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Foreword: Postmodernism and Law

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SYMPOSIUM

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THE SCENE AND THE ACTION

In this symposium entitled "Postmodernism and Law," the critical term has turned out to be the "and." This may seem somewhat startling, if not downright inauspicious, but in fact it is neither. If the "and" is so important, it is because it establishes the grammar of the discourse to be had about postmodernism and law. It is this "and" which in an ironically disjunctive mode separates "postmodernism" and "law" and which hints that the conjunction of the two (if any) is something deferred, yet to be achieved.[1]

In Professor Jennifer Wicke's essay, *Postmodern Identity and the Legal Subject*, this separation and promised conjunction of postmodernism *and* law is explored through the metaphor of sexuality.[2] As Professor Wicke notes, "the coming together of 'postmodernism' and the Law with its stern capital 'L' intact promises to be a dynamic coupling, postmodernism offering to put its delirious spin on the rigor and fixity of the body of the law."[3] Professor Wicke questions whether this "dynamic coupling" *will* and *should* ever occur.

If we follow Professor Wicke's script, it is questionable whether the coupling will ever occur. Even though Wicke announces the encounter as a passionate, spark-producing romance, nonetheless, this is a romance that plays itself out as burlesque comedy. Indeed, whenever it is time for postmodernism and law to couple, the postmodern is

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I am grateful to the members of the University of Colorado Law Review for their intellectual curiosity, their sense of purpose, and their unfailing professionalism in putting this symposium together. On all these counts, special thanks to Etta Walker.

1. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1444-46 (1990) (examining the disjunctive effect of the conjunctive "and").

2. Wicke, *Postmodern Identity and the Legal Subject*, 62 U. COLO. L. REV. 455, 455 (1991).

3. *Id.*

nowhere to be found. On the contrary, according to Wicke, postmodern identity is a kind of identity crisis or as she puts its, an "oxymoron,"[4] "an immediate contradiction"[5]—one that is "perhaps inconceivable and undesirable."[6] Now, of course, absent a postmodern identity on the scene, law will be left all alone and there will be no "dynamic coupling" at all.

Professor Wicke is not entirely chagrined by the prospect that the courtship between postmodernism and law may be frustrated. She raises the concern that "the costs of a shot-gun marriage between the two are too high—these bedfellows could make strange politics."[7] She thinks that perhaps there *should* be no coupling. Her concern is an explicitly political one: while postmodernism dissolves the notions of identity and the subject, both social conceptions remain critical (essential?) to the political struggles of oppressed groups within the legal arena. To obtain protection, oppressed groups must, according to Wicke, be able to represent themselves as coherent unified legal subjects—precisely the kinds of legal subjects (the person, the corporation, etc.) that Wicke believes our courts of law already recognize. For Wicke, the union of law and postmodernism could well lead to the dissolution of the various legally recognized subjects and thus to the denial of rights and other important legal protections for oppressed groups.

All of Wicke's metaphorics of sexual union prompt Mary Joe Frug to ask, "Who's the bride and who's the bridegroom?" Professor Frug detects in Wicke's sexualization of the encounter between postmodernism and law an implicit hierarchy. As Professor Frug notes, Wicke represents Law as having a "rigorous body" that deploys "ammunition," whereas postmodernism is likened to "elastic bands and adhesives."[8] As Frug argues, Wicke represents THE LAW in the metaphors of male power (rigor, solidity, etc.) while postmodernism is represented in the metaphors of female subordination (pliancy, softness, etc.) For Frug then, given this sort of framing, the dramatic denouement is quite predictable: "the individual who will yield her name and her body is postmodernism."[9]

If law and postmodernism are both already set up in Wicke's arti-

4. *Id.* at 463.

5. *Id.*

6. *Id.*

7. *Id.* at 455.

8. Frug, *Law and Postmodernism: The Politics of a Marriage, A Symposium Response to Professor Jennifer Wicke*, 62 U. COLO. L. REV. 483, 484 (1991).

9. Frug, Response to Professor Jennifer Wicke at the Symposium on Law and Postmodernism (Feb. 22, 1991) (available at University of Colorado Law Review). *See generally* Frug, *supra* note 8, at 485-86.

cle to consummate this action (or perhaps inaction) the question becomes what will motivate its actualization. Mary Joe Frug answers that it is "because of Professor Wicke's commitment to *politics*" and to "subordinate groups" that postmodernism will have to give in to THE LAW, and to THE LAW's definition of the subject as unified and coherent.[10]

Now, note the intervention here: in the midst of this courtship between postmodernism and law, a third and seemingly determinative actor has appeared: *the political.* Indeed, Wicke's description of a "dalliance" between law and postmodernism has just turned into a *menage a trois*—one where the political is already calling the shots. Indeed, in Wicke's article, the political is already aligned with THE LAW and both seem to be always already immune from the identity-decentering effects of the postmodern. In Wicke's article, the encounter between THE LAW and postmodernism is regulated by a politics whose identity and significance are themselves put beyond question.

This story, if I have it right, presupposes and reaffirms a rather pre-postmodern understanding of the identity of the political (not to mention, the law). It presupposes that political categories like "self-determination," or "rights," or even "oppressed group" have *some fundamental significance* immune from the free play of signifiers—that they have *some solid presence* that resists the identity-decentering movements of the postmodern condition itself.

Indeed, while Wicke's article does a magnificent job of reacquainting postmodernist thought with its own postmodern condition (and hence with its very own identity crisis), it simultaneously locates the political (as well as the law) in some stable somewhere safely *beyond* the reach of the vertiginous gyrations of the postmodern condition. There is in short a crucial asymmetry here: postmodernity for postmodernism and pre-postmodernism for the law and for the political. In Wicke's article, it is as if the law and the political were already imbricated in *the scene* and the postmodern were a kind of uninvited *actor*, relatively helpless to change the *action* already anticipated by this scene. Given this social aesthetic, it is, of course, easily understandable that for Wicke postmodernism often seems to be informed by the "*fatuous assumption* that an alteration of textual style . . . or the decentering of a discourse . . . sends shock waves to the heart of social domination."[11]

Now, as I see it, the dramatic relations of Wicke's social aesthetics already pre-script this conclusion. Nonetheless, her point resonates

10. *See* Frug, *supra* note 8, at 485-86.

11. Wicke, *supra* note 2, at 471 (emphasis added).

broadly. Indeed, much postmodern thought (both in and out of the legal academy) undoubtedly goes wrong in imagining that its "novel" interpretive or "deconstructive" gestures "transform" social reality or otherwise accomplish something "politically meaningful" (beyond getting tenure). Of course, this premature presumption of the efficacity, significance, and success of academic thought is hardly unique to postmodernism. On the contrary, this sort of academic political romance, this naive philosophical idealism, characterizes virtually all contemporary legal thought (and much of the American academic enterprise in the humanities generally). But Wicke means to say more than this. She is not just launching a generic "idealism critique" at postmodernism. She thinks, if I have her right, that postmodernism, with its focus on representation and its decentering of the subject, is *especially* ill-equipped to accomplish desirable political objectives—and that this is particularly so when postmodernism is up against THE LAW.

Now again, there is something in Wicke's caution that seems to resonate profoundly. It certainly resonated with the scene when she first delivered her paper on that cold Colorado morning in the Lindsley Memorial Moot Courtroom of the University of Colorado School of Law. In this courtroom—with its austere furnishings, its official United States and State of Colorado flags, its windowless self-enclosure, its bureaucratic brown wood paneling, its stone cold juridical green marble, its stereotypic allocation of chair-status[12]—Wicke's caution seemed to be a virtual entailment of topography. Indeed, what could a postmodernist performance possibly accomplish in such a staid setting—a setting that constantly reminds of the serious, solemn, solid nature of the action that takes place in this room and others like it? Indeed, if we focus on *this* scene, on *this* staid courtroom, then perhaps we are compelled to agree with Wicke that THE LAW partakes of a seriousness, a solemnity, an objectified self-identical solidity that must undoubtedly overwhelm the action of postmodernism. This is a courtroom. Not a place for postmodernism.

And yet. . .

And yet, if we examine this scene more carefully, its seriousness, its solemnity, its objectified self-identical solidity begin to crack. The brown wood, it turns out, is early 1960s imitation dark walnut laminated paneling. The juridical green marble is plastic imitation marble. In fact, the entire courtroom is an imitation courtroom. And the appellate arguments heard here are imitation appellate arguments, in imitation cases heard before imitation judges presiding over an imitation

12. High backs for the judges, middle backs for the jury box, and hard backs for the audience.

moot court. In this very place where students are taught to become "real" lawyers and "real" judges, the seriousness, the solemnity, the objectified self-identical presence of THE LAW are revealed to be—when we think about it—imitation-seriousness, imitation-solemnity, imitation-solidity. In this courtroom, *as in "real" courtrooms*, what we have is a multiplicity of imitations imitating themselves. And *each* of these imitations, as we know, is *potentially* vulnerable at any time to being revealed—*if we think about it*[13]—as something less than "the real thing." This courtroom, like "real" courtrooms, does its work by virtue of those who have internalized the images, the symbols, the metaphors, the roles, and the rhetorical relations that constitute this courtroom as a kind of inter-subjective or trans-subjective reality.

And the question is, of course, what can we say about the "logic" of *this* trans-subjective or inter-subjective reality? Is it some sort of settled, *pre-rationalist* mythic order? Is it grounded, informed, and regulated by some sort of foundational *rationalist* logic amenable to propositional restatement like the end-products of the ALI? Is it the epiphenomenal manifestation of some grand totalizing philosophical *modernist* thematic? Is it the *postmodern* traffic of contingent and re-arranging intersections of a variety of social, cultural, and political forms?

I think that this courtroom, like law itself, can best be understood as a kind of patchwork—an assembly-in-process of all four kinds of epistemic "logics." What characterizes the most thoughtful accounts of our intellectual, political, and cultural situation is the recognition that we are constructed, configured, and enabled by the (as yet) unrationalized, unsynthesized, and uncontrollable play of pre-rationalist, rationalist, modernist, and postmodernist "logics."

These contemporaneous epistemic logics are related to each other in a wide variety of ways. Most simply, we can think of them spatially—as an arrangement of *separate and distinct forms*. But we can also think of them as *combining and recombining* in a broad array of different cultural or intellectual permutations—which become momentarily invested and immobolized in an object-form. We can also think of the various forms as *appropriating and reappropriating* each other for their own ends. We can even think of the various forms as *unconsciously nested* within each other (like a series of Chinese dolls—each of which remains unaware of what it contains and of what contains it). Finally, we can think of all these relations going on all at once. On this (arguably postmodern) account, the postmodern condition does not supplant or otherwise replace any of the (historically)

13. This is meant to be one hell of a qualification.

prior epistemic, intellectual, or cultural modes, but rather reenacts each in forms that are not their own.[14]

If this is right, then one can say that *this* moot courtroom (like "real" courtrooms) is already suffused with the postmodern condition. This is consonant with Professor Kennedy's description of our current situation. In his comment, Kennedy suggests that many of the features that Wicke associates with postmodernism—the increasing fragmentation and heterogeneity of culture, the weakening of traditional historical narratives, the devolution of the modernist syntheses, the increasing speed, proliferation, and succession of forms of life, the new modes of critical practice and technique—are all already suffusing law.[15] For Kennedy, the relation of postmodernism and law cannot be conceived as a union (frustrated or not) because there is no original separation. Postmodernism is not *outside* the Lindsley Memorial courtroom knocking at the door, waiting to get in. For David Kennedy, postmodernism is already here. It is immanent in the practices, the attitudes, the scene, and the action of the legal community.

For Kennedy, Wicke's caution against the corrosiveness of postmodernism to the politically desirable character of THE LAW arrives too late: it is a bit of nostalgia. And, as Kennedy suggests, nostalgia may itself have already become a kind of postmodern phenomenon—an unwitting performative confirmation that the world of modernism with its cheery Enlightenment hopes and methods, this world of legal process, of Warren courts, of 1964 civil rights struggles, of brave bold normative law review articles, and of constitutional rights worship is a world that has already gone by—a world that no longer says what it means and no longer means what it says; a world as old and faded and as self-evidently denaturalized as the 1960 imitation dark walnut paneling of the Lindsley Memorial Courtroom itself.

So: what's *the scene* and what's *the action*? Is the Lindsley Memorial Courtroom a postmodern scene in which the Enlightenment narratives feature as artifacts of nostalgia while we devote ourselves to the political possibilities offered by postmodernism—as Frug and Kennedy implicitly suggest? Or is the Lindsley Memorial Courtroom, as Wicke implicitly suggests, still an Enlightenment scene, a pristine enclave of THE LAW, one that we would all do well to protect from the identity-decentering action of the postmodernist interloper?

Whose metaphors? Which rhetoric?

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14. For elaboration, see Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEXAS L. REV. 1195 (1989).

15. Kennedy, *Some Comments on Law and Postmodernism: A Symposium Response to Professor Jennifer Wicke*, 62 U. COLO. L. REV. 475 (1991).

THE ACTOR AND THE ACTION

For Professor Jamie Boyle, these questions are already depasse. They are moot—at least for law. The scene is already (like it or not) a postmodernist one. In consequence, *scene* fades out as a critical dimension of dramatic tension. Instead, we turn to *the actor* and his *action*.

In his article, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, Boyle demonstrates the extent to which the legal scene is already populated by postmodern subjects.[16] He lucidly describes the epistemic and political roles played by our various constructed subjectivities in the *assumptions* of political theory (Rawls and Hobbes); in the doctrinal *representations* of the law; and in the *conduct* of professional discourses (such as academic legal thought itself).

Boyle argues that contemporary legal thought, including critical legal thought, has directed too much attention to objectivity and not enough to the subject. This seems to me to be exactly right. Indeed, as some of us have argued previously, much of the work that legal thinkers typically think, fear, or hope is being done by the "objective" realm of normative theory, legal doctrine, disciplining rules, etc., is already being done through the (thus far) eclipsed routines of socially constructed subjects.[17] For cls thinkers, this recognition means that the cls critiques of objectivity, neutrality, etc., will always fall short of

16. Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489 (1991).

17. Schlag, Fish v. Zapp: *The Case of the Relatively Autonomous Self*, 76 GEO. L. J. 37 (1988) [hereinafter Schlag, Fish v. Zapp]; Schlag, *supra* note 14; Schlag, *"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990); Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991); Schlag, *The Problem of the Subject*, 69 TEXAS L. REV. — (forthcoming 1991); Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135 (1988); Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990); Winter, *supra* note 1, at 1444-46; Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963 (1991); Winter, *Forward: Building Houses*, 69 TEX. L. REV. — (forthcoming 1991); Coombe, *Room for Manoeuver: Towards a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69 (1989); Coombe, *Same As It Ever Was: Rethinking the Politics of Legal Interpretation*, 34 MCGILL L. J. 603 (1989); Minow, *Identities*, 3 YALE J. L. & HUMANITIES 97 (1991).

In turn much of these recent efforts to inquire into the problem of the subject are influenced by and a reaction to earlier treatments of the legal subject in critical legal thought. Particularly significant was the early work of Duncan Kennedy on the subject-formation of the legal thinker. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY—A POLEMIC AGAINST THE SYSTEM (1983); Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1 (1983).

Much of the recent work on the subject is also (consciously or not) influenced by and a reaction to the work of Stanley Fish, who rarely mentions the subject or the self (by name) yet in one sense speaks of little else. S. FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE

the project of "transformation." Indeed, even if critical legal thinkers were completely successful in "demystifying," "deconstructing," and "contextualizing" *objectivist* legal doctrine and orthodox legal theory, they would still find themselves in the faculty lounges, in the legal theory workshops, in the classrooms, and in the courts confronting *the same* unreconstructed cast of characters, *the same* unmodified assembly of constructed subjectivities doing their *same old* routines under a *new* set of names—really neat names like "neo-pragmatism," "contextualism," "anti-formalism," and "anti-foundationalism."

If critical legal thinkers want to avoid yet another round of "We are all [. . .][18] now!"—if they are serious about wanting to transform the *practices* of members of the legal community—then "the subject" must be retrieved from intellectual oblivion and questioned. Boyle is clearly on to this: For him, the space of the subject is an important social site where much of the political work of law is already being done. As he puts it, "The subject is loaded up, consciously or unconsciously, with a particular set of qualities or attributes. That subject then *reflexively* produces a kind of society, a legal decision, or a professional practice."[19]

That insight, of course, raises an interesting problem—namely, that in our attempt to inquire into the construction of the subject, we will *reflexively project* into that inquiry our *own* social and intellectual construction as subjects. This seems to me to be largely unavoidable. In fact, I predict that when legal thinkers begin inquiry into the construction of legal subjects, they will—true to their own professional disciplinary formation as legal academic subjects—transform "the subject" into an *object* of inquiry and thereby establish and eclipse once again their own subjectivity. Hence, inquiries into the character of legal subjects will likely focus first on the most *objectified* forms of legal subjectivity (i.e., what the courts explicitly define as subjects). Correspondingly, the more difficult, interesting, and critical inquiries will be eclipsed at first. To give a few examples of these sorts of inquiries—the ones that will be overlooked at first—consider the kinds of

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OF THEORY IN LITERARY AND LEGAL STUDIES (1989); *see* Schlag, Fish v. Zapp, *supra*; Lippucci, *Surprised By Fish*, 63 U. COLO. L. REV. — (forthcoming 1992).

18. realists
historicists
contextualists
pragmatists
anti-formalists
anti-foundationalists
postmodernists

19. Boyle, *supra* note 16, at 518 (emphasis added).

questions posed by Michel Foucault. The interesting and critical challenge as Michel Foucault points out is to understand. . .

> the subject's points of insertion, modes of functioning, and system of dependencies. Doing so means overturning the traditional problem, no longer raising the questions: How can a free subject penetrate the substance of things and give it meaning? How can it activate the rules of a language from within and thus give rise to the designs which are properly its own? Instead, these questions will be raised: How, under what conditions, and in what forms can something like a subject appear in the order of discourse? What place can it occupy in each type of discourse, what functions can it assume, and by obeying what rules? *In short, it is a matter of depriving the subject (or its substitute) of its role as originator and of analyzing the subject as a variable and complex function of discourse.*[20]

Achieving this shift in the ways in which we ask and think about the subject and subjectivity will no doubt be difficult. I think we, as legal thinkers, are already constituted as the kinds of subjects who deny the serious subject-decentering implications of the otherwise widely touted—indeed, virtually now *de rigueur*—recognition that the subject is socially constructed.

Jamie Boyle seems to be aware of this problem: He advises that it is helpful to focus on "the professional subject"—to "focus on the way that people who work with the languages of power in our society (law, science, economics, policy science) are actually constituted as social subjects."[21] But I go further than Boyle on this point. It seems to me that if inquiry into the subject is to avoid, as much as possible, the unconscious re-establishment of the discipline's own already constructed subject-formations, the troubling of the disciplinary subject of the legal thinker is not just helpful, but absolutely critical.

What is required is nothing less than the decentering of the disciplinary subject and hence the "deconstruction" of precisely the form of disciplinary thinking that repeatedly situates the conscious autonomous individual legal thinker as the privileged adjudicator of the truth of propositional content and as the independent wielder of instrumental power. In certain modalities of our intellectual and material culture, this decentering of the subject is already well under way, requiring only a recognition—a taking note—that this decenteredness has been effected. Television, advertising, electoral politics, fashion,

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20. Foucault, *What is an Author?*, in P. RABINOW, THE FOUCAULT READER 118 (1984). For an attempt to produce this kind of shift in our inquiries about the subject, see Schlag, *The Problem of the Subject*, *supra* note 17.

21. Boyle, *supra* note 16, at 516-17.

and newspaper journalism, for instance, strike me as modalities where it is particularly easy to appreciate that there is no conscious, unitary, autonomous subject in charge of the modalities. In other modalities of material and intellectual culture, however, the representation of the subject as a conscious, unitary, and autonomous individual agent remains pervasive and dominant. For instance, in the formal practices of legal thought (e.g. law review writing) the construction of the individual subject as a conscious, unitary, and autonomous agent is so pervasive, and so well embedded, that any work that seriously challenges the identity of this subject immediately encounters a great deal of resistance. Indeed, if one attempts this sort of work, one learns rather quickly that legal thinkers are constructed as subjects who are quite resistant to any sort of inquiry into their *own* disciplinary character, routines, or intellectual practices.

Thus, we can expect a fair amount of *resistance* in our attempts to understand the construction of the legal thinker as subject. Indeed, we can expect all manner of resistance—identifiable in the idioms of jurisprudence, politics, psychoanalysis, or rhetoric. This resistance is, of course, an impediment to intellectual inquiry, but it can also be, at times, extremely (even if unwittingly) helpful. The resistance of legal thinkers to intellectual inquiry into their own subjectivity allows us to begin to understand how they are constituted as *legal subjects*. In the prototypical, pronounced, and sometimes unseemly reactions of legal thinkers to the questioning of their thinking practices, there is a graphic, performative revelation of the character of their subjectivity. In this revelation, their subjectivity becomes available for articulation, inquiry, and even transformation.

This re-orientation of jurisprudential attention to the sort of disciplinary subject who produces all this doctrine, legal theory, and academic argument strikes me as an important enterprise—not the least reason is that it has much more to do with what *Law is* than the objectivist epiphenomena which routinely *go by the name* of "case law," or "doctrine," or even "legal theory." Law *is* the habits of mind, the routines, the interpretive strategies, and the rhetorical constructions of those *who successfully* deploy its name.[22] That is why it is in some sense true that "law is politics." Law is politics, not because law is subject to political value choice, but rather because law is a form that power sometimes takes.[23]

22. *See*, Schlag, *Normativity and the Politics of Form*, *supra* note 17; Winter, *Without Privilege*, 139 U. PA. L. REV. 1063 (1991).

23. I will stop the regression here recognizing that the "power" term requires a great deal of elaboration—and prompts many more questions and difficulties than it answers. If I use the "power"

Now, if Boyle emphasizes the extent to which jurisprudential and political *action* is already anticipated by the construction of the *actor*, Thomas follows the more traditional strategy of attempting to persuade the *actors* (us) to adopt a particular kind of *action* (postmodern theory). In his provocative and ambitious article, *Milton and Mass Culture: Toward a Postmodernist Theory of Tolerance*, Thomas puts into play the postmodern political practice of "appropriation" by using Milton's thought to introduce and advocate a postmodern theory of tolerance.[24] Thomas demonstrates that postmodern theory—with its critiques of essentialism and foundationalism and its celebration of pluralism, textuality, and the decentered subject—does a better job than the critical theory of the Frankfurt School in illuminating the politics of free expression in our particular conditions.

For Thomas, the politics of the Frankfurt School err by dreaming the dream of transcendence and presuming the possibility of a noncoercive "communicative beyond." Postmodernism, by contrast, "admits its own inevitable complicity with domination and power, but . . . seeks to take advantage of that complicity to subvert or reorder the dominant cultural priorities."[25] This combination of complicity/subversion is precisely what Thomas describes as the postmodern "politics of appropriation." This is the kind of politics that will tolerate pornography, not because of some neutral principles fixation or some ACLU line-drawing difficulty, but because, as Thomas tells it, the exposure of pornography will subject it to a series of potentially emancipatory reformulations and recombinations—in which the themes of male domination may give way to "an interactive, non-linear, non-dominating sexuality that offers new opportunities for articulating desire and pleasure."[26]

Now, the kind of politics of appropriation that Thomas champions in his article are very far from those traditionally associated with the progressive politics of the Sixties and of the Frankfurt School. At the same time, however, Thomas's normative agenda and his political values seem quite congenial to that sort of Sixties politics. This of course prompts some questions.

One question, given the normative character of Thomas's article, is what informs his political value judgments? In other words, what is it about the postmodern politics of appropriation that leads Thomas to

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term here, it is in a constructive sense—to signal that the reduction or subordination of law to value choices (passionate or not) is a big mistake.

24. Thomas, *Milton and Mass Culture: Toward a Postmodernist Theory of Tolerance*, 62 U. COLO. L. REV. 525 (1991).

25. *Id.* at 556.

26. *Id.* at 560.

adopt a left of center politics largely consonant with the agenda of critical thought? Similar questions arise when Thomas sums up at the end of the article, and says "*This* is the postmodern condition of American culture. Our theory of tolerance, our first amendment jurisprudence, *should* recognize our condition."[27] Given Thomas's sustained celebration of postmodern thought—one wants to ask *why*? Why *should* first amendment jurisprudence recognize our condition? Or as Professor Dale Jamieson puts it, "where does the 'ought' come from, and what can be its force and grounding?"[28] How does postmodernism authorize such a seemingly totalizing, essentialist, and foundation-setting "*should*"? These questions can be understood in several senses. They can, of course, be understood as the usual rationalist request for some sort of normative justification—the usual sort of intellectually uninteresting projection of the categories and grammar of orthodox normativity on the postmodern text. More interestingly, however, the questions can be understood as framed within the postmodern aesthetic itself, and can thus be understood as asking for an account of the postmodern political strategy. Who or what is the postmodern subject who produces this political value agenda? What is the status, and how is it generated?

These are very difficult questions. There is no doubt that at least some forms—I would argue, the most interesting forms—of postmodern thought place the possibility and the character of ethics in question. The resulting tension between postmodern thought and ethics prompts responses along rather predictable lines. In decreasing order of frequency in the legal literature, we have these three kinds of responses:

The simple rejection response. This response entails the wholesale *rejection* of one paradigm (say, postmodernism) by the other (say, ethical thought). For instance, postmodernism is summarily rejected because its redescription of the world is conceived to sanction the amoral and the immoral. On the other side, ethics is rejected entirely because the ethical is construed as synonymous with the reestablishment of an essentialist and totalizing social aesthetic. This simple rejection response is easy to produce (for both moralists or postmodernists) because it is a kind of non-engagement. It is a kind of shadow-boxing, a kind of disciplinary solipsism where one paradigm is made to answer within the regulatory intellectual paradigm of the other—usually without the slightest awareness that the game and its outcome thus have been totally rigged.

27. *Id.* at 575.

28. Jamieson, *The Poverty of Postmodernist Theory*, 62 U. COLO. L. REV. 577, 590 (1991).

The assimilative self-modification response. This response is an attempt to reformulate the meaning or significance of one paradigm in light of the other. Here, ethics does not reject postmodern thought wholesale, but restricts its scope of application and its operations; postmodernism is placed at the service of a traditional ethical or political program. On the other side, postmodernism does not reject ethics wholesale, but requires certain aesthetic modifications in ethical practice, such as non-essentialism and non-totalizing conceptualizations. In law, both of these kinds of assimilative moves are exemplified in the prototypical cls uses of deconstruction and in the prototypical cls insistence on anti-essentialism and contexualism in normative thought.

The empathic internalization response. With this response, one paradigm becomes suffused on the concerns, dilemmas, and problematics of the other. This is different from the assimilative self-modification response above where the relations of postmodernism and ethics remain relations of *exteriority*—where one paradigm contains (and subsumes) the other for its own ends within its own architecture. Here, by contrast we have an *interiorization* of the relations. The problematics, descriptions, and concerns of postmodernism become those of ethics even though they will wreak havoc (at least temporarily) on the integrity of ethical thought. Similarly, the concerns and hopes of ethics become those of postmodernism even though the aesthetic of ethical thought will contaminate (at least temporarily) the postmodern paradigm. To simplify, in this response, ethics seeks to re-create itself in light of the postmodern condition, and postmodern thought turns its energies towards the creation of a postmodern ethic.

It strikes me that, given an intellectually mature institutional and discursive environment, this third kind of response would offer a great deal of promise and interest. But, of course, for anyone to undertake this sort of response would require the capacity and willingness to think and experience the dissolution of one's own disciplinary paradigm. We should not expect this to occur "voluntarily" too often. Still, it seems interesting to consider the possibility that this dissolution may be occuring anyway—despite our wishes and despite our disciplinary defense mechanism. It also seems interesting to consider the possibility that, *in our context*, the postmodern deconstruction of the paradigm-dependency of the disciplines could very well coincide with ethical concerns as well.

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Of course, such eithical concerns would remain problematic and controversial. At the simplest level, there remain arguments to sup-

port the maintenance of the disciplinary paradigms. For instance, if one thinks that one is in possession of a normative discourse with a secure and appealing identity, then it will seem natural to protect that discourse from the destabilizing effects of postmodern thought and culture. Dale Jamieson's comments, for instance, seem informed by this kind of commitment. His comments seem designed to place postmodernism on trial in an already constituted court of normative reason—not a bad thing to do, if one finds one's self in the Lindsley Memorial Courtroom addressing an audience of lawyers and law students. Professor Jamieson is meticulous in following the methods of analytical philosophy—defining carefully the object of his inquiry (postmodernism) and then dissecting it into several parts—some of which he likes, most of which he does not.

Viewed from his own normative perspective, postmodernism turns out to be morally obtuse, if not morally bankrupt. What's more, postmodernism turns out to be intellectually vacuous as well. Indeed, it is flawed because it is not nearly as novel as it thinks itself to be and because it is a poor approximation of statements that have been said before in better ways by philosophers. It is a kind of fad—"Hume plus advertising," he says in a wonderfully biting comment.[29]

Now, it seems to me that Jamieson's comments are a useful example of a critique of postmodernism from the perspective of an analytical philosopher who rejects the implication of the postmodern critiques of disciplinary knowledges (like academic philosophy). This is the perspective that one might have of postmodernist thought if one looked at it from a discipline that understood itself to be entirely secure in its knowledge claims and in its methodology. Jamieson's comments can thus be understood as analytical philosophy's postmodernism. This leaves as a question, of course, what is the relation between analytical philosophy's description of postmodernism and postmodernism itself?

This is a question that I would like to generalize—that is, to make more general. One of the things that occurs when a symposium title includes a rather vague, alluring, mysterious, contested signifier like "postmodernism" (not to mention "law") is that the various participants proceed to perform, and externalize onto the signifier, their disciplinary aesthetic, methods, and agendas. At the end of the day, we have not one, but many postmodernisms—a rich panoply of juxtaposed descriptions.

In some sense, that is what we have here in this symposium. Professor Wicke's article is a magnificent poetic description of

29. *Id.* at 586.

postmodernist thought—combined with the kind of political self-questioning that has become characteristic of contemporary literary criticism. Richard Thomas understands postmodernism to be a novel kind of social theory—one that can usefully be applied to resolve traditional problems of normative legal theory. Mary Joe Frug, David Kennedy, and Jamie Boyle, by contrast, understand postmodernism much more as the name for a certain kind of practice of thought. Dale Jamieson, true to his disciplinary form, wants to pin down the identity of postmodernism so he can determine whether it is morally right or morally wrong. And not to leave me out, here I am using "postmodernism" as the occasion to suggest how the very form of disciplinary knowledges (law, philosophy, literature) and the very construction of disciplinary or sub-disciplinary thinkers as certain kinds of professional subjects already pre-script a certain kind of intellectual and political action.

Indeed, we have in this very symposium itself a sort of performative confirmation of the advent of the postmodern condition. We have *the crisis of postmodern identity*—one that arguably extends beyond postmodernism to the very disciplines and knowledges that try to make sense (or nonsense) of the postmodern condition. We have *the displacement of any orthodoxy* that might claim a singular privileged access to the "authorship" of postmodernism. We have serious questions posed as to what kinds of *subjects* have enabled and authored all these polysemous versions of postmodernity. And we have, as well, in several of the contributions, evidence of *a residual nostalgia* for prior intellectual practices—a nostalgia which ironically indicates both that these intellectual practices are stubbornly resistant to change *and* that they are no longer what they used to be.