspective.

For the Peircean pragmaticist, however, the Good always exists beyond current forms of knowledge. It is a materiality that, ultimately, polices the boundaries of discursive adventure. It thereby sets limits upon what can count as truth. Moreover, dimensions of materiality that are not directly discernible in an empirical sense - such as gender-, ethnic-, and class-divisions - can be identified through this notion of the Good. The concept of the Good facilitates their identification by pointing to an ideal realm against which prevailing social conditions are compared. For example, the Good may take the image of a unitary whole that will benevolently order society. Alternatively, it may be conceived of as an internally diversified whole whose different dimensions possess intelligible logics of their own. Conversely, again, the Good could be envisioned as a fully pluralised fluidity whose only logic is perpetual fragmentation. Each image of the Good will support particular perceptions about the

dimensions of materiality that are possible. Only the second of these three, however - the internally diversified whole - can support the idea that materiality has a number of distinct dimensions (such as gender, ethnicity, and class) whose relatively autonomous dynamics give rise to a non-linear and chaotic system. The existence of such dimensions, following Ian Hacking, can be reasonably held to exist as long as subjects are able to alter their socio-biological environment through acting as if they exist (Hacking 1983, Chapter 16). This amounts to a non-representationalist form of realism, a realism whose terms of reference can only be known retrospectively of action.

Rorty argues - in his refutation of Peircean pragmaticism - that "realist" forms of pragmatism such as this are logically impossible (Rorty 1991: 129-32). Knowledge, for Rorty, is inescapably constituted within language games whose forms bear no necessary correspondence with materiality; the relationship between experience and nature is thus fully indeterminate. As Hookway inadvertently observes, however, Peirce was able to link the idea of critical freedom with a belief that materiality would ultimately determine the contours of that exploration. The device was Peirce's non-rational, metaphysical beliefs and his associated imaginings about the form of the transcendental realm (Hookway 1985: 285). A realist form of pragmatism such as Peirce's only becomes "impossible" so long as materiality is held to adhere to a strictly formalist logic. As soon as non-rationality and non-linearity are admitted into reason, as naturalised evolutionary epistemology suggests that subjects must do when faced with inexplicable changes to their social environments, the notion of "impossibility" disappears. In its place arises the need to test the "reality" of the "new" dimensions of sociality that are envisioned. Specifically, subjects test the "reality" of these new dimensions by measuring the extent to which those dimensions create change in established areas of social life, in keeping with the properties that are attributed to those dimensions. In this way, for example, the reality of new forms of tribalism - such as "urban-Maori" in the New Zealand/Aotearoa context - can be established by measuring the extent to which that notion of tribalism invokes changes in other dimensions of society, such as the state's negotiations with Maori over the distribution of economic resources.

It is this same capacity - to infuse formalist reasoning with non-rational calculations - that empowers the subject of multicultural law to escape the confines of conventional wisdoms

and to envisage counterhegemonic ways of configuring knowledge and social arrangements such as the household, the marketplace, the inter-state worldplace, etc. This ability to creatively contemplate what might lie beyond "what is" is vital if dissimilarly-positioned subjects are to construct shared understandings about time, space, and other social resources in a non-violent manner. This is particularly so where significant and fundamental gaps exist between their perspectives. Elemental gaps can, to stress the point, only be filled through an exercise of the imagination.

To this end, non-rational creativity stands as a pivotal adaptive-mechanism through which subjects adjust to the proliferation of difference within their social milieu. Moreover, it is a primary device through which they can develop shared forms of knowledge that are appropriate to the contingency of their circumstances. As such, at the centre of a naturalised conception of multicultural law exists the need for an awareness that formalistic reason must be infused with non-rational creativity. In keeping with this, the orthodox legal concern with the codification of normality (through the construction of norms) must diminish. The very concept of a stable "norm" must alter because the range of considerations that go into the construction of any norm do include non-rational calculations that cannot be artlessly reduced to estimations of the norm's descriptive adequacy, explanatory comprehensiveness, or predictive power. That said, neither can the latter criteria be ignored. The marginalisation of descriptive adequacy, explanatory comprehensiveness, etc., would certainly, in time, reduce judgement to the level of capricious action. In such conditions, subjects' adaptedness to their environments would diminish; a form of reason that privileges non-rational instinct over rational enquiry may actually diminish subjects' fittedness and reduce their capacities to survive. The value of non-rationality comes to the fore as an adaptive-mechanism, however, where the prevailing foundations for judgements are strongly contested by conflicting parties. Non-rationality enables those that judge to self-consciously reconfigure the foundations for judgement in the knowledge that no foundation can fully represent "what is." Judgement is thereby moved beyond purely formalist prescription.

It will soon become apparent that there is no conventional "Conclusion" to this thesis. The absence of conclusion symbolises the form of argument being presented. A multicultural conception of law must remain open to the future configurations that subjects might construct

of the very notion of a "multicultural conception of law," in response to the socio-biological demands that challenge them. The directions that it will take will depend, moreover, upon the positionings that those subjects take toward Justice. In part, these positionings will be informed by knowledge that has hitherto proved to be descriptively or predictively-accurate, or comprehensive in its explanations of events. In part, also, those positionings will be informed by the moral and intuitive calculations that are needed to compensate for the inevitable realms of silence that exist within and beneath that knowledge. In this way subjects move between the determinate discourses that have hitherto informed their actions and the plurality of meaning that emerges from their non-rationality, in keeping with the socio-biological changes that confront them.

My discussion of legal pluralism has informed this conclusion by outlining the various positions that legal pluralisms take on the definition of law, of legal subjectivity, and on the possibility of alternative conceptions of law. Despite the considerable differences between them the various legal pluralisms suggest that *subjectivity* will play a major role in alternative conceptions of legality. *Naturalised evolutionary epistemology* provides a useful framework for distinguishing between the positions that exist between the legal-pluralisms on this. Moreover, its evolutionary format informs my contention that the subjectivity that is deemed necessary to advance a multicultural conception of law is contingent upon the nature of subjects' socio-biological struggles.

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