The Philosopher's Stone

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This paper examines the extent to which two philosophical approaches, legal liberalism as exemplified in the theories of Ronald Dworkin, and deconstruction, deal with the tension between formalism and substantive justice. Formalism continues to flourish despite decades of attack from within and without the legal profession. In part this is because a consistent and reasonably predictable legal system is seen as a necessity. This paper explores the difficulties both of retreating into formalism, and of discarding it, and argues that in deconstruction we can find a way to live with the paradox of formalism.

Introduction

The attack on so-called "judicial activism" in the wake of *Mabo*[1] and *Wik*[2] illustrates the magnitude of our investment in a legal system that can be perceived as truly judicious rather than merely political. This paper explores the difficulties both of retreating into formalism, and of discarding it, and argues that in deconstruction we find both the philosophical and the practical tools that allow us to live with formalism as a legal paradox.

Of alchemy, law and deconstruction

The mediaeval quest to change base metals into gold did not survive the Enlightenment, and none of us fail to recognise Rumplestilskin's spinning of straw into gold as pure fairy tale. But the alchemy of legal formalism, which seeks to transmute process into substance, continues to flourish. It is critiqued, even ridiculed, from inside and outside the legal profession and the legal academy, but remains remarkably immune to criticism. In part this is because a consistent and reasonably predictable legal system is seen as a necessity. However, it is possible to answer the positivist challenge that abandoning formalism leaves the law open to bias, uncertainty and injustice. Deconstruction, in particular, offers us an

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1 *Mabo and Others v The State of Queensland [No. 2]* (1992) 175 CLR 1.

2 *The Wik Peoples v The State of Queensland and Others; The Thayorre People v The State of Queensland and Others* (the *Wik* case) (1997) 71 ALJR 173.

alternative strategy for addressing questions of justice and legality in a way that avoids the rigidity and hypocrisy necessarily embedded in a formalist approach. Unfortunately deconstruction is often perceived as an essentially negative strategy, imbued with nihilism and devoid of constructive suggestions for any workable alternative. Such dismissals are unjustified.

Formalism's promise

An important part of formalism's success story is widespread faith in the power of formal equality before the law to promote actual equality as well.[3] A strict formalist approach saves us not just from whimsy or caprice, but from the intrusion of *any* extra-legal consideration. Thus the legal subject is "beyond reach of external pressure of a disreputable kind",[4] but also, and all too often, beyond the reach of substantive justice - a justice sensitive to individual context and subjective experience. But does a decrease in the degree of formalism carry with it a corresponding increase in the degree of substantive justice? Eroding the adherence to rules erodes not just certainty and universality, values increasingly up for grabs in our postmodern age, it also erodes the autonomy of the law. Justice can never be collapsed into formalism,[5] but the danger of collapsing law into politics, or whatever else we call the demands of the moment, are just as great. Perhaps less formalism will mean less oppression and injustice, or perhaps we will lose much more than we gain. As conservatives are fond of reminding us, it has been tried before:

> "There is no independence of law against National Socialism. Say to yourselves at every decision which you make: "How would the Führer decide in my place?" In every decision ask yourselves: "Is this decision compatible with the National Socialist conscience of the German people?"[6]

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3 Tay, Alice E-S, "Jurisprudence - The Role of the Law in the Twentieth Century: From Law to Laws to Social Science", (1991) 13 *Sydney Law Review* 247, p 251.

4 id, p 262.

5 Cornell, Drucilla, *The Philosophy of the Limit*, Routledge, New York, 1992, p 2.

6 Hans Frank (1900–1946), German Nazi politician. Speech to jurists in 1936. Quoted in: William L. Shirer, *The Rise and Fall of the Third Reich*, ch. 8, "Justice in the Third Reich" (1959). Frank was at the time commissioner of justice and president of the German Law Academy; later

This is, admittedly, a low blow. A repeat of the horrors of Nazi Germany is not an inevitable consequence of renouncing formalism. However, formalism is one of the bulwarks of legal autonomy. Although the boundary between law and politics is more rhetorical than real, formalism bolsters autonomy, and therefore helps to elevate the law above mere instrumentalism. Take it away and law may become more just, flexible and responsive. It may alternatively, as seems very likely, render the law even more a captive to populist tyranny or the vicious imperatives of the market. These are the fears that those who attack formalism as part of a progressive or transformative agenda must allay. The project is not a hopeless one, but it is not made easier by ignoring the enemy's strength, or by failing to counter enemy propaganda with credible alternatives. The extent to which two philosophical approaches deal with the tension between formalism and substantive justice is examined below. These are evaluated, not just in terms of how well difference is accommodated, but by the extent to which there is potential to avoid uncritical legal change in the service of the shifting and contingent needs of "society" and "the market".[7]

The decent liberal and the government of laws

Formalist approaches are alive and well, although not in a strictly positivist sense. The most credible contemporary versions justify formalism, not by reference to itself as in pure positivist accounts, but in terms of the ultimate justice it is said to promote. Liberal formalism allows that judges both make and apply law, but holds that in making law judges are constrained, if not by strict adherence to precedent, than to principles of justice that are informed by community values and an accumulated judicial wisdom. The position has been characterised as "idealism" or "post-formalism",[8] but I will use the designation of "liberal formalism". It is still formalism because of the emphasis on legal distinctness if not autonomy, and the persistent faith in the "rightness" of legal forms. But it is formalism imbibed with an essential decency - the high-

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he became governor-general of Poland, where he established concentration camps and conducted a policy of persecution and extermination. Extracted from *The Columbia Dictionary of Quotations*, Columbia University Press, 1993.

7 See Fraser, Andrew, *LAW 112 History and Philosophy of Law 1993 Study Guide*, School of Law, Macquarie University, 1993, pp 3 - 4.

8 Leane, Geoffrey, "Testing some theories about law: can we find substantive justice within law's rules?", 19 (4) *Melbourne University Law Review*, 924.

water mark of the liberal project, with its emphasis on emancipation and mutual respect and tolerance.[9]

(Note that against characterising the position as formalist is its insight that legitimacy, whilst requiring formality and procedure, does not stem from the formal or procedural nature of law. Legitimacy is claimed because law unifies and articulates the "true" principles of the "true" community.[10] However legal forms, because of their supposed contribution to "objectivity" and "fairness" are still privileged, even reverenced.)

Ronald Dworkin: Herculean interpretation and the one right answer

One of today's most influential liberal theorists is Ronald Dworkin.[11] Dworkin's approach is grounded in a liberal preference for individual rights over collective goals, continuing faith that in any case there is "one right answer", and what can be read as a formalist but not positivist, understanding of the law. Law is a collection of moral and political principles, as opposed to bare technical rules.[12] It is law that treads a middle ground between extremes of positivism or pragmatism - "that provides for the future while keeping faith with the past".[13]

Dworkin acknowledges that tensions arise between legal form (Dworkin's "coherence") and substantive justice. Such tension is not inevitable and it is not insurmountable. It is merely the tension of competing principles, to be dealt with by judges who decide on compromises between these competing demands on a case by case basis, and who can, in theory, always get it "right". For Dworkin the tension can be resolved by combining

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9 No doubt this can be construed as nauseating bourgeoisie "rightsy" liberal pap. However, it is arguably the dominant position held by legal practitioners, jurors, public administrators, etc. No matter how deconstructable the sheer dominance of the position gives credence. Also, Derrida, Cornell and many others engaged in radical projects which assault liberalism do so because they too draw their moral and political imperatives from these "traditional emancipatory ideals".

10 See, for example, Valerie Kerruish's description of Ronald Dworkin's jurisprudence, *Jurisprudence as Ideology*, Routledge, London, 1991, p 104.

11 Davies characterises Dworkin's approach as a "middle way between natural law theory and positivism". See Davies, M, *Asking the Law Question*, The Law Book Company Limited, Sydney, 1994, p 60.

12 Kerruish, already cited n 10, p 67.

13 id, p 68.

fairness, justice and due process in "the right relation".[14] This is done in an essentially objective, cognitive judicial act, understood by Dworkin as "interpretation".

This liberal formalist approach does not account satisfactorily for why the tension arises or how it is dealt with. Dworkin's emphasis on "community" understates the dimensions of the fissure between formalism and justice. His is a model of law for a society that has structure and hierarchy, but: "its roles and rules are equally in the interests of all". [15]

By supposing from the outset an egalitarian community where relationships are characterised by complex reciprocity, the extent to which substantive justice in any particular case may clash with community norms is played down. To overstate consensus is to understate difference. This buries the magnitude of the gap which may exist between the benchmarks of prior decisions and social norms, and the justice imperatives of a singular instance. By assuming this web of egalitarian and reciprocal relationships we assume away the very real possibility that requirements of justice may not be merely vying for priority over the rules, they might, in truth, be implacably opposed or antithetical to them.

Justice Accused

These tensions have been examined by Robert Cover in his analysis of fugitive slave cases in ante-bellum America.[16] Often these cases involved judges who, as individuals, were profoundly abolitionist, yet who almost invariably found against fugitive slaves and their supporters. Cover makes clear that the complicity of these judges in an oppressive, unjust regime cannot simply be dismissed as uncritical collaboration or cowardice. As Cover correctly points out, the dilemma for the (personally) abolitionist judge was not so much moral/formal as moral/moral:

> "the legal actor did not choose between liberty and slavery. He had to choose between liberty and ordered

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14 Dworkin, R, *Law's Empire*, p 405, quoted in Berns, Sandra, *Concise Jurisprudence*, The Federation Press, Sydney, 1993, p 44.

15 Dworkin, R, *Law's Empire*, pp 200 - 201, quoted in Berns, already cited n 14, p 47.

16 Cover, Robert, *Justice Accused*, Yale University Press, New Haven, 1975. I thank Professor Sandra Berns for directing me to *Justice Accused*, and for commenting on an earlier draft of this article.

> federalism; between liberty and consistent limits to the judicial function; between liberty and fidelity to public trust; ... between liberty and the viability of the social compact." [17]

Faced with such a choice it may be preferable to do violence to legal principles rather than to flesh and blood human beings. The manner in which the American ante-bellum judges, and Hercules[18], Dworkin's ideal judge, deal with the tension between form and substance is intensely problematic. As Sandra Berns and Robin West point out, the adjudication of Hercules is best understood as an act of power over real bodies - the ramifications of what Hercules decides extend far beyond the realm of cognition.[19]

> "Legal interpretation takes place in a field of pain and death ... A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life." [20]

Moreover, when Hercules does this he is *situated.* He brings along his own experiences as a person of particular race, gender, class and status.[21] It is simply not convincing to assert that such factors are subsumed by the judicial office to the point where all that informs the decision is the inexorable logic of the law. This is not just a *Herculean* task, relying on the exercise of sufficient strength or wisdom. Rather, it is an *inhuman* task. We cannot do it.

Except, of course, sometimes we do. There are (some) "good", even redemptive, judicial decisions at all levels of the courts. Sometimes legislatures change laws for the better, for example through wholesale reforms such as the introduction of Torrens title or the *Family Law Act.* Law cannot be dismissed as just an instrument of capitalist oppression, or a tool of the patriarchy,

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17 id, pp 197 - 198.

18 When Ronald Dworkin mined Greek mythology for an archetype to base is ideal judge on, he should, perhaps, have selected Ares because of the associations of war and death, or maybe Midas, to remind us that the judge still seeks to transmute process into substance.

19 Berns, already cited n 14, p 51, and West, Robin, "Adjudication is not interpretation: some reservations about the law-as-literature movement" (1983) 54 *Tennessee Law Review* 203.

20 Cover, Robert, "Violence and the Word", (1986) 95 *The Yale Law Journal* 1601.

21 Berns, already cited n 14, p 58.

or a hegemonic prop of white supremacy. And this is not merely because "the certainty and universality"[22] of law is sometimes stretched to accommodate difference and particularity.

The value of an "objective" text

In his chilling analysis of legal rhetoric in Vichy France, Richard Weisberg argues that it was autonomous French legal doctrine, which had abandoned formalism, rather than Nazi pressure, that facilitated the mass deportation and eventual extermination of France's Jews.[23]

Weisberg's argument is that Vichy France is a blood-curdling example of what happens when an interpretative community (in this case Vichy's lawyers and judges) abandon positivist restraints. Weisberg claims that an objective text provides the foundational ethics and beliefs necessary to evaluate and constrain judicial choices.[24] If Vichy lawmakers had taken recourse to traditional French constitutional values of liberty, fraternity and equality, instead of embracing "textual manipulation", they would have had a solid basis for rejecting racist laws.[25]

> "Vichy teaches that practice normatively unconstrained from the notion of "text" is only as good as the values of its most articulate practitioner ... The lesson of Vichy is that professional communities *cannot* accept theories denying the objective existence of texts." [26]

Legal formalism, confined by the French constitutional norms of egalitarianism, offered a refuge for France's Jews that the self-generated, situational standards of Vichy law could never provide.

There are enough instances of the law upholding personal interests against the state, safeguarding "hard won historical enclaves",[27] and insisting on state and corporate accountability and responsibility to tell us that liberalism's claims of legal

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22 Tay, already cited n 3, p 252.

23 Weisberg, Richard, *Poethics, and other strategies of law and literature*, Columbia University Press, New York, 1992, pp 144 - 158. Again, I thank Sandra Berns for directing me to Weisberg's work.

24 id, p 144.

25 id, p 174.

26 id, p 175.

27 Tay, already cited n 3, p 249.

autonomy, and a positive role for law's forms and procedures are more than a cynical fraud. The biggest threat to keeping such spaces open is the incredible smugness of liberal law, and one of the most effective foils to this smugness is deconstruction.

Deconstruction

> "Deconstruction involves demystifying a text ... to discover its ambivalence, blindness, logocentricity ... this effort penetrates to the very core of the text and examines what it represses and how it is caught in contradictions and inconsistencies ... examines what is left out, what is unnamed, what is excluded, and what is concealed ... it discloses tensions but does not resolve them." [28]

Deconstruction offers a relentless and devastating critique of legal claims to autonomy, rationality, universality, and neutrality. Jacques Derrida has dealt explicitly with the issues under discussion - for him the tension between form and substance in law is the tension between generality and specificity, and the tension between Law and Justice; it constitutes the most fundamental aporia of justice:

> "justice must be singular and yet justice as law always implies a general form".[29]

Drucilla Cornell says it is a paradox that cannot be overcome, it must simply "be lived".[30]

There are many illustrations of how this paradox operates in practice. For example, a potential plaintiff will need to have their story translated into legal language. This involves not just a substitution of the law's technical terms in place of everyday vernacular. What may have seemed like important aspects of the story may be eventually omitted, and other elements of the story elevated, or possibly completely imported, as the story is made to "fit" legal discourse:

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28 Rosenau, Pauline Marie, *Post-Modernism and the Social Sciences: Insights, Inroads, and Intrusions*, Princeton University Press, Princeton, 1992, p 120.

29 Cornell, Drucilla, *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law*, Routledge, New York, 1991, p 113.

30 ibid.

> "The law re-casts, re-phrases, and re-views the experiences of lay people in the process of giving a "legal" interpretation to an event. It thus enforces its own meanings." [31]

Lay people "dress up" for court, temporarily reinventing themselves through atypical clothing and speech and other "cosmetic" devices such as character witnesses. This attempt to "play by the rules" automatically and immediately excludes "deep" justice. Substantive justice is not possible once law "kicks in" - like everything else it must be mediated through legal forms. A violence is done to any legal actor. And this violence is not the only cost. As Dragan Milovanovic points out, although this conformity to legal norms may deliver the sought after verdict, it also gives:

> "further legitimacy to the rule of law ideology as well as to the dominant symbolic order". [32]

Yet somehow, despite the contradictions, paradoxes and betrayals involved, we must still "be just with justice". [33]

As stated above, deconstruction emphasises exposing tensions rather than resolving them. The process does not demand an eventual reconstruction, but rather altered understandings, and an appreciation of how our understandings have been constituted.[34] Deconstruction deals with the tension between formalism and substantive justice, not by attempting to reconcile what is irreconcilable, but by leading us, heart first, into a way of living with it. As Derrida would have it - "Deconstruction is justice". [35]

An important, but often overlooked, aspect of the way deconstruction deals with the tension between generalities of form and particularities of justice is that deconstruction does allow that some normative views are better silenced. It can be permissible, even desirable, to do violence to difference and the Other in pursuit of the "good" - what turns out to have been

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31 Davies, already cited n 11, p 270.

32 Milovanovic, D, "Postmodern Law and Subjectivity: Lacan and the Linguistic Turn", in Caudill, D, and Gold, S J, (eds), *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice*, Humanities Press, New Jersey, 1995, p 44.

33 Cornell, already cited n 29, p 112.

34 Davies, already cited n 11, pp 261 - 262.

35 id, pp 271 - 272. See also Cornell, already cited n 5, p 132.

"the traditional emancipatory ideals" all along.[36] Thus, whilst honoring the Other is elevated to a central norm by deconstructionists, it is not the ultimate good or an end in itself. And the Other is certainly not ascendant to the point where legal forms and procedures are better abandoned - the general form is *always* necessary:

> "justice as law always implies a general form. This general form can itself be understood as necessary for law if it is not to be blatantly unjust, merely the expression of the preference or interest of the judge". [37]

By adhering to legal forms law avoids capriciousness and instrumentalism. It will necessarily violate some particularities, but, as in the case of white supremacists in South Africa, not all Others deserve honoring. Of course the way out is not always so easy. The Other we would violate and silence may not be an unmitigated evil, as it is in Cornell's example of apartheid.[38] Cornell does suggest a way forward, but it is not one that allows us to avoid responsibility, complicity or hard choices. Justice is singular and particular - it can never be realised by law which is *necessarily* a web of general principles, forms and procedures. Not only are justice and law in tension; they constitute a paradox because that law should be general is a requirement of the very justice this generality forestalls. But justice is also deconstruction. A task performed with humility and humour is distinct from a task performed with smug complacency. Cornell suggests two things are required of us. Firstly, to seek, despite the difficulties, to "realise the emancipatory ideals", and secondly to "acknowledge the status of any interpretation we offer".[39] That is, to be aware of its violence - Cover's field of pain and death.

Outcomes and responsibility

This is not to suggest that we are entitled to ground the law in a supposedly positive text, yet allow our criticisms of the law to continue floating in the stratosphere of our "utopian ideals".[40]

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36 Cornell, already cited n 5, p 114.
37 Cornell, already cited n 29, p 113.
38 Cornell, already cited n 5, p 114.
39 ibid.
40 See Berns, already cited n 14, pp 67 - 70.

If law is contingent, then so too are our criticisms of it.[41] Thus, as Sandra Berns says:

> "The interpretation of law, like the criticism of law, must, ... centre upon the outcomes it permits and upon where the responsibility for these outcomes lies."[42]

It has been argued above that a formalist approach can both generate injustice, as in the fugitive slave cases, and constrain injustice, as would have been preferable in Vichy France.
What we see in both instances is a judiciary which is able to plead that responsibility for their decisions lies not in themselves but in the law.[43] Deconstruction, far from being only an endless word-game where critique eventually eats itself, assists us in keeping our focus on the actual lived experiences that flow as the outcome of judicial determinations, and on *everybody's* complicity in allowing them.

Conclusion

> "Let judges secretly despair of justice: their verdicts will be more acute. Let generals secretly despair of triumph; killing will be defamed. Let priests secretly despair of faith: their compassion will be true." [44]

The liberal insistence that we are pursuing the best available option, and that every day in every way we are getting better and better, obscures the imperfections of our law - the tensions, paradoxes, and out and out betrayals that deconstruction brings into sharp relief.

Appeals to community, common good and shared values obscure differences amongst legal subjects, and consequently also obscure the violence often done to law's subjects, yet these phantoms are still the bedrock of liberal legal theory. This is so even in more realistic and relational contemporary accounts in liberal jurisprudence that expand legal discourse to include not merely technical rules, but also policy and moral-politico principles. This "expanded text" is accompanied by an acknowledgment that interpretation is a central legal process, but this liberal interpretation is presented as cognitive and

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41 id, p 69.
42 ibid.
43 id, p 66.
44 Cohen, Leonard, "Lines From My Grandfather's Journal", 1961, *Columbia Dictionary of Quotations*, Columbia University Press, 1993.

objective. This is not an honest account of how tensions between form and substance are treated. "Adjudication is not interpretation" - it is an act of power by judges who are themselves *situated* in the social and legal order.

Cynicism and "trashing" are of no use to use to us because at this point we must also acknowledge that law is more than a smokescreen for sordid power plays. However, the insights of deconstruction are useful. Rather than attempting to reconcile the irreconcilable, deconstruction abandons liberalism's attempts at alchemy, and all its smug complacency, and opts instead for its own emancipatory vision, founded on humility, humour and honesty. We do not deny our violence and partiality, and we do not festoon our acts in a grotesque parody of what we know to be unattainable.

Justice, like meaning, is always deferred. It is only a promise, "[but] a promise is not nothing." [45]

[45] Jacques Derrida, quoted in Cornell, already cited n 5, p 59.