

CRITIQUE AND COMMENT

DETERMINACY, INDETERMINACY AND RHETORIC IN A PLURALIST WORLD

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[This paper begins by critically examining the theses of determinate legal meaning adopted by contemporary liberal legalists. The paper argues that these versions of the determinacy thesis must be rejected in view of the pluralism envisaged by what Craig Calhoun has described as the 'politics of identity'. The paper develops an alternative theory of legal discourse which accepts the indeterminacy of meaning in a pluralist world. In the absence of any one universal or hermeneutic standpoint from which the merits of competing interpretations may legitimately be assessed, it will be argued that the endorsement of one interpretation over all others must constitute an act of power generally exercised in response to the rhetorical force of such competing arguments. The paper therefore challenges those conservative versions of 'postmodernist' theory which maintain that the impossibility of achieving some transcendental perspective means that we must accept the (presumably monologic) status quo in which we are supposedly embedded. Further, the paper challenges those transformative legal theories which oversimplify law as a stable, homogeneous body of 'liberal' doctrine which must be reformed 'from the outside'.]

CONTENTS

I	Introduction.....	545
II	Objectivist Foundations of the Determinacy Thesis.....	547
	A Because It Is There	547
	B Formal Foundations of Determinate Meaning	549
	C A Conventionalist Theory of Meaning.....	550
III	Ontology and Determinacy — The Creation of 'Community'	552
	A An Overview of Gadamerian Hermeneutics	554
	B Gadamer Version I — Communal Prejudices and the Determinacy Thesis.....	557
	C Gadamer Version II — A Critical Hermeneutics?	559
	D Dworkin's Debt to Gadamer	559
IV	Determinacy, Cultural Heterogeneity and Psychoanalysis	562
	A Theorising Determinacy.....	564
V	How Might a Determinacy Thesis Accommodate Difference?.....	565
	A An Overview of Habermas' Discourse Theory	566
	B Communicative Action and Legal Adjudication	567
	C The Transparency of Background Assumptions to Rational Discourse	568
	1 Mutually Understood Terms	569
	2 The Scope and Significance of Background Knowledge.....	570
	D Habermas' 'Transcendental Theory Hope'	571
VI	Critical Theory and Pluralist Hermeneutics	572
	A The Problem with Critical Pluralism	573

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VII	A Pragmatic, Pluralist Theory of Interpretation.....	574
	A Accepting Pluralism.....	574
	B The Role of Power	576
	C The Combination of Power with Rhetoric	579
VIII	Conclusion	581

I INTRODUCTION

Although liberal legalism is by no means a homogeneous doctrine, a key aspect of any liberal legal theory is the proposition that the meaning of legal rules is generally determinate from their inception or, at the least, determinate immediately before their application in particular circumstances.¹ For the purposes of liberal legal theory, determinacy may mean that there is always one right interpretation of a rule; or at the least that law consists of a vast bulk of interpretive decisions made ‘automatically’, supplemented by a small residue of uncertain cases where courts must ‘make’ law. Without such determinacy, liberal legalists maintain that the separation of the judicial from the legislative power under the rule of law would collapse — judges would presumably apply rules in accordance with some preferred outcome, politically speaking, rather than merely applying the law in the vast majority of cases.² The determinacy thesis offers a superficially attractive account of how judges check and balance the executive power while themselves being constrained by ‘the law’. The linchpin of the liberal determinacy thesis is therefore that there is some standpoint from which the truth of propositions of law may be determined. Whilst not assuring a democratic society, the apparent exclusion of arbitrarily exercised power under the liberal rule of law is portrayed as an important step away from the perceived tyranny of the ‘Dark Ages’.

Perhaps the surest path to the determinacy thesis would be a formal theory of meaning, enabling us to relax into the comforting certainty of a ‘slot machine jurisprudence’.³ But at least since the later work of Wittgenstein,⁴ it has been

¹ For a generic theory of liberal legalism, see Andrew Altman, *Critical Legal Studies: A Liberal Critique* (1990) 26–7. For references to a theory of determinacy in the context of particular liberal legal theories, see H L A Hart, *The Concept of Law* (1994) where Hart argues that meaning is generally conventionally determined from the outset, penumbral cases aside; Lon Fuller, *The Morality of Law* (revised edition, 1969); and see generally Ronald Dworkin, *Law’s Empire* (1986) viii–ix, 76–86, where Dworkin argues that the proper interpretation of legal doctrine provides one right answer which can only be determined at the time of judgment. For a similar argument devoid of the ‘right answers’ thesis, see Neil MacCormick, ‘Reconstruction after Deconstruction: A Response to CLS’ (1990) 10 *Oxford Journal of Legal Studies* 539.

² Altman, above n 1, 27.

³ For a formalist theory of language, see Ferdinand de Saussure, *Course in General Linguistics* (Charles Bally and Albert Sechehaye trans, 1983); for a critique of which see Peter Goodrich, *Legal Discourse — Studies in Linguistics, Rhetoric and Legal Analysis* (1987) 17–31.

⁴ For the pragmatic theory of language propounded by Wittgenstein, see Ludwig Wittgenstein, *Philosophical Investigations* (G Anscombe trans, 3rd ed, 1968); Ludwig Wittgenstein, *Philosophical Remarks* (R Hargreaves and R White trans, 1975) 110.

widely accepted that communication is a pragmatic affair.⁵ It is therefore understandable that contemporary liberal theories of law develop theories of legal determinacy which accommodate this sea change towards pragmatic theories of language.⁶ But pragmatism is only granted a limited work permit within these contemporary liberal legal theories, for fear that a too wholehearted embrace of what are perceived as the more 'radical' elements of pragmatic language theory might lead to a theory of law in which adjudication is unconstrained and the determinacy thesis rejected.⁷ Thus, for example, H L A Hart was prepared to accept that meaning is made by social convention, but argued that, once made, meaning was fixed at the core with interpretive skirmishes being confined to the periphery. Similarly, Dworkin adopted one interpretation of Hans-Georg Gadamer's work which maintains that there is one communal morality which may change over time, but which nevertheless constrains an interpreter and leads the interpreter to the one right interpretation in a particular context. In contrast to these hermeneutic theories which generally seem to reject the possibility of interpreters transcending their lifeworlds, Habermas argues for a critical theory in which determinacy is possible in a hypothetical rational discourse towards which we all necessarily aspire by engaging in the 'universal pragmatics' of communicative action. Whilst Habermas is clearly not a liberal social theorist, the significance to liberal legal theory of his assimilation of pragmatic language theory and the determinacy thesis is apparent.

The common thread within these attempts to combine concessions to pragmatic language theory with the determinacy thesis is the denial of the disruptive effects of what Craig Calhoun has called the politics of identity.⁸ Only by denying the politics of identity is it possible to construct one community which can agree on one determinate outcome. But if both communities and individuals are fractured into a multitude of competing subcommunities and personal identities respectively, general agreement is impossible because it would never be possible to 'know the mind of the other' such that a meeting of the minds could be realised.

The first part of this paper therefore critically reviews the paths to the determinacy thesis proffered by contemporary liberal legal theories and also by the critical theory of Habermas, and argues that none of the accounts of linguistic determinacy is convincing. It will be argued that these accounts of the determi-

⁵ Although, of course, predominantly formal theories of language such as structuralism have, and retain, some prominence in literary theory. For general discussion of literary theory, see Terry Eagleton, *Literary Theory: An Introduction* (1983); John Passmore, *A Hundred Years of Philosophy* (1968); John Passmore, *Recent Philosophers* (1990); John Thompson, *Critical Hermeneutics* (1981). For an overview of the transition from formalism to pragmatism in the legal context, see Peter Goodrich, 'The Role of Linguistics in Legal Analysis' (1984) 47 *Modern Law Review* 523.

⁶ Thus, for example, Unger was seemingly compelled by this recasting of liberal theory to rework a definition of legal formalism which accommodated this admission of some versions of pragmatic language theory: see Roberto Unger, *The Critical Legal Studies Movement* (1986) 1.

⁷ See, eg, Mark Tushnet, 'Does Constitutional Theory Matter? A Comment' (1987) 65 *Texas Law Review* 777; Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Yale Law Journal* 997, 1002.

⁸ Craig Calhoun, 'Social Theory and the Politics of Identity' in Craig Calhoun (ed), *Social Theory and the Politics of Identity* (1994) 9; Craig Calhoun, *Critical Social Theory* (1995).

nacy thesis are unconvincing because it is not possible to contain the potentially disruptive pragmatic elements of the respective liberal legal theories within defined bounds.

Having rejected the various accounts of legal determinacy, the remainder of the article is devoted to offering an original account of legal indeterminacy in which the roles of both power and rhetoric are recognised in a world characterised by the politics of identity.

II OBJECTIVIST FOUNDATIONS OF THE DETERMINACY THESIS

A Because It Is There

The determinacy thesis is often portrayed as being consistent with the 'commonsense' view that determinacy is fundamental to our day-to-day communication. There is, as even a non-liberal such as Eagleton notes, 'a certain practical solidarity built into the structures of any shared language, however much that language may be traversed by the divisions of class, gender and race.'⁹

This 'commonsense' view is developed by Altman in his attempt to rebut what he perceives to be the 'radical indeterminacy' thesis of Peller:¹⁰

That there is something seriously awry in Peller's argument may be gleaned from the fact that like all forms of radical relativism, this one is self-refuting. The implications of the argument extend not merely to the domain of legal discourse but to all language. If all words are indeterminate in meaning, then so are the words of Peller's argument, and if that is so, then the argument means nothing and establishes nothing.¹¹

There are two parts to Altman's argument. Firstly, he asserts that general communication depends upon determinate meanings. Secondly, he suggests that if general communication consists of the exchange of determinate meanings, legal communication must also be determinate.

Leaving aside the second step of Altman's argument, it is by no means clear that ordinary communication is as determinate as Altman suggests. The question here is whether 'ordinary' communication is determinate in any sense of use to a liberal legalist. There is some substance in Altman's critique of indeterminacy theory if it is taken to hold that the question 'what does this rule/statement mean?' is merely an invitation to some unconstrained anarchic frenzy. But if

⁹ Terry Eagleton, *Ideology: An Introduction* (1991) 13.

¹⁰ Gary Peller, 'The Metaphysics of American Law' (1985) 73 *California Law Review* 1151, 1167-75.

¹¹ Altman, above n 1, 93. Altman's interpretation of Peller seems to ignore Peller's consideration of the ideological (in the sense of the reality-masking) aspects of legal theory. Peller would arguably more appropriately be interpreted as offering a critique of the determinacy thesis which suggests that there is one objective meaning of a text, rather than arguing that no meaning whatsoever exists. In his more recent work, even Jacques Derrida has maintained that deconstruction is not a licence for textual solipsism: see, eg, Jacques Derrida, 'Afterword: Towards an Ethic of Discussion' in Jacques Derrida, *Limited Inc* (1988) 128, where Derrida argues that the absence of simple meaning postulated by deconstruction means that discourse must be founded upon the making of 'precise distinctions'.

Peller's essay can mean all things to all people, why did he bother? Certainly there are some theorists that seem to embrace the type of nihilist indeterminacy which Altman attempts to rebut.¹² However, contrary to Altman's assertion, indeterminacy theorists do not necessarily have to deny the possibility of understanding arising from all communicative acts.¹³ In other words, it is quite consistent for an indeterminacy theorist to simultaneously acknowledge that at some level there is a degree of mutual understanding and also that communication does not generally consist of the exchange of 'right' or 'automatic' meanings contemplated by the liberal determinacy thesis. I will take the apparently simple example of an offer of a cup of tea to develop the argument that general communication is not sufficiently determinate to meet the demands of the liberal legalist.

If I offer a cup of tea to a visitor to my house, they generally don't jump up on the table in the belief that I have announced that there is a snake in the house. Furthermore, if my visitor were to jump up on the coffee table, the response of a considerable majority of the community would be that this was an instance of 'irregular' behaviour on the part of my visitor. But the fact that my visitor does not leap onto the table in fear of a snake, or act in some other 'irregular' manner, does not suggest that the meaning of my offer is determinate in any sense of practical use to a liberal legalist. The 'meaning' of this seemingly innocent, simple offer may vary, depending upon a plethora of contextual factors such as irony (it may be a standard joke, perhaps because I don't know how to make a cup of tea), reminiscence ('remember the last cup of tea we had before we climbed that mountain?'), sarcasm ('why am I always offering to get you something?') and so forth.¹⁴

Let's assume however that the context of the statement suggests that the most probable 'meaning' is the first: that I don't know how to make a cup of tea but I am nevertheless offering to make one.¹⁵ Even so, the 'meaning' of the statement is still not determinate because, upon closer reflection, my inability to play host to my visitor may 'say' all manner of things. For example, my offer may speak about the upbringing of white Australian males and the perpetuation of a male patriarchy (why weren't generations of males generally expected to learn 'domestic science' at school?), about my acquiescence in my inability to undertake the most basic of domestic chores, about the low regard that I hold for my visitor ('we both know that I can't make a cup of tea and, what's more, if you want a cup of tea you can get it yourself'), about the high regard for my visitor ('I don't know how to make a cup of tea but I am willing to learn for you'), about

¹² See, eg, Dalton, above n 7; Tushnet, above n 7.

¹³ Of course, as Derrida has noted, communication extends far beyond the transfer of an idea from one person to another. It is, for example, possible for a person to communicate with themselves as by personal diary. See further Jacques Derrida, 'Signature Event Context' (1977) 1 *Glyph* 172, 172-3.

¹⁴ *Ibid.* See also Derrida, *Limited Inc.*, above n 11.

¹⁵ John Austin had argued that contexts are determinable and critical to the attribution of meaning by discursive participants: John Austin, *How To Do Things with Words* (2nd ed, 1975), a view more recently applied in the legal context by Allan Hutchinson, 'A Postmodern's Hart: Taking Rules Sceptically' (1995) 58 *Modern Law Review* 788. For a rebuttal of this approach, see Derrida, 'Signature Event Context', above n 13.

the cultural significance of tea as a lubricant for social interaction, about what our culture says about how to entertain visitors, and so forth. There is, as Derrida argued, nothing outside of the text.¹⁶ All is subject to the difference born of the diacritical difference of Saussure's code and the deferral of the trace.¹⁷

Without detailing an indeterminacy theory at this stage, the preceding comments suggest how readily the pragmatic use of language may be relied upon in challenging Altman's assertion that the meaning of any speech act is capable of 'automatic' or 'right' identification. This *potential* for indeterminacy indicates that it is simply not good enough for Altman to assert that determinacy exists: he must be put to the defence of this assertion by offering a theory of meaning which underpins his determinacy thesis. For present purposes there are two broad categories of alternative theories of meaning which may underpin the determinacy thesis: formal theories and pragmatic theories.

B Formal Foundations of Determinate Meaning

Formal theories in the tradition of Frege to Dummett maintain that understanding is achieved when the truth conditions of a statement are understood. Such theories have been widely discredited¹⁸ on the basis that even if it is accepted that it is possible to trace the analytical path of completely defining the truth conditions of a statement, there can still be indeterminacy of meaning because a statement can bear all sorts of senses.¹⁹ As MacIntyre observes, the geographical placenames of 'Londonderry' and 'Coire Columcille' refer to the same place, but the sense of the two names is different given the historical and political sense of using either the English or the Irish name.²⁰ As there is no compelling reason to restrict meaning to the reference or denotation of a term by excluding the sense or connotation of the term, the formalist is therefore confronted with a multiplicity of meanings. Despite their best endeavours, formalists are therefore returned to the infinitude and indeterminacy of context.²¹

¹⁶ Jacques Derrida, *Of Grammatology* (Gayatri Spivak trans, 1976) 158. See also Jacques Derrida, *Dissemination* (Barbara Johnson trans, 1981) 328. For a discussion of the problems that this 'textual solipsism' poses for a discourse ethics, see Derrida, *Limited Inc*, above n 11. See also Richard Kearney, 'Derrida and the Ethics of Dialogue' (1993) 19 *Philosophy and Social Criticism* 1; Peter Dews, *Logics of Disintegration — Post-structuralist Thought and the Claims of Critical Theory* (1987); Richard Wolin, *Labyrinths* (1995).

¹⁷ The reference to 'trace' borrows from the Derridean concept: see Derrida, *Of Grammatology*, above n 16, 70. For the indeterminacy arising from the flow of difference, see Jacques Derrida, 'Signature Event Context', above n 13, 185. This theory of indeterminacy is therefore stronger than that suggested by Nietzsche's comment that 'only something which has no history can be defined': Friedrich Nietzsche, *On the Genealogy of Morality* (Carol Diethe trans, 1994) 57.

¹⁸ For a discussion of formal theories of meaning in the context of his attempt to assimilate them with some pragmatic elements, see Jürgen Habermas, 'A Reply' in Axel Honneth and Hans Joas (eds), *Communicative Action: Essays on Jürgen Habermas's Theory of Communicative Action* (1991) 234ff.

¹⁹ Gottlob Frege, 'On Sense and Reference' in Max Black and Peter Geach (eds), *Translations from the Philosophical Writings of Gottlob Frege* (1952) 56–78. For discussion of this, see Christopher Norris, *The Contest of Faculties: Philosophy and Theory After Deconstruction* (1985) 47.

²⁰ Alasdair MacIntyre, *Whose Justice? Which Rationality?* (1988) 378.

²¹ Derrida, *Of Grammatology*, above n 16, 89.

C A Conventionalist Theory of Meaning

But the growing recognition of the pragmatic aspects of language use, accelerated by the later work of Wittgenstein²² and the contribution of speech act theorists such as John Austin,²³ need not necessarily lead to the *potentially* nihilistic theory of deconstruction.²⁴ Indeed, the thrust of ordinary language philosophy was to find the source of meaning in the general agreement of a community upon the meaning of terms.²⁵

In the legal context, ordinary language theory was applied most notably by H L A Hart.²⁶ In an attempt to overcome the contingency of meaning presented by rule sceptics such as Karl Llewellyn,²⁷ Hart argued that the application of words to factual circumstances was generally determined by social convention.²⁸ According to Hart, by a unidirectional process of incremental growth which excluded regression,²⁹ a complex of core meanings had been generated. Incorporating the intentionalism of speech act theory, Hart accepted that such core meanings were the primary resource to which the legislator referred in framing legislation. Although at one point Hart suggested that legislative omniscience combined with this complex of conventionally determined meanings would mean that legislation might only apply to those circumstances specifically contemplated by the legislature,³⁰ he carried on to note that we are merely human and must therefore accept that there will always be a penumbra of doubt beyond the core of meaning.³¹ On this basis, Hart observed that for the purposes of the rule that 'no vehicle may be taken into the park', the paradigm cases of 'vehicle' will be conventionally determined and at present include 'the motor-car, the bus, the motor-cycle'.³²

²² 'For a large class of cases, though not for all in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language': Wittgenstein, *Philosophical Investigations*, above n 4, [43]. Note John Austin's criticism of the term 'use' as hopelessly ambiguous: Austin, above n 15, 100.

²³ Austin, above n 15.

²⁴ Note the debate as to just what deconstruction means. To Christopher Norris, deconstruction is a powerful tool in revealing often subtle rhetorical devices: see, eg, Christopher Norris, *Deconstruction: Theory and Practice* (revised ed, 1993). On the other hand, Richard Rorty perceives deconstruction as authorising the textual solipsism which Derrida has gone some way towards rebutting, at least in his more recent work: Richard Rorty, *Consequences of Pragmatism* (1982).

²⁵ Wittgenstein, *Philosophical Investigations*, above n 4, [242]. For discussion of this aspect of Wittgenstein's pragmatics, see Garth Hallett, *A Companion to Wittgenstein's 'Philosophical Investigations'* (1979).

²⁶ Although note that it was a modified ordinary language theory which incorporated the permanence of core meanings with the pragmatism of Wittgenstein's agreements upon language.

²⁷ Karl Llewellyn, *The Bramble Bush: Or Our Law and its Study* (1951). Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (1962).

²⁸ See, eg, Hart, above n 1, 126.

²⁹ See, eg, *ibid* 129, 135. Cf Wilfrid Waluchow, *Inclusive Legal Positivism* (1994) 65.

³⁰ Hart, above n 1, 127-8.

³¹ *Ibid* 128.

³² *Ibid* 128-9.

Hart's work can be interpreted in a number of ways,³³ but perhaps the most commonly accepted can be paraphrased as the view that there is a large core of legal determinacy supplemented by a penumbral zone of uncertainty where judges must legislate.³⁴ Under this theory of meaning, the function of the judge is merely to create a list of conventionally determined 'meanings' and determine whether the circumstances of the instant case fall within those meanings. When conventional meaning 'runs out', Hart suggested that judges either adopt a purposive³⁵ interpretation or reach an 'acceptable' decision.³⁶

Whilst many critics have attempted to rebut Hart's theory of core meanings by citing such exceptional cases as Fuller's query of whether a book might be a vehicle (of ideas) or Hutchinson's Ford carpark,³⁷ these attempted rebuttals have merely reinforced Hart's depiction of incremental growth from a determinate core. The problem is that these exceptional cases can always be rationalised on the basis that they are merely another example of a penumbral case. There is therefore little rhetorical benefit to be gained by challenging Hart's theory of core meanings by pointing to an unusual case. No matter how many reported decisions are analysed and the decision made that they support the indeterminacy thesis, Hart's supporters could always say, 'Ah, that is just another penumbral decision which is at the tip of the iceberg. What about the millions of easy decisions made everyday which are not reported, simply because there is no argument about the meaning of the terms?'

A much more rhetorically appealing criticism of Hart's conventionalism is that, notwithstanding his view to the contrary,³⁸ an existing conventional meaning cannot be directly applied to a new case. No two situations will be identical in every respect and so a decision must be made that the instant case falls within the conventionally determined scope of a particular rule, no matter how many cases have previously been considered to fall under the rule.³⁹ Given the singularity of any case, the application of language in any case must therefore always be a penumbral decision.⁴⁰

As already noted, according to Hart, penumbral cases are determined upon some notion of purpose or what is 'acceptable'. A theory of interpretation

³³ For a discussion of this, see Mark Burton, 'The Song Remains the Same — The Search for Interpretive Constraint and the Rhetoric of Legal Theory in Hart and Hutchinson' (1997) 20 *University of New South Wales Law Journal* (forthcoming).

³⁴ See, eg, Hutchinson, above n 15, 792. However, note the emphasis upon formalist aspects of Hart's work in Alan Hunt, *Explorations in Law and Society — Towards a Constitutive Theory of Law* (1993) 301; Peter Fitzpatrick, *The Mythology of Modern Law* (1992) 207.

³⁵ Hart, above n 1, 127, 129. Note that Hart is ambiguous as to whether it is the purpose of the legislature or the purpose of the interpretive community.

³⁶ *Ibid* 204–5.

³⁷ Hutchinson, above n 15, 811.

³⁸ For a discussion of this aspect, see Burton, above n 33.

³⁹ For a discussion of which, see Jeffrey Goldsworthy, 'The Self-Destruction of Legal Positivism' (1990) 10 *Oxford Journal of Legal Studies* 449, 467. See generally Dworkin, above n 1, 114–50.

⁴⁰ Hart, above n 1, 129, 135. Cf Waluchow, above n 29, 65. For further consideration of the polysemy of language and its impact upon Hart's core meanings, see Malcolm Wood, 'Rule, Rules and Law' in Philip Leath and Peter Ingram (eds), *The Jurisprudence of Orthodoxy: Queen's University Essays on H L A Hart* (1988) 27.

founded upon legislative purpose is particularly problematic.⁴¹ If it is accepted that authorial intention can be prelingual, it is not clear how an interpreter can access such an intention in any manner which produces the determinate result sought by liberals. On the other hand, if it is accepted that authorial intention cannot be prelingual, there must be a theory for interpreting the terms in which the intention is expressed if the intentionalist theory is to be of any assistance. An intentionalist theory *by itself* is therefore of no assistance in applying a rule to each unique case — it can only exist as part of a broader theory of language.

Hart's account of legal determinacy is therefore fundamentally flawed. His theory of core cases does not adequately explain how unique cases can be resolved automatically and nor does his intentionalism explain how meaning can be determinate in the context of penumbral cases. Further, while he rejected referential theories of truth and meaning, Hart nevertheless adhered to the view that an admittedly contingent meaning was objectively 'there' at any spatio-temporal point. Owing to growing acceptance of the perceived shortcomings of conventionalist and intentionalist theories of meaning, this objectification of meaning has increasingly been called into question. The tide of Western thought has therefore turned, in various ways, towards a hermeneutic standpoint which acknowledges the impossibility of both referential and realist theories of meaning.

It is therefore understandable that in more recent times, the liberal theorisation of legal determinacy has focused upon the second limb of Hart's theory of penumbral adjudication. This alternative limb of Hart's theory of adjudication suggests that judges resolve penumbral decisions in an 'acceptable' way, and owes much to Wittgenstein's view that meaning is founded upon consensus. Thus, according to Hart, penumbral cases will be determined by judges who select new meanings, to which the wider community gives their agreement.⁴² This represents a fundamental shift in the liberal conception of legal determinacy. Rather than the content of legal rules being fixed once and for all, this non-conventionalist pragmatism acknowledges that the content of legal rules may expand and/or contract over time.⁴³ This alternative form of pragmatic interpretive theory, only hinted at by Hart, is adopted by Dworkin, albeit in a considerably more refined form.⁴⁴ At this point it is therefore appropriate to turn to a critical appraisal of Dworkin's theory of legal determinacy.

III ONTOLOGY AND DETERMINACY — THE CREATION OF 'COMMUNITY'

Dworkin challenged Hart's theory primarily with respect to the acknowledgment of judicial lawmaking. Pointing to the fact that judges in hard cases speak in

⁴¹ For a discussion of the problems associated with intentionalist theories of interpretation, see Burton, above n 33.

⁴² Hart, above n 1, 123–4.

⁴³ As opposed to Hart's conventionalism, where the content of legal rules could only expand as the rules were applied to new circumstances: see generally Hart, above n 1, 129, 135.

⁴⁴ Dworkin, above n 1, 41–3.

terms of determinacy rather than discretion, Dworkin noted that such statements contradicted Hart's theory that judges make law in every hard case. As we have no reason to believe that judges are simpletons or liars, Dworkin argued, we should take their statements at face value and accept the existence of legal determinacy.⁴⁵ If the application of the rule is to be determinate at all, the interpreter must link all previous cases under a coherent theory of the application of the rule. Dworkin argued that such a theory cannot help but be a moral theory, drawing upon the community's principles of morality not only in determining what counts as a theory, but also in establishing the content of such a theory.⁴⁶

Even though interpretation entails such recourse to communal principles of morality found within institutionally authorised texts, Dworkin argued, there can only be one right interpretation of the relevant legal text at any particular time, because an interpreter is constrained to interpret the legal text in light of the best interpretation of a univocal communal morality.⁴⁷ According to such a theory, for example, at one point in time it might be determined that the best interpretation of Hart's hypothetical 'no vehicles in the park' rule indicates that it is highly relevant that the vehicle is being used to rescue an injured person or animal. At another point in time, the best interpretation of the rule in light of prevailing moral norms might hold that both people and animals are expendable and that it therefore makes no difference whether the vehicle is being used to rescue a person or an animal.

Under Dworkin's theory, legal meaning is therefore simultaneously determinate and pragmatic. Meaning is pragmatic in the sense that the substantive norms of communal morality are constantly being reviewed and rebalanced. Dworkin's legal hermeneutics therefore portrays the judge as constrained by the moral principle of integrity, while simultaneously contributing to the ongoing development of communal morality in a process of creative construction analogised to writing a new chapter in the legal 'chain novel'.

The sophistication of Dworkin's unification of law with morality and of determinacy with pragmatism owes much to his interpretation of Gadamer's hermeneutic theory. In *Law's Empire*,⁴⁸ Dworkin merely suggests that Gadamer 'strikes the right note' without elaborating upon Gadamerian theory or the criticisms

⁴⁵ Ibid 37–44. As has already been suggested in debunking the intuitive sense of determinacy, the argument that 'what you see is what you get' is hardly convincing. Everyday people act and speak in accordance with beliefs which do not necessarily make those beliefs true in some universal sense. As Couzens Hoy notes, Dworkin's methodological premise of accepting at face value what judges say may undermine his later argument — that judges must interpret earlier legal texts 'in their best light'. There is no widely accepted judicial support for this premise: David Couzens Hoy, 'Dworkin's Constructive Optimism vs Deconstructive Legal Nihilism' (1987) 6 *Law and Philosophy* 321.

⁴⁶ See generally Dworkin, above n 1, 114–50.

⁴⁷ Ibid viii–ix, 76–86. The assimilation of law and morality along with the 'right answers' thesis would seem counterintuitive: see, eg, Stanley Fish, *There's No Such Thing As Free Speech and It's a Good Thing Too* (1994) 142. For an attempt to construct a pluralist hermeneutic theory, see David Couzens Hoy's contributions in David Couzens Hoy and Thomas McCarthy, *Critical Theory* (1994). See also Georgia Warnke, *Justice and Interpretation* (1992) 71, where she even interprets Dworkin as rejecting the 'right answers' thesis.

⁴⁸ Dworkin, above n 1, 62.

⁴⁹ Ibid.

thereof.⁵⁰ As Dworkin's interpretation of Gadamer has only rarely been considered in any detail,⁵¹ a critical review of Gadamer's theory constitutes a valuable point of departure in developing a critique of Dworkin's theory of legal determinacy.

A An Overview of Gadamerian Hermeneutics

Seeking an answer to the question 'how is understanding possible?',⁵² Gadamer repositioned the knowing subject of Enlightenment epistemology by adapting Heidegger's phenomenology. Accordingly, Gadamer argued that the knowing subject was a part of Being as opposed to the dispassionate observer idealised in the commonly held perception of the natural sciences.⁵³ Moreover, in adopting Heidegger's concept of the 'forestructure' and renaming it 'prejudice,' Gadamer argued that 'the fundamental prejudice of the enlightenment is the prejudice against prejudice itself, which deprives tradition of its power.'⁵⁴ The Enlightenment discourse, Gadamer continued, constrains our appreciation of the concept of understanding by focusing upon knowing 'the truth' when in fact our prejudices preclude the possibility of ever accessing such objective truth.⁵⁵ Instead of offering accounts of the conditions of possibility of such truth, Gadamer argued, philosophy ought to recognise that all understanding is hermeneutic. Hermeneutics is the study of being, and as '[b]eing that can be understood is language,'⁵⁶ Gadamer's theory of understanding is founded upon his theory of language.⁵⁷

⁵⁰ Curiously, although Dworkin referred to both Gadamer and Habermas, he did not consider the criticisms of Gadamer's theory by Habermas in the course of their polemical exchange. It is therefore surprising to find that Dworkin just assumes that Gadamer is 'about right' without considering the merits of the criticisms of Gadamerian hermeneutics in any detail, particularly those found in Habermas' debate with Gadamer. See Jürgen Habermas, 'A Review of Gadamer's Truth and Method' in Fred Dallmayr and Thomas McCarthy (eds), *Understanding and Social Inquiry* (1977). For Gadamer's rejoinder to Habermas, see Hans-Georg Gadamer, *Philosophical Hermeneutics* (David Linge trans, 1976).

⁵¹ See generally Warnke, above n 47; and see, eg, Couzens Hoy, above n 45, 327–32.

⁵² Hans-Georg Gadamer, *Truth and Method* (Garrett Barden and John Cumming trans, 1989) xviii. It must be stressed that Gadamer is concerned merely to explain the conditions for understanding and is not concerned with developing a methodology of interpretation by which understanding may occur, a point which he repeatedly states. See, eg, Hans-Georg Gadamer, *Truth and Method* (Garrett Barden and John Cumming trans, 1982) 263.

⁵³ Kant aspired to the standpoint of the universal man, depicted in Immanuel Kant, *The Critique of Judgement* (James Meredith trans, 1952) [40].

⁵⁴ Gadamer, *Truth and Method*, above n 52, 239–40.

⁵⁵ *Ibid* 246. Note that Gadamer adhered to the historical specificity of the concept of reason when he observed that 'reason exists for us only in concrete, historical terms, ie it is not its own master but remains constantly dependent on the given circumstances in which it operates.': *ibid* 245; Hans-Georg Gadamer, 'Wahrheit in den Geisteswissenschaften' cited in Georgia Warnke, *Gadamer: Hermeneutics, Tradition, Reason* (1987) 66.

⁵⁶ Gadamer, *Truth and Method*, above n 52, xxii. For further endorsement of this inheritance from German idealism, see Gadamer, *Truth and Method*, above n 52, 401: 'Not only is the world "world" only insofar as it comes into language, but language, too, has its real being only in the fact that the world is re-presented within it. Thus the original humanity of language means at the same time the fundamental linguistic quality of man's being-in-the-world.'

⁵⁷ *Ibid* 446–7; Gadamer, *Philosophical Hermeneutics*, above n 50, 16–17. For discussion of this aspect of Gadamer's theory, see Susan Hekman, *Hermeneutics and the Sociology of Knowledge* (1986) 95.

Acknowledging the social aspect of language⁵⁸ and its material foundations,⁵⁹ Gadamer therefore rejected referential theories of language. Further, he observed that the process of interpretation is not the excavation of historical fact portrayed by Dilthey⁶⁰ or Hirsch,⁶¹ the latter of whom maintained that interpretation entails the reconstruction of the author's subjective intention.⁶² Such referential and intentionalist theories of interpretation, Gadamer argued, suffer from the Enlightenment prejudice against prejudice. Developing an understanding of a text, Gadamer continued, is rather an intersubjective process where the subject encounters the communication within the context of a social lifeworld which influences the meaning attributed to the particular utterance:

It is not only that historical tradition and the natural order of life constitute the unity of the world in which we live as men [*sic*]; the way that we experience one another, the way that we experience historical traditions, the way that we experience the natural givenness of our existence and of our world, constitutes a truly hermeneutic universe, in which we are not imprisoned, as if behind insurmountable barriers, but to which we are opened.⁶³

Prejudices are therefore positive phenomena, as they enable the interpreter to understand a text.⁶⁴ Despite his apparently relativist celebration of prejudice, Gadamer also whiggishly heralded the advance of understanding towards the 'right' understanding of the tradition.

The 'true' prejudices of the tradition play an important role in influencing (but not determining) the world view of the subject which Gadamer called the 'horizon'. The horizon is defined as 'the range of vision that includes everything that can be seen from a particular vantage point'.⁶⁵ Different horizons will appear to subjects as they travel down the path of self-knowledge towards understanding by examining their personal prejudices. A subject will be compelled to examine personal prejudices because there will always be a question posed by the text under examination.⁶⁶ Understanding a text therefore entails a confrontation between the reader and the text which causes the reader to critically examine background prejudices with the object of finding a 'common language' with the text.⁶⁷ Such a confrontation is facilitated by the making of two key assumptions. These assumptions are firstly that the relevant text is coherent,⁶⁸ and secondly

⁵⁸ Gadamer, *Truth and Method*, above n 52, 260.

⁵⁹ *Ibid* 404–5.

⁶⁰ For Dilthey's theory of understanding, see Wilhelm Dilthey, *Selected Writings, 1959–1968*, (H Rickman trans, 1976) 207.

⁶¹ Eric Hirsch, *Validity in Interpretation* (1967) 82.

⁶² See the discussion of intentionalist approaches in Gadamer, *Truth and Method*, above n 52, 264.

⁶³ *Ibid* xiv.

⁶⁴ *Ibid* 261–4.

⁶⁵ *Ibid* 269.

⁶⁶ *Ibid* 266; Hans-Georg Gadamer, *Reason in the Age of Science* (1981) 106, 108.

⁶⁷ Gadamer, *Reason in the Age of Science*, above n 66, 110. See also Gadamer, *Truth and Method*, above n 52, 238, 260.

⁶⁸ Gadamer, *Truth and Method*, above n 52, 262. This assumption which will not be criticised in this article in any detail. Suffice it to say that such an assumption is at best contentious, and that Warnke's defence of Gadamer on this matter misses the point that the existence of contradictions within a text does not necessarily support the conclusion that there is one dominant meaning

that the text offers, at the least, the possibility of some complete truth.⁶⁹ Adopting these assumptions means that the interpreter is compelled to take the text, and more importantly, the different horizon represented by the otherness of the text, seriously.⁷⁰ This insight is what Gadamer called 'effective historical consciousness'.⁷¹

By the very process of interpretation, then, the subject will be forced to confront the competing constraints of the text and the tradition. The outcome of this confrontation, Gadamer maintains, cannot be the perpetuation of idiosyncratic interpretations or interpretations which merely replicate the interpreter's prejudices, because the conflict between text and subject horizon will engender a new understanding. Understanding can only be achieved when the horizons of the text and that of the subject are fused by virtue of the dialogue between the knowing subject and the text:

Reaching an understanding in conversation presupposes that both partners are ready for it and are trying to recognise the full value of what is alien and opposed to them. If this happens mutually, and each of the partners, while simultaneously holding on to his [sic] own arguments, weighs the counter-arguments, it is finally possible to achieve, in an imperceptible but not arbitrary reciprocal translation of the other's position (we call this an exchange of views), a common language and a common statement.⁷²

The fusion of horizons on the field of the tradition⁷³ means that there is only one right interpretation of a particular text for the interpreter at any particular point in time, as the fusion restores a unity between the text and the tradition in accordance with the reader's 'fore-conception of completion'.⁷⁴

Historical consciousness is aware of its own otherness and hence distinguishes the horizon of tradition from its own. On the other hand, it is itself, as we are trying to show, only something laid over a continuing tradition, and hence it immediately recombines what it has distinguished in order, in the unity of the historical horizon that it thus acquires, to become again one with itself.⁷⁵

This fusion of alternative viewpoints is apparently predicated upon the ability of the interpreter to transcend and objectify those standpoints in the movement towards the fusion of agreement. This interaction of critical transcendence and prejudices is therefore central to Gadamer's theory of understanding. Much of the difficulty, and perhaps also much of the rhetorical force, of Gadamer's work stems from the fact that some parts of his work could be interpreted on the one hand as advocating a strong form of communal constraint which denies any prospect of critical insight, while on the other hand, other parts of his work are

which is contradicted. There may well be several possible meanings none of which can be identified as the dominant meaning: see Warnke, *Gadamer*, above n 55, 84.

⁶⁹ Gadamer, *Truth and Method*, above n 52, 262.

⁷⁰ *Ibid* 102.

⁷¹ See also Gadamer, *Philosophical Hermeneutics*, above n 50, 27.

⁷² Gadamer, *Truth and Method*, above n 52, 348.

⁷³ *Ibid* 273.

⁷⁴ *Ibid* 261.

⁷⁵ *Ibid* 273.

consistent with a critical pluralism. I will therefore briefly review the grounds for these interpretations in order to question Dworkin's implicit assumption that there is *one* Gadamerian theory when he suggested that Gadamer is 'about right'.

B *Gadamer Version I — Communal Prejudices and the Determinacy Thesis*

At some points in his work, Gadamer acknowledged that the process of examining one's prejudices will be an infinite task,⁷⁶ implying that the transcendental, objective appraisal of competing viewpoints is an impossibility. The consequences of this inevitability of a prejudice-laden understanding depend upon the nature of the prejudices envisaged by Gadamer. If prejudices are specific to the individual, Gadamer's hermeneutic theory leads to a strong relativism where the number of valid interpretations may equal the number of interpreters, unless there is some means of critically assessing the merits of the various interpretations. On the other hand, if prejudices are monovalent and communal, it would only be possible for interpreters in any particular social setting to reach one right answer.

The interpretation of Gadamer which emphasises the communal character of prejudices is supported by his repeated reference to prejudices as if there could only be one type of prejudice in any community at a particular point in time. Thus, whilst Gadamer rejected the Enlightenment preoccupation with objective truth, his preoccupation with one truth is reflected in scattered references to 'true prejudices' and 'right understanding' constituting the tradition.⁷⁷ In a kind of Darwinian selection which he failed to explain, Gadamer maintained that the tradition ensures that only those interpretations which fit the tradition will survive.⁷⁸ The temporal distance which is a component of the concept of 'tradition' somehow fulfils a filtering process by which the tradition works itself pure, ensuring that we are only imbued with 'true' prejudices which comprise 'a unity that is efficacious in our lives':⁷⁹

It [the filtering process] not only lets those prejudices that are of a particular and limited nature die away, but causes those that bring about genuine understanding to emerge clearly as such. It is only this temporal distance that can solve the really critical question of hermeneutics, namely of distinguishing the true prejudices, by which we understand, from the false ones by which we misunderstand.⁸⁰

⁷⁶ Ibid 265–6, 269.

⁷⁷ Evident in Gadamer's definition of a person who 'has an horizon' as meaning a person who 'knows the relative significance of everything within this horizon, as near or far, great or small': *ibid* 269.

⁷⁸ *Ibid* 266. Note that Fish also adopts a pragmatic theory in which the reader is apparently free to create his or her own meaning, but that Fish seeks to restrict the apparent anarchy which would flow from this approach by invoking the concept of common interpretive strategies which constrain the range of possible interpretation which readers might adopt.

⁷⁹ Gadamer, *Reason in the Age of Science*, above n 66, 137.

⁸⁰ Gadamer, *Truth and Method*, above n 52, 266.

Even in the face of the threat to the monovalence of the tradition posed by multiculturalism, Gadamer maintained that the tradition would offer a reassuring standard by which to assess competing interpretations:⁸¹

This is something that hermeneutical reflection teaches us: that social community, with all its tensions and disruptions, ever and ever again leads back to a common area of social understanding through which it exists.⁸²

In the same paper Gadamer emphasised the nationalism of the tradition, implying that there is one national tradition rather than a plurality of traditions:

Actually, the historian even the one who treats history as a 'critical science', is so little separated from the ongoing traditions (for example, those of his [*sic*] nation) that he is really himself engaged in contributing to the growth and development of the national state. He is one of the 'nation's' historians; he belongs to the nation. And for the epoch of national states, one must say: the more he may have reflected on his hermeneutical conditionedness, the more national he knows himself to be.⁸³

Within this framework of true prejudices inevitably guiding interpretation, it is not surprising that Gadamer adopted the determinacy thesis founded upon a soft relativism which acknowledges the existence of a communal consensus upon fundamental values such that the legal order is accepted as valid for everyone:⁸⁴

It is part of the idea of a legal order that the judge's judgment does not proceed from an arbitrary and unpredictable decision, but from the just weighing up of the whole. ... This is the reason why, in a state governed through law, there is legal certainty, ie it is possible to know, in principle, what the exact situation is.⁸⁵

Given Gadamer's apparent endorsement of an omnipresent, monovalent, national tradition it is understandable that some commentators have interpreted his theory as merely endorsing the status quo as it would seem impossible to transcend the national tradition to some critical perspective or to even assume the perspective of an alternative standpoint.⁸⁶ This emphasis upon the ontology of the monovalent tradition comprising 'true' prejudices therefore seems to simultaneously exclude any prospect of a transcendental critical theory, the relativism of Foucault⁸⁷ and the difference of Derrida.

⁸¹ 'Since the human intellect is too weak to manage without prejudices it is at least fortunate to have been educated with true prejudices': *ibid* 242. 'True prejudices must still finally be justified by rational knowledge, even though the task may never be able to be fully completed': *ibid* 242.

⁸² Gadamer, *Philosophical Hermeneutics*, above n 50, 42; see also Gadamer, *Truth and Method*, above n 52, 262.

⁸³ Gadamer, *Philosophical Hermeneutics*, above n 50, 28.

⁸⁴ Gadamer, *Truth and Method*, above n 52, 294.

⁸⁵ *Ibid* 294.

⁸⁶ *Ibid* 269. For a discussion of this aspect of Gadamer's work, see Jürgen Habermas, 'A Review of Gadamer', above n 50, 335; Couzens Hoy and McCarthy, above n 47, 41; Jürgen Habermas, *The Philosophical Discourse of Modernity* (F Lawrence trans, 1987) 344-7; Eagleton, *Literary Theory*, above n 5, 72-4. Cf Warnke, above n 55, where Warnke argues for a critical hermeneutics which accepts the importance of prejudices without conceding that they are determinative.

⁸⁷ For a defence of Gadamer from the charge of relativism, see Hekman, above n 57, 115.

C *Gadamer Version II — A Critical Hermeneutics?*

But in some passages Gadamer seems to have suggested that the interpreter can transcend his or her prejudices, 'so that the text, as another's meaning, can be isolated and valued on its own.'⁸⁸ Gadamer therefore suggested that, contrary to Habermas' assertion, hermeneutics did not necessitate the surrender to tradition:

But is man [*sic*] as a political being the mere object of the techniques of making public opinion? I think not: he is a member of society, and only in playing his role with free judgment and politically real effectiveness can he conserve freedom. It is the function of hermeneutical reflection, in this connection, to preserve us from naïve surrender to the experts of social technology.⁸⁹

This critical engagement with a text is fundamental to Gadamer's discourse upon effective historical consciousness. Such critical engagement suggests that we do more than 'come home to our communal tradition' when engaging with a text — the interpreter is compelled to critically review his or her prejudices.

D *Dworkin's Debt to Gadamer*

There are therefore at least two conflicting interpretations of Gadamer's hermeneutic theory — one reclines in the comfort of what is perceived to be a conservative, stable status quo, whilst the other grapples with an account of critical theory in a prejudiced world. In one attempt to reconcile Gadamer's apparent aspiration to a critical perspective with his acknowledgement of prejudice, Couzens Hoy drew upon the discourse theory of Foucault by arguing that a pluralist interpretation of Gadamer's work was the foundation for a critical hermeneutics.⁹⁰ This pluralist reading of Gadamer suggests that the tradition is not one coherent unity but multifaceted,⁹¹ that there are multiple traditions each competing for supremacy in a manner reminiscent of Mikhail Bakhtin's dialogic theory of meaning, which emphasised the social, diachronic construction of meaning.⁹² Couzens Hoy argues that any member of a community is therefore exposed to any number of alternative standpoints, and that hermeneutics requires that the member take these standpoints seriously and accordingly examine his or her own prejudices from the alternative standpoints.

But the major shortcoming with this approach is that neither Couzens Hoy nor Gadamer explains how it is possible for a person invested with prejudices to

⁸⁸ Gadamer, *Truth and Method*, above n 52, 266. 'A person who has no horizon is a man who does not see far enough and hence overvalues what is nearest to him. Contrariwise, to have an horizon means not to be limited to what is nearest, but to be able to see beyond it. A person who has an horizon knows the relative significance of everything within this horizon, as near or far, great or small. Similarly, the working out of the hermeneutical situation means the achievement of the right horizon of enquiry for the questions evoked by the encounter with tradition.' Gadamer, *Truth and Method*, above n 52, 495–6.

⁸⁹ Gadamer, *Philosophical Hermeneutics*, above n 50, 40.

⁹⁰ Couzens Hoy and McCarthy, above n 47, 144–200.

⁹¹ There are also suggestions of this pluralist interpretation of Gadamer in Warnke's work: see Warnke, above n 55, 103.

⁹² Mikhail Bakhtin, 'Discourse in the Novel' in Mikhail Bakhtin, *The Dialogic Imagination: Four Essays* (C Emerson and M Holquist trans, 1981) 259; V Voloshinov, *Marxism and the Philosophy of Language* (L Matejka and I Titunik trans, 1973).

transcend those prejudices in order to examine their original prejudices. Surely a prerequisite of such a process would be a universal medium of discourse, if the two standpoints were not to talk past each other.

Regardless of whether there is a right interpretation of Gadamer, it is clear that Dworkin was either ignorant of the competing interpretations or chose to ignore the debate. In *Law's Empire*, Dworkin moved from the proposition that Gadamer 'strikes the right note' to the view that the interpretation of legal texts is instinctively⁹³ governed by a principle of integrity which dictates that texts are interpreted in accordance with the assumed omnipresent and monovalent moral tradition of the 'true community'.⁹⁴ The influence of Gadamer in this crucial aspect of Dworkin's theory is unmistakable. It is because of his preparedness to construct one community with one coherent set of moral principles governing legal interpretation that Dworkin was prepared to adopt Gadamer's conclusion that legal officials could produce one right answer.⁹⁵ This right answer thesis remains the central aspect of Dworkin's theory.⁹⁶

It is because of his willingness to assume the existence of a community with a coherent scheme of principle that Dworkin scoffed at suggestions that the law was unfair, stating that 'no one really thinks the law wicked or its authors tyrants'.⁹⁷ According to Dworkin, the true society is a no-go zone for disaffected minorities: conflict exists, but it is conflict concerning which interpretation of monovalent communal principles is consistent with past practices and prevailing social morality as interpreted by state officials. It is conflict within the constraints of Dworkin's paradigm of law busily purifying⁹⁸ itself through the actions of state officials.⁹⁹ This pursuit of coherence is not unique to Gadamer and Dworkin, but shared with reception theorists such as Iser, who suggested that texts ought to be read so as to 'normalise' any indeterminacies and thereby achieve a coherence within the text.¹⁰⁰ Eagleton suggests that this willingness to overcome dissonant

⁹³ Dworkin, above n 1, 183. For a critique of Dworkin's reporting of social facts such as common beliefs, despite a lack of empirical research to support such observations, see especially Richard Moles, 'The Decline and Fall of Dworkin's Empire' in Alan Hunt (ed), *Reading Dworkin Critically* (1992) 71, 83-6.

⁹⁴ Here, the parallel between Dworkin and Bourdieu's concept of the habitus is striking. See Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice trans, 1977) 72-95. For a critique of the monological aspect of Dworkin's theory of interpretation which ignores the interaction of judge and community, see Frank Michelman, 'The Supreme Court 1985 Term, Foreword: Traces of Self Government' (1986) 100 *Harvard Law Review* 4, 76. Michelman's argument is adopted by Habermas in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, 1996) 222-37.

⁹⁵ Gadamer, *Truth and Method*, above n 52, 294.

⁹⁶ Dworkin, above n 1, viii-ix.

⁹⁷ *Ibid* 111.

⁹⁸ *Ibid* 407-8.

⁹⁹ Whilst Dworkin was by no means a Nazi sympathiser, there is a resemblance between Dworkin's subsumption of minority moralities within 'our' culture and Gadamer's comments in his Paris lecture delivered in 1941. See Warnke, above n 55, 71-2; Gadamer, *Philosophical Hermeneutics*, above n 50, 28.

¹⁰⁰ Wolfgang Iser, *The Implied Reader — Patterns of Communication in Prose Fiction from Bunyan to Beckett* (1974); Wolfgang Iser, *The Act of Reading — A Theory of Aesthetic Response* (1978).

voices within a text is merely a result of the influence of *Gestalt* psychology,¹⁰¹ while the impulse to achieve the coherence of psychoanalytic theory may also be discerned. Gadamer's observation that true understanding requires texts to be interpreted as internally coherent¹⁰² and Dworkin's Neptune of integrity¹⁰³ are not naturally occurring phenomena but are rather constructed ideals of a particular political vision.¹⁰⁴

As with Gadamer, Dworkin's work may therefore be understood to acquiesce in the impossibility of transcending any given context in achieving a universal standpoint for critique, and therefore as negating any possibility of critical insight. In this respect, Dworkin's focus upon one communal morality is remarkably similar to Richard Rorty's soft relativism. According to Rorty, after Gadamer it is clear that 'we' cannot be critical of alternative projects which differ from 'our' own because there is no universal critical standpoint. Dworkin is therefore comfortable in bringing 'internal skeptics' such as Rorty aboard his depiction of Neurath's boat.¹⁰⁵ According to both Rorty and Dworkin, there can be no critique of 'our' project because we are hermeneutically chained to it and therefore cannot transcend our lifeworld in some critical moment.¹⁰⁶ Truth is what is 'right for us' — a chilling prospect for some,¹⁰⁷ and a poor account of discursive practice for others.¹⁰⁸

Norris criticises such challenges to critical theory on the basis that relativism paralyses social debate by missing the fact that there are contests of power 'out there' in which often powerful interests seek to manipulate discourse to further their own interests. The lesson of the Gulf War, Norris argues, is a telling example of the attempt by the military and supporters of the war to manipulate the mass media in stifling dissent.¹⁰⁹ Only a critical theory of social discourse, Norris argues, can justify the existence and rationality of those who stand against the mass media tide in constructing an alternative discourse on events such as the

¹⁰¹ Eagleton, 'Literary Theory', above n 5, 81.

¹⁰² Gadamer, *Truth and Method*, above n 52, 261, see also 259, 261–2. Couzens Hoy argues that whilst a universalist interpretation of Gadamer is open, so also is a pluralist interpretation such that deconstruction and Gadamerian hermeneutics are not necessarily incompatible, see Couzens Hoy and McCarthy, above n 47, 188ff. It is certainly the case that Gadamer recognises that there is no prospect of universal truth: Gadamer, *Truth and Method*, above n 52, 270. By his approach to tradition and his emphasis upon achieving unity he does seem to suggest that at any particular time there is one true interpretation.

¹⁰³ Dworkin, above n 1, 183.

¹⁰⁴ For further critical discussion of the assumption of coherence, see Paul de Man, *Blindness and Insight: Essays in the Rhetoric of Contemporary Criticism* (1971).

¹⁰⁵ *Ibid* 82–3.

¹⁰⁶ Dworkin's suggestion that a judge may transcend the prevailing norms of communal morality is strikingly weak in the context of his adherence to the 'right answers' thesis. Cf Dworkin, above n 1, 219 with xii–iv.

¹⁰⁷ See, eg, the work of Christopher Norris, especially *What's Wrong with Postmodernism* (1990); Christopher Norris, *Uncritical Theory, Postmodernism, Intellectuals and the Gulf War* (1992). Indeed, as noted by Georgia Warnke, in a lecture delivered in 1941 Gadamer cited the tradition of the 'Volk' as superior to the claims of democracy: Warnke, above n 55, 71–2.

¹⁰⁸ Jürgen Habermas, 'Questions and Counterquestions' in R Bernstein (ed), *Habermas and Modernity* (1985) 192, 193–5.

¹⁰⁹ See, eg, Norris, *Uncritical Theory, Postmodernism, Intellectuals and the Gulf War*, above n 107; Norris, *What's Wrong with Postmodernism*, above n 107.

Gulf War. Norris observes that the theorisation of social discourse on the Gadamerian assumption of 'our' tradition or 'our' project cloaks the existence of social dissent. Perhaps in an ideal world we would all loll around in club chairs engaging in Rorty's 'interesting conversations'¹¹⁰ without ever having to make a decision. In the 'real world' however, facts are interpreted, laws are interpreted and decisions are made. Often such interpretive decisions are imposed over a more or less vocal dissent. This dissent poses a threat to the communal monovalence underpinning Dworkin's determinacy thesis. It is therefore necessary to briefly consider the existence of such pluralism before turning to alternative theories of discourse which account for such a plurality of views.

IV DETERMINACY, CULTURAL HETEROGENEITY AND PSYCHOANALYSIS

As Charles Taylor has noted,¹¹¹ modern social theory is heavily influenced by this assumption of some fundamental commonality bonding all members of any particular community such that a common set of founding assumptions is possible. Wittgenstein suggested that meaning is founded upon agreement,¹¹² apparently ignoring the conundrum that a community would initially have to agree upon what such agreement comprises. Similarly, it is the belief in the homogeneous tradition as the foundation of interpretive constraint which underpins both Dworkin's and perhaps Gadamer's right answer theses.

I will challenge the existence of this communal homogeneity by arguing that there is not a common set of founding assumptions, that there is not one tradition. It will be argued that the assumption of one community is flawed on two counts. Firstly, it ignores the existence of communities characterised by pluralism. Secondly, in all of the liberal legal theories outlined, there is the assumption that members of the community are coherent selves, despite the considerable psychoanalytic literature after Freud and Lacan to the contrary.

That we live in a multicultural community is, in these times, a trite observation. The wealth of literature springing from liberal theory's requirement that the diversity of autonomous selves be appreciated is testimony to the modern recognition of multiculturalism.¹¹³ However, Steven Rockefeller has questioned the assumption of multicultural theory which posits the community as merely fractured into perhaps a relatively small number of subcultures, arguing that focusing upon the grouping of individuals into a handful of subcultures ignores

¹¹⁰ Richard Rorty, *Philosophy and the Mirror of Nature* (1980) 389.

¹¹¹ Charles Taylor, *Multiculturalism and 'The Politics of Recognition': An Essay* (1992) 44.

¹¹² Wittgenstein, *Philosophical Investigations*, above n 4, [242].

¹¹³ For an early discussion of the problems of multiculturalism within a liberal social theory, see John Locke, 'An Essay Concerning Toleration' in David Wootton (ed), *John Locke: Political Writings* (1993) 186, 186–210. See also John Rawls, *A Theory of Justice* (1971) 3–4. For a critical overview of the liberal literature dealing with pluralism, see Wil Kymlicka, *Liberalism, Community, and Culture* (1989); Taylor, *Multiculturalism*, above n 111.

¹¹⁴ Steven Rockefeller, 'Comment' in Amy Gutman (ed), *Multiculturalism: Examining the Politics of Recognition* (1992) 87–103.

the possibility that there may be numerous tiers of subcultures.¹¹⁵ Indeed, Taylor traces the breakdown of omnipresent, pre-modern moral orders and the development of the new order of modernity in which the fear of meaninglessness is experienced at the individual level.¹¹⁶ This burgeoning recognition of the autonomous self, Calhoun observes, is reflected in the Cartesian maxim 'I think therefore I am', and Fichte's idealist 'I am I'.¹¹⁷ This ideology of the autonomous self seems to contradict the subsumption of the individual within any group or 'culture'.¹¹⁸

In a similar vein, in one essay which served to undermine much of his theory of an all-encompassing institutionalised lifeworld, Fish recognised the diversity of institutions which play a part in influencing the outlook of the subject.¹¹⁹ While writing about 'the legal institution', Fish conceded that there was no such homogeneous totality in any institution. Each is fractured along numerous fault lines attributable to the uniqueness of each member, arising from their membership of any number of institutions. Indeed, in some parts of his work, Fish seems to accept that such institutional heterogeneity means that institutions will be racked with debate about even the most fundamental of institutional objectives.¹²⁰ Fish later appeared to resile from this view by suggesting that his theory of legal practice is consistent with having as much stability and determinacy as anyone would need.¹²¹ It is difficult to reconcile this conservative shift with his earlier description of institutional practice as an 'engine of change',¹²² which perhaps more accurately captures the sense that social institutions are far from monolithic structures. This growing recognition of the diversity amongst individuals has coincided with the prominence accorded to the liberal notion of the essential self, which may be traced back at least as far as John Stuart Mill. Just as Fish's suggestion of uniquely socialised individuals threatens to undermine the social homogeneity which underpins the determinacy thesis, so the increasing awareness of the autonomous self seeking 'self-fulfilment' poses a considerable threat to the posited cultural homogeneity underpinning many theories of legal determinacy.

In light of this ongoing preoccupation with the individual, in some respects it is understandable that much modern theory takes as given the concept of the coherent, autonomous self depicted in the ontology and epistemology of so much

¹¹⁵ Ibid.

¹¹⁶ See generally Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (1989) 18; Peter Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (1969).

¹¹⁷ Calhoun, 'Social Theory and the Politics of Identity', above n 8.

¹¹⁸ Of course, it was the individuation of the subject and the power struggles which ensued which comprised one focus of Foucault's work. For a discussion of this aspect of his work, see Michel Foucault, 'Afterword: The Subject and Power' in Hubert Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (1982) 208; Michel Foucault, 'About the Beginning of the Hermeneutics of the Self: Two Lectures at Dartmouth' (1993) 21 *Political Theory* 198.

¹¹⁹ Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (1989) 141–60.

¹²⁰ Ibid 157.

¹²¹ Fish, *There's No Such Thing As Free Speech*, above n 47, 191.

¹²² Ibid 189; Fish, *Doing What Comes Naturally*, above n 119, 156.

modern literature. Thus, Calhoun observes, role theorists generally overlooked the multiplicity of roles which any individual was required to fulfil in ordinary life,¹²³ social constructionists such as Fish generally depicted individuals as automatons subjected to normativisation, while other theorists emphasised and continue to accept the idea of an essential self.¹²⁴

In more recent times, considerable attention has been paid to the view that individuals are confronted with the 'predicament of rivalry and contestation'¹²⁵ arising from the insertion of the modern subject 'into a series of separate value-spheres, each one of which tends to exclude or attempts to assert its priority over the rest'.¹²⁶ In this regard, the substantial body of writing dealing with psychoanalytic theory, which portrays the deep divisions within the subject, is highly relevant.¹²⁷ According to such theories of the self, the individual is constantly engaged in an internal dialogue which never reaches the point of complete self-knowledge.¹²⁸ Thus in feminist theory, Donna Haraway has argued that there are no essential characteristics of the female self, maintaining that each assertion of a shared characteristic which defines the concept 'woman' is merely 'an excuse for the matrix of women's dominations of each other.'¹²⁹ The existence of the politics of identity suggests that individuals inhabit unique lifeworlds which themselves are never static, but, as Bakhtin recognised, are characterised by the diversity envisaged within his concept of heteroglossia.¹³⁰

A Theorising Determinacy

This fracturing of communities and of the self poses a fundamental threat to the liberal theory of determinacy. If meaning is dependent upon conventional agreement (Hart and Wittgenstein), or upon agreement founded upon some communal morality presumably generated by a homogeneous community (Dworkin), or finally, upon the existence of autonomous, homogeneous institutions (Fish), how can these theories of determinacy survive the recognition that multiculturalism and the fractured self rent asunder any postulated communal

¹²³ In relation to this point, Calhoun cites Merton, who considered that those who did not fulfil the prescribed functions of their roles fell within the 'deviant' category: Robert Merton, *Social Theory and Social Structure* (1968) 185ff. However, Calhoun notes, Erving Goffman argued that conflict between roles could produce fragmentation of the self: Erving Goffman, *The Presentation of Self in Everyday Life* (1971) 203–20.

¹²⁴ See, eg, John Hewitt, *Dilemmas of the American Self* (1989) 127, where Hewitt talks of the 'essence of community'.

¹²⁵ Taylor, *Sources of the Self*, above n 116, 318.

¹²⁶ Anthony Cascardi, *The Subject of Modernity* (1992) 3.

¹²⁷ See Rainer Nägele, 'Freud, Habermas and the Dialectic of Enlightenment: On Real and Ideal Discourses' (1981) 22 *New German Critique* 41–62. For a discussion of psychoanalysis and an attempt to contain the fractious self within norms of coherence, see Jürgen Habermas, *Knowledge and Human Interests* (1971) 214–45. Habermas' interpretation of Freud in this instance is virtually unrecognisable.

¹²⁸ See, eg, Jacques-Alain Miller (ed), *The Seminar of Jacques Lacan — Book II: The Ego in Freud's Theory and in the Technique of Psychoanalysis* (Sylvana Tomaselli trans, 1988) 166.

¹²⁹ Donna Haraway, *Simians, Cyborgs, and Women — The Reinvention of Nature* (1991) 155.

¹³⁰ Bakhtin, above n 92.

homogeneity?¹³¹ The only potentially plausible defence of the determinacy thesis in the face of this pluralism is framed in terms of a universalising rational discourse which transcends the plurality of our world — ‘rational’ discourse can lead us to the one right answer despite the multiplicity of viewpoints which inhabit our world.

Of course, it is not only liberals who seek such a critical standpoint from which to assess the merits of truth claims in an interpretive, epistemological or moral context. As many ‘members’ of critical legal studies recognise, if the hermeneutic monism underlying Dworkin’s legal theory is rejected on the basis that there is no one tradition which generates the right answers, then there is no possibility of supplanting liberal legal theory with an alternative theory. That is, unless either a critical pluralism or a critical standpoint can be invoked as warranting the truth of some alternative legal agenda such as a pragmatic program of reform.¹³² In the absence of such an alternative framework, all that the ‘critical’ scholar could aspire to is the exposure of the perceived contradictions of liberal theory and an admittedly biased attempt to explain how a system so riddled with contradictions could survive. Thus, in attempting to explain the survival of the legal system, critical scholars have often argued that other social theories are mere ideology when viewed from what is portrayed as a superior standpoint. Such critical scholarship is therefore founded upon an external, objectifying perspective (often derived from Marxist theory), as if the chosen perspective is the one concrete foundation in an otherwise contingent world.¹³³

Many liberal and critical scholars share a preoccupation with theorising rational, monist discourse (albeit with different ends in view), in response to the perceived plurality of the lifeworld. It is therefore to an assessment of the merits of such critical theory that we must turn.

V HOW MIGHT A DETERMINACY THESIS ACCOMMODATE DIFFERENCE?

A liberal legalist seeking to buttress the determinacy theory against the pluralist threat might be expected to turn to some standpoint theory as the means of transcending and overcoming the value dissent of our fractured world. Such a standpoint may be a universal one, for example, that contemplated by Kant¹³⁴ and

¹³¹ For a discussion of the problems that multiculturalism poses for Dworkin’s theory of law, see Ian Duncanson, ‘Power, Interpretation and Ronald Dworkin’ (1989) 9 *University of Tasmania Law Review* 278.

¹³² For discussion of the dilemma confronting *Critical Legal Studies* in this regard, see Allan Hutchinson and Patrick Monahan, ‘Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought’ (1984) 36 *Stanford Law Review* 199, 215.

¹³³ See, eg, the early Gyorgy Lukacs, who argued that Marxian theory was unique in that it recognised the universality of the class consciousness of the proletariat: Gyorgy Lukacs, *History and Class Consciousness: Studies in Marxist Dialectics* (Rodney Livingstone trans, 1971). In the context of legal theory, Horwitz’s historical study of American law is a classic example of this approach: Morton Horwitz, *The Transformation of American Law 1780–1860* (1977).

¹³⁴ Kant, above n 53, [40].

those falling within the critical tradition.¹³⁵ Perhaps the most significant contemporary social theorist falling under this broadly universalist rubric is Habermas.¹³⁶

Habermas accepted the pluralism of modern society,¹³⁷ but sought to modify Kantian and Hegelian critical theory by removing the metaphysical emphasis upon consciousness embodied in the categorical imperative.¹³⁸ Instead, he developed a critical theory founded upon his interpretation of the conditions for communication in modern lifeworlds,¹³⁹ and therefore provides the key to identifying the social process which underpins the perceived human capacity for critical insight.¹⁴⁰

A An Overview of Habermas' Discourse Theory

Reaching understanding is, according to Habermas, 'the inherent *telos* of human speech.'¹⁴¹ Understanding is achieved when the recipient can say 'yes' to a validity claim.¹⁴² Although he recognises that there are different forms of rationality¹⁴³ and intersubjective discourse,¹⁴⁴ Habermas maintains that rational discourse upon moral and legal norms entails a preparedness to propose validity claims supported by reasons which are open to criticism, with a view to reaching the uncoerced consensus of the populace (and all future people) acting rationally.¹⁴⁵ At the core of Habermas' theory is the assertion that there is only ever one

¹³⁵ The alternative foundation for a critical standpoint may be class, gender, age, etc. As Calhoun notes, the shortcoming of such essentialist positions is that they fail to account for the marked differences within any of the nominated classes: Craig Calhoun, 'The Standpoint of Critique? Feminist Theory, Social Structure, and Learning from Experience' in Craig Calhoun, *Critical Social Theory*, above n 8.

¹³⁶ Although Habermas is by no means a liberal social theorist.

¹³⁷ For a discussion of Habermas' treatment of pluralism, see B Walker, 'Habermas and Pluralist Political Theory' (1992) 18 *Philosophy and Social Criticism* 81.

¹³⁸ Habermas, *The Philosophical Discourse of Modernity*, above n 86, 294–326.

¹³⁹ Jürgen Habermas, 'A Reply to My Critics' in John Thompson and David Held (eds), *Habermas: Critical Debates* (1982) 219, 236.

¹⁴⁰ Hegel argued that Kant's theory of reason was deficient in that it ignored the role of material conditions in influencing the processes by which we learn of the posited objective world. In turn, Habermas argued that the Hegelian metaphysical preoccupation with the teleological theory of history needed to be overcome if the path to empirical social study was to be cleared: see Jürgen Habermas, *The Theory of Communicative Action: Lifeworld and System — A Critique of Functional Reason* (1987) vol 2, 382–3.

¹⁴¹ Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (1984) vol 1, 287. See also, Jürgen Habermas, *Communication and the Evolution of Society* (T McCarthy trans, 1979) 1.

¹⁴² Habermas, *Communication and the Evolution of Society*, above n 141, 2; Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, above n 141, 287–8, 392. This is somewhat problematical. As Couzens Hoy notes, it is possible to understand without agreeing: Couzens Hoy and McCarthy, above n 47, 182–3. Also see Habermas, 'A Reply', above n 18, 246.

¹⁴³ Instrumental rationality, for example, does not depend upon the existence of two knowing subjects, while social interaction obviously does.

¹⁴⁴ In this regard, Habermas is prepared to adopt the classification of speech acts developed by John Austin: Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, above n 141, 295–337.

¹⁴⁵ Habermas, *Between Facts and Norms*, above n 94, 227. See generally Jürgen Habermas, *Zur Rekonstruktion des Historischen Materialismus* (1976) 217 quoted in Couzens Hoy and

right answer in the given context because there is only one answer supported by reasons to which all would assent at any particular spatio-temporal point. Whilst accepting that those reasons may not survive indefinitely, it is the assertion of warranted truth supported by idealised procedural assumptions¹⁴⁶ which Habermas perceived as the key to context transcendence.¹⁴⁷ Without this objective of universal truth, Habermas considered that discursive practice would be meaningless, because there would be no criterion for assessing the respective theories posited — a strong relativism would prevail in a frustrating world where we all spoke past each other.

Thus, while Kant considered rationality to be predicated upon what the self-conscious subject can will to be a universal law without self contradiction, Habermas adopted an intersubjective definition of rationality which focused upon what the subject can submit as a universal law to all others for discursive validation in the ideal speech situation.¹⁴⁸ Habermas therefore presents his theory of rationality as a procedural ethics governing discursive practice, a definition which aspires to universality because it purports to contain no substantive norms for the good life.¹⁴⁹

B Communicative Action and Legal Adjudication

But how is this theory of communicative action relevant to the determination of legal disputes? Habermas recognised that not all discourse is analogous to the

McCarthy, above n 47, 161, 170; Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, above n 141, 1–22; Habermas, 'A Reply to My Critics', above n 139, 113; Jürgen Habermas, *Legitimation Crisis* (1976) 89. Habermas restricted members of the ideal community to 'all subjects capable of speech and action': Jürgen Habermas, 'Justice and Solidarity: On the Discussion Concerning Stage 6' in Thomas Wren (ed), *The Moral Domain: Essays in the Ongoing Discussion between Philosophy and the Social Sciences* (1990) 224, 245. In another elaboration upon the concept of the ideal speech situation, Habermas, *Legitimation Crisis* (1976) 107–8, suggested that in such a situation, 'the bracketed validity claims of assertions, recommendations, or warnings are the exclusive object of discussion; ... participants, themes, and contributions are not restricted except with reference to the goal of testing the validity claims in question; ... no force except that of the better argument is exercised; and ... as a result, all motives except that of the cooperative search for truth are excluded.'

¹⁴⁶ Although Habermas has resiled from the 'ideal speech situation' nomenclature in his more recent work, his commitment to the substance of this procedural ideal remains: see generally Habermas, *Between Facts and Norms*, above n 94. These procedural assumptions include: that participants ascribe identical meanings to expressions, connect utterances with context transcending validity claims and assume that addressees are accountable in the sense that they are autonomous and sincere with both themselves and others: *ibid* 4. For a discussion of this aspect of Habermas' theory with references to relevant untranslated material, see, eg, Maeve Cooke, *Language and Reason: A Study of Habermas's Pragmatics* (1994) 31–2. For consideration of the developments within Habermas' discursive theory, see Stephen White, *The Recent Work of Jürgen Habermas: Reason, Justice and Modernity* (1988).

¹⁴⁷ Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, above n 141, 22–42.

¹⁴⁸ '[D]iscourse or argumentation is a more exacting type of communication. ... [It] generalizes, abstracts, and stretches the presuppositions of context-bound communicative actions by extending their range to include competent subjects beyond the provincial limits of their own particular form of life': Jürgen Habermas, *Moral Consciousness and Communicative Action* (1990) 202.

¹⁴⁹ For a critique of Habermas on this point, see Charles Taylor, 'Language and Society' in Axel Honneth and Hans Joas (eds), *Communicative Action: Essays on Jürgen Habermas's The Theory of Communicative Action* (1991) 23.

natural sciences, which he assumed to be predicated upon the identification of one truth about the objective world. He identified the discourses of aesthetics, cultural values and literary criticism as examples of where there is no one right answer, but nevertheless the statement of reasons plays a considerable role in the furtherance of meaningful discourse.¹⁵⁰ By contrast, it would seem that the determination of moral and legal norms is susceptible to the rationality constituted by a universal consensus upon normative propositions.¹⁵¹ Habermas therefore considered that the articulation of legal norms is undertaken with the belief that a rational consensus upon the law can be reached in ideal circumstances.¹⁵²

C *The Transparency of Background Assumptions to Rational Discourse*

Upon closer examination of his foundational assumptions, it can be argued that Habermas' *telos* of agreement ignores several arguments which suggest that communicative rationality can be anything but the primary form of discursive practice. Firstly, it will be argued that the idealising assumptions protecting the integrity of rational understanding are so artificial as to take away the descriptive validity of Habermas' theory. Secondly, even if we accept Habermas' idealising assumptions, it will be argued that it would be irrational for participants in discourse to ever claim to have transcended their own lifeworld in arriving at the universalising perspective envisaged by Habermas.

Before exploring these criticisms in more detail, it should be noted that both stem from the fact that Habermas was prepared to concede some ground to hermeneutic theory by accepting that the days of the Kantian universal perspective have passed. In seeking some foundation for critical insight, Habermas therefore had to draw a compromise which sought to superimpose a rational discourse upon a subjectivised lifeworld background. In contrast to the seemingly central role of the monologic tradition in Gadamer's hermeneutics and Rousseau's republicanism,¹⁵³ the importance of ontological presuppositions within Habermas' theory is that they merely restrict the number of credible reasons proffered in support of a validity claim (without determining the outcome) and therefore enhance the prospect of consensus.¹⁵⁴ Thus Habermas accepted¹⁵⁵ that

¹⁵⁰ See Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, above n 141, 20.

¹⁵¹ *Ibid* 19.

¹⁵² Habermas, *Between Facts and Norms*, above n 94. Note that Habermas certainly did not consider that such consensus was realistically possible as he explicitly acknowledged the need for coercion to protect rational discourse from those who would compel agreement by overt force: Habermas, *Legitimation Crisis*, above n 145, 87.

¹⁵³ See also Cass Sunstein, 'Interest Groups in American Public Law' (1985) 38 *Stanford Law Review* 17; Frank Michelman, 'The Supreme Court 1985 Term', above n 94; Frank Michelman, 'Political Truth and the Rule of Law' (1988) 8 *Tel Aviv University Studies in Law* 29.

¹⁵⁴ Habermas, *Communication and the Evolution of Society*, above n 141, 178–205. See also, Jürgen Habermas, 'The Hermeneutic Claim to Universality' in Josef Bleicher (ed), *Contemporary Hermeneutics: Method, Philosophy and Critique* (1980) 181, 205; Habermas, *The Philosophical Discourse of Modernity*, above n 86, 298, 319–26. For discussion of Habermas' appropriation of hermeneutic concepts, see Jack Mendelson, 'The Habermas-Gadamer Debate' (1979) 18 *New German Critique* 44.

the subject's understanding is riddled with unthematized knowledge which both holds out the prospect of discursive consensus and also is beyond critical, discursive examination.¹⁵⁶ Habermas believed that this 'invisible' knowledge comprises ideas which are taken for granted, the norms which secure social cohesion, and the competencies and skills that individuals have internalised.¹⁵⁷ Habermas therefore accepted that it would be impossible for participants in discourse to achieve complete transparency of the assumptions flowing from their lifeworld background:

The fundamental background knowledge that must tacitly supplement our knowledge of the acceptability conditions of linguistically standardized expressions if hearers are to be able to understand their literal meanings, has remarkable features: It is an *implicit* knowledge that cannot be represented in a finite number of propositions; it is a *holistically structured* knowledge, the basic elements of which intrinsically define one another; and it is a knowledge *that does not stand at our disposition*, inasmuch as we cannot make it conscious and place it in doubt as we please.¹⁵⁸

Given that discourse is carried on within this sea of 'invisible' knowledge, any validity claim will necessarily carry many implicit assumptions. Participants would therefore never be in a position to know themselves in the sense of the knowing subject postulated by the Enlightenment. The problem with the aspiration to context transcendence embodied in Habermas' theory of communicative rationality is that it does not seem to sit at all well with his acceptance of the apparently considerable influence of the lifeworld background upon discourse.

1 *Mutually Understood Terms*

Turning to the assumption of mutually understood terms, the consequences of this assumption for Habermas' theory are twofold. Firstly, it explains the shared background of understanding to which Eagleton and Altman referred, and thereby explains why in ordinary discourse we seem to be able to minimise the number of issues which need to be addressed with a view to achieving a consensus. Secondly, it makes the *telos* of agreement appear to be a logical keystone of rational discourse. Without knowing or assuming that they have proceeded from a common standpoint, participants could not rationally believe that consensus

¹⁵⁵ Habermas, *The Philosophical Discourse of Modernity*, above n 86, 298, 319–26.

¹⁵⁶ See, eg, Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, above n 141, 336. But cf generally Cooke, *Language and Reason*, above n 146, 15–16 where she argues that the prereflective background would not escape the critical gaze of modern society.

¹⁵⁷ Habermas, *The Theory of Communicative Action: Lifeworld and System*, above n 140, 119–52. See also Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, above n 141, 70. Paradoxically, whilst Habermas criticised Foucault for self-contradiction in positivistically unveiling power whilst simultaneously rejecting the knowing subject, he maintained that the unthematized knowledge of the background invisible to discursive participants is nevertheless susceptible to his analysis: see, eg, Habermas, *The Philosophical Discourse of Modernity*, above n 86, 266–93.

¹⁵⁸ Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, above n 141, 70, 336; Habermas, 'A Reply', above n 18, 244–5.

might ultimately be achieved.¹⁵⁹ As with Gadamer, for Habermas the existence of the lifeworld background therefore constitutes a positive influence by facilitating discourse.

Unlike his interpretation of Gadamer, which suggested that he envisaged a monologic tradition, Habermas acknowledged the existence of a plurality within modern Occidental communities and therefore faced the problem of explaining how it was possible for discursive participants from different backgrounds to interact with the purpose of achieving understanding. In response to this difficulty, Habermas maintained that discursive participants must assume away the consequences of this potentially disruptive plurality by accepting that the terms of their discourse are mutually understood.¹⁶⁰ However, the preceding discussion¹⁶¹ of multiculturalism and the fractured self suggests that it would be rational to expect that in a pluralist world there would be a real prospect (if not an inevitability) of discursive participants beginning from disparate backgrounds and that this difference would also be reflected in disparate understandings of discursive terms. Further, in the absence of transparent background assumptions, it would be impossible for discursive participants to know that they all begin from a common set of assumptions.¹⁶²

It is therefore difficult to understand how Habermas can claim that it would be rational for participants to assume that they all commence from a common understanding of discursive terms. If participants do not even know that they are beginning from a common foundation and are rationally precluded from assuming it, how can they be sure that they have reached the sort of consensus envisaged in Habermas' ideal speech situation?¹⁶³

2 *The Scope and Significance of Background Knowledge*

Even if Habermas' foundational assumption as to a shared understanding of discursive terms is accepted as valid, the postulate of context transcending validity claims is also susceptible to criticism. The question here is the scope of what Habermas at times¹⁶⁴ calls the 'prereflective' background knowledge. The broader the scope of such knowledge, the closer Habermas moves to accepting that discursive participants must uncritically accept the constraint of a monologic tradition in a way strikingly similar to that envisaged in the 'monologic' interpretation of Gadamer's work.

The term 'background' implies that such prereflective knowledge is relatively limited. On the other hand, Habermas apparently accepted that an understanding of gravity falls within the prereflective background knowledge. It is therefore

¹⁵⁹ Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society*, above n 141, 13. See also Habermas, *The Philosophical Discourse of Modernity*, above n 86, 326.

¹⁶⁰ See above n 146. See also Habermas, 'A Reply', above n 18, 219.

¹⁶¹ See the discussion in above Part IV.

¹⁶² Habermas, *The Philosophical Discourse of Modernity*, above n 86, 323–6.

¹⁶³ A problem acknowledged in Jürgen Habermas, *Justification and Application: Remarks on Discourse Ethics* (1993).

¹⁶⁴ Although there are instances where Habermas appears to suggest that all knowledge will be subject to critical review: see generally, Habermas, 'A Reply', above n 18, 223–4.

difficult to know the limits of this prereflective knowledge and, furthermore, the basis upon which Habermas implied that such knowledge comprises a relatively small portion of total knowledge. Regardless of the scope of this unthematized background knowledge, it is difficult to understand how a participant can claim to be acting rationally when they tender what they envisage as universal reasons for validity, knowing all the while that there can be no such universality owing to the prejudices of the background which influence the presentation and content of those reasons. Indeed, Habermas concedes that the assumption of context transcending validity claims is rather thin when he acknowledges that an agreement will always be subject to revision in the light of better arguments and that discursive participants will embrace the ephemeral nature of validity claims.¹⁶⁵

D Habermas' 'Transcendental Theory Hope'

The fact that the assumptions underpinning the ideal speech situation are not achievable is not the point, according to some statements of Habermas¹⁶⁶ and some of his supporters such as McCarthy.¹⁶⁷ What is important is our acceptance of the ideal as at least to some extent constraining our practice.¹⁶⁸ Thus, the argument continues, even if participants accept the impossibility of complete understanding of the background, they would nevertheless appraise what appeared to be the aspects of the background relevant to the particular validity claim.

This admission of the impossibility of the truly transcendental assessment of validity claims, while retaining the aspiration to such a universal standpoint, merely strengthens the objections of pragmatists such as Rorty and Fish. Thus Fish disparagingly refers to much critical legal theory as merely perpetuating the 'transcendental theory hope' of the Enlightenment.¹⁶⁹ Those, such as Couzens Hoy, who wish to retain some room for critical insight whilst accepting the artificiality of universalist aspirations, query whether the appeal to an ideal made by Habermas and McCarthy is pragmatically necessary in engendering 'genuine' discourse. Indeed, Couzens Hoy suggests, an appeal to 'truth' as determined by

¹⁶⁵ Habermas, *Between Facts and Norms*, above n 94, 226–7. For a discussion of this perceived shortcoming in Habermas's work, see Couzens Hoy and McCarthy, above n 47.

¹⁶⁶ See generally, Habermas, 'The Hermeneutic Claim to Universality', above n 154, 206; Habermas, *The Philosophical Discourse of Modernity*, above n 86, 321–2; Habermas, 'A Reply to My Critics', above n 139, 235.

¹⁶⁷ Couzens Hoy and McCarthy, above n 47, 217–45; see also Cooke, *Language and Reason*, above n 146, 112–7.

¹⁶⁸ Given the insistence by Habermas upon consensus and truth in such texts as *Communication and the Evolution of Society*, above n 141 and *The Theory of Communicative Action: Reason and the Rationalization of Society*, above 141, 8–22, 26, it is difficult to account for McCarthy's views as a valid interpretation of Habermas rather than a revision of Habermasian theory. Habermas does accept that if the ideal speech situation is not achieved, other forms of communication such as strategic communication (where the intention is to achieve a particular consequence rather than to reach understanding) prevail: see, eg, Habermas, *Communication and the Evolution of Society*, above n 141, 3–4. But if the ideal speech situation is never achieved in actual practice, Habermas' theory of communicative action has nothing to say about actual discursive practice. See also Christopher Norris, *Uncritical Theory: Postmodernism, Intellectuals, and the Gulf War*, above n 107, 62.

¹⁶⁹ Fish, *There's No Such Thing As Free Speech*, above n 47, 180–99.

an unattainable ideal is merely one more rhetorical tool which may do more harm to 'genuine' debate than any good arising from an appeal to an unattainable 'truth'.¹⁷⁰ In contradistinction to a critical monism dependent upon an appeal to an empty procedural ideal, Couzens Hoy and others propose a critical pluralism which seeks to accord mutual respect to discursive participants on the basis that they are rational autonomous agents.¹⁷¹

VI CRITICAL THEORY AND PLURALIST HERMENEUTICS

The perceived failure of Habermas to offer a convincing theory of critical monism in a pluralist world¹⁷² has led those seeking a critical theory to adopt alternative reconciliations of hermeneutics with critical theory. In particular, they have been led to explore the possibility of a critical theory born of the contests envisaged by a pluralist hermeneutics. If multiple lifeworlds at any point in time are a reality, Couzens Hoy suggests,¹⁷³ might it not be enough for the critical appraisal of interpretations to invite consideration of a theory from the perspective of other lifeworlds which actually exist? Given that Habermas accepted that discourse can never be founded upon a transparent understanding of the background, he tacitly acknowledged that this appeal to other lifeworlds was what actually happened in everyday discursive practice. Perhaps an equally plausible interpretation of discursive practice would be to accept that what we put forward, for example in the human sciences, is an interpretive theory which best describes our perception of the facts as we understand them today. Our purpose for putting forward the theory is arguably to test it in the community to which it is disclosed, in order that lacunae, inaccuracies, unsupported assumptions and so forth may be revealed and the theory either modified or discarded.¹⁷⁴

In other words, the practical application of a pluralist theorisation of critical discourse, such as that propounded by Couzens Hoy, differs little from the application of the critical monism of Habermas. Both envisage a rational debate in which competing interpretations are subjected to the furnace of peer review. The key difference is in the concept of the purpose of such discourse. Habermas maintains that all discourse is premised on the search for truth or the best interpretation through a consensus reached by all rational, fully informed subjects participating in an ideal speech situation. On the other hand, a hermeneutic pluralist such as Couzens Hoy accepts that truth may be an outcome of discourse while refusing to make that the ultimate objective.

¹⁷⁰ Couzens Hoy and McCarthy, above n 47, 249. For further criticism of the utopian elements of Habermas's discourse theory see Y Sintomer, 'Power and Civil Society: Foucault vs. Habermas' (1992) 18 *Philosophy and Social Criticism* 357.

¹⁷¹ See, eg, Couzens Hoy and McCarthy, above n 47, 249; and Maeve Cooke, 'Habermas, Autonomy and the Identity of the Self' (1992) 18 *Philosophy and Social Criticism* 18.

¹⁷² For criticism of Habermas' commitment to an unconstrained consensus in the context of a pluralist lifeworld, see Selya Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* (1986); Thomas McCarthy, *Ideals and Illusions: On Reconstruction and Deconstruction in Contemporary Critical Theory* (1991); Cooke, *Language and Reason*, above n 146, 153-4.

¹⁷³ Couzens Hoy and McCarthy, above n 47, 260-2.

¹⁷⁴ See generally *ibid* 262; Warnke, *Gadamer*, above n 55, 132.

A *The Problem with Critical Pluralism*

Couzens Hoy's theory, it has already been noted, rejected the discourse of 'truth' but argued that one interpretation would be jettisoned in favour of another because it was 'better'.¹⁷⁵ But Couzens Hoy does not elaborate upon the standard applied in determining whether an interpretation is 'better'.¹⁷⁶ Calhoun has similarly attempted some form of compromise between hermeneutic and critical theories by jettisoning 'truth'. After recognising the politics of identity, he can only suggest that the best we can do is to come up with differing accounts, one of which may for the time being be of greater use for a particular pragmatic purpose.¹⁷⁷ What we seek, Calhoun observes, '[a]nd indeed often achieve — is not consensus as such, but adequate mutual understanding for the pursuit of various practical tasks in which we are jointly engaged.'¹⁷⁸

This merely begs the questions of what understanding can be 'adequate' and in relation to whose pragmatic purpose?¹⁷⁹ By suggesting that there is, at any point in time, one project (whether local or general) in which the entire community has consensually chosen to participate, Calhoun contradicts his earlier acknowledgement of the politics of identity. Furthermore, Calhoun fails to explain how such a consensus upon one project is possible in the first place. If there can be consensus upon one project, however localised, why can't there be consensus upon everything and hence, no politics of identity? Moreover, in the context of legal theory, Calhoun inexplicably suggests that the attribution of legal meaning is a special case in which meaning will be founded upon consensus.¹⁸⁰ Unlike Calhoun, this article accepts the implications of the politics of identity by recognising that the existence of some communal project is at best highly contextualised and contingent, only made afterwards, and not always already there.

The ranks of commentators embracing this pluralism born of the politics of identity continue to grow, all accepting that it is a 'good thing' to foster such a multiplicity of views because only from such social pluralism, they argue, can 'better' theories surface.¹⁸¹ None of these commentators is prepared to define

¹⁷⁵ For an early discussion of this in the context of legal interpretation, see Couzens Hoy, 'Dworkin's Constructive Optimism', above n 45, 355.

¹⁷⁶ For a similar approach to that of Couzens Hoy, see Warnke, above n 47, *Justice and Interpretation*, 132; Warnke, *Gadamer*, above n 55; Desmond Manderson, 'Beyond the Provincial: Space, Aesthetics, and Modernist Legal Theory' (1996) 20 *Melbourne University Law Review* 1048. See also Cooke, *Language and Reason*, above n 146, 157ff where Cooke argues in a similar vein for a procedural standard for the assessment of discourse rather than focusing upon consensus as the ideal. For the application of this approach in developing theories of deliberative democracy see, eg, James Fishkin, *Democracy and Deliberation: New Direction for Democratic Reform* (1994) 4; Cass Sunstein, 'Interest Groups in American Public Law' (1985) 38 *Stanford Law Review* 29.

¹⁷⁷ Calhoun, *Critical Social Theory*, above n 8, 7.

¹⁷⁸ Calhoun, 'Social Theory and the Politics of Identity', above n 8, 51.

¹⁷⁹ For example, was there really only one communal purpose during the Gulf War? For a critique of postmodernist theory and its uncritical implications for localised social action, see Christopher Norris, above n 170.

¹⁸⁰ Calhoun, 'Social Theory and the Politics of Identity', above n 8, 51, 52.

¹⁸¹ See above n 176.

what they mean by 'better'. Given that critical pluralists reject any universalising standpoint from which to assess the respective merits of competing theories, it is difficult to understand how the meaning of a 'better' theory can itself be anything other than controversial and beyond universal acceptance. If one accepts the politics of identity and the pluralism which it spawns, it is difficult to see how such 'critical' pluralism can be truly critical and resist the slide into, at least, the soft relativism of Rorty, where 'hey man, what's good for us is good' is the catchcry.

VII A PRAGMATIC, PLURALIST THEORY OF INTERPRETATION

A Accepting Pluralism

From the preceding discussion, it may be seen that in more recent times theories of determinacy have been founded upon both hermeneutic and universalist propositions. Gadamer, Habermas, Fish, Rorty and Calhoun all sought to exclude power by recourse to some shared tradition, ideal or pragmatic project which engendered a social consensus. Couzens Hoy and Jean François Lyotard preferred to deal with discourse in an abstract way, remaining silent on how a pluralist discursive theory would apply in practice when decisions have to be made. The principal critique of such theories offered by this article has been that by admitting the pragmatism of language, and by failing to offer a convincing account of language use in the context of the politics of identity, these theories have failed.

If there is a multiplicity of sub-communities and hence potentially infinite applications of a signifier, does this mean that there is no truth, no meaning, no 'best interpretation'? Altman has interpreted (in a self-serving way) the indeterminacy thesis to be suggesting this.¹⁸² Or does the politics of identity mean, as some 'deconstructionists' have suggested,¹⁸³ that meaning is what we, individually, choose to make of any speech act in some anarchic frenzy. There is, as Hart once said in a quite different context, the need for a fresh start in offering a theory of language which rejects both the determinacy thesis and the nihilism and apathy that some deconstructionists apparently endorse.

In light of the earlier discussion of pluralism, the starting point of such a fresh start must be the acceptance of the pluralism born of the politics of identity. As has been argued above, such pluralism is clearly incompatible with the universalist aspects of Habermas' work, the monologic discourse of the monist interpretation of Gadamer's work and also Rorty's ethnocentric community. In a

¹⁸² See generally, Altman, above n 1, 92-3. Curiously, Altman discounts 'deconstruction' without one reference to Derrida, just one reference to Foucault and only a few pages dealing with several legal theorists. The passage from Foucault quoted by Altman, when placed in the context of Foucault's work, does not necessarily support Altman's interpretation that indeterminacy equates with an absence of meaning. Foucault and other 'radical relativists' (Altman's terminology, not mine) argue that there is no essential meaning, that meaning is created in any given context. Indeterminacy then, does not necessarily mean an absence of meaning. Rather, indeterminacy merely suggests that there is a choice between possible meanings.

¹⁸³ See, eg, Joseph Miller, *The Ethics of Reading* (1987).

pluralist world, a multitude of interpretive communities is inescapable. In this regard, one significant aspect of Fish's work is his recognition that interpretation occurs at a host of localised sites.¹⁸⁴ However, there must be reservations concerning Fish's depiction of a lifeworld mysteriously divided into autonomous, homogeneous institutions.¹⁸⁵ Further, as even Fish has acknowledged at times, the notion of institutional autonomy and homogeneity does not stand up to much scrutiny. Indeed, Fish acknowledged that individuals may come to challenge the assumptions which they have 'inherited' and thereby discard those assumptions in favour of another set of assumptions.¹⁸⁶ Further, Fish conceded that members within an institution may have quite different understandings of the particular enterprise. The Vietnam War, he notes, had different effects on participants within the 'literary studies' institution, depending upon 'whether or not their conception of what they [did], their sense of the enterprise, [was] bound up in an essential way with political issues.'¹⁸⁷ In a similar vein, he argued that the change wrought by Chomskian linguistics was only relevant to those in the literary community who already considered themselves linguists.¹⁸⁸ In the context of law, Fish observes:

Rather than being an embarrassment, the presence in contract doctrine of contradictory versions of the enterprise is an opportunity. It is in the spaces opened by the juxtaposition of apparently irreconcilable impulses — to be purely formal and intuitively moral — that the law is able to exercise its resourcefulness.¹⁸⁹

In the absence of the stabilising effect upon meaning flowing from the existence of these homogeneous, autonomous, interpretive communities, we must accept that legal arguments may be subjected to critical review not only by members of the legal institution, but by a wide spectrum of the community.¹⁹⁰

¹⁸⁴ Stanley Fish, *Is There a Text in This Class? The Authority of Interpretative Communities* (1980) 97–8.

¹⁸⁵ It is beyond the scope of this paper to explore the shortcomings of Fish's theory in any detail. Suffice it to say that Fish at no stage offers an account of how such institutions came into existence, other than vaguely alluding to some social contract-like allocation of institutional function: see, eg, *ibid.* One critical problem which Fish does not address is how it was possible for there to be communal discourse and agreement upon such an allocation of institutional tasks, if meaning is institution-specific and *postdates* such an agreement.

¹⁸⁶ 'This does not mean that one is always a prisoner of his [*sic*] present perspective. It is always possible to entertain beliefs and opinions other than one's own; but that is precisely how they will be seen, as beliefs and opinions *other than one's own*, and therefore as beliefs and opinions that are false, or mistaken, or partial, or immature, or absurd. That is why a revolution in one's beliefs will always feel like a progress': *ibid* 361.

¹⁸⁷ Fish, *Doing What Comes Naturally*, above n 119, 151.

¹⁸⁸ *Ibid* 147–8. It is because of cases such as this, where linguistics as a distinct discipline preceded Chomskian linguistics, that Fish argues that change can only occur where it is anticipated within the relevant interpretive community.

¹⁸⁹ Fish, *There's No Such Thing As Free Speech*, above n 47, 161.

¹⁹⁰ Many decisions of the judicial branch of government are reported in the media, ranging from summaries of penalties imposed upon the latest group of drink drivers to controversial judicial observations to detailed analyses of particular judgments. Aside from scrutiny by the mass media, many decisions will be examined by a host of 'non-legal' people including the litigants in the instant case, people seeking their own legal advice, and members of various interest groups and political lobbyists. The process by which some decisions are considered worthy of widespread review itself calls for further study, but for present purposes, the point is that the critical

Once the construct of one interpretive community is rejected, the theorisation of social discourse must turn away from consensus by the broad community or by some subcommunity as the foundation of discourse.

The absence of personal and cultural homogeneity postulated by the politics of identity suggests that there can be no 'right' interpretation as such, whether under hermeneutic or universalist models. At the individual level, the interpreter's interpretation of a text reflects the outcome of a balancing of the differing and often contradictory aspects of the self in arriving at an arbitrary conclusion as to what the text means.¹⁹¹ For any interpreter, an interpretation is therefore a contingent point on a continuum of personal change as the competing aspects of the self are reconsidered and new compromises reached. At the social level,¹⁹² in a heterogeneous community there will also be a number of interpretations vying for supremacy. The identification of the 'best' interpretation ultimately constitutes an act of power founded upon a subjective decision regarding the acceptability of the warrants of authority accompanying the competing interpretations to disparate parts of the community.¹⁹³ To put this another way, in a world where there is no one 'natural', 'rational' or hermeneutically ascertained meaning and where power infiltrates every nook of social being, the attribution of meaning is inescapably an act of power.

B *The Role of Power*

There are broadly three reactions to such an assertion of the inevitability and ubiquity of power in all social relations, including adjudication. The prospect of such a role for power within any theory of interpretation is anathema to liberal legalists, who portray the exercise of such power in a negative light. Under liberal theory, power is legitimated either expressly or impliedly by the consent of autonomous rational subjects.¹⁹⁴ If adjudication involved the illegitimate (non-consensual) exercise of power, they say, we must inevitably slide back into the anarchic morass of the Dark Ages from which we were saved by legal determinacy.¹⁹⁵ No, liberal legalists continue, the determinacy thesis must accurately

audience might be a small portion of any particular community or it might be all of the community.

¹⁹¹ Dyson argues that we need to move away from essentialising assumptions regarding characteristics of members of any class/race etc: Michael Dyson, *Reflecting Black: African American Cultural Criticism* (1993); see also Diana Fuss, *Essentially Speaking: Feminism, Nature and Difference* (1989) xii.

¹⁹² Of course, there is no clear dichotomy between the individual and the social level, the differentiation only being used here as an aid to explication.

¹⁹³ The concept of warranted assertibility being taken from Richard Rorty: Rorty, above n 24, 136.

¹⁹⁴ John Locke, 'Second Treatise of Government' in John Locke, *Two Treatises of Government* (1st ed 1698, 1988) [211], 403. See also, Thomas Hobbes, *Leviathan*, (1st ed 1651, 1968) 225–8. Dworkin rejects the notion of consent, but in practical terms it is difficult to differentiate the 'protestantism' of his 'true community' of willing subjects from one founded upon consent; see Dworkin, above n 1, 190, 192–3, 252. For an examination of the modern theorisation of power as founded upon consent see, eg, Barry Hindess, *Discourses of Power: From Hobbes to Foucault* (1996).

¹⁹⁵ See generally, Altman, above n 1.

reflect social reality, because otherwise we would already have slipped into the war of all against all of the Dark Ages.

The second response to the recognition of the significance of power within social relations is to accept its presence, but to deny that it is *necessarily* present. Thus many non-liberals depict law as already the domain of power. According to this critical perspective, legal doctrine merely represents manipulation by an empowered elite furthering its own interests under the guise of a rights discourse.¹⁹⁶ To these critical theorists, the determinacy thesis serves the ideological purpose of masking the reality of the illegitimacy of judicial power. 'To study ideology', John Thompson suggests in a different context, 'is to study the ways in which meaning or signification [serve] to sustain relations of domination.'¹⁹⁷ According to such critiques of legal doctrine, the illegitimate exercise of power in adjudication must be eliminated as part of a more wide-ranging reform of the political community, which seeks to reinstate the autonomy of the rational subject as the foundation of legitimate government.

The third response to the recognition of a necessary role for power in adjudication is to embrace it in various ways as an inevitable part of social discourse. This third option is clearly anathema to proponents of the first two approaches to the role of power in discourse. Understandably, those who engage in social theory with a view to social reform ask if everything is an effect of power:

What is there 'left over', so to speak, to find this situation so appalling? What [*sic*] including one Michel Foucault could conceivably protest against this condition, given that all subjectivity is merely the effect of power in the first place? If there is nothing beyond power, then there is nothing that is being blocked, categorized and regimented, and therefore absolutely no need to worry. Foucault does indeed speak of resistances to power; but what exactly is doing the resisting is an enigma his work does not manage to dispel.¹⁹⁸

Non-liberals therefore worry about the postmodern scepticism about truth and rights, perhaps understandably seeing a rights discourse as a central plank in a program of furthering the interests of disadvantaged peoples:

I worry about criticising rights and legal language just when they have become available to people who had previously lacked access to them. I worry about those who have, telling those who do not, 'you do not need it, you should not want it.'¹⁹⁹

There are therefore a number of significant contemporary discourses aligned against the postulate of the inevitability of power in adjudication. Such discourses either perceive power as an illegitimate component of adjudication where it is not founded upon the consent of autonomous, rational subjects or, without

¹⁹⁶ See, eg, Horwitz, above n 133; Duncanson, above n 131, 298. For a discussion of this functionalist tendency within critical legal studies generally, see Robert Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57.

¹⁹⁷ John Thompson, *Studies in the Theory of Ideology* (1984) 4.

¹⁹⁸ Eagleton, *Ideology*, above n 9, 47.

¹⁹⁹ Martha Minow, 'Interpreting Rights: An Essay for Robert Cover' (1987) 96 *Yale Law Journal* 1860, 1910.

explicitly adopting this liberal denunciation of power, are fearful of the consequences of embracing power in social theory. The question therefore arises of how a non-liberal legal theory can simultaneously account for the phenomenology of determinacy; explain the fact that we have not succumbed to the Hobbesian spectre of the war of all against all; deny the validity of an ideal adjudication bereft of illegitimate power, and still provide some hope for those who wish to offer a critique of the status quo without being told in Baudrillardian fashion, that 'we don't debate things in these here parts because rationalism has been run out of town.'²⁰⁰

But the depiction of power as avoidable, which underpins the first two responses to power, has not been the only model for the exercise of power within Western social theory. In a theorisation of power similar in many respects to antecedent critical theory and even one branch of Locke's deliberations upon power,²⁰¹ Foucault argued that there is a need to 'cut off the King's head' by acknowledging the diversity and ubiquity of power within any community. In various degrees and forms, power is exercised by everybody within a community: total subjugation can therefore only rarely exist.²⁰² Thus, Foucault challenged the universality of the ideal underpinning much critical social theory, arguing that such an ideal is merely one effect of power.²⁰³ One reading of Foucault would therefore suggest that social power is a much broader, multifaceted phenomenon than what Hindess has called the 'simple-minded determinism'²⁰⁴ of a concept of power as a mere ability to control others. On this view, power can not only control but be a means of creation:

If power were never anything but repressive, if it never did anything but to say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse.²⁰⁵

Foucault is therefore not concerned with the legitimisation of power in particular instances, but rather merely with describing the effects of power in localised discourses.

Eagleton's concern that the recognition of a role for power in all social discourse eliminates any prospect for critique of alternative world views is founded

²⁰⁰ See, eg, Jean Baudrillard, *Forget Foucault* (1987).

²⁰¹ For a discussion of which see Barry Hindess, above n 194, 17–22, 145–6.

²⁰² Foucault, 'About the Beginning of the Hermeneutics of the Self', above n 118, 221; Michel Foucault, 'The Ethic of Care for the Self as a Practice of Freedom' in James Bernauer and David Rasmussen (eds), *The Final Foucault* (1988) 1, 12.

²⁰³ Foucault, 'About the Beginning of the Hermeneutics of the Self', above n 118.

²⁰⁴ Hindess, above n 194, 141.

²⁰⁵ Michel Foucault, 'Truth and Power' in Paul Rabinow (ed), *The Foucault Reader* (1986) 51, 61. See also Michel Foucault, *Discipline and Punish — The Birth of the Prison* (1977) Pt 3, where Foucault develops this theme of the creative aspects of disciplinary power. For a similarly critical view of the functionalist depiction of law as simply furthering the interests of a ruling class, see E P Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975) 258–69. As Calhoun notes, Foucault's formulation of power precludes any prospect of a critical perspective: Calhoun, *Critical Social Theory*, above n 8, 119; see also Habermas, *The Philosophical Discourse of Modernity*, above n 86, chs 9, 10.

upon a 'quantitative'²⁰⁶ conception of power, which assumes that social relations arise from confrontations of power in which the person or group with the most power subjugates the other(s). Under this quantitative theory of power, the issue is whether the power is being legitimately exercised or not; legitimacy generally being conceived in terms of the consent of autonomous rational subjects. At times Foucault lent support to this quantitative conception of power, particularly when he wrote of power at the macro level:

[A] central phenomenon in the history of societies is that they manifest in a massive and universalizing form, at the level of the whole social body, the locking together of power relations with relations of strategy and the results proceeding from their interaction.²⁰⁷

The theory of interpretation advanced in this article denies that such totalising power can exist, a view consistent with the former conception of Foucault's work which emphasised the localised nature of power.²⁰⁸ This is not to suggest that at times the exercise of power in the quantitative sense will not be too apparent — the suppression of dissenting interpretations in the political arena by bloody means is all too frequent. However, the point of this article is that the survival of any interpretation cannot be achieved by force alone.

C *The Combination of Power with Rhetoric*

Some sense of the complexity introduced into any history by this recognition of both a bifurcation of concepts of power and the acceptance of a diffusion of power throughout the community may be gleaned from Douglas Hay's account of the administration of criminal law in the United Kingdom during the eighteenth century.²⁰⁹ Hay's thesis is that the successful administration of criminal law in a time of great social foment was not solely dependent upon the crushing weight of state authority, but was largely attributable to what would often be called 'extra-legal factors' such as the paternalism of the ruling classes. The law could be brutally applied when need be, but it was not brute force alone which served to maintain order in a community with a largely ineffective criminal administration. In other words, order was maintained as much by the willing compliance of the 'oppressed' as by the imposition of state authority.

Hay's work suggests that members of a community may often feel that an interpretation is determinate and even, perhaps, 'right', notwithstanding that such an interpretation runs contrary to the perceived interests of those members. But it is the contention of this article that the dynamism of the politics of identity dictates that any such conclusion can only be a tentative, contingent position

²⁰⁶ For a discussion of differing conceptions of power within Western social theory, see generally Hindess, above n 194.

²⁰⁷ Foucault, 'About the Beginning of the Hermeneutics of the Self', above n 120, 226.

²⁰⁸ See, eg, Michel Foucault, 'Omnes et Singulatim: Towards a Criticism of "Political Reason"' in Sterling McMurrin (ed), *The Tanner Lectures on Human Values* (1981) vol 2, 223, 226; Michel Foucault, 'What is Enlightenment?' in Paul Rabinow (ed), *The Foucault Reader* (1986) 32, 45.

²⁰⁹ Douglas Hay, 'Property, Authority and the Criminal Law' in Douglas Hay et al, *Albions Fatal Tree: Crime and Society in Eighteenth Century England* (1975) 17.

founded upon the individual's interpretations of the arguments in favour of competing interpretations. Such a position is subject to review at any time in response to alternative arguments for an alternative interpretation. For any meaning to arise and survive in the contingent world portrayed by the politics of identity, there must be sufficient support for a particular interpretation for it to be accepted as 'right'. The task of any advocate of an interpretation is therefore to frame the interpretation in such a manner that it garners sufficient support from the proportions of the community that may critically review the interpretation. In the absence of any universalising or hermeneutic standpoint from which truth may be assessed, the rhetorical art of persuasion is clearly critical to the success of any argument.

It is in this regard that Rorty's notion of warrants of authority is relevant. However, rather than adopting Rorty's portrayal of warrants of authority as having a standing accepted by all members of the community, I am arguing that the arguments in support of a particular interpretation may need to appeal to multiple warrants of authority to be acceptable in different coexisting lifeworlds in order to muster sufficient support.²¹⁰ By raising alternative arguments in support of a particular interpretation, the interpreter gathers together members of the community in support of one interpretation even though the supporters might agree on nothing else.²¹¹ Beginning from different standpoints does not necessarily produce different results. The persuasiveness of any interpretation may be influenced by any or all of a host of principles, including what Richard Posner called the maximisation of wealth,²¹² consideration of past decisions, arguments from particular moral principles, argument by analogy, and even the universalising rhetoric of determinacy.²¹³ The identification of meaning must therefore be a rhetorical process in which an interpreter seeks to win the support of sufficient peers and commentators so as to minimise the risk of criticism or other adverse reaction. Moreover, publication of alternative ideas might not be tolerated, compelling the decision-maker to frame the grounds for a decision in terms acceptable to the reviewing community.²¹⁴

Within such a model there can be no question that the decision-maker is merely identifying what social morality requires or what the interests of some undefined social class would require.²¹⁵ There can, therefore, be no suggestion that this theory allows 'us' to settle back on the sofa with a self-satisfied smile, relaxed in

²¹⁰ In his discussion of ideology, Eagleton suggests that it is the heterogeneity of the dominant ideology which enables it to survive, a view which is consistent with my theory of interpretation: Eagleton, *Ideology*, above n 9, 45.

²¹¹ Even Marx and Engels recognised the importance to the success of a revolutionary class of this rhetorical task of garnering support by appealing to disparate classes: Karl Marx and Frederick Engels, *The German Ideology: Part One* (1978) 65. For a discussion of this universalising aspect of emergent ideology, see Eagleton, *Ideology*, above n 9, 56.

²¹² Richard Posner, *Economic Analysis of Law* (4th ed, 1992) 523.

²¹³ Fish, *There's No Such Thing As Free Speech*, above n 47, 141–79.

²¹⁴ For which I have drawn upon Rorty's concept of warranted assertibility: see text accompanying n 193. For application of this concept in the domain of the philosophy of science, see, eg, Margaret Jacob, 'Science and Politics in the Late Twentieth Century' in Margaret Jacob, *The Politics of Western Science 1640–1990* (1992) 1, 4.

²¹⁵ But cf Horwitz, above n 133.

the knowledge that '[o]ur identification with our community — our society, our political tradition, our intellectual heritage — is heightened when we see this community as ours rather than nature's, *shaped* rather than *found*, one among many which men [*sic*] have made.'²¹⁶

This reassurance is not available to us because there is not one society which we can call 'ours'.²¹⁷ All that we may have is a multiplicity of coalitions of interest groups prepared to accept various premises but not others, various arguments but not others, various interpretations but not others, across the gamut of political issues. Any such coalition is liable to change in response to changes within such coalitions elsewhere in the wider community.²¹⁸ Nowhere is there an equilibrium which affords anybody the opportunity to rest on their laurels²¹⁹ — a proponent of an interpretation is constantly striving to win and maintain allies in a dynamic world. An argument is only as good as the support which it is able to muster from the wider social context of which it is a part.²²⁰ Furthermore, as with Couzens Hoy's critical pluralism, this theory is sceptical of the prospects of achieving 'the truth'.

VIII CONCLUSION

By accepting that all knowledge is 'grounded' in some social context, contemporary determinacy theorists have conceded that all knowledge is to some extent pragmatic. But once pragmatism is thus admitted past the portals of liberal legal theory, it wreaks havoc from within upon attempts to theorise legal determinacy. Both psychoanalytic theory and multicultural theory, which stress the plurality of the personal and social lifeworld respectively, offer a sound foundation for questioning the liberal belief in a monovalent, homogeneous community which serves to constrain what is accepted to be the pragmatic process of interpretation. Unless contemporary liberal theory can develop an account of legal determinacy which incorporates an acknowledgement of this politics of identity, it is difficult to see how the liberal determinacy thesis can be considered anything other than a view of law through rose-tinted spectacles. It is in this context that Habermas'

²¹⁶ Rorty, above n 24, 166.

²¹⁷ As Raymond Williams noted, hegemonic ideology must always be responsive to the dynamism of alternative ideologies: Raymond Williams, *Marxism and Literature* (1977) 112.

²¹⁸ 'Discourses must be treated as discontinuous practices, which cross each other, are sometimes juxtaposed with one another, but can just as well exclude or be aware of each other': Michel Foucault, 'Is it Useless to Revolt?' (1981) 8 *Philosophy and Social Criticism* 1. But cf Horwitz, above n 133. Whilst a critique of Horwitz's work is beyond the scope of this paper, the pluralist social theory tendered here is clearly inconsistent with Horwitz's thesis. Horwitz argues that American law adapted mechanically to the demands of an ascendant 'commercial interest.' Thus he charts the demise of substantive judicial decision-making and the rise of legal formalism. The 'oppressed' may also have had an interest in the apparent objectification of the law, as it may have enabled them to adopt the rhetoric of rights rather than being confronted with the reality of judicial discretion exercised by a biased judge: see further Thompson, above n 205. What Horwitz seems to assume is that the law successfully picked a winner in forming a strategic alliance with the commercial interest. But the 'commercial interest' could not exist without the host of legal relations which constituted it as a prominent interest.

²¹⁹ *Contra* Gadamer, *Reason in the Age of Science*, above n 66, 108–9.

²²⁰ Such an approach is therefore incompatible with a strong relativism, which accepts that each argument is as good as any other.

work is significant. He was prepared to accept the pluralism of the politics of identity, and sought to develop a theory of determinacy in a pluralist lifeworld. Habermas' work therefore points the way for future developments within liberal legal theory. But as we have seen, Habermas' unconvincing attempt to overcome the anarchic effects of a pluralist world suggests that present and future liberal legalists confront a daunting, and arguably impossible, task.

In rejecting the various liberal and non-liberal accounts of the determinacy thesis, I am mindful of the 'political' implications of such a conclusion. As noted at the outset of this paper, if it were convincing, the determinacy thesis might be a reassuring account of how a 'civilised' society can entrench the rule of law as a bulwark against arbitrary exercises of 'quantitative' power. For this reason, it is not only conservative liberals who support the determinacy thesis as a fundamental aspect of modern democratic society. It is therefore not surprising to find that a theory of interpretive determinacy is adopted by some on the political left who also advance a theory of social transformation towards a 'better' society, because such transformative theories also depend upon being able to identify the transformative path which is 'right'. To those advancing such theories of social transformation, the indeterminacy thesis can all too easily lead to a fatalistic acceptance that 'what will be will be'. There is certainly some merit in the concern expressed by Norris and Eagleton that to reject accounts of legal determinacy without replacing them with an alternative amounts to no more than the adoption of what they perceive to be a conservative, stable status quo.²²¹ Indeed, this conservative endorsement of the status quo is all too apparent in the postmodernist work of Fish and Rorty.

In the latter part of this paper I have argued that an endorsement of an indeterminacy thesis need not entail the conservative depiction of a world in which dissenting voices are lost in 'our' 'frankly ethnocentric' world view or in the prevailing interpretation of 'the' legal community. If the indeterminacy thesis is taken seriously, I have argued, I cannot validly argue for one 'right' theory of interpretation, one 'right' interpretation or even one 'right' program of social reform. Nor can I validly argue for a critical pluralism, a description of a theory which is oxymoronic if the pluralist aspect is taken seriously. In a sense the argument advanced in this paper therefore fatalistically accepts that there is nothing to be done but acquiesce in the status quo. But whereas Norris, Eagleton, Rorty and Fish all generally perceive the status quo to be a static world dominated by the conservative influence of liberal theory, the argument of this article is that the lifeworld is much more dynamic such that no one world view *necessarily* holds sway. Indeed, taking the domain of liberal legal theory, one purpose of this paper has been to illustrate the fact that the liberal idea of legal determinacy is itself the subject of competing interpretations. The argument advanced in the latter part of this paper would suggest that the willingness of many social and legal theorists to suppress such dynamism in favour of a 'stable' status quo is itself but a rhetorical device.

²²¹ See, eg, Christopher Norris, *Reclaiming Truth: Contribution to a Critique of Cultural Relativism* (1996).

To the liberal legalist worried about the breakdown of social order should the determinacy thesis be jettisoned, and to the transformative theorist who believes that he or she is 'outside' the present legal system, I therefore say the same thing: we are already a fractured part of a fractured community, in which we are all constantly seeking to gather supporters for our respective views. This account of the rhetoric of legal theory and legal interpretation is therefore neither a normative theory nor a conservative theory.

This theory of law as rhetoric is also significant for legal history. According to contemporary liberal legal theory the analysis of earlier legal interpretations would entail an account of how judges and administrators had generally reflected the morality of their community in making an interpretation, and would perhaps also identify those interpretations which were 'wrong' according to the prevailing standards of the community at the time of the decision. By contrast, the theory of law as rhetoric in a pluralist world asks: 'How was it that this legal doctrine came to be accepted as right — what rhetorical devices enhanced the appeal of this doctrine in a multifarious community?' In answering this question, the diversity within our pluralist world must be to offer a wide-ranging interpretation of the operation of the plurality that is law within a pluralist society.