



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 28

Number 3 *Symposium—The Sound of the Gavel:
Perspectives on Judicial Speech*

Article 13

4-1-1995

Demanding Justice without Truth: The Difficulty of Postmodern Feminist Legal Theory

Jennifer Lynn Orff

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Jennifer L. Orff, *Demanding Justice without Truth: The Difficulty of Postmodern Feminist Legal Theory*, 28 Loy. L.A. L. Rev. 1197 (1995).

Available at: <https://digitalcommons.lmu.edu/llr/vol28/iss3/13>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

DEMANDING JUSTICE WITHOUT TRUTH: THE DIFFICULTY OF POSTMODERN FEMINIST LEGAL THEORY

I. INTRODUCTION

*The best lack all conviction, while the worst
Are full of passionate intensity.*¹

Postmodern philosophy has challenged our traditional conceptions of both rational knowledge and objective truth.² Feminist theory has contributed to the attack on rationality and objectivity by arguing that the traditional objective viewpoint has all too often disguised a viewpoint that is actually exclusively male.³

This Comment argues that although feminist legal theory has both benefited from, and contributed to, the postmodern critique of reason and objectivity, feminists must take a hard look at the dangers of abandoning these concepts altogether. Abandoning the traditional ideas of rational knowledge and objective truth will leave feminist legal theory without a needed critical position—a position that speaks with authority from outside of socially contingent ways of living.⁴

This Comment begins with a discussion of traditional philosophical theories about the nature of both knowledge and truth.⁵ Next, it describes the rise of the postmodern world view in the disciplines of science, anthropology, linguistics, literary theory, and philosophy.⁶ In order to bring the many facets of postmodernism into focus, it constructs a brief outline of the possible approaches that a theorist might take when faced with the challenge of the postmodern world view.⁷

Next, this Comment explores the work of Martha Minow, Catharine MacKinnon, Stanley Fish, and Drucilla Cornell, four legal theo-

1. William Butler Yeats, *The Second Coming*, in *THE LITERATURE OF ENGLAND* 1115, 1115 (George K. Anderson & Karl J. Holzkecht eds., 1953).

2. This Comment will not attempt to define the term "postmodern." The reader will be able to get a fair sense of the postmodern world view from the discussion *infra* part III.

3. See, e.g., CATHARINE A. MACKINNON, *Introduction to FEMINISM UNMODIFIED* 1, 16 (1987) [hereinafter *MACKINNON, Introduction*] (arguing that "[f]eminism has revealed nature and society to be mirrors of each other: the male gender looking at itself looking at itself").

4. See *infra* parts V-VI.

5. See *infra* part II.

6. See *infra* part III.A-D.

7. See *infra* part III.E.

rists who have, to differing degrees, adopted the language and ideas of postmodern philosophy.⁸ It closely analyzes their work to develop a picture of the type of postmodernism that each theorist advocates.

Through this examination, this Comment reveals an inconsistency that arises when a theorist simultaneously adopts both the postmodern view of truth and knowledge, and the argument that radical feminist changes in society are necessary.⁹ It then revisits the outline of possible postmodern approaches and examines where each of the four theorists fits in that outline.¹⁰

Finally, this Comment discusses what I have called "the difficulty of postmodern feminist legal theory."¹¹ It demonstrates that, to the extent feminist legal theorists adopt postmodernism, they undermine both any moral justification for their feminist goals, and any privileged status for their claims of knowledge about the truth of women's oppression. In this way, feminist legal scholars add their voices to the chorus of "[t]he best" who "lack all conviction."¹² The inevitability of these consequences leads to the conclusion that postmodernism is totally incompatible with feminist legal theory.¹³

II. TRADITIONAL TRUTH AND KNOWLEDGE THEORY

Every philosophical theory has had to grapple with two central questions: What, if there is such a thing, is the nature of truth or reality? And if truth does exist, how do we come to have knowledge of it; that is, how do we know things? Philosophers have traditionally called the study of the nature of truth or reality "metaphysics,"¹⁴ and have called the study of the nature of knowledge "epistemology."¹⁵ In this Comment I will simply refer to these two terms as "truth theory" and "knowledge theory."

8. See *infra* part IV.A-D.

9. See *infra* parts IV.A-D, V.

10. See *infra* part IV.E.

11. See *infra* part V.

12. Yeats, *supra* note 1, at 1115.

13. See *infra* part VI.

14. The English metaphysician Francis Herbert Bradley described metaphysics as "an attempt to know reality as against mere appearance, or the study of first principles or ultimate truths, or again the effort to comprehend the universe . . . somehow as a whole." *THE CONCISE ENCYCLOPEDIA OF WESTERN PHILOSOPHY AND PHILOSOPHERS* 203 (J.O. Urmson & Jonathan Rée eds., rev. ed. 1991) [hereinafter *ENCYCLOPEDIA*].

15. Epistemology is "[t]he branch of philosophy which investigates the origin, structure, methods and validity of knowledge." *THE DICTIONARY OF PHILOSOPHY* 94 (Dagobert D. Runes ed., 1942) [hereinafter *DICTIONARY*]. The word is from the Greek *episteme* (knowledge) and *logos* (theory). *Id.*

Any sophisticated philosophical theory should have both a complete truth theory and a complete knowledge theory. That is, the theorist should explain to the rest of us what the truth of the situation is, and how the theorist is able to know that truth.

Traditional knowledge theory posits the existence of an external, objective reality that can be "known" through the senses and ordered through reason.¹⁶ According to most traditional knowledge theories, the way a person knows anything is by directly perceiving the world's objective reality, and then using the reasoning processes of the rational mind to order one's direct perceptions in the transcendental realm.¹⁷

For Plato, this transcendental realm was the realm of "Forms," where eternal ideals such as Justice, Beauty, and Equality resided.¹⁸ Knowledge of these eternal Forms was the proper goal of philosophy.¹⁹ Plato considered the world of the senses to be unreal and compared it to shadows on the wall of a cave.²⁰ The real world was the "world of the mind," where the Forms behind appearances were apprehended by the philosopher.²¹ To enter this world the philosopher had to make the "rough ascent [up from the cave] . . . into the light of the sun."²²

The medieval philosophers believed that the transcendental realm was that of the Christian God.²³ According to these "natural law" scholars, earthly law itself was a reflection of the divine order and will of God.²⁴ Richard Hooker exemplified the jurisprudence of the day with the statement: "[O]f law there can be no less acknowledged, than that her seat is the bosom of God, her voice the harmony of the world" ²⁵

16. See, for example, Daniel Morrissey's description of Immanuel Kant's knowledge theory: The mind contains "a certain preexisting classification system that it uses to synthesize the raw data of experience and make it understandable." Daniel J. Morrissey, *Moral Truth and the Law: A New Look at an Old Link*, 47 SMU L. REV. 61, 68 (1993).

17. *Id.* at 67-69.

18. See ENCYCLOPEDIA, *supra* note 14, at 243; PLATO, *The Republic*, in GREAT DIALOGUES OF PLATO 118, 312-16 (Eric H. Warmington & Philip G. Rouse eds. & W.H.D. Rouse trans., 1984).

19. ENCYCLOPEDIA, *supra* note 14, at 243.

20. PLATO, *supra* note 18, at 312-16.

21. *Id.* at 315.

22. *Id.* at 313.

23. Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 434 (1987).

24. *Id.*

25. RICHARD HOOKER, *OF THE LAWS OF ECCLESIASTICAL POLITY* 127 (Arthur Stephen McGrade ed., 1989).

For Saint Thomas Aquinas, "the eternal law is the plan of government in the Chief Governor, [and] all the plans of government in the inferior governors must be derived from the eternal law."²⁶ Thus, "[a] tyrannical law . . . is not a law, absolutely speaking, but rather a perversion of law."²⁷ Saint Thomas believed human beings were endowed with "a share of the Eternal Reason,"²⁸ and thus were naturally inclined to follow their proper ends and participate in the eternal law.²⁹

Modern philosophers such as Descartes and Kant removed the transcendental realm from the Kingdom of God and placed it in the rational mind.³⁰ For Kant, "reason of itself, independent on all experience, ordains what ought to take place."³¹ Using reason, all rational beings could devise laws that were not dependent upon the "contingent conditions of humanity,"³² but were instead "*a priori* simply in the conceptions of pure reason."³³

The British empiricist philosophers rejected the transcendental realm entirely and instead argued that all knowledge was derived from experience of the physical world.³⁴ For the empiricists there were no *a priori* concepts produced by reason or intellect alone.³⁵ Instead, such concepts either could be broken down into simpler concepts derived from experience or had no meaning at all.³⁶

Although the empiricists rejected the transcendental realm, they neither rejected reason nor denied that objective facts existed.³⁷ Instead, they argued that knowledge should be acquired through the methods of science.³⁸ Thus, for the empiricists, rational scientific knowledge accurately described objective reality.³⁹

Traditional philosophy, then, for ancient, medieval, and modern philosophers, has always relied on the use of reason to obtain knowl-

26. THOMAS AQUINAS, TREATISE ON LAW (*Summa Theologica*, QUESTIONS 90-97) 44 (n.d.).

27. *Id.* at 33.

28. *Id.* at 15.

29. *Id.*

30. Williams, *supra* note 23, at 435.

31. IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 35 (T.K. Abbott trans., Prometheus Books 1987) (1785).

32. *Id.*

33. *Id.* at 11-12.

34. ENCYCLOPEDIA, *supra* note 14, at 88.

35. *Id.*

36. *Id.*

37. *See id.*

38. *Id.*

39. *See id.*

edge about an objective truth. Even the modern empiricist philosophers, who rejected the metaphysics of the transcendental realm, did not give up their faith in the objectivity of scientific observation.

III. THE RISE OF POSTMODERN TRUTH AND KNOWLEDGE THEORY

*Things fall apart: the center cannot hold . . .*⁴⁰

Commenting on the world view of the postmodern mind, Huston Smith has written: "[W]e are not more modest than our precursors; we hang our arrogance in different quarters. Whereas our forebears strike us as arrogant in the amount they thought they knew, we are oppositely arrogant."⁴¹ Thus, Smith implies that the transition from the modern to the postmodern world view is one from arrogance about knowledge, to arrogance about ignorance.

According to Joan Williams, "[t]raditional epistemology, with its belief in the existence of transcendent, objective truth, has been replaced in the twentieth century by a 'new epistemology,' which rejects a belief in objective truth and the claims of certainty that traditionally follow."⁴² The postmodern world view does not consist solely of epistemology,⁴³ but, as this section will demonstrate, reaches out to encompass every branch of philosophy—as well as other academic disciplines such as mathematics, physics, anthropology, literary criticism, and jurisprudence. Postmodernism does, however, begin with a distinct epistemology, and then derives its other claims about the nature and possibility of ultimate truth—what we might call its metaphysics, or more properly its "anti-metaphysics"—from its epistemology.⁴⁴

Through the following historical overview, the reader should begin to get a sense of what the postmodern world view is, and why its tenets present such a compelling challenge to traditional truth and knowledge theory.

40. Yeats, *supra* note 1, at 1115.

41. HUSTON SMITH, *The View From Everywhere*, in *BEYOND THE POST-MODERN MIND* 17, 28 (1989).

42. Williams, *supra* note 23, at 430-31.

43. See *supra* note 15 (defining epistemology).

44. See *supra* note 14 (defining metaphysics). The postmodern position could be called an anti-metaphysics because most postmodern theorists would deny that a metaphysics could exist or be constructed. For a discussion of postmodern philosophy's denial of the possibility of a metaphysics, see *infra* part III.C-E.

A. *The Demise of Traditional Science*

- *Turning and turning in the widening gyre*
*The falcon cannot hear the falconer . . .*⁴⁵

Traditional Newtonian physics described a world where space, time, and matter were absolutes, capable of being perceived and described by the rational and unbiased scientist.⁴⁶ In the Newtonian universe, events occurred in the three-dimensional space of Euclidian geometry.⁴⁷

In the late nineteenth century, developments in science and mathematics began to call into question Euclidian geometry.⁴⁸ Mathematicians eventually abandoned Euclid's system as inadequate to describe empirical reality.⁴⁹ Kurt Gödel's incompleteness theorem "demonstrated that arithmetic cannot be both complete and internally consistent."⁵⁰ Gödel's theorem "played an important metaphorical role . . . outside of math and physics," by reinforcing the notion that "languages, including mathematics, are necessarily incomplete descriptions of reality."⁵¹

These changes in mathematics led to dramatic changes in physics.⁵² Albert Einstein's theory of relativity rejected the Newtonian concept of absolute time.⁵³ The effect of the theory of relativity has been described in the following way:

[T]he theory of relativity [required scientists] to abandon the idea that there was a unique absolute time. Instead, each observer would have his own measure of time as recorded by a clock that he carried: clocks carried by different observers would not necessarily agree. Thus time became a more personal concept, relative to the observer who measured it.⁵⁴

The theory of relativity thus challenged the belief that the universe was capable of a single, objective, description.⁵⁵

45. YEATS, *supra* note 1, at 1115.

46. Williams, *supra* note 23, at 437.

47. *Id.* at 437 n.45.

48. *Id.* at 436-37.

49. *Id.* at 437.

50. *Id.* at 439.

51. *Id.*

52. *See id.* at 436-39.

53. STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME: FROM THE BIG BANG TO BLACK HOLES 20-21 (1988).

54. *Id.* at 143.

55. Williams, *supra* note 23, at 437-38.

In addition, quantum mechanics also began to blur the traditional scientific distinction between particles and waves by demonstrating that particles often behave like waves, and waves like particles.⁵⁶ Werner Heisenberg's uncertainty principle proved that the present position and velocity of a given particle could never be measured with certainty, but could only be estimated based on probabilities.⁵⁷ Thus, quantum mechanics demonstrated that

[i]n the world of the very small, where particle and wave aspects of reality are equally significant, things do not behave in any way that we can understand from our experience of the everyday world. It isn't just that [the traditional picture of the] atom with its electron "orbits" is a false picture; *all* pictures are false⁵⁸

Another blow to traditional science came with the work of historians of science Thomas Kuhn and Paul Feyerabend.⁵⁹ Kuhn argued that science was not a precise construction of theories on the basis of neutral fact, but instead a socially contingent activity.⁶⁰ Thus, for Kuhn there was "no scientifically or empirically neutral system of language or concepts"; instead scientific "tests and theories must proceed from within one or another paradigm-based tradition."⁶¹

Feyerabend also argued that scientific progress was a myth, and that there was no such thing as the scientific method.⁶² Both Kuhn and Feyerabend "viewed scientific models as interpretations that were dependent on the perspective of the observer."⁶³

56. JOHN GRIBBIN, *IN SEARCH OF SCHRÖDINGER'S CAT: QUANTUM PHYSICS AND REALITY* 86-92 (1984); HAWKING, *supra* note 53, at 56.

57. HAWKING, *supra* note 53, at 54-56.

58. GRIBBIN, *supra* note 56, at 92. It seems open to debate whether the demise of traditional physics actually has any implications for non-scientific disciplines, or for our normal, everyday interactions with the world. For example, Heisenberg's uncertainty principle tells me that I cannot know the exact location of a particle at any given time. HAWKING, *supra* note 53, at 54-56. However, I would not try to walk through a door, instead of opening it, simply because there is a theoretical chance that it would not be there.

59. Williams, *supra* note 23, at 455.

60. ENCYCLOPEDIA, *supra* note 14, at 165-66; see Thomas Kuhn, *The Resolution of Revolutions*, reprinted in *A POSTMODERN READER* 376, 377 (Joseph Natoli & Linda Hutcheon eds., 1993).

61. Kuhn, *supra* note 60, at 378. Kuhn wrote that a scientist is "like the chess player who, with a problem stated and the board physically or mentally before him, tries out various alternative moves [that are] trials only of themselves, not of the rules of the game. They are possible only so long as the paradigm itself is taken for granted." *Id.* at 377.

62. ENCYCLOPEDIA, *supra* note 14, at 111.

63. Williams, *supra* note 23, at 455. Thus, for Kuhn, scientists who work within different paradigms "practice their trades in different worlds Both are looking at the world

These scientific developments called into question traditional scientific notions of "reality," "knowledge," and "objectivity."⁶⁴ Facts were no longer fixed bits of reality, but instead moved and changed with the position of the observer.⁶⁵ Scientific observations were no longer neutral observations of these facts, but instead were determined by the preconceptions of the scientist.⁶⁶

B. *The Rise of Culture*

At the same time that scientists were reevaluating the basic tenets of science, linguists and anthropologists were beginning to demonstrate the contingent nature of linguistic and cultural categories.⁶⁷ Linguist Benjamin Whorf argued that human beings have no access to objective facts.⁶⁸ Instead,

[w]e cut up and organize the spread and flow of events as we do, largely because, through our mother tongue, we are parties to an agreement to do so, not because nature itself is segmented in exactly that way for all to see. Languages differ not only in how they build their sentences but also in how they break down nature to secure the elements to put in those sentences.⁶⁹

Thus, Whorf argued that human perceptions were filtered through the contingent categories of language.⁷⁰ Another linguist, Ferdinand de Saussure, argued that language was a "system of signs" that was "arbitrary and conventional," with "each sign defined not by some essential property but by the differences which distinguish it from other signs."⁷¹

... But in some areas they see different things, and they see them in different relations one to the other." Kuhn, *supra* note 60, at 381.

64. See Williams, *supra* note 23, at 436-39, 455.

65. *Id.*

66. *Id.* at 455.

67. *Id.* at 444-57.

68. BENJAMIN LEE WHORF, *Languages and Logic*, reprinted in LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF 233, 240 (John B. Carroll ed., 1956) [hereinafter LANGUAGE, THOUGHT, AND REALITY].

69. *Id.*

70. *Id.* Whorf demonstrated, for example, that not everyone senses Western concepts of space, time, and matter intuitively. BENJAMIN LEE WHORF, *An American Indian Model of the Universe*, reprinted in LANGUAGE, THOUGHT, AND REALITY, *supra* note 68, at 57. Whorf's examination of the Hopi language demonstrated that the Hopis do not share the Western belief in objectified time, but instead conceive of time in a manner more consistent with relativity physics than with traditional Western conceptions. *Id.* at 58.

71. Jonathan Culler, *Jacques Derrida*, in STRUCTURALISM AND SINCE: FROM LÉVI-STRAUSS TO DERRIDA 154, 166 (John Surrock ed., 1979).

Anthropologists such as Clifford Geertz asserted that anthropological writings were not scientific analyses of objective facts, as traditionally had been claimed, but were instead only interpretations.⁷² For Geertz,

The concept of culture . . . is essentially a semiotic one. . . . Believing . . . that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning.⁷³

Thus, anthropologists "begin with [their] own interpretations of what [their] informants are up to, or think they are up to, and then systematize those."⁷⁴ In this way, Geertz also stressed the location of the observer as determinate of the nature of the reality observed.⁷⁵

C. *The Rise of Postmodern Philosophy*

*The ceremony of innocence is drowned*⁷⁶

Postmodern philosophers have integrated the above insights from linguistics, anthropology, and science into a postmodern view of a world without rational knowledge or objective truth.

Ludwig Wittgenstein, one of the most influential postmodern philosophers, "rejected the view that . . . objective meanings are determined by reference to a reality outside language."⁷⁷ For Wittgenstein, "no single reality exists independently of the observer's interpretations."⁷⁸ Culture, as a "web of human agreements," is the basis for cognition, which is not related to an objective reality.⁷⁹ Language has no meaning in relation to an external reality, but instead has meaning only in relation to the culture, or "form of life," in which the language operates.⁸⁰

72. Williams, *supra* note 23, at 455-57; see CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 3-30 (1973).

73. GEERTZ, *supra* note 72, at 5.

74. *Id.* at 15.

75. Williams, *supra* note 23, at 455-57.

76. Yeats, *supra* note 1, at 1115.

77. Williams, *supra* note 23, at 451. This is a very postmodern interpretation of Wittgenstein's work. Wittgenstein's theory is complex, however, and the nature of the correct interpretation is controversial.

78. *Id.* at 452.

79. *Id.* at 453.

80. *Id.* at 452.

The certainty people feel about their language and perceptions is a function, not of any correspondence with outside reality, but of "pervasive and systematic agreements between people."⁸¹ This certainty comes from one's embeddedness in a particular "form of life,"⁸² a "nest of propositions"⁸³ that is the "inherited background against which [one] distinguish[es] between true and false."⁸⁴

Wittgenstein argued that, "[t]o say of man . . . that he *knows* something; that what he says is therefore unconditionally the truth, seems wrong to me.—It is the truth only inasmuch as it is an unmov-ing foundation of his language-games."⁸⁵ Therefore, the "*truth* of cer-tain empirical propositions belongs to our frame of reference,"⁸⁶ not to any consistency between empirical reality and our perceptions of it. Thus, "it's not that on some points men know the truth with perfect certainty. No: perfect certainty is only a matter of their attitude."⁸⁷ Wittgenstein recognized, however, that "[our] language-game does change with time,"⁸⁸ so that "[a]t certain periods men find reasonable what at other periods they found unreasonable."⁸⁹

Another philosopher who has contributed to the postmodern world view is William V.O. Quine.⁹⁰ Quine argued that the notion of knowledge as a matter of resonance between words and the world must be discarded.⁹¹ In its place, Quine substituted the notion of "hol-ism."⁹² Under this theory, the truth of a statement was a function not of its relationship to the world, but of its relationship to all other be-liefs held to be true.⁹³ The result was that "[a]ny statement can be

81. *Id.* at 453.

82. LUDWIG WITTGENSTEIN, *ON CERTAINTY* 46e (G.E.M. Anscombe & G.H. von Wright eds. & Denis Paul & G.E.M. Anscombe trans., 1969).

83. *Id.* at 30e.

84. *Id.* at 15e.

85. *Id.* at 52e.

86. *Id.* at 12e.

87. *Id.* at 52e.

88. *Id.* at 34e.

89. *Id.* at 43e.

90. Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 270-71 (1992); see WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* (1960). This discussion of Quine's theory is presented with the same reservation as the one expressed about Wittgenstein. See *supra* note 77 (discussing Wittgenstein's theory).

91. Patterson, *supra* note 90, at 270.

92. *Id.*

93. *Id.*

held true come what may, if we make drastic enough adjustments elsewhere in the system."⁹⁴

Postmodern philosopher Jean-Francois Lyotard also has rejected the search for an objective truth, or "metanarrative," that can legitimate and justify particular human institutions.⁹⁵ For Lyotard, "legitimation of first-order discourses (e.g., law and science) by resort to second-order discourses of reason (e.g., philosophy) is replaced with a picture of knowledge as a move within a game, specifically a 'language-game.'"⁹⁶

Thus, "Lyotard's principal focus in attacking the traditional conception of knowledge as rational scrutiny of claims to truth and validity is philosophy. What Lyotard seeks is the complete displacement (not replacement) of philosophy with knowledge of the pragmatics of interaction."⁹⁷ Lyotard argues that the use of philosophy as a metanarrative to justify legal institutions must be abandoned.⁹⁸

Contemporary philosopher Richard Rorty agrees with Wittgenstein that "the notion of knowledge as accurate representation, made possible by special mental processes, and intelligible through a general theory of representation, needs to be abandoned."⁹⁹ Rorty explains that traditional philosophy has conceived of the mind as a "great mirror" that is able to reflect accurate representations of the natural world.¹⁰⁰

Although postmodern philosophy has shattered this theory of knowledge, Rorty does not believe that this means a decline into relativism.¹⁰¹ Instead, he argues for a revival of pragmatism, a "Deweyan approach to both social science and morality, one which emphasizes the utility of narratives and vocabularies rather than the objectivity of laws and theories."¹⁰²

94. WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 20, 43 (1953).

95. *Patterson*, *supra* note 90, at 257 n.9. Thus, Lyotard "define[s] *postmodern* as incredulity toward metanarratives." JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* at xxiv (Geoff Bennington & Brian Massumi trans., 1984).

96. *Patterson*, *supra* note 90, at 257 n.9.

97. *Id.*

98. *Id.*

99. RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 6 (1979).

100. *Id.* at 12.

101. *Id.* at 13.

102. RICHARD RORTY, *Method, Social Science, and Social Hope*, in *CONSEQUENCES OF PRAGMATISM* 191, 195 (1982). John Dewey, along with Charles Sanders Peirce and William James, are the main figures of the school of philosophy known as pragmatism. Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1610 (1990).

A pragmatist, according to Rorty, "drops the notion of truth as correspondence with reality altogether, and says that [for example] modern science does not enable us to cope because it corresponds, it just plain enables us to cope."¹⁰³ Thus, for such a pragmatist, the criteria for the adoption of a new theory would not be whether the theory is true, but instead whether it "enables us to cope."¹⁰⁴ Rorty argues that we should adopt his pragmatic view of truth, not if we believe that it is actually true—since the question of what is actually true is "not a profitable topic"¹⁰⁵—but rather if we believe that it "is a good thing to try for."¹⁰⁶

Rorty does not address the question of how we can determine what is a "good thing to try for"¹⁰⁷ once we have accepted the pragmatist view that "there is . . . no criterion that we have not created in the course of creating a practice, no standard of rationality that is not an appeal to such a criterion, [and] no rigorous argumentation that is not obedience to our own conventions."¹⁰⁸

These postmodern philosophers often seem to move directly from the theory that we are unable to know things objectively, to the conclusion that objective reality itself does not exist.¹⁰⁹ The postmodern story goes something like this: We cannot know objective reality—postmodern epistemology; therefore, such reality does not exist—postmodern anti-metaphysics. However, if the ultimate nature of reality is "no-reality," isn't this a metaphysics as well?¹¹⁰

The jump from no-knowledge to no-reality may seem logical and inevitable for some postmodern philosophers, but I would argue that this is hardly so.¹¹¹ Just because we cannot know or see reality certainly does not mean that it does not exist. Only if we hold out our

Pragmatists explore the consequences and practical effects of conceptions when exploring truth, meaning, and action. *Id.*

103. RICHARD RORTY, *Introduction to CONSEQUENCES OF PRAGMATISM*, *supra* note 102, at xvii [hereinafter RORTY, *Introduction*].

104. *Id.*

105. *Id.* at xliii.

106. *Id.*

107. *Id.*

108. *Id.* at xlii.

109. See, e.g., WITTGENSTEIN, *supra* note 82, at 12e ("The truth of certain empirical propositions belongs to our frame of reference . . ."); QUINE, *supra* note 94, at 43 ("Any statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system.").

110. For a definition of metaphysics, see *supra* note 14.

111. Wittgenstein himself may have questioned this when he wrote "Is God bound by our knowledge? . . . For that is what we want to say." WITTGENSTEIN, *supra* note 82, at 57e.

own minds as the measure of ultimate reality does ultimate reality disappear when we find our minds not up to the task of grasping it with certainty. The idea that anything our minds cannot grasp cannot exist is a very anthropocentric idea—as if we were creators of the universe through our thought processes!¹¹²

D. *The Deconstruction of Philosophical and Literary Texts*

The idea of “deconstruction” generally is associated with the French philosopher Jacques Derrida.¹¹³ Derrida argues that all philosophical theories are versions of a single system, a system that we cannot escape, but that can be critiqued only from within by reversing the hierarchies that it has established.¹¹⁴

Derrida calls this system “logocentrism” or the “metaphysics of presence.”¹¹⁵ He has written that “[t]he history of metaphysics” is based on “the determination of being as *presence* in all the senses of this word. . . . [A]ll the names related to fundamentals, to principles . . . have always designated the constant of a presence”¹¹⁶ Thus, for Derrida, traditional philosophy always has conceived of reality as a series of present states, so that the reality of *A* is made to depend on the fact that *A* is present at time *X*, at time *Y*, and again at time *Z*—its existence is a series of present states.¹¹⁷

The problem with the metaphysics of presence is that any account of what is happening at a given instant requires references to other instants that are not present.¹¹⁸ For example, the motion of an object is only conceivable insofar as every instant—every present state—is already marked with traces of the past and the future.¹¹⁹

A similar problem arises with language. Derrida accepts the linguist Saussure’s¹²⁰ conception of language as a process of differentia-

112. The philosopher René Descartes argued that he could be sure of his own existence only because of the existence of his mind, which was able to reason. *ENCYCLOPEDIA*, *supra* note 14, at 74. He argued that it was self-evident that nothing could reason without existing, so he must exist. *Id.* In addition, Descartes argued that God existed because he was able to conceive of the idea of God. *Id.* Descartes believed that he would not be able to conceive of a perfect Supreme Being unless one actually existed. *Id.* at 75.

113. *ENCYCLOPEDIA*, *supra* note 14, at 71.

114. Culler, *supra* note 71, at 154.

115. *Id.*

116. Jacques Derrida, *Structure, Sign, and Play in the Discourse of the Human Sciences*, reprinted in *A POSTMODERN READER*, *supra* note 60, at 223, 225.

117. See Culler, *supra* note 71, at 162.

118. *Id.* at 161-62.

119. *Id.* at 162-63.

120. See *infra* part III.B for a discussion of Saussure.

tion, wherein one word is differentiated from other words with different meanings.¹²¹ No word has an inherent meaning, but instead its meaning is totally relational.¹²² The meaning of a word when it is spoken, then, is marked by the traces of other words that one is not uttering.¹²³ Thus, "no element can function as a sign without referring to another element which itself is not simply present,"¹²⁴ and no sign can be "*present* in and of itself, referring only to itself."¹²⁵ In this way, Derrida shows that while the metaphysics of presence posits a reality that can be fully present at any one time, such a reality cannot exist.¹²⁶

One main feature of logocentrism, for Derrida, is the "logic of supplementarity."¹²⁷ This supplementarity has been described as follows: "Derrida shows that prior metaphysical, epistemological, ethical and logical systems have been constructed on the basis of conceptual oppositions such as transcendental/empirical, internal/external, original/derivative, good/evil, universal/particular. One of the terms in each binary set is privileged, the other suppressed or excluded."¹²⁸

Deconstruction, then, is the process of reconsidering this hierarchy by inverting it, and "show[ing] that what were conceived as the distinguishing characteristics of the marginal are in fact the defining qualities of the central object of consideration."¹²⁹ "By analysing the denigrated or marginalized terms and the nature of their exclusion, Derrida demonstrates that the preference for one term over its opposite is ultimately untenable: the privileged term has meaning only in so far as it is contrasted with its ostensibly excluded opposite."¹³⁰

Derrida recognizes that the deconstructive critique of logocentrism itself cannot escape logocentrism; it only can remain within the system and continue to reveal contradictions and paradoxes by reversing hierarchies and showing that there is no metaphysical reason for the privileging of one term and the denigrating of its opposite.¹³¹ Derrida has written:

121. Culler, *supra* note 71, at 166.

122. *Id.*

123. See JACQUES DERRIDA, *Semiology and Grammatology: Interview with Julia Kristeva*, in *POSITIONS* 15, 29 (Alan Bass trans., 1981).

124. *Id.* at 26.

125. *Id.*

126. See Culler, *supra* note 71, at 161-64.

127. *Id.* at 168.

128. *ENCYCLOPEDIA*, *supra* note 14, at 72.

129. Culler, *supra* note 71, at 168.

130. *ENCYCLOPEDIA*, *supra* note 14, at 72.

131. Culler, *supra* note 71, at 154.

There is no sense in doing without the concepts of metaphysics in order to attack metaphysics. We have no language—no syntax and no lexicon—which is alien to this history; we cannot utter a single destructive proposition which has not already slipped into the form, the logic, and the implicit postulations of precisely what it seeks to contest.¹³²

Because “we cannot give up this metaphysical complicity without also giving up the critique we are directing against this complicity,”¹³³ we must continue to use

all these old concepts, while at the same time exposing here and there their limits, treating them as tools which can still be of use. No longer is any truth-value attributed to them [Instead] . . . they are employed to destroy the old machinery to which they belong and of which they themselves are pieces.¹³⁴

Deconstruction in philosophy, then, “does not consist in turning the page of philosophy . . . but in continuing to read philosophers *in a certain way*.”¹³⁵

Similarly, deconstruction in literary criticism attempts to reveal the contradictions and paradoxes in literary works.¹³⁶ A deconstructive reading of a literary text “starts from the premise that all texts reflect [a] belief in objective truth [It then goes on to] deconstruct this metaphysics by revealing how the text undermines its own claims to truth and by showing that its meaning is in fact contingent.”¹³⁷

Derrida’s work also focuses on the indeterminacy of language.¹³⁸ This indeterminacy stems from two sources. First, the meaning of any word cannot be truly present at any given time, but instead carries traces of excluded words.¹³⁹ In addition, any word is repeatable—what Derrida calls “iterable”—by any speaker.¹⁴⁰ In this process of repetition, the meaning of a word inevitably changes.¹⁴¹

132. Derrida, *supra* note 116, at 226.

133. *Id.* at 227.

134. *Id.* at 230.

135. *Id.* at 235.

136. Williams, *supra* note 23, at 461.

137. *Id.*

138. See Culler, *supra* note 71, at 164, 171.

139. *Id.* at 164.

140. *Id.* at 171.

141. See *id.*; *infra* part IV.D (discussing Drucilla Cornell’s argument that indeterminacy of language stems from its iterability).

The consequence of this indeterminacy is that reality itself is indeterminate because we are capable of perceiving and describing reality only within language.¹⁴² This is not something to be feared; instead Derrida recommends a "Nietzschean affirmation—the joyous affirmation of the freeplay of the world and without truth, without origin, offered to an active interpretation."¹⁴³

The indeterminacy of language has political consequences as well, since it disables totalitarianism by denying that totalitarian authority can ever fix the meaning of language, and thereby dictate one acceptable truth.¹⁴⁴ In addition, once the oppositions of logocentrism have been deconstructed, we no longer can claim a monopoly on truth for the privileged term in a binary set by excluding the marginalized term.¹⁴⁵ According to Derrida, the exclusion of the marginalized term involves violence:

we are not dealing with the peaceful coexistence of a *vis-à-vis*, but rather with a violent hierarchy. One of the two terms governs the other . . . or has the upper hand. To deconstruct the opposition, first of all, is to overturn the hierarchy at a given moment. To overlook this phase of overturning is to forget the conflictual and subordinating structure of opposition.¹⁴⁶

E. Postmodern Approaches to Truth and Knowledge Theory

The legal theorists discussed in the next section of this Comment do not simply advocate one uniform concept of postmodern theory.¹⁴⁷ Instead, each has his or her own spin on what type of change

142. Culler, *supra* note 71, at 166.

143. Derrida, *supra* note 116, at 240.

144. Other postmodern philosophers and critics have also argued that the drive to find "the truth" hides a totalitarian impulse. For example, Zygmunt Bauman writes that [w]here one cannot do without the "well grounded concept of truth" is when it comes to tell others that they are in error and hence (1) ought or must change their minds, thus (2) confirming the superiority (read: right to command) of the holder of truth (read: the giver of command). The bid for truth as a claimed quality of knowledge arises therefore solely in the context of hegemony and proselytism . . . [where] one refuses to coexist peacefully and respect the existing borders Truth is, in other words, a *social relation* . . . an aspect of a hierarchy . . . a bid for domination-through-hegemony.

Zygmunt Bauman, *Postmodernity, or Living with Ambivalence*, reprinted in A POSTMODERN READER, *supra* note 60, at 9, 10-11.

145. See ENCYCLOPEDIA, *supra* note 14, at 72.

146. JACQUES DERRIDA, *Positions: Interview with Jean-Louis Houdebine and Guy Scarpetta*, in POSITIONS, *supra* note 123, at 37, 41.

147. See *infra* part IV.

postmodernism demands of our traditional world view, and what the consequences of postmodernism are for legal theory.

In order to help the reader better understand these different varieties of postmodernism, this section presents an outline of possibilities for postmodern theory. When developing this outline, I began with a traditional conception of truth and knowledge theory: that both transcendent truth and transcendent knowledge exist.¹⁴⁸

"Transcendent truth" means simply truth that exists independently of what we think about it—truth that we cannot think away, and that would not be constrained by the extent to which our cognition is socially constructed. The term transcendent truth as used in this Comment includes "transcendental" truth developed through the use of reason, as well as "empirical" truth developed from observation and experience of the external world.¹⁴⁹ Therefore, even the philosophy of the British empiricists¹⁵⁰ would be committed to both transcendent truth and transcendent knowledge according to my definition of the term.

"Transcendent knowledge" simply means knowledge of transcendent truth, which is able to "transcend" our particular contingent social situation. Thus, the terms transcendent truth and transcendent knowledge, as used in this Comment, should not be confused with concepts from the "transcendental idealism" of Immanuel Kant.¹⁵¹

Faced with the postmodern challenge, a traditional theorist who advocates both transcendent truth and transcendent knowledge could concede a little by agreeing with the postmoderns that our social situatedness makes our knowledge of transcendent truth "biased." This concession still would not make the theory genuinely postmodern, however, as traditional knowledge theory has conceded that persons may be biased in their knowledge.¹⁵² In addition, the concept of bias

148. See *supra* part II.

149. For an example of these types of truth theory, see *supra* part II.

150. See *supra* part II.

151. For Kant, empirical reality was uncertain, but by using logic one could form "transcendental" mental concepts that were *a priori*—that is, before empirical experience or observation of the world. These concepts included scientific concepts such as "causation" and moral concepts such as Kant's own "categorical imperative." *ENCYCLOPEDIA, supra* note 14, at 156-64.

152. For example, philosopher Jürgen Habermas, a staunch defender of traditional truth theory, acknowledges that we have "egocentric or ethnocentric perspectives," but believes that through "unrestrained communication" we can "bring[] to the fore the deepest force of reason, which enables us to overcome [these biases] and reach an expanded . . . view." Mitchell Stephens, *The Theologian of Talk*, *L.A. TIMES*, Oct. 23, 1994 (Magazine), at 26, 30 (quoting interview with Jürgen Habermas).

presupposes the possibility of rational knowledge of an objective truth from which the biased knowledge deviates.¹⁵³

The next step for the theorist would be to hang on to transcendent truth, but to concede transcendent knowledge entirely, and replace it with embedded, socially constructed knowledge.¹⁵⁴ In this scenario, there would still be an objective reality out there, but we would not be capable of seeing it because we would only be able to "see" using the socially constructed tools of our language and cultural community.¹⁵⁵ Thus, we would have no way to test the congruence of our "reality" with the true transcendent reality or truth. Transcendent truth might as well not even exist, as we would not be capable of seeing it.

As noted earlier, however, many postmodern philosophers go directly from the concession that knowledge is socially constructed to the conclusion that transcendent truth does not exist at all.¹⁵⁶ This would be the next step for the theorist: If she really were convinced by the postmoderns, she then would advocate that transcendent truth and knowledge are nonexistent, and we are left with only socially constructed, embedded knowledge, and contingent, relative "truths" specific to our own forms of life.¹⁵⁷

This Comment presents an outline of all of the possibilities open to the theorist below. In the outline, "partial" postmodernism is postmodernism which retains transcendent truth, as it posits less extreme consequences from the social construction of some or all knowledge. "Total" postmodernism throws out transcendent truth altogether, as this form of postmodernism begins with the social construction of knowledge and pushes it to the extreme conclusion that there is no transcendent reality at all.

The outline is as follows:

1. Traditional theory
 - a. transcendent truth, transcendent knowledge
 - b. transcendent truth, biased knowledge
2. Partial postmodernism
 - a. transcendent truth, socially embedded knowledge

153. The word "bias" is defined as "such a prepossession with some . . . point of view that the mind does not respond impartially." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 211 (1976) [hereinafter WEBSTER'S].

154. See *supra* part III.B-D.

155. See *supra* part III.B-D.

156. See *supra* part III.C.

157. See *supra* part III.B-D.

3. Total postmodernism
 - a. no transcendent truth, socially embedded knowledge

The next section discusses the work of four postmodern theorists: Catharine MacKinnon, Martha Minow, Drucilla Cornell, and Stanley Fish.¹⁵⁸ MacKinnon, Minow, and Cornell specifically discuss feminism in their work on legal theory, while Fish focuses on legal theory in general.¹⁵⁹ I have included Fish here because his vision of the effect of postmodernism on traditional legal theory is very extreme and different from that of the other theorists, thus providing a useful comparison.¹⁶⁰

The discussion to follow analyzes where in my outline these theorists would place themselves, and where, in my view, they actually fit. This exploration of their work eventually will require some reconsideration and modification of the outline. Therefore, the above outline should be considered preliminary.

IV. THE INTERSECTION OF POSTMODERNISM AND LEGAL THEORY

A. Martha Minow's Contexts and Perspectives

In her insightful article *Justice Engendered*,¹⁶¹ Martha Minow writes about the "dilemma of difference"¹⁶² that the Supreme Court faces "[i]n a society of diversity with legacies of discrimination, within a polity committed to self-governance, [where] the judiciary becomes a critical arena for demands of inclusion."¹⁶³

Minow focuses chiefly on the way this "dilemma of difference" is inevitably framed from various "points of view."¹⁶⁴ "[L]ink[ing] problems of difference to questions of vantage point,"¹⁶⁵ she argues that any "objective stance" will undoubtedly "appear partial from another point of view."¹⁶⁶ This is because no "objective" point of view can exist.¹⁶⁷ Minow quotes Hillary Putnam, who argues that "[t]here is no God's Eye point of view that we can know or usefully imagine; there are only the various points of view of actual persons reflecting

158. See *infra* part IV.A-D.

159. See works by these theorists cited *infra* part IV.A-D.

160. See *infra* part IV.C.

161. Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987).

162. *Id.* at 12, 17-31.

163. *Id.* at 93.

164. *Id.* at 12-14.

165. *Id.* at 14.

166. *Id.*

167. See *id.* at 14-15.

various interests and purposes that their descriptions and theories subserve."¹⁶⁸

For Minow this embeddedness in perspective is not imprisonment, however, because persons are able to shift from one perspective to another.¹⁶⁹ She makes this clear by stating in the dedication at the beginning of her article that "[f]or resolving any doubts about the possibility that people can take the perspective of another, the author thanks [various persons]."¹⁷⁰

Although persons are free to choose which perspective they will adopt in a given situation, they are not able to free themselves from having a perspective.¹⁷¹ "Once we see that any point of view, including one's own, is a point of view, we will realize that every difference we see is seen in relation to something already assumed as the starting point."¹⁷²

Since there is no escape from perspective itself, the "task for judges is to identify vantage points, to learn how to adopt contrasting vantage points, and to decide which vantage points to embrace in given circumstances."¹⁷³ This will engage judges in "struggles over descriptions of reality" that constitute the various perspectives.¹⁷⁴

This exploration of other perspectives is qualified by a warning: A judge must also remember that although she can enrich her understanding through taking on different vantage points, "no one can see fully from another's point of view."¹⁷⁵ In other words, no one can fully imagine what it is like to walk in another's shoes—perspective shifting can never totally capture the perspective of others.

Minow next explores how "some [Supreme Court] Justices, on some occasions, have tried to see beyond the dominant perspective and reach an alternative construction of reality. In many other instances, however, the Justices presume that the perspective they adopt is either universal or superior to others."¹⁷⁶ Because no perspective can be truly universal, when the Justices "fail to acknowledge their

168. *Id.* at 14 n.18 (quoting HILLARY PUTNAM, *REASON, TRUTH AND HISTORY* 50 (1981)).

169. *Id.* at 10 n.* (introductory footnote).

170. *Id.*

171. *Id.* at 15.

172. *Id.*

173. *Id.*

174. *Id.* at 16.

175. *Id.* at 32.

176. *Id.* at 53-54.

own perspective and its influence on the assignment of difference,"¹⁷⁷ they assume that "all other perspectives are either presumptively identical to [their] own or are irrelevant."¹⁷⁸

These assumptions are easy to fall into because when one is a member of a powerful or dominant group it is more difficult to see one's ideologies as mere perspective.¹⁷⁹ "The more powerful we are, the less we may be able to see that the world coincides with our view precisely because we shaped it in accordance with those views. That is just one of our privileges."¹⁸⁰ The viewpoint of the powerful coincides with the world because

[t]he winning views about what differences matter and why they matter acquire the earmarks of factuality. . . . Ideological success is achieved when only dissenting views are regarded as ideologies; the prevailing view is the truth.

. . . Accordingly, political and cultural success itself submerges the fact that conceptions of reality represent a perspective of some groups, not a picture of reality free from any perspective.¹⁸¹

Minow's exhortation to the Supreme Court Justices, and "all [others] who judge,"¹⁸² then, is this:

It may be ultimately impossible to take the perspective of another completely, but the effort to do so may help [you] recognize that [your] perspective is partial. . . . After shaking free of these unstated assumptions and developing a sense of alternate perspectives, [you] must then choose. The process of looking through other perspectives does not itself yield an answer, but it may lead to an answer different from the one that [you] would otherwise have reached.¹⁸³

Minow argues that judges must stop "treat[ing] other points of view as irritants in the way of [their] vision" and "hanging on to faulty certainty."¹⁸⁴ Instead, judges first must acknowledge partiality in their own views, and then must choose "which partial view to advance or accept."¹⁸⁵

177. *Id.* at 50.

178. *Id.*

179. *Id.* at 73.

180. *Id.* (footnote omitted).

181. *Id.* at 66-67 (footnotes omitted).

182. *Id.* at 15.

183. *Id.* at 60.

184. *Id.* at 75.

185. *Id.*

This choosing, of course, is the hard part, and Minow gives judges little guidance regarding the principles that should govern the choosing or rejecting of viewpoints. She notes that although "[g]iven the relationship between knowledge and power, those with less privilege may well see better than those with more[,]"¹⁸⁶ always choosing the standpoint of the oppressed or "different" may "deny the multiple experiences of members of the denigrated group and create a new claim of essentialism."¹⁸⁷ Therefore, instead of creating a new "standpoint theory" from the point of view of the oppressed, judges need to "strive for the standpoint of someone who is committed to the moral relevance of contingent particulars."¹⁸⁸

Whose standpoint is that of a person who sees all of these "contingent particulars"? Minow does not really answer this question. It may be that this perspective of contingent particulars is simply the perspective of any person who has honestly tried to embrace different perspectives and to learn from what each perspective has to contribute. Minow says "exercises in taking the perspective of the other will deepen and broaden anyone's perspective."¹⁸⁹

Does this attention to perspective mean that we must give up general concepts and principles? Not at all. According to Minow, "immersion in particulars does not require the relinquishment of general commitments. The struggle is not over the validity of principles and generalizations—it is over which ones should prevail in a given context."¹⁹⁰

Minow elaborates on the idea of "context" in an article written with Elizabeth V. Spelman entitled *In Context*.¹⁹¹ Minow and Spelman focus on context "in order to expose how apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written."¹⁹²

Reading through their article, one gets the impression that the authors use the term "context" similarly to the way Minow uses the word "perspective" in *Justice Engendered*.¹⁹³ The authors state that "[a]rguments over context . . . may wrongly imply that we can ever

186. *Id.* at 86.

187. *Id.* at 76.

188. *Id.*

189. *Id.* at 81.

190. *Id.* at 92 (footnotes omitted).

191. Minow & Spelman, *supra* note 102.

192. *Id.* at 1601.

193. Minow, *supra* note 161.

escape context. We will argue instead that we are always in some context."¹⁹⁴ While "the selection of some context is unavoidable,"¹⁹⁵ it is possible to "switch from one context to another—from one level of analysis to another, or from a focus on one set of traits or concerns to a focus on another set."¹⁹⁶ In other words, while context cannot be transcended, we can jump from one context to another—we are not totally embedded in our own context.

The authors describe and respond to the various objections that have been made to contextual thinking.¹⁹⁷ They first address the argument that contextual thinking undermines the foundations for the exercise of judgment, and that "[a]bsent foundations for knowledge and judgment, there are no bases for holding those who wield power to account, much less for constraining their own political preferences and prejudices."¹⁹⁸

The authors respond to this criticism by arguing that emphasis on context does not engender relativism because a commitment to context merely requires one to refrain from judging until one has examined all of the relevant contexts and looked at the situation from all of the relevant perspectives.¹⁹⁹ "Principles such as equality, fairness, and freedom can be defended and even fulfilled in light of contextualized assessments of the limitations of particular rules, given the frames of references of their authors and their expositors and given evidence of the actual effects of rules on people."²⁰⁰ Thus, "[t]he basic norm of fairness—treat like cases alike—is fulfilled, not undermined, by attention to what particular traits make one case like, or unlike, another."²⁰¹

In addition, the authors argue that those who advocate "abstraction are themselves situated in particular ways of knowing that limit their understandings. . . . Arguments and principles presented as if they came from no situation still sit within the contexts of their authors and readers."²⁰² These supposedly "objective" arguments ob-

194. Minow & Spelman, *supra* note 191, at 1605.

195. *Id.*

196. *Id.*

197. *Id.* at 1615-39.

198. *Id.* at 1618.

199. *Id.* at 1634-39.

200. *Id.* at 1632; *see also* Minow, *supra* note 161, at 92 (arguing that emphasis on perspective "does not require the relinquishment of general commitments").

201. Minow & Spelman, *supra* note 191, at 1629.

202. *Id.* at 1627.

scure the point of view from which they were made, giving them a false legitimacy.²⁰³

The authors also address another objection to context: that the focus on context will emphasize the particular situations of particular individuals and obscure important commonalities between persons, such as those of race, class, and gender.²⁰⁴ The argument is that such an emphasis is depoliticizing because it makes "less legitimate the processes of abstraction by which [a group's] members [come] to be able to see and name what they [have] in common [and] thereby pull[] the rug out from under their motivation for and hopes for political change."²⁰⁵

The authors respond by arguing that the postmodern focus on context has usually been used to emphasize, not every possible feature of a person or situation, but instead previously neglected traits, such as race, class, and gender.²⁰⁶ Therefore, "[t]he attention to particularity that aims to highlight people subject to domination is not an unthinking immersion in overwhelming detail, but instead a sustained inquiry into the structures of domination in our society. . . . [And] can provide grounds for judgment of good and evil."²⁰⁷ The question then "becomes which context should matter, what traits or aspects of the particular should be addressed, how wide should the net be cast in collecting the details, and what scale should be used to weigh them?"²⁰⁸

The last section of the Minow and Spelman article attempts to demonstrate how thinking "in context" would work in dealing with a concrete, contextual issue—the question of whether "children who allege that they are victims of child abuse must testify in open court, facing the alleged abuser."²⁰⁹ The authors first examine how the Supreme Court Justices have either adopted or ignored the various contexts that could be invoked to understand this situation.²¹⁰ They note that the Court has only indirectly addressed the context of the child witness called to testify.²¹¹

203. *See id.* at 1627-28.

204. *Id.* at 1622-23.

205. *Id.* at 1623.

206. *See id.* at 1629.

207. *Id.* at 1633.

208. *Id.* at 1629.

209. *Id.* at 1639.

210. *Id.* at 1639-44.

211. *Id.* at 1643.

The authors recommend consideration of a "contextual" rule of judicial decision making that would allow the decision maker to "evaluate individual cases in order to assess whether to permit child testimony in the absence of direct face-to-face confrontation."²¹² Such an approach would not be a form of relativism, but instead a "refined sense of what factors should count in judgment, not an abandonment of the possibility of judgment."²¹³

Following this approach, a judge would immerse herself "in a variety of contexts that different people believe are relevant to [the] given problem."²¹⁴ The judge also would "examine the expression of larger patterns of power, domination, and exclusion in the particular details of each context."²¹⁵

Minow's concern with both context and perspective underscores her embrace of postmodern knowledge theory; what she calls "the situatedness of human beings who know, argue, justify, judge, and act."²¹⁶ Minow's postmodern knowledge is interesting, however, because Minow asserts that it is possible to shift from perspective to perspective,²¹⁷ and from context to context.²¹⁸

Minow's judge seems to have accepted some of the lessons of postmodern philosophy, but not to have taken the postmodern message to the extreme. While her judge does not reject abstract ideas like justice and rights, she does use the exercise of taking on different perspectives to see the case in context, thereby making herself more sensitive to the litigants in the particular case.²¹⁹ The question remains, however, whether all this context jumping and perspective shifting will really provide a judge with better tools to decide a case than the traditional tools of legal reasoning.

Why does Minow's judge not take the lessons of the social construction of all knowledge to the extreme and argue that perspective shifting is not possible? Perhaps because Minow senses that such an extreme postmodern view endangers the whole concept of judging. This is because judging presupposes some sort of transcendent reasoning. After all, how would one go about shifting from one's own perspective to that of another? One would investigate the reality of

212. *Id.* at 1646.

213. *Id.*

214. *Id.*

215. *Id.* at 1647.

216. *Id.* at 1649.

217. Minow, *supra* note 161, at 10 n.* (introductory footnote).

218. Minow & Spelman, *supra* note 191, at 1605.

219. *Id.*

another's perspective by analogizing that person's experience to the only experiences one has access to—one's own experiences. This process of analogy—that is, comparing dissimilar experiences and perspectives—would seem to be impossible without at least some type of transcendent knowledge to link the two perspectives.

Without such an ability to abstract, each person would be totally trapped in perspective. A judge would have no way to decide cases because, if knowledge is totally embedded, everyone is right and deserves to win. That is, from litigant *A*'s perspective, she is right and deserves to win. From litigant *B*'s perspective, she is right and deserves to win. Since the highest form of knowledge is embedded perspective, and there are no transcendent principles to judge who really is right, we must conclude either that both are right, or that both are wrong—it doesn't really matter which decision the judge makes. Each person is equally right in a world where everyone is right from their own perspective.

In addition, there would be no moral justification for giving deference to the judge's perspective over the perspective of one of the litigants—except that it has the power of the state behind it. If everything is just perspective, there is no reason to treat the judge's perspective on the problem at hand as any more justified than that of either of the litigants.

Indeed, there is no better rationale for having a judge decide disputes than for having all litigants decide disputes by force, or having all litigants with names beginning with A through F always win their cases, or deciding cases by a lottery. If knowledge is totally embedded, then judges do not exist, at least not as we conceive of them.

It is difficult to construct Minow's truth theory. Although she advocates an embedded theory of knowledge—albeit with perspective shifting—she says nothing about the possibility, or impossibility, of transcendent truth. She does state that when looking at things in context, or from various perspectives, one still can use general principles such as equality and justice.²²⁰ It seems for Minow, then, that such principles might have justification independent of any particular perspective.

If Minow's judge heard a case where the perspective of one of the participants denied the importance of the general principles of justice and equality, I think that Minow probably would argue that this participant's perspective should not govern as to the application of those

220. Minow, *supra* note 161, at 92.

principles.²²¹ Her argument against allowing this participant's perspective to govern would only make sense, however, if the principles of justice and equality have importance apart from perspective—that is, importance in and of themselves.

Minow might argue, however, that these principles should be used, and the perspective of the participant who denies them disregarded, simply because these general principles form the foundations of the U.S. constitutional system—the legal system in which Minow probably supposes these judges to be working. She might argue that these general principles have reflected certain partial perspectives, but that because our people have found worth in them in the past—enough worth to inscribe them into our constitutional fabric—we should continue to apply them. In this scenario, Minow would not be denying that these general principles are partial, but rather would be justifying their use by citing tradition or a history of practical benefits that these principles have been able to achieve for groups of persons with varying perspectives.

This would be a pragmatic argument for the retaining of general principles.²²² If Minow adopted such an argument, she would be arguing for general principles not because they have any relation to transcendent truth, but simply because they have worked well in the past. But from whose perspective would Minow decide whether these principles worked well? Whose criteria would she use? Even a pragmatic argument seems to require some yardstick by which working well is judged.

And Minow definitely has an idea about how society could work better than it presently does. The language of feminism, as well as many other “isms,” runs through her work.²²³ How can she advocate feminism, even on a pragmatic level, without retaining the yardstick of transcendent truth to justify her choice of feminism over the current “structures of domination in our society”²²⁴?

I believe that Minow retains feminism as a bit of transcendent truth by which our societal and legal systems are judged. Minow is thus a partial postmodernist who embraces the postmodern lesson of

221. Cf. *id.* (stating that emphasis on perspective “does not require the relinquishment of general commitments”); Minow & Spelman, *supra* note 191, at 1632 (“[p]rinciples such as equality, fairness, and freedom can be defended”).

222. For a definition of pragmatism, see *supra* note 102.

223. Minow & Spelman, *supra* note 191, at 1601 (“neutral and universal rules [exclude persons other than] privileged, white, Christian, able-bodied, heterosexual, adult men”).

224. *Id.* at 1633.

embedded knowledge in her perspectives and contexts, but retains some sort of transcendent truth in her general feminist principles.

B. Catharine MacKinnon's Women's Standpoint

Catharine MacKinnon's legal theory is a feminist critique of the patriarchal status quo based on marxist analysis.²²⁵ MacKinnon sees the relationship between the sexes much like a marxist would see the relationship between the classes—one of power, domination, and oppression.²²⁶

One of the core themes in her work is the thesis that "the social relation between the sexes is organized so that men may dominate and women must submit and this relation is sexual—in fact, is sex."²²⁷ Because sexuality is "whatever a given society eroticizes,"²²⁸ "[s]exual violence can no longer be categorized away as violence not sex When acts of dominance and submission, up to and including acts of violence, are experienced as sexually arousing, as sex itself, that is what they are Violence is sex when it is practiced as sex."²²⁹

In this analysis, "[r]ape, battery, sexual harassment, sexual abuse of children, prostitution, and pornography . . . form a distinctive pattern: the power of men over women in society."²³⁰ This pattern of sexual violence perpetuates a system where "[a]ggression against those with less power is experienced as sexual pleasure, an entitlement of masculinity. For the female, subordination is sexualized, in the way that dominance is for the male, as pleasure as well as gender identity, as femininity."²³¹ What MacKinnon attempts is to shatter the ideol-

225. MacKinnon writes:

Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away

. . . As work is to marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific As the organized expropriation of the work of some for the benefit of others defines a class, workers, the organized expropriation of the sexuality of some for the use of others defines the sex, woman.

CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 3 (1989) [hereinafter *MACKINNON, FEMINIST STATE*]. For MacKinnon, however, feminism is ultimately more important than marxism, as feminism is marxism's "final conclusion and ultimate critique" and "turns marxism inside out and on its head." *Id.* at 125.

226. *Id.* at 4.

227. *MACKINNON, Introduction, supra* note 3, at 3.

228. CATHARINE A. MACKINNON, *Desire and Power*, in *FEMINISM UNMODIFIED, supra* note 3, at 46, 53 [hereinafter *MACKINNON, Desire and Power*].

229. *MACKINNON, Introduction, supra* note 3, at 6.

230. *Id.* at 5.

231. *Id.* at 6-7.

ogy that these actions are deviant or personal choices, and to show that they are integral to the system of patriarchy.²³²

Pornography is the ultimate expression of this system of sexual dominance.²³³ In pornography, women are portrayed simply as "fuck-ees," existing only to be fucked: "Man fucks woman; subject verb object."²³⁴ Because pornography instills a false consciousness in women as well as men, women often become sexually aroused by their own degradation.²³⁵ Thus, pornography, as a facet of the patriarchal system, "has the political genius of making everybody potentially complicit through the stirring between their legs,"²³⁶ and invading one of the most intimate and personal aspects of a woman's life.²³⁷ However, from the feminist standpoint, a "good fuck" is no compensation for "getting fucked" by the system, just as the fact that a worker has a good day on the job is no compensation for that worker's exploitation and alienation under the capitalist system.²³⁸

For MacKinnon, traditional liberal feminism's emphasis on gender differences only obscures the fact that "[t]he differences we attribute to sex are lines inequality draws."²³⁹ Such an emphasis makes a system of oppression look "falsely symmetrical," and in this way "[d]ifference is the velvet glove on the iron fist of domination."²⁴⁰

For this reason feminist jurisprudence must give up the traditional focus on "difference" and adopt MacKinnon's "dominance approach."²⁴¹ Instead of trying to make rules that fit the reality of sexual "difference," the dominance approach tries to change a "politics [that] construct[s] the deep structure of society," and that "systematic[ally] relegate[s] . . . an entire group of people to a condition of inferiority and attribut[es] it to their nature."²⁴²

For MacKinnon, society is an expression of the male point of view of reality.²⁴³ Indeed, "[f]eminism has revealed nature and society to be mirrors of each other: the male gender looking at itself look-

232. *Id.* at 7.

233. MACKINNON, *FEMINIST STATE*, *supra* note 225, at 195-214.

234. *Id.* at 124.

235. *See* MACKINNON, *Introduction*, *supra* note 3, at 15.

236. *Id.*

237. MACKINNON, *FEMINIST STATE*, *supra* note 225, at 94.

238. MACKINNON, *Desire and Power*, *supra* note 228, at 60-61.

239. MACKINNON, *Introduction*, *supra* note 3, at 8.

240. *Id.*

241. CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED*, *supra* note 3, at 32, 32-45.

242. *Id.* at 41.

243. MACKINNON, *Introduction*, *supra* note 3, at 16.

ing at itself."²⁴⁴ Feminism, then, is important because it "take[s] women's situation seriously from women's standpoint."²⁴⁵ Feminism's "methodological secret" is that it "is built on believing women's accounts of sexual use and abuse by men."²⁴⁶ "The feminist theory of knowledge begins with the theory of the point of view of all women on social life."²⁴⁷ Feminists "criticize male pursuits from women's point of view, from the standpoint of our social experience as women."²⁴⁸

"Woman's commonality, which includes our diversity, comes from our shared social position."²⁴⁹ This position is social, not biological, because "there is too much variance in women's status, role, and treatment for it to be biological, and too little variance for it to [be] individual."²⁵⁰ "The commonality is that, despite real changes, bottom is bottom."²⁵¹

"[D]ifferences *among* women . . . such as . . . race and class" do not "undercut the meaningfulness or even the reality of gender."²⁵² For "to show that an observation or experience is not the same for all women proves only that it is not biological, not that it is not gendered."²⁵³ Similarly, the fact that some things that happen to women, like rape, also happen to some men, does not undermine the reality of male dominance.²⁵⁴ MacKinnon gives a powerful example: "That some non-Jews, such as gypsies and gays, were victims of the Holocaust does not mean the Holocaust was not, or was less, anti-Semitic."²⁵⁵

Women recognize the commonality of their oppression through "consciousness raising."²⁵⁶ A woman may come to a consciousness raising group with "an unspecific, often unattached, but just barely submerged discontent."²⁵⁷ Through talking with other women, a woman becomes conscious of her "oppression as common rather than

244. *Id.*

245. CATHARINE MACKINNON, *Not by Law Alone: From a Debate with Phyllis Schlafly*, in FEMINISM UNMODIFIED, *supra* note 3, at 21, 26 [hereinafter MACKINNON, *Law Alone*].

246. MACKINNON, *Introduction*, *supra* note 3, at 5.

247. MACKINNON, *Desire and Power*, *supra* note 228, at 50.

248. *Id.*

249. MACKINNON, *Law Alone*, *supra* note 245, at 25.

250. *Id.*

251. MACKINNON, FEMINIST STATE, *supra* note 225, at 10.

252. MACKINNON, *Desire and Power*, *supra* note 228, at 56.

253. *Id.*

254. *Id.*

255. *Id.*

256. MACKINNON, FEMINIST STATE, *supra* note 225, at 83-105.

257. *Id.* at 85.

remaining on the level of bad feelings.”²⁵⁸ She learns that “apparently unchangeable dictates of the natural order are powerful social conventions.”²⁵⁹ Consciousness raising “unmask[s]” the “[r]ealities hidden under layers of valued myth,”²⁶⁰ and “through socializing women’s knowing, transforms it,”²⁶¹ thereby making the “chains become visible.”²⁶²

MacKinnon’s discussion of consciousness raising seems to indicate that only those women who have thrown off the shackles of their own false consciousness, such as MacKinnon herself, possess the correct women’s standpoint.²⁶³ MacKinnon supports this intuition with her reply to Phyllis Schlafly, an antifeminist opponent of the Equal Rights Amendment,²⁶⁴ in a debate. MacKinnon states, “I’m saying [Schlafly’s] analysis of her own experience is wrong.”²⁶⁵ Thus, although all women experience oppression as women, just as in the marxist view all workers experience oppression as workers, only some understand the nature of the oppression they experience.²⁶⁶

For MacKinnon, one benefit of viewing the world from the women’s standpoint is that this standpoint unmasks the false universalism and objectivity of the dominant standpoint in Western culture—the male standpoint.²⁶⁷ This universal male standpoint reflects a notion of scientific objectivity that

as a stance toward the world erects two tests to which its method must conform: distance and aperspectivity. To perceive reality accurately, one must be distant from what one is looking at and view it from no place and at no time in particular, hence from all places and times at once. . . . [This] epistemology decisively controls not only the form of knowing but also its content by defining how to proceed, the process of knowing, and by confining what is worth knowing to that which can be known in this way.²⁶⁸

258. *Id.* at 86.

259. *Id.* at 91.

260. *Id.* at 89.

261. *Id.* at 101.

262. *Id.* at 104.

263. *Id.* at 83-105.

264. MACKINNON, *Law Alone*, *supra* note 245, at 22.

265. *Id.* at 30.

266. See MACKINNON, *FEMINIST STATE*, *supra* note 225, at 103-04.

267. MACKINNON, *FEMINIST STATE*, *supra* note 225, at 96-98; MACKINNON, *Desire and Power*, *supra* note 228, at 51-58.

268. MACKINNON, *FEMINIST STATE*, *supra* note 225, at 97.

The "nonsituated, distanced standpoint"²⁶⁹ is not only male in the sense that it reflects the male view, but it also facilitates male dominance by being a standpoint of objectification: "[T]o look at the world objectively is to objectify it. The act of control . . . is itself eroticized under male supremacy."²⁷⁰ That is, the male standpoint looks at the world the way it looks at women, as an object to be conquered.²⁷¹ In this system

the neutrality of objectivity and of maleness are coextensive linguistically [that is, the neutral is male and the male is neutral], whereas women occupy the marked, the gendered, the different, the forever-female position. . . . [M]en have been knowers, mind; women have been "to-be-known," matter, that which is to be controlled and subdued.²⁷²

Views of reality that conflict with scientific objectivity "are authoritatively defined as unreal or irrational."²⁷³ Looking at male objectivity from the women's standpoint

sheds a rather distinct light on the indeterminacy/determinacy question as men have agonized over it. Take the problem of "is there a reality and how do I know I'm right about it?" The "is there a there there?" business. . . . Women know the world is out there because it hits us in the face. Literally. We are raped, battered, pornographed, defined by force, by a world that begins, at least, entirely outside us. No matter what we think about it, how we try to think it out of existence or into a different shape for us to inhabit, the world remains real. . . . We can tell that it is there, because no matter what we do, we can't get out of it. Male power is for us—therefore *is*—this kind of fact.²⁷⁴

From a women's standpoint,

Cartesian²⁷⁵ doubt . . . comes from the luxury of a position of power that entails the possibility of making the world as one

269. MACKINNON, *Desire and Power*, *supra* note 228, at 50.

270. *Id.*

271. *See id.*

272. *Id.* at 55.

273. MACKINNON, *FEMINIST STATE*, *supra* note 225, at 99.

274. MACKINNON, *Desire and Power*, *supra* note 228, at 57; *see* MACKINNON, *FEMINIST STATE*, *supra* note 225, at 123.

275. This is a reference to the philosopher René Descartes, who arrived at his famous formula "*cogito, ergo sum*" by doubting the existence of the physical objects around him. *ENCYCLOPEDIA*, *supra* note 14, at 74; *see supra* note 112 (discussing Descartes's philosophy).

thinks or wants it to be. Which is exactly the male standpoint. You can't tell the difference between what you think and the way the world is—or which came first—if your standpoint for thinking and being is one of social power.²⁷⁶

MacKinnon distinguishes from this typically male epistemology a feminist epistemology which

locates the position of consciousness, from which one knows, in the standpoint and time frame of that attempting to be known. . . . Knowledge is neither a copy nor a miscopy of reality, neither representative nor misrepresentative as the scientific model would have it, but a response to living in it. Truth is in a sense a collective experience of truth, in which "knowledge" is assimilated to consciousness, a consciousness that exists as a reality in the world, not merely in the head. This epistemology does not at all deny that a relation exists between thought and some reality other than thought Rather, it redefines the epistemological issue from being the scientific one, the relation between knowledge and objective reality, to a problem of the relation of consciousness to social being.²⁷⁷

This epistemology recognizes that "cognitive judgments need not be universally agreed upon to be true."²⁷⁸ MacKinnon recognizes that "[s]ituated thought is as likely to produce 'false consciousness' as access to truth."²⁷⁹ Thus, "[t]he account of error, of women's nonfeminist perception of their situation, is that the perception is probably as justified by aspects of the woman's experience as a feminist perception would be."²⁸⁰

MacKinnon does not explain exactly what is to be done about this "error," although the above passage seems to indicate that it is to be tolerated as "justified."²⁸¹ MacKinnon realizes that "[g]iven the imperatives of women's lives, the necessity to avoid punishment . . . it is not irrational for women to see themselves in a way that makes their necessary compliance tolerable, even satisfying."²⁸² But MacKinnon's

276. MACKINNON, *Desire and Power*, *supra* note 228, at 58.

277. MACKINNON, *FEMINIST STATE*, *supra* note 225, at 98-99.

278. *Id.* at 102.

279. *Id.* at 108.

280. *Id.* at 102.

281. *Id.*

282. *Id.* at 100.

reply to Phyllis Schaflly seems to indicate that such error is not her women's standpoint—even if it comes from a woman.²⁸³

How does MacKinnon know that she is right and Schaflly is wrong? If a "nonfeminist perception" is "probably as justified . . . as a feminist perception would be,"²⁸⁴ how can feminism even justify itself as superior to theories which reinforce male domination? It is impossible to tell which perspective is closer to reality unless one has criteria that are not drawn from any perspective—that is, criteria drawn from objective knowledge of objective reality. Without such criteria independent of perspective, there is no real reason to pick feminism over patriarchy.

There appears to be a fundamental inconsistency in MacKinnon's theory. On the one hand, she states that she is not trying to present an "objective" reality of women's oppression, but instead "the point of view of women."²⁸⁵ This is the language of postmodern knowledge theory.²⁸⁶ On the other hand, MacKinnon obviously feels that there is a material reality to women's oppression.²⁸⁷ For example, MacKinnon says that her feminist account of pornography as a form of violence towards women is "not just a matter of perspective, but a matter of reality."²⁸⁸ This reality of the abuse of women "hits us in the face. Literally."²⁸⁹ These assertions seem to echo traditional truth and knowledge theory. But MacKinnon's argues that the true reality of women's oppression is seen only through her women's standpoint.²⁹⁰ This seems to indicate that before one can clearly see this reality, one must take a certain perspective toward the world—MacKinnon's feminist perspective.

Perhaps, for MacKinnon, her feminist perspective is so close to the reality of women's oppression that it can be used to judge other perspectives. As such, this perspective is simply a new objective perspective. And yet MacKinnon confuses this issue by couching her analysis in the terms of postmodern knowledge theory.²⁹¹ MacKinnon derides the quest for objectivity as traditionally male,²⁹² but then at

283. See MACKINNON, *Law Alone*, *supra* note 245, at 30.

284. MACKINNON, *FEMINIST STATE*, *supra* note 225, at 102.

285. CATHARINE A. MACKINNON, *Sex and Violence: A Perspective*, in *FEMINISM UN-MODIFIED*, *supra* note 3, at 86 [hereinafter MACKINNON, *Sex and Violence*].

286. See *supra* part III.B-D.

287. MACKINNON, *Desire and Power*, *supra* note 228, at 58.

288. MACKINNON, *Sex and Violence*, *supra* note 285, at 91.

289. MACKINNON, *Desire and Power*, *supra* note 228, at 57.

290. MACKINNON, *Law Alone*, *supra* note 245, at 26.

291. See *id.* at 21-22; MACKINNON, *Desire and Power*, *supra* note 228, at 50.

292. See MACKINNON, *Desire and Power*, *supra* note 228, at 55.

the same time she argues that the perspective that she just happens to hold, the women's perspective, is congruent with reality.²⁹³ In other words, some perspectives are more equal than others.

Stanley Fish has made just this criticism of MacKinnon.²⁹⁴ He discusses MacKinnon's criticism of the Indian practice of *suttee*, where women throw themselves on the funeral pyres of their dead husbands.²⁹⁵ Fish states:

What is wrong with Indian women from the feminist point of view is not that they are willing . . . to die for the beliefs that have captured them, but that they have not been captured . . . by the right beliefs. Were they to be captured by the right (feminist) beliefs, they would still be willing to die for them, and in doing so they would be the recipients, not of MacKinnon's pitying scorn . . . but of . . . praise . . .²⁹⁶

Thus, for Fish, MacKinnon's discussion of *suttee* "make[s] clear (although apparently not to her) that the issue is not the removal of objectivity, but the determination of the point of view from which objectivity . . . will reveal itself."²⁹⁷

I would describe MacKinnon's theory this way: Transcendent truth exists, and part of that truth is the truth of the system of women's oppression, which exists materially in the same way as the oppression of workers exists for marxists. Persons view things through socially constructed perspectives, but persons can shift perspectives through the consciousness raising process, and some perspectives capture reality better than others. In addition, one perspective—the "women's" or "feminist" perspective—captures the material reality of women's oppression so well that it can be used to judge all other perspectives.

It appears, then, that MacKinnon is really a traditional truth and knowledge theorist masquerading as a postmodern by wearing the clothing of postmodern knowledge theory.

293. See MACKINNON, *Sex and Violence*, *supra* note 285, at 91.

294. STANLEY FISH, *Introduction: Going Down the Anti-Formalist Road* [hereinafter FISH, *Introduction*], in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 1, 16-25 (1989) [hereinafter FISH, *DOING WHAT COMES NATURALLY*].

295. *Id.* at 19-20.

296. *Id.* at 19.

297. *Id.* at 20.

C. Stanley Fish's Imprisoning Paradigm

In his collection of essays, *Doing What Comes Naturally*,²⁹⁸ Stanley Fish describes what he calls "anti-foundationalism":

Anti-foundationalism teaches that questions of fact, truth, correctness, validity, and clarity can neither be posed nor answered in reference to some extracontextual, ahistorical, nonsituational reality, or rule, or law, or value; rather, anti-foundationalism asserts, all of these matters are intelligible and debatable only within the precincts of the contexts or situations or paradigms or communities that give them their local and changeable shape.²⁹⁹

The reader's intuition that Fish's anti-foundationalism sounds a lot like the postmodern philosophy I have been discussing will be confirmed when I mention that Fish lists as anti-foundationalist theorists, among others: Richard Rorty, Thomas Kuhn, Clifford Geertz, and Jacques Derrida, as well as himself.³⁰⁰

Fish's work is concerned with what we will find at the end of a journey "down the [anti-foundationalist] road."³⁰¹ At the end of this road, Fish argues, transcendent knowledge, including any theory that stands outside of our social practices and judges them, is impossible.³⁰² All knowledge is embedded because we are "always and already"³⁰³ situated cognitively in our own forms of life.

Like Wittgenstein, Fish asserts that "certainty," or the attachment to our beliefs, is not a result of the correspondence of these beliefs to an outside reality, but instead is a result of our situated position.³⁰⁴ Fish writes that "[i]t is thus a condition of human life always to be operating as an extension of beliefs and assumptions that are historically contingent, and yet to be holding those beliefs and assumptions

298. FISH, *DOING WHAT COMES NATURALLY*, *supra* note 294.

299. STANLEY FISH, *Anti-Foundationalism, Theory Hope, and the Teaching of Composition*, in *DOING WHAT COMES NATURALLY*, *supra* note 294, at 344 [hereinafter, FISH, *Anti-Foundationalism*]. Fish also calls this philosophy "anti-formalist" in some of his essays. See, e.g., FISH, *Introduction*, *supra* note 294, at 1-33 (using term "anti-formalist" rather than "anti-foundationalist").

300. FISH, *Anti-Foundationalism*, *supra* note 299, at 345.

301. FISH, *Introduction*, *supra* note 294, at 25.

302. See *id.* at 14-15.

303. *Id.* at 26.

304. STANLEY FISH, *Anti-Professionalism*, in *DOING WHAT COMES NATURALLY*, *supra* note 294, at 246; see *supra* part III.C (discussing Wittgenstein's postmodern certainty).

with an absoluteness that is the necessary consequence of the absoluteness with which they hold . . . us."³⁰⁵

Fish criticizes other postmodern theorists for arguing that once we recognize the embeddedness of all knowledge, we can then escape our contingent cognitive structures.³⁰⁶ Fish cautions, that while [i]t might seem that in traveling [the anti-foundationalist] road one is progressively emancipated from all constraints . . . the removal of *independent* constraints to which the self might or might not conform does not leave the self free but reveals the self to be always and already constrained by the contexts of practice.³⁰⁷

Thus, "constraints are not something one can either embrace or throw off because they are constitutive of the self."³⁰⁸

Even accepting the fact that all knowledge is contingent and situated will not free us from our beliefs.³⁰⁹ Consequently, it does not matter whether anti-foundationalism is embraced or rejected:

[A]nti-foundationalist thought deprives us of nothing; all it offers is an alternative account of how the certainties that will still grip us when we are persuaded to it came to be in place. . . . [W]hen you get to the end of the anti-[foundationalist] road nothing will have changed except the answers you might give to some traditional questions in philosophy and literary theory.³¹⁰

For Fish, then, we are imprisoned in the various paradigms which constitute our very selves and are the foundation of our cognitive ability.³¹¹

Because constraints cannot be removed, Fish argues that the fear that anti-foundationalism will lead to relativism is illusory.³¹² Fish describes the fear of relativism as "[t]he fear . . . of a world without principle, a world where might makes right, and personal preferences run roughshod over the rules and laws intended to constrain them."³¹³ Fish responds to this fear by arguing that it is true that "in the absence of a perspective independent of interpretation some interpretive per-

305. FISH, *Anti-Professionalism*, *supra* note 304, at 246.

306. *Id.* at 225-42.

307. FISH, *Introduction*, *supra* note 294, at 26.

308. *Id.* at 27.

309. FISH, *Anti-Professionalism*, *supra* note 304, at 225-42.

310. FISH, *Introduction*, *supra* note 294, at 26.

311. FISH, *Anti-Professionalism*, *supra* note 304, at 242-46.

312. FISH, *Introduction*, *supra* note 294, at 10, 26-27.

313. *Id.* at 10.

spective will always rule by virtue of having won out over its competitors."³¹⁴ This does not mean, however, that the "personal preferences" of the self will then be allowed complete freedom.³¹⁵ Such freedom is impossible because, quite simply, there are no "personal" preferences if "personal" means unconstrained by a person's socially embedded condition.³¹⁶ Therefore, "the condition of being without constraints is quite literally unimaginable and therefore need not be feared."³¹⁷

The journey down the anti-foundationalist road also takes us to a place where theory itself has no consequences.³¹⁸ This is because "theory"—which Fish defines as "a set of principles or rules or procedures that is attached to . . . no particular field of activity, but is of sufficient generality to be thought of as a constraint on . . . all fields of activity"³¹⁹—must be a set of "constraints that are more than the content of a practice from which they are indistinguishable,"³²⁰ and such a set of constraints is not possible.

What, then, is theory for Fish? It is merely a certain type of discourse that is itself a practice, instead of standing apart from and judging all practices.³²¹ As such, theory can have practical consequences, but it cannot have theoretical consequences.³²² Theoretical consequences are impossible because it is impossible for human beings to think "theoretically," where this means thinking apart from their own situated practices.³²³

Fish discusses the impossibility of transcendent knowledge in his essay *Anti-Professionalism*.³²⁴ There, he argues that critique of professional institutions is impossible because such critique would require an ahistorical, nonsituated standpoint: "a self that can rise above its historical situation to a state where the false imperatives of merely institutional forms will be exchanged for the true imperatives that can now be espied by a newly cleaned vision."³²⁵

314. *Id.*

315. *Id.* at 10-11.

316. *Id.*

317. *Id.* at 27.

318. *Id.* at 14.

319. *Id.*

320. *Id.*

321. *Id.* at 14-15.

322. *Id.*

323. *See id.*

324. FISH, *Anti-Professionalism*, *supra* note 304, at 215.

325. *Id.* at 233.

Thus, anti-professionalism is "indefensible" because it incorrectly assumes the "possibility of free selves choosing extrainstitutional values by means of independent criteria."³²⁶ There are no values which are extrainstitutional because values are a product of human agreements and forms of life, and can never originate from outside such situated human constructs.³²⁷

Any critique of an institution would originate from within that institution, in which case it could not engender any radical change, or from within another institution, which would make the substitution of one set of institutional values for another merely a political exercise.³²⁸ While we can still try to change our professional paradigms, we cannot advocate our new changes on the grounds that they are not "professional" in the pejorative sense of "political" or "interested," because every new set of values is interested, situated, and political.³²⁹ If one is a professional, one cannot escape from the paradigm of professionalism, and this is why true anti-professionalism is impossible.³³⁰

Fish recognizes and addresses one common objection to his postmodern theory: that he is positing anti-foundationalism itself as a non-contingent, transcendent truth.³³¹ Fish phrases the objection this way:

[E]ither anti-foundationalism . . . is asserted seriously, in which case it is asserted as a foundation and undoes the very position it supposedly proclaims, or it is asserted unseriously, that is, not urged on us as a statement of what is really the case, and therefore it has no claim on our serious attention.³³²

Fish meets this objection by arguing that those who make it misconstrue the anti-foundationalist claim, "which is not that there are no foundations, but that whatever foundations there are (and there always are some) have been established by persuasion, that is, in the course of argument and counterargument on the basis of examples and evidence that are themselves cultural and contextual."³³³

Fish's argument is that anti-foundationalism is a "thesis about how foundations emerge, and in contradistinction to the assumptions

326. *Id.* at 242.

327. *Id.* at 242-43.

328. *Id.* at 243.

329. *Id.* at 242.

330. *See id.*

331. FISH, *Introduction*, *supra* note 294, at 29.

332. *Id.*

333. *Id.*

that foundations do not emerge but simply *are*, anchoring the universe.”³³⁴ Thus anti-foundationalism can assert itself like any other argument, and can even assert itself as absolutely true, as long as “there is no argument that holds the field against it.”³³⁵ Yet if this is true, and Fish’s anti-foundationalism is just what he says—one argument among many—then we are certainly free to disregard it if we do not like its content or its possible results.

Fish’s anti-foundationalism must meet another challenge, however—the challenge of change. If we are so embedded in these cultural paradigms, how does any culture ever change? From time to time, social paradigms and world views do appear to change radically. Human beings, through an exercise of their own will, seem to be able to reject social paradigms into which they have been acculturated all of their lives.

Fish addresses the issue of change by arguing that, among the beliefs of a person belonging to a certain “interpretive community” or form of life, there is a set of beliefs regarding when and how “one’s assumptions are subject to challenge and possible revision.”³³⁶ In this way, even one’s criteria for change come from within one’s social and cultural paradigms, so that when a “new” idea is incorporated into one’s belief system, it does not undermine, but instead reinforces, that system.³³⁷

Thus, it is impossible to be influenced by something that is wholly outside one’s already existing framework because “the mind is informed by assumptions that limit what it can even notice.”³³⁸ In other words, while it may seem that a new idea or belief comes from within a totally independent paradigm, this cannot be true because if this were so, it could not even be noticed from within one’s own set of beliefs.³³⁹ A “new” belief cannot be incorporated into one’s own set of beliefs unless there is “already in place, as a part of [one’s] community’s conception of itself, the assumption of a relationship between it and [the new idea or belief].”³⁴⁰

334. *Id.* at 29-30.

335. *Id.* at 30.

336. STANLEY FISH, *Change*, in FISH, *DOING WHAT COMES NATURALLY*, *supra* note 294, at 141, 146-47.

337. *See id.*

338. *Id.* at 146.

339. *Id.*

340. *Id.* at 147.

Once the "new" belief is adopted, it may require alteration of other beliefs or "the entire system or network they comprise"³⁴¹ in order to achieve equilibrium within one's preexisting belief system. This still does not mean, however, that the "new" belief was at one time something wholly outside one's socially embedded set of beliefs and assumptions.³⁴² Although the configuration and boundaries of one's belief system can change and expand, such change always comes from within that belief system, and can never be accomplished by ideas totally outside of its purview.³⁴³

In this way Fish attempts to explain the phenomenon of change in a world where knowledge is socially constructed and where truth is not an independent force for causing change.³⁴⁴ It seems that Fish's interpretation of the process of change from within denies the possibility of radical change. Instead, the socially constructed consciousness is changed gradually and partially by the adoption of ideas that are already within its frame of reference.³⁴⁵

Yet if the paradigms of patriarchy are as pervasive and all-encompassing as described by feminists like Catharine MacKinnon,³⁴⁶ how has feminism even been allowed a foothold in our socially constructed system of beliefs? For feminism to be adopted under Fish's model of change, feminism must have been able to fit within our already established system of beliefs to the extent that, when it came onto the scene, we were able to notice it.³⁴⁷ If this is the case, then feminism may not be as radical as some proponents think it is—it must instead be a reformulation, with a new spin, of already held beliefs within the system of patriarchy. If, on the other hand, feminism is something totally new—a paradigm entirely outside that of patriarchy—then the emergence of feminism would belie Fish's theory of change.

As noted earlier, Fish denies asserting anti-foundationalism as a transcendent truth.³⁴⁸ Fish understands that to do so would make his theory internally inconsistent.³⁴⁹ Asserting anti-foundationalism as transcendent truth would be inconsistent for one of two reasons: Either anti-foundationalism posits that there is no transcendent truth,

341. *Id.* at 146.

342. *Id.* at 147.

343. *Id.* at 146-47.

344. *Id.* at 143-45.

345. *Id.* at 146-47.

346. *See supra* part IV.B.

347. FISH, *Change*, *supra* note 336, at 146.

348. FISH, *Introduction*, *supra* note 294, at 29-30.

349. *Id.* at 29.

and thus Fish is saying that the transcendent truth is that there is no transcendent truth; or anti-foundationalism posits that all knowledge is embedded, and thus Fish's claim that he has seen transcendent truth is hypocritical. To avoid this mess, Fish simply posits anti-foundationalism as an embedded truth.³⁵⁰

From which inconsistency is Fish shying away in declining to claim transcendent truth status for anti-foundationalism? Is Fish implying simply that knowledge of transcendent truth is not possible because all knowledge is embedded? Or is he arguing that transcendent truth itself does not exist? This is a difficult question. Once Fish adopts embedded knowledge, he must also admit that even if transcendent truth does exist, human beings are not able to see it. Thus, the existence or nonexistence of transcendent truth becomes irrelevant.

Yet I still get the feeling that Fish really thinks that he has seen the truth of anti-foundationalism in some more substantial way than mere embedded truth, even given his disclaimer. But if this is so, he does not admit it. Instead, he avoids the inconsistency argument by asserting that his anti-foundationalism is just one of many embedded truths, to be debated and either rejected or accepted by persons in this particular time and place.³⁵¹

D. Drucilla Cornell's "Recollective Imagination"

*There was a time when you were not a slave, remember that. You walked alone, full of laughter, you bathed bare-bellied. You say you have lost all recollection of it, remember. . . . You say there are no words to describe this time, you say it does not exist. But remember. Make an effort to remember. Or, failing that, invent.*³⁵²

Drucilla Cornell also paints a postmodern picture, but her picture is radically different from that of Stanley Fish.³⁵³ Cornell concludes that the fact that "we are immersed in an already-given historical real-

350. *Id.* at 29-30.

351. *Id.*

352. MONIQUE WITTIG, *LES GUÉRILLÈRES* 89 (David LeVay trans., Beacon Press 1985).

353. DRUCILLA CORNELL, *TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE* (1993) [hereinafter CORNELL, *TRANSFORMATIONS*].

ity of understanding [does] not . . . turn that reality into a prison which bars us from innovation, [in fact] the exact opposite is the case."³⁵⁴

Critique of institutions is possible precisely because our forms of life are indeterminate, constantly changing and open-ended.³⁵⁵ This indeterminacy results from the repeatability, or what Derrida calls iterability, of language.³⁵⁶ Language is necessarily intersubjective and capable of being repeated by any speaker.³⁵⁷ This "allows for both understanding and communication and for misunderstanding and re-activation of the range of definition."³⁵⁸

In addition, language, as a system of signs, is indeterminate because

[a] sign is always in referential relation to some other sign or interpretant. Signs are never simply self-referential or mere representations of an object. In this sense, there can be no full determinacy of any institutionalized system of meaning, including the legal system, because the sign itself always points us to another sign beyond the repetition implicit in self-reference or direct reference to the designated object. As long as the sign is determined in a relation to another sign, there can be no closure of the process of interpretation in the discovery of the truth of the actual.³⁵⁹

For Cornell legal reasoning involves such a process of interpretation, since the meaning of the words in statutes and case law will always be indeterminate.³⁶⁰ This interpretation is "retrospective in the sense that we always begin the process of interpretation from within a pre-given context."³⁶¹ This fact, however, does not shackle legal interpretation because "ascertaining the meaning of a norm or proposition involves us in an imaginative enterprise."³⁶² Legal interpretation de-

354. DRUCILLA CORNELL, *Pragmatism, Recollective Imagination, and Transformative Legal Interpretation*, in TRANSFORMATIONS, *supra* note 353, at 27 [hereinafter CORNELL, *Recollective Imagination*].

355. DRUCILLA CORNELL, "Convention" and Critique, in CORNELL, TRANSFORMATIONS, *supra* note 353, at 13.

356. *Id.* at 15; see *supra* part III.D (discussing Derrida's theory of the iterability of language).

357. CORNELL, "Convention" and Critique, *supra* note 355, at 15.

358. *Id.*

359. CORNELL, *Recollective Imagination*, *supra* note 354, at 25. In this essay Cornell attributes this discussion of the indeterminacy of language to Charles Peirce. *Id.* But her focus on indeterminacy is also similar to that of Saussure and Derrida. See *supra* part III.B, III.D.

360. CORNELL, *Recollective Imagination*, *supra* note 354, at 27-30.

361. *Id.* at 27.

362. *Id.* at 28.

mands a "recollective imagin[ing]" of our pregiven context.³⁶³ In doing this we necessarily choose between competing visions of the past. However, "[b]ecause the 'past' is always offered to us within competing interpretive frameworks, we cannot prefer one framework over the other because one is not a framework at all but a pure account of what 'actually was.'"³⁶⁴ In other words, we cannot rely on the congruence of one interpretation of the past with the "Real"—with a capital "R"—past, since "the *meaning* of the past cannot be reduced to a pure description,"³⁶⁵ and "the past cannot be fully recollected."³⁶⁶ The past, therefore, "cannot be known other than through interpretation."³⁶⁷

The fact that "[t]he past is there, but not finished"³⁶⁸ allows a judge to use recollective imagination to bridge past and future in a judicial decision that, for the moment at least, "stabilize[s] legal meaning."³⁶⁹ Thus, "[a] legal verdict is a creative supplement to the texts upon which it relies, which once again brings the meaning of the text to life."³⁷⁰ In addition,

[t]he theoretical indeterminacy of legal doctrine as a system of signs leaves open opportunity for active intervention on the part of the individual lawyer. The reality of our established *sittlich*³⁷¹ commitments is not just there and then reflected in the language of legal argumentation. Instead, the reality of *Sittlichkeit* is constituted and reconstituted in the very process of legal argumentation and judicial decision.³⁷²

Thus, "[t]he rules of the game can be shifted. . . . By shifting the rules of the game, we can also expand the boundaries of our form of life."³⁷³ Through the process of recollective imagination we can "remember" our forms of life in a creative process that is at the same time a process of invention.³⁷⁴ When we remember, we necessarily

363. *See id.* at 23-24.

364. *Id.* at 29.

365. *Id.*

366. *Id.* at 29-30.

367. *Id.* at 30.

368. *Id.*

369. *Id.* at 29.

370. *Id.* at 30.

371. According to Cornell, the term *Sittlichkeit* was used by the philosopher Hegel to refer to a community's collective ethics. *Id.* at 25. Cornell seems to use *sittlich* as an adjective with a meaning close to "situated" or "embedded." *Id.* at 32.

372. *Id.* at 32.

373. *Id.* at 33. For discussion of Wittgenstein's term "form of life," see *supra* part III.C.

374. CORNELL, *Recollective Imagination*, *supra* note 354, at 28-30.

invent, and in that process of invention, we, as socially situated human subjects, can find freedom to change our forms of life.³⁷⁵

Cornell argues that feminism involves such a reinterpretation of the word "Woman," and the concept of the "feminine."³⁷⁶ Cornell argues that such a reimagining of the feminine must necessarily be "metaphoric,"³⁷⁷ because only a metaphoric understanding "does not reduce the feminine to a set of characterizations shared by all women" and "reset the trap of rigid gender identities, deny[ing] the real differences between [women]."³⁷⁸

Understanding the "significance of the feminine within sexual difference"³⁷⁹ in a metaphoric way allows for a "feminine voice and a feminine 'reality' that can be identified as such"³⁸⁰ without at the same time returning to an "essentialist or naturalist theor[y] of Woman."³⁸¹

Cornell advocates what she calls "ethical feminism,"³⁸² which "emphasizes the role of . . . imagination, not description, in creating solidarity between women."³⁸³ The metaphoric reimagining of Woman is possible for ethical feminists because "[d]econstruction [has] demonstrate[d] that there is no essence of Woman that can be eidetically abstracted from the linguistic representations of Woman."³⁸⁴ Without an "essence of Woman" acting as a constraint on interpretation, feminists are free to reinterpret Woman metaphorically. For Cornell this means that "[w]e are not fated to simply repeat the same old dance, we can *be* out of step. The feminine is not engraved in stone."³⁸⁵ The meaning of the feminine can never "be frozen because of the slippage of meaning inherent in the metaphoricity of language."³⁸⁶

Cornell advocates that feminists use this indeterminacy of language to their advantage, by gradually changing and shifting words

375. *Id.* at 25-33.

376. DRUCILLA CORNELL, *The Doubly-Prized World: Myth, Allegory, and the Feminine*, in TRANSFORMATIONS, *supra* note 353, at 57-111 [hereinafter CORNELL, *Doubly-Prized*].

377. *Id.* at 58.

378. *Id.*

379. *Id.* at 57.

380. *Id.* at 58.

381. *Id.* at 57.

382. *Id.* at 59.

383. *Id.*

384. *Id.* at 71. Eidetic means "of, or relating to . . . essences." WEBSTER's, *supra* note 153, at 727.

385. CORNELL, *Doubly-Prized*, *supra* note 376, at 88.

386. *Id.* at 92.

and concepts.³⁸⁷ For Cornell, language is malleable by the individual human will; feminists can use language indeterminacy to affect the consensus about our settled meanings and forms of life.³⁸⁸ Deconstruction techniques can destabilize meanings in ways that help women break free from old and outworn forms of life into ones that are more feminist.³⁸⁹

Cornell criticizes Catharine MacKinnon for not attempting a feminist reinterpretation of "Woman."³⁹⁰ Cornell argues that by defining women solely as "fuckees," MacKinnon reduces women to the definition patriarchy has given to them instead of liberating them from it.³⁹¹ Cornell argues that MacKinnon "cannot successfully develop her own feminist theory of the state because she is unable to affirm feminine sexual difference as other than victimization."³⁹²

Cornell calls for a "re-metaphorization"³⁹³ of feminine sexuality which emphasizes its myriad forms, instead of reducing it to "getting fucked."³⁹⁴ Such a reimagining is possible because "no reality can perfectly totalize itself because reality, including the reality of male domination, is constituted in and through language in which institutionalized meaning can never be fully protected from slippage and reinterpretation."³⁹⁵

It is crucial to understanding the difference between the theories of Cornell and Fish to also understand the difference between the ideas of Wittgenstein and Derrida.³⁹⁶ The postmodern arguments of Wittgenstein and Derrida are very different: Whereas Wittgenstein argues that meaning is always situated contextually,³⁹⁷ Derrida attacks the notion that meaning can ever be situated contextually because language is radically indeterminate.³⁹⁸ Fish, following Wittgenstein, argues that the social embeddedness of our knowledge creates a prison

387. *See id.* at 57-60, 94.

388. *See id.* at 94.

389. *Id.* at 86-97.

390. Drucilla Cornell, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State*, 100 YALE L.J. 2247, 2256-58, 2264-68 (1991) (book review).

391. *Id.* at 2250, 2265-67.

392. *Id.* at 2248.

393. *Id.* at 2275.

394. *Id.* at 2267.

395. *Id.* at 2264.

396. For a discussion of Wittgenstein and Derrida, see *supra* part III.C-D.

397. *See supra* part III.C.

398. *See supra* part III.D.

of language from which we can never escape.³⁹⁹ Cornell, following Derrida, argues that the iterability of language creates a radically indeterminate context where no meaning is ever fixed, and where new meaning can always be created to further the agenda of the speaker.⁴⁰⁰

Cornell highlights this difference between her theory and that of Fish in her critique of Fish's article on anti-professionalism.⁴⁰¹ Cornell argues that critique generally, and anti-professionalism in particular, "does not necessarily coincide with the belief in essences or a form of true meaning."⁴⁰² This is because the boundaries of our professional form of life are themselves indeterminate, and the agreements necessary for discourse within our form of life do not necessarily force agreement among the participants as to how to evaluate that professional form of life.⁴⁰³ Disagreement is comprehensible, then, because "we live in an open-ended language game."⁴⁰⁴ Thus, anti-professionalism is always possible, because the boundaries of what is "professional" are always changing.⁴⁰⁵

The work of Cornell and Fish contains similarities as well as differences. Both embrace the postmodern notion of embedded knowledge, and neither mentions perspective shifting, or a privileged objective perspective. Thus, they both embrace a form of knowledge that is more firmly embedded than that of either Minow⁴⁰⁶ or MacKinnon.⁴⁰⁷

Does Cornell retain transcendent truth? This is difficult to determine. If Cornell argues for transcendent truth status for her ethical feminism, she will not be able to support such a claim because of her embrace of embedded knowledge. If she merely asserts ethical feminism as embedded truth, then she loses any moral justification for asserting ethical feminism over any other theory. A similar conflict is also apparent in the work of Minow and MacKinnon.⁴⁰⁸ Minow deals with this conflict by modifying embedded knowledge to allow for per-

399. See *supra* part IV.C.

400. CORNELL, *Doubly-Prized*, *supra* note 376, at 64-74, 86-97.

401. CORNELL, "Convention" and Critique, *supra* note 355, at 12; see *supra* part IV.C.

402. CORNELL, "Convention" and Critique, *supra* note 355, at 13.

403. *Id.*

404. *Id.*

405. See *id.*

406. See *supra* part IV.A.

407. See *supra* part IV.B.

408. See *supra* part IV.A-B.

spective shifting.⁴⁰⁹ MacKinnon creates a hierarchy of perspectives.⁴¹⁰ Because Cornell does not modify her own embedded knowledge, she has no way to justify her choice of ethical feminism. She cannot appeal to transcendent truth, because her totally embedded knowledge denies her any opportunity to see transcendent truth even if it does exist. Thus for Cornell, as for Fish,⁴¹¹ the existence or nonexistence of transcendent truth becomes irrelevant.

E. Summary of the Approaches of These Theorists to Postmodern Truth and Knowledge Theory

Now comes the time to begin to explore where these four theorists fit in my outline, preliminarily sketched above.⁴¹²

1. Traditional Theory (MacKinnon)
 - a. Transcendent truth = oppression of women.
 - b. Transcendent knowledge = "women's perspective" (MacKinnon's). Other perspectives are inferior as they are not as congruent with transcendent truth.
2. Partial Postmodernism (Minow)
 - a. Transcendent truth = general concepts like Justice.
 - b. Embedded knowledge = perspectives and contexts. Perspective shifting is possible, but this may require some transcendent thought.
3. Partial or Total Postmodernism (Fish/Cornell)
 - a. Status of transcendent truth is unknown, as embedded knowledge does not allow human beings knowledge as to its existence.
 - b. Embedded knowledge.
 1. Changing ones own paradigms is impossible (Fish).
 2. Changing one's own paradigms is possible because of iterability of language (Cornell).

V. THE DIFFICULTY OF POSTMODERN FEMINIST LEGAL THEORY

In the exploration of the work of these four theorists, this Comment has illuminated a variety of tensions and inconsistencies.⁴¹³ These tensions stem from a fundamental problem within postmodern

409. *See supra* part IV.A.

410. *See supra* part IV.B.

411. *See supra* part IV.C.

412. *See supra* part III.E.

413. *See supra* part IV.A-D.

theory—if a postmodern theorist makes a transcendent truth claim for her theory while at the same time adopting embedded knowledge, her theory is internally inconsistent; if she denies transcendent truth status for her theory, she loses any moral justification for advocating one theory over another.

In the work of the three feminist legal theorists—Minow, MacKinnon, and Cornell—this tension is very evident: On the one hand, these theorists are tempted to make some sort of a transcendent truth claim for feminism; yet, on the other hand, their adoption of postmodern knowledge theory, and possibly also postmodern truth theory, makes this impossible.⁴¹⁴ To the extent that they adopt postmodern truth theory, they undermine any moral justification for their feminist goals; to the extent that they adopt postmodern knowledge theory, they undermine any privileged status for their knowledge-claims about the reality of woman's oppression.

This is why Catharine MacKinnon, while adopting postmodern knowledge theory language by using "women's standpoint," still makes the claim that "women's standpoint" is in some way a privileged standpoint—one that is more valuable than other standpoints because it illuminates the reality of women's oppression.⁴¹⁵

This is why, although Martha Minow talks about perspectives and argues that there is no vision without perspective, she then modifies her postmodern knowledge theory claim with the caveat that perspective shifting is possible.⁴¹⁶ She may intuitively understand that in a world where persons can never, even for a moment, look through the eyes of another, the basis for social justice is undermined because compassion and righteous anger are lost.

This is why Drucilla Cornell argues so forcefully that adoption of postmodern knowledge theory is an opportunity for freedom instead of bondage within perspective.⁴¹⁷ Perhaps she understands that such a position endangers the very notion of radical change—change that feminism has historically demanded.

In addition, hovering over the work of Cornell and the other postmodern legal theorists is the specter of relativism. MacKinnon and Minow avoid this specter by not adopting postmodern truth theory, and by qualifying their postmodern knowledge theory with privi-

414. See *supra* part IV.A-B, D.

415. See *supra* part IV.B.

416. See *supra* part IV.A.

417. See *supra* part IV.D.

leged standpoints and perspective shifting.⁴¹⁸ For Cornell and Fish, the challenge of relativism is more threatening. Fish avoids it by arguing that we are so embedded in our social paradigms that the simple knowledge that this is so will not alter our behavior—will not free us to live in a relativistic world.⁴¹⁹

For Cornell, embeddedness means freedom rather than constraint;⁴²⁰ thus, relativism is a more difficult issue. She argues that our freedom in shaping the reality of our world entails a responsibility for the realities that we shape.⁴²¹ But where does this responsibility come from? To whom are we responsible? Without some theory of truth that is not contingent on perspective, it is hard to argue that we have responsibilities to create or sustain a more just world. When the truth is removed as a yardstick for the measurement of claims of justice, justice becomes a very difficult notion to defend.

This, then, is the difficulty of postmodern feminist legal theory.

VI. CONCLUSION

Feminism is totally incompatible with postmodern theory. This is so because feminism is an “ism” not simply about what *is*, but also about what *ought* to be, and about what must be done in order to create a more just world. As such, feminism must describe and condemn with moral force the injustices faced by women, and advocate the changes necessary to end these injustices. Feminist legal scholars must condemn as absolutely unjust the legal systems that buy, sell, and use women’s minds and bodies, and that perpetuate the power of all men over all women.⁴²²

In the postmodern world, no society is more just than any other; no proposition more true than any other. Instead, justice and truth are merely socially constructed figments of the imagination—concepts we rely on in order to make sense of it all. We may need to believe our concepts are true, and indeed we may feel certain that they are,⁴²³ but they are mere ghosts constructed by our embeddedness in our skin, our gender, our language, and our society.

Feminism, if it is to have any meaning at all, must be a theory about the truth of women’s oppression. Feminists disagree about

418. See *supra* part IV.A-B.

419. FISH, *Introduction*, *supra* note 294, at 10, 26-27.

420. See *supra* part IV.D.

421. CORNELL, “Convention” and Critique, *supra* note 355, at 22.

422. For a description of such a system, see MacKinnon’s description *supra* part IV.B.

423. See *supra* part II.C (discussing Wittgenstein’s postmodern “certainty”).

many things. But if feminism is to mean anything, feminists must at least agree that it is objectively true that women have been and are being oppressed by the various societies, cultures, and political systems in which they live. Feminists must also agree that this state of affairs is unjust. Such agreement is what would make them feminists—instead of just idle academics surveying what “is” from the Ivory Tower and trying to quantify it.⁴²⁴ Feminist legal scholars must retain the commitment to truth and justice, and the position that logic—albeit stripped of its masculinist assumptions—and reason are the pathways to Truth’s door.

When one is not concerned with changing anything, or with making any impact on this world in which we live, it is easy for one to say that there is no objective truth, that no state of affairs is more just than another, that everything is just a “form of life,”⁴²⁵ or a “language game.”⁴²⁶ Postmodern theory, if adopted, can justify a passive, non-involved stance toward the injustices in our society.⁴²⁷ Further, feminist adoption of such postmodern theory removes our very right to judge, to say to a person or society: What you are doing is unjust—you are betraying something within you, some moral truth that human dignity commands.

Postmodern philosopher Richard Rorty himself has recognized the “morally humiliating”⁴²⁸ implications of such a position:

Suppose that Socrates was wrong, that we have *not* once seen the Truth, and so will not, intuitively, recognize it when we see it again. This means that when the secret police come, when the torturers violate the innocent, there is nothing to be said to them of the form “There is something within you which you are betraying. Though you embody the practices of a totalitarian society which will endure forever, there is something beyond those practices which condemns you.”⁴²⁹

In the postmodern world view, there is nothing “beyond [our particular] practices”⁴³⁰ because objective truth does not exist separate

424. “[M]ale academics have been able to afford to talk in ways that mean nothing . . .”
MACKINNON, *Introduction*, *supra* note 3, at 4-5.

425. *See supra* part III.C.

426. *See supra* part III.C.

427. *See* Martha C. Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 YALE J.L. & HUMAN. 197, 203-04 (1994) [hereinafter Nussbaum, *Valuing Values*].

428. RORTY, *Introduction*, *supra* note 103, at xlii.

429. *Id.*

430. *Id.*

from them, or if there is some truth beyond our practices, we cannot see it because we cannot transcend those very practices.

There is a reality to the oppression of women that is independent of what any, or all, women and men think.⁴³¹ If some or all women believe that women are not oppressed, they have false consciousness,⁴³² not just a different—and equal—perspective.

Looking at the perspectives of different women is a good thing—it makes feminist theory more complete and diverse—it helps us to have better theory, and better explain women's reality. Saying that there is no truth apart from perspective, on the other hand, will only lead us to a place where we are no longer able to judge the relative worth of any particular perspective. If we do this, feminism is dead. It is dead because at the end of this road it loses the power to judge right from wrong, and thereby judge patriarchy as wrong and unjust. We must be able to say that some perspectives are more valid, more true, than others.

Martha Nussbaum has written about a conference on philosophy that she attended where the four invited speakers, who were feminist theorists from "third world" countries, proudly advocated the abstract ethical language of rights, justice, equality, and personhood in their papers.⁴³³ For them, "abstract values meant the possibility of liberation, whereas contextuality . . . meant continued oppression by the status quo. . . . [None] conceded that they lived in a postmodern world . . . nor . . . did they think it a conclusion with which they could live."⁴³⁴

This world is not just language games to women who are being raped in Bosnia,⁴³⁵ or genitally mutilated in Africa, or who are being denied the opportunity to fulfill their dreams in any country because of sexist assumptions regarding their biological destiny. Such women

431. Catharine MacKinnon writes:

We are raped, battered, pornographed, defined by force, by a world that begins, at least, entirely outside us. No matter what we think about it, how we try to think it out of existence or into a different shape for us to inhabit, the world remains real It exists independent of our will.

MACKINNON, *Desire and Power*, *supra* note 228, at 57.

432. For a discussion of MacKinnon's feminist false consciousness, see *supra* part IV.B.

433. Nussbaum, *Valuing Values*, *supra* note 427, at 198-99.

434. *Id.* at 199.

435. On the current campaign of rape and genocide directed at women in Bosnia, see Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 12 (1994) [hereinafter MacKinnon, *Genocide*] ("[T]he men are told to take the women away and not bring them back, first they rape them, then they kill them, and then sometimes rape them again and cut off their breasts and tear out their wombs.").

do not care to play language games. They want to survive. They want justice, condemnation, retribution, and, finally, a world free from such things.⁴³⁶ They know that what happens to them is unjust, not just unjust in the minds of some social, political, or linguistic groups, but unjust absolutely and forever.⁴³⁷

Feminist legal scholars must take a long, hard look at the current trend toward postmodern theory in feminist scholarship.⁴³⁸ What are the implications of such theory for feminists? How does such theory benefit women? When feminist legal theorists buy into the postmodern world view, they are removing the very basis that they have for real critical theory. They thus join the ranks of "the best" who "lack all conviction."⁴³⁹ It goes without saying that in this world "the worst" will continue right along with "passionate intensity."⁴⁴⁰

Feminists must insist upon a deeper perspective. The perspective where perspective is actually left behind.⁴⁴¹ The vision of a justice that transcends all perspectives, and of a truth that is more than our collective delusions. This is what feminism is about. Feminist legal theory travels down the postmodern road at its peril.

VII. EPILOGUE

To her who asks the nature of her crime they answer that it was identical with that of the woman of whom it is written that she saw that the tree of the garden was good to eat, tempting to

436. See Nussbaum, *Valuing Values*, *supra* note 427, at 198-99, 208, 219.

437. "Women have created the idea of women's human rights by refusing to abandon ourselves and each other . . . certainly not by transcending the reality of our violations, but by refusing to deny their reality as violations." MacKinnon, *Genocide*, *supra* note 435, at 6.

438. Postmodern theorists could attack the argument made in this Comment—that the feminist adoption of postmodern theory will result in negative consequences—by arguing that such a consequentialist argument should not be taken seriously. However, in the postmodern world, consequentialist arguments are the only arguments available. See RORTY, *Introduction*, *supra* note 103, at xvii, xlii; cf. FISH, *Anti-Professionalism*, *supra* note 304, at 214-46 (arguing that critique based on independent, transcendent truth criteria is impossible). Since these theorists remove transcendent truth as a criterion, they cannot argue that postmodernism should be adopted because it is objectively true. Feminists should only be forced to adopt postmodernism if, despite its negative consequences, postmodernism is the transcendent truth.

439. Yeats, *supra* note 1, at 1115.

440. *Id.*

441. John Rawls has named such a perspective the "perspective of eternity," and he eloquently writes: "Purity of heart, if one could attain it, would be to see clearly and to act with grace and self-command from this point of view." JOHN RAWLS, *A THEORY OF JUSTICE* 587 (1971).

*see, and that it was the tree requisite for gaining understanding.*⁴⁴²

According to an old Hebrew myth, it was a woman who first acquired the knowledge to be able to choose between good and evil, right and wrong, truth and falsity.⁴⁴³ If the myth is to be believed, then, such choices are our birthright. We cannot shirk this duty because the choices are too difficult—or because we might be wrong.

*Jennifer Lynn Orff**

442. WITTIG, *supra* note 352, at 82.

443. *Genesis* 3:1-7.

* I would like to thank my parents, George and Sharon Orff, my sister, Stephanie Orff, and my cat, Gericho, for their love and support. I would also like to thank Dean Lawrence Solum for his help in the research and writing of this Comment.