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Is the Rule of Law Possible in a Postmodern World?

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Abstract: The Rule of Law is the core of our political and legal ideology, but the Rule of Law increasingly is attacked as an unattainable goal. Postmodern theorists challenge whether it makes sense to believe that rules can be formulated for general application and then later neutrally applied by decision makers. Postmodern theorists reject the Enlightenment world view and its political corollary, classical liberalism. The author agrees with the spirit of the postmodern critique, but argues that we can understand the Rule of Law in a manner consonant with postmodern thought. Drawing on the Continental tradition of hermeneutics, or the philosophy of interpretation, the Rule of Law is reformulated in accordance with the insights of the post-Enlightenment era.

This article first reviews Dean Geoffrey Walker's recent attempt to defend the Rule of Law from a post-Enlightenment perspective. Dean Walker describes the emerging post-Enlightenment world view as it is reflected in disparate fields that include quantum physics and Taoism. However, Dean Walker's approach remains wedded to Enlightenment conceptions. His efforts can only serve as the springboard for a more productive hermeneutical inquiry.

The Enlightenment vision of rational, insular subjects decoding the objective world does not accurately portray the experience of understanding and knowing. Given that the natural sciences are now viewed as irremediably intersubjective and interpretive practices, it is no surprise that legal practice has been stripped of its formalist pretensions. The author describes how this inescapable hermeneutical situation does not preclude the Rule of Law, but rather is the very foundation of the Rule of Law.

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INTRODUCTION

Postmodernism is all the rage. Discussions concerning the culture of postmodernity and the significance of postmodern thought fill an increasing number of pages in leading law reviews, and postmodernism dominates contemporary legal theory.[1] Postmodern thought is best understood as a critique of the philosophical biases of the modern era. This postmodern critique generally adopts the following characterization of modernity. Modern thinkers premise rational thought on a knowing subject who organizes and is able to make sense of the world of objects. The legacy of Cartesian doubt crystallizes this premise of modernity: The indubitable presence of ourselves as thinking subjects is the firm ground of all knowledge. The Cartesian approach bifurcates the world of objects and the *cogito,* thereby rendering all knowledge subject to the skeptical rejoinder that we can never be certain that our thoughts are mirroring the world of objects accurately. The jurisprudence of modernity similarly rests on the subject/object distinction. Under the modern view, rules are regarded as particular objects that direct the legal subject in the exercise of his function as judge, administrator, or advocate.[2]

1. Recent articles have stressed the need to clarify what the term "postmodernism" encompasses. "Postmodernity" is the term used to characterize the contemporary cultural milieu, which critics view as superficial, fragmented, and disconnected from a substantive tradition of ethical and political knowledge. Products of this culture, such as MTV, are described as "postmodern." The anti-foundationalist philosophical orientations that have developed as part of this culture collectively are termed "postmodern thought." For an overview of this terminology in the legal literature, see J.M. Balkin, *What Is a Postmodern Constitutionalism?,* 90 MICH. L. REV. 1966 (1992), and Dennis Patterson, *Postmodernism/Feminism/Law,* 77 CORNELL L. REV. 254 (1992). For my observations on some problems inherent in Balkin's definitional approach, see Francis J. Mootz III, *Postmodern Constitutionalism as Materialism,* 91 MICH. L. REV. 515 (1992).

Although we can define postmodern thought generally as "anti-foundationalist," there is no fixed postmodern dogma or canon. Postmodern thought encompasses various contemporary "styles of thought sharing philosophical commitments to anti-foundationalism, immanence [and] historicity .... As they are practiced now, poststructuralism and pragmatism are postmodernist jurisprudences, as (largely) are feminism and critical race theory." Margaret J. Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice,* 139 U. PA. L. REV. 1019, 1024 n.30 (1991). Of course, not all feminist scholarship is postmodern. For a good description of how feminism can be practiced in either a modern or postmodern way, see Dennis Patterson, *supra.* For examples of postmodern legal thought, see generally William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form,* 89 MICH. L. REV. 707 (1991); *Postmodernism and Law: A Symposium,* 62 U. COLO. L. REV. 433 (1991); *Symposium: The Critique of Normativity,* 139 U. PA. L. REV. 801 (1991).

2. Justice Antonin Scalia recently articulated a thoroughly modernist perspective of the Rule of Law in *The Rule of Law as a Law of Rules,* 56 U. CHI. L. REV. 1175 (1989). Professor Margaret Radin identifies the "philosophical underpinning" of modern approaches to the Rule of Law as consisting of the following assumptions:

Postmodern theorists argue that modernity no longer provides a useful description of our place in the world, which they view as an indeterminate, intersubjective network of meanings. A striking feature of much postmodern legal thought, particularly its post-structuralist variant, is its flat rejection of the possibility of the Rule of Law. Postmodern scholars view language as indeterminate and social practices as historically contingent. Consequently, there is no firm foundation upon which a theory of rule-governed behavior can rest. The Rule of Law becomes an unavoidable casualty of postmodernity to the extent that the Rule of Law requires determinate objective rules that function as guides for insular and secure interpretive subjects. Joseph Singer describes the impact of postmodern antifoundationalism in stark terms, arguing that if "traditional legal theorists are correct about the importance of determinacy to the rule of law, then—by their own criteria—the rule of law has never existed anywhere."[3] Allan Hutchinson echoes this theme with an uncompromising attack:

> The Rule of Law is a sham; the esoteric and convoluted nature of legal doctrine is an accommodating screen to obscure its indeterminacy and the inescapable element of judicial choice. Traditional lawyering is a clumsy and repetitive series of bootstrap arguments and legal discourse is only a stylized version of political discourse.[4]

The postmodern critique undoubtedly is provocative and stimulating in its characterization of the Rule of Law as a myth, but the ramifications of attacking the heart of the legitimating ideology of Western political theory are far reaching and not to be suffered lightly. Perhaps the most important question facing contemporary legal theory is whether it is inevitable that the Rule of Law pass away like other unhelpful relics of modernity, such as originalism or the plain meaning doctrine,[5] or whether we can understand the Rule of Law in a manner consonant with postmodern thought. If the growing number of critics

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(1) law consists of rules; (2) rules are prior to particular cases, more general than particular cases, and applied to particular cases; (3) law is instrumental (the rules are applied to achieve ends); (4) there is a radical separation between government and citizens (there are rule-givers and appliers, *versus* rule-takers and compliers); (5) the person is a rational chooser ordering her affairs instrumentally.

Margaret J. Radin, *Reconsidering the Rule of Law,* 69 B.U. L. REV. 781, 792 (1989). Radin criticizes this modern view from a Wittgensteinian perspective, which is closely related to, yet different from, the hermeneutical approach that I develop in this Article.

3. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory,* 94 YALE L.J. 1, 14 (1984).

4. ALLAN C. HUTCHINSON, DWELLING ON THE THRESHOLD: CRITICAL ESSAYS ON MODERN LEGAL THOUGHT 40 (1988).

5. I argue that contemporary hermeneutics is a postmodern philosophical effort that properly discredits both originalism and plain meaning in Francis J. Mootz III, *The Ontological Basis of*

who argue that postmodern thought undermines at least the traditional understanding of the Rule of Law are correct, the question nevertheless remains: Is the Rule of Law possible in a postmodern world?

Discussing the relationship between postmodernism and the Rule of Law is not idle academic chatter. The postmodern challenge to the possibility of the Rule of Law strikes to the core of our political self-understanding. The idea of the Rule of Law (albeit in different form and context) extends back to the genesis of modern Western thought in ancient Greece, and therefore it implicates much of the Western tradition of legal and political philosophy.[6] The Rule of Law continues to play an embattled central role in contemporary jurisprudence as a focus in the modern exchanges between positivists, realists, natural law theorists and critical theorists. Nevertheless, the contemporary debate increasingly has shifted from the question of what the Rule of Law entails to the question of whether the idea of the Rule of Law is coherent in light of postmodern critiques of language and subjectivity. There is a growing consensus that postmodernity spells the end of the Rule of Law, although there is less agreement about the character of postmodern legal practice.[7]

Given the seemingly oxymoronic quality of the term "postmodern," in this Article I adopt the more descriptive label "post-Enlightenment" to describe the emerging intellectual climate.[8] Characterizing postmodern thought as a response to the inadequacies of the Enlightenment era helps to clarify the challenge to the Rule of Law. The Enlightenment goal of objective (scientific) knowledge has spawned an

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Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricouer, 68 B.U. L. REV. 523 (1988).

6. F.A. HAYEK, THE CONSTITUTION OF LIBERTY 162–75 (1960); Fred Dallmayr, *Hermeneutics and the Rule of Law,* 11 CARDOZO L. REV. 1449, 1451 (1990) (explaining that the intellectual roots of liberal political institutions are linked to Greek philosophy). The tension between the supposed antinomies of justice and the Rule of Law reaches back to the contrasting visions of political order in Plato's writings. In Plato's *Republic,* justice is realized in the rule of philosopher-kings; in Plato's *Laws,* Plato deems a rule-governed society as preeminent. ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE 22–23 (1990); H. Malcolm Macdonald, *Government Under Law, in* THE RULE OF LAW 3–4 (Arthur L. Harding ed., 1961).

7. I have described the work of Pierre Schlag as radically deconstructive in this regard, and in response, I have articulated a postmodern response grounded in Gadamer's philosophical hermeneutics. *See* Francis J. Mootz III, Rethinking the Rule of Law: A Demonstration that the Obvious Is Plausible (1993) (unpublished manuscript, on file with the *Washington Law Review*).

8. I share Marshall Berman's dislike for the term "postmodern," primarily because I believe that our culture is still in the throes of modernity even as we move away from Enlightenment epistemological foundations. *See* MARSHALL BERMAN, ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY 15–36 (1982) (arguing that modernity stretches from the sixteenth century to the present, and that epochal shifts mark the manner in which we define and cope with this evolving modern era).

ethos that is indelibly inscribed in our attitudes, actions, and theories. Within the disciplines of law and political theory the Enlightenment ethos is manifested as liberalism: the belief that individual subjects join together to form a community defined by rational public strictures and a wide sphere of private, subjective autonomy. This vision of individual subjects as the seat of knowledge and morality is no longer satisfactory. In this century, we have come to see that the Enlightenment project has failed because it established the scientific model of knowledge as the only legitimate source of understanding, thereby denigrating our actual mode of understanding which extends beyond the limits of science. The Enlightenment picture of rational, self-contained knowing subjects does not accurately portray the experience of understanding and knowing, as evidenced by the dramatic admission that even the natural sciences are irremediably intersubjective, interpretive projects that do not involve detached and neutral investigations of objects.[9] If we no longer view the natural sciences as objective, rule-bound enterprises, the possibility for sustaining the Rule of Law appears dim.

This Article rejects the idea that the Rule of Law is possible only if we embrace Enlightenment conceptions of knowledge. Post-Enlightenment thought does not destroy the possibility of the Rule of Law. To the contrary, it provides a necessary corrective to the Enlightenment presuppositions that have rendered the doctrine of the Rule of Law problematic in the first place. The Continental tradition of philosophical hermeneutics, best exemplified in the work of Hans-Georg Gadamer, exhibits post-Enlightenment thinking in a manner that does not preclude the possibility of the Rule of Law.[10] Viewed from

9. Important seminal works by members of the scientific community include THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962), and MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY (1958). David Bohm describes the impact of the theory of relativity and quantum theory on our preconceptions of scientists as neutral observers by arguing that "both observer and observed are merging and interpenetrating aspects of one whole reality, which is indivisible and unanalysable." DAVID BOHM, WHOLENESS AND THE IMPLICATE ORDER 9 (1980). Bohm states further:

> As relativity and quantum theory have shown that it has no meaning to divide the observing apparatus from what is observed, so the considerations discussed here indicate that it has no meaning to separate the observed fact (along with the instruments used to observe it) from the theoretical notions of order that help to give 'shape' to this fact. . . . Fact and theory are thus seen to be different aspects of one whole in which analysis into separate but interacting parts is not relevant. That is to say, not only is undivided wholeness implied in the *content* of physics (notably relativity and quantum theory) but also in the *manner of working* in physics.

Id. at 143.

10. In this Article, I rely principally on Gadamer's magnum opus, HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. Crossroad

Gadamer's perspective, however, our traditional conception of the Rule of Law must radically be revised to the point that many would argue that the Rule of Law has in fact been discarded. The challenge of post-Enlightenment thought cannot be met by simply reaffirming the comforting vision of the Rule of Law that animates the Enlightenment perspective. By following Gadamer's lead we will not overcome the post-Enlightenment challenge as much as engage it and struggle with it.

Mainstream scholars continue to defend the Rule of Law without addressing the radical critique of post-Enlightenment thought.[11] These scholars undoubtedly believe that accepting post-Enlightenment thought is tantamount to abandoning the Rule of Law. I set the stage

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Publishing 1989) (1960). For other important works by Gadamer, see HANS-GEORG GADAMER, DIALOGUE AND DIALECTIC: EIGHT HERMENEUTICAL STUDIES ON PLATO (P. Christopher Smith trans., Yale University Press 1980) (1934–74); HANS-GEORG GADAMER, PHILOSOPHICAL APPRENTICESHIPS (Robert R. Sullivan trans., MIT Press 1985) (1977); HANS-GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS (David E. Linge trans. & ed., University of California Press 1976) (1962–72).

Leading secondary sources that discuss Gadamer's philosophical hermeneutics include RICHARD J. BERNSTIEN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1988); P. CHRISTOPHER SMITH, HERMENEUTICS AND HUMAN FINITUDE: TOWARD A THEORY OF ETHICAL UNDERSTANDING (1991); GEORGIA WARNKE, GADAMER: HERMENEUTICS, TRADITION AND REASON (1987); JOEL C. WEINSHEIMER, GADAMER'S HERMENEUTICS: A READING OF *TRUTH AND METHOD* (1985); and FESTIVALS OF INTERPRETATION: ESSAYS ON HANS-GEORG GADAMER'S WORK (Kathleen Wright ed., 1990).

Leading secondary works relating Gadamer's philosophical hermeneutics to legal philosophy include LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE (Gregory Leyh ed., 1992); Dallmayr, *supra* note 6; Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661 (1991); Kenneth Henley, *Protestant Hermeneutics and the Rule of Law: Gadamer and Dworkin*, 3 RATIO JURIS 14 (1990); Gregory Leyh, *Dworkin's Hermeneutics*, 39 MERCER L. REV. 851 (1988); Mootz, *supra* note 5; George Wright, *On a General Theory of Interpretation: The Betti-Gadamer Dispute in Legal Hermeneutics*, 32 AM. J. JURIS. 191 (1987); and Mootz, *supra* note 7.

This Article starts with the presumption that post-Enlightenment thought is productive and discusses what post-Enlightenment jurisprudence should look like when based on Gadamer's philosophical hermeneutics. In this short Article, I do not defend my presumption against the Enlightenment model, but my efforts in this regard may be found in Mootz, *supra* note 5. For the reader who finds all this talk about postmodernism to be quite ridiculous, I hope the Article still serves a useful and interesting function by defending the Rule of Law from a postmodern perspective, thereby blunting some of the excesses of postmodernism.

11. An interesting case in point is Ronald Dworkin. *See* RONALD DWORKIN, LAW'S EMPIRE (1986). Dworkin makes an elegant argument against legal positivism that can appeal to modernists and postmodernists alike. Thus, it is quite possible to connect Dworkin's descriptions of "law as integrity" and "constructive interpretation" to some of the themes of Gadamer's philosophical hermeneutics. Leyh, *supra* note 10, at 857–65. Nevertheless, Dworkin does not embrace Gadamer's metaphysical arguments and in many respects can be read as rejecting Gadamer's full-bodied notion of the historicity of knowledge, especially when Dworkin makes the ambiguous claim that there are right answers to every legal dispute. Dworkin, *supra*, at viii–ix (defending his "right answer" thesis, although admitting that no right answer to a particular legal dispute can be proved as such to every member of the community).

for my discussion of the relevance of Gadamer's hermeneutics to the Rule of Law by examining a recent attempt to embrace post-Enlightenment thought that does not surrender the view that the Rule of Law is a coherent doctrine. In *The Rule of Law: Foundation of Constitutional Democracy,*[12] Dean Geoffrey de Q. Walker undertakes to defend a traditional conception of the Rule of Law both as a tradition worthy of respect and a political ideal that is necessary for the emerging post-Enlightenment world. Walker succinctly states that the "rule of law is not a complete formula for the good society, but there can be no good society without it."[13] To a significant degree, Walker adheres to familiar liberal tenets by arguing that the Rule of Law is desirable because it provides the stable backdrop (empirical fact) against which individuals can pursue their own projects (subjective values) in a manner that facilitates social growth. Friedrich A. Hayek provides a better elaboration of this modernist conception of the Rule of Law, and Hayek's work plainly forms a primary inspiration for Walker's project.[14] However, Walker's book is not simply a nostalgic recapitulation of traditional visions of liberalism because he recognizes that the Enlightenment model is now seriously discredited and therefore can not sustain the Rule of Law. Today Hayek is regarded by many as an outdated capitalist apologist, but Walker undertakes to rehabilitate Hayek's thesis by demonstrating the possibility and benefits of adhering to the Rule of Law in a post-Enlightenment world. Walker attempts to reinvigorate the Rule of Law by projecting it beyond the Enlightenment perspective that until recently shaped its contours.

Walker's effort merits a close critical assessment because he purports to engage postmodern critics on their own terms. Walker does not ignore the fundamental challenges of post-Enlightenment thought; instead, he sets out to demonstrate that it is the critics of the Rule of

12. GEOFFREY DE Q. WALKER, THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY (1988).

13. *Id.* at 42.

14. This is confirmed explicitly by Walker's acknowledgement of his indebtedness to Professor Hayek, *id.* at xxvi. Hayek is known principally for his writings in support of a radically laissez-faire economic system, but the concomitant requirement of a liberal political order occupied much of his later career. Hayek encapsulates the Rule of Law thus:

> Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.

FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944). Hayek's principle work in the area is F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960). His last and most definitive statement on the subject of the Rule of Law is 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER (1973).

Law who fail to appreciate the full dimensions of post-Enlightenment theory. However, my assessment of Walker's theory leads me to conclude that it can only serve as a bridge to the truly post-Enlightenment discourse embodied in Gadamer's philosophical hermeneutics. This Article critically assesses Walker's attempt to preserve the Rule of Law by embracing the post-Enlightenment condition and concludes that Walker's effort falls short because he remains planted firmly in the Enlightenment model of knowledge despite his best efforts to break free. Walker's thesis serves as a clarion call to initiate a post-Enlightenment discourse, but the result of his effort serves as a warning that half measures will not suffice. Walker's project to recast the Rule of Law is a necessary one that should be carried forward more productively. Gadamer's philosophical hermeneutics is an appropriate starting point for such a project.

This Article is organized in two parts. In part one, I review Walker's attempt to abandon the Enlightenment picture of the world without abandoning the traditional conception of the Rule of Law as a bulwark against arbitrary assertions of political power. I first discuss Walker's definition of the Rule of Law, in which he attempts to accomplish the seemingly irreconcilable goals of constraining legal actors while also providing the necessary flexibility for modernization. I then connect Walker's definition of the Rule of Law with his conception of post-Enlightenment thought. Finally, I present Walker's indictment of current legal practice for abandoning the Rule of Law during the transition to a post-Enlightenment world when it is most needed.

In part two, I criticize Walker for failing to embrace the radical character of the post-Enlightenment challenge. I argue that Walker's rather unique approach of blending classical liberalism with the lessons to be drawn from quantum physics and Taoism locates his defense of the Rule of Law in contemporary intellectual currents, but that his approach fails to measure up to the task. Walker embraces the liberating possibilities of post-Enlightenment physics, but he remains wedded to Enlightenment metaphysics, thereby precluding an effective defense of the Rule of Law. I then demonstrate that Gadamer's philosophical hermeneutics provides the post-Enlightenment discourse best suited for cultivating a better appreciation of the dialogic character of legal practice and for redefining the Rule of Law after the collapse of Enlightenment ideology.

I. DEAN WALKER'S POST-ENLIGHTENMENT DEFENSE OF THE RULE OF LAW

In this part of the Article, I describe Walker's efforts to reinvigorate the Rule of Law. First, I review Walker's definition of the doctrine. After establishing this background, I present Walker's understanding of the post-Enlightenment challenge. Walker's definition of the Rule of Law purports to incorporate the lessons of post-Enlightenment thought, and so it is necessary to connect his definition with his conception of the emerging world view. Finally, I describe Walker's prescription for preserving the Rule of Law as a political reality in order to assure our safe passage to a post-Enlightenment world.

A. Defining the Rule of Law

Contemporary Rule of Law jurisprudence reflects the tension between acknowledging that a simplistic "rule book" approach to law must be discarded and yet still attempting to reinforce the legal system's privileged status as a rational enterprise not reducible to bare ethics or politics.[15] On one hand, we acknowledge that linguistic inde-

15. *See* ALTMAN, *supra* note 6, at 27–56 (considering the works of H.L.A. Hart, Ronald Dworkin and Rolf Sartorius as three different responses to the collapse of the "rule book" picture of law, a collapse that results from the fact that in late capitalist societies laws often are no more than vague principles that not only require but invite the discretion of courts and administrative agencies charged with enforcing the laws). Although contemporary jurisprudence involves the continuing struggle to define legal practice in a new manner, many legal practitioners continue to employ the old terminology. As one commentator notes, the Supreme Court Justices "have not been reading their Derrida," resulting in a gap between jurisprudential theses and the language of judicial opinions. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 231.

Justice Scalia's efforts to clarify the appropriate method for interpreting legal texts exemplify the persistance of modernist, Enlightenment strategies. Scalia endorses the assumption that the meaning of a legal rule exists prior to the application of the rule to a particular dispute, by virtue of the plain meaning of the words used to state the rule. If there is no plain meaning that can be applied to the case at hand, the judge is left to decide the dispute on grounds other than the rule. *See* Scalia, *supra* note 2, at 1187 ("All I urge is that [fact-based, discretionary] modes of analysis be avoided where possible; that the *Rule* of Law, the law of *rules,* be extended as far as the nature of the question allows . . . ."). Lending jurisprudential support to Scalia's plain meaning approach is Frederick Schauer's careful and precise extension of the claim that meaning is distinct from application. Schauer, *supra*; Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 657–65 (1991) (defending a "presumptive positivism" that respects the importance of plain meaning in legal interpretation).

For persuasive criticisms of these efforts to rehabilitate plain meaning, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (extending his analysis of a Gadamerian approach to statutory interpretation); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 546–49 (1992) (arguing that Scalia's approach is qualified sufficiently that it does not resuscitate full-bodied plain meaning, and that Schauer's presumptive preference to enforce plain meaning inevitably will be overcome in a large number of cases); Nicholas S. Zeppos, *Justice Scalia's*

terminacy does not permit hard and fast "rules" that can be known and followed regardless of the context or the interpreter's perspective. On the other hand, we do not view legal practice simply as the exercise of judgment by those in power, who may or may not judge correctly according to then prevailing conceptions of justice. Walker attempts to define the Rule of Law in a way that mediates this opposition.

Walker rejects a normative, or "values," approach to the Rule of Law under which "the rule of law has no meaning unless it expressly recognizes certain fundamental human rights."[16] Instead, he adopts an "institutions-principles-procedures" approach that focuses on the process by which the normative goals developed by a society are implemented through the legal system.[17] Walker's distinction between a values approach and an institutions approach rests on the distinction at the heart of liberal political theory, the perceived contrast between the model of the positive state (which exists to enable individuals to develop their capacities fully) and the model of the negative state (which exists only to protect social organization from dysfunction).[18] Walker's explicit goal in following the latter approach is to insulate formal, legal arrangements from prior normative conflicts in society, thereby serving the dual purpose of ensuring the insular integrity of the legal system and also freeing the ongoing dynamics of social organization from the strictures of the legal system. It is necessary to retrace Walker's definitional structure in some detail in order to understand the motivations for his approach.

Walker's institutional approach drives his description of the problems that the Rule of Law must address. Primarily, a government must ensure civil order by outlawing private coercion and by enforcing this prohibition.[19] The Hobbesian state of nature must be tamed to allow a measure of self-determination and self-governance among the citizenry. The requirement of law and order is not the full extent of the doctrine's scope, however, because the leviathan government of civil society must also be subject to the law, which includes both constitutional limits on governmental power as well as the equal application of general laws to agents of the government.[20] In short, the Rule

Textualism: The "New" New Legal Process, 12 CARDOZO L. REV. 1597 (1991) (critiquing Scalia's plain meaning jurisprudence).

16. WALKER, *supra* note 12, at 11.

17. *Id.* at 9–11, 23–42.

18. *Id.*

19. This is expressed in point 1, *Laws against private coercion,* and point 5, *Enforcement of laws against private coercion. Id.* at 24, 28–29.

20. This is expressed in point 2, *Government under law,* and point 6, *Enforcement of government under law principle. Id.* at 24–25, 29.

of Law must be superior to both governed and governor. If every member of society equally is subject to preestablished rules embodied in institutional structures, then presumably those persons who attain political power will not be in a position to impose their subjective will on others in the community. Implicit in this view is the belief that legal rules are objective things distinct from the subjective actors who are confronted by them, even if the rules do not form a tightly knit rule book of unambiguous commands that control the subjective actors.[21]

Walker reinforces the distinction between objective rules and subjective actors by making the familiar argument that all laws, regardless of content, must be certain (knowable, prospective, and relatively stable), be generally applied, and treat all citizens equally, so that they can serve as guides for future conduct.[22] Walker believes that a separation of powers is necessary to ensure that laws retain these characteristics, both in their promulgation and enforcement. A vitally important requirement is ready access to an independent court system that can adjudicate disputes arising between citizens or between a citizen and the government.[23] In turn, the linchpin of the court system is a judiciary independent of the government and yet still "bound by law."[24] Finally, Walker adopts the term "natural justice" to refer to the minimal structural features that a legal system would have to incorporate to sustain the Rule of Law, including the traditions of unbiased tribunals, open court sessions, and a presumption of innocence in criminal trials.[25] Because Walker recognizes that a bare description of institutions and principles does not address the problem of government "under law" except in the most superficial and tautological way, he relies on the dynamic practice of adjudication to implement the features of the Rule of Law. Nevertheless, Walker believes that the heart of this adjudicative practice is the existence of clear, general and pro-

21. In this respect, Walker does not differ from most contemporary theorists, who reflect positivist assumptions even as they recognize that the historical movement to positivism is spent. *See supra* note 15.

22. This is expressed in point 3, *Certainty, generality, equality.* WALKER, *supra* note 12, at 25–27.

23. This is expressed in point 7, *Independence of the judiciary,* point 8, *Independent legal profession,* and point 10, *Accessibility of courts. Id.* at 29–37, 40.

24. *Id.* at 31–32. Walker admits that the belief that judges should find the law rather than make it has certainly been discredited by the realists, but he retains the spirit of the proposition as a statement of the proper attitude that the judge should adopt, namely humility for her own limitations and attentiveness to the tradition preceding her. *See infra* notes 83–86 and accompanying text.

25. This is expressed in point 9, *Natural justice; impartial tribunals.* WALKER, *supra* note 12, at 37–40.

spective rules by which people can order their lives and according to which their disputes may be judged.

Walker's decision to follow a formalistic institutional approach is not without equivocation, however. Walker's definition of the Rule of Law also introduces a normative dimension that is not captured by a purely procedural or positivist perspective. Walker quotes with approval Joseph Raz's effort to differentiate between "the rule of law" and "the rule of *good* law,"[26] but he recognizes substantive limits on laws by requiring that they be generally congruent with prevailing social values.[27] Walker's institutional definition of the Rule of Law eschews a wholly "value" approach that would attempt to identify fundamental human rights that are entailed by the Rule of Law, primarily because he believes that any such attempt would inappropriately reify certain social practices of Western democracies.[28] But Walker also rejects the extreme positivist view that the Rule of Law simply means law and order (according to which the Rule of Law prevailed in juristic yet evil Nazi Germany) and the equally limited view that it is simply a requirement that the government be subject to

26. Joseph Raz, *The Rule of Law and its Virtue, in* LIBERTY AND THE RULE OF LAW 3, 4 (Robert L. Cunningham ed., 1979). Raz argues:

> If the rule of law is the rule of the good law, then to explain its nature is to propound a complete social philosophy. But then the term lacks any useful function. We have no need to be converted to the rule of law in order to discover that to believe in it is to believe that good should triumph.

Id. at 4. *See generally* JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM (1980). Thus, Walker is echoing Raz when he posits principles of natural justice that must be observed if the Rule of Law is to exist, WALKER, *supra* note 12, at 10, but expressly goes beyond both Raz and John Rawls when he claims that the substantive limit of public morality is a feature of the Rule of Law. *Id.* at 19, 23. It becomes clear later in his discussion that Walker regards the move as a necessary one to preserve the dynamic quality of the Rule of Law.

27. This is expressed in point 4, *General congruence of law with social values.* WALKER, *supra* note 12, at 27–28. Walker hedges this step, but he certainly takes it.

> In a sense we may be cheating a little by making this . . . point an element or a part of the definition. Strictly speaking, it is a limit of the model, not an ingredient of it. The rule of law could theoretically exist without this requirement being satisfied. But, for the reasons given, it would not last long. Since we are interested in actual practice, we would therefore be wrong to accept a definition that would dignify as examples of the rule of law mere passing interludes of institutionalized legality. This . . . requirement is, therefore, of such vital importance that even if it is properly described as a limit of the model, it should as a practical matter form part of the definition.

Id. at 28.

28. Walker believes that the Rule of Law could be realized in (non-totalitarian) communist or Islamic states, and would implicate wholly different patterns of rights and obligations among members of these societies. *Id.* at 11–14. In this respect, he differs markedly from Hayek, whose theory of the Rule of Law was grounded in the necessity of a free market capitalist economic system. Walker's broader notion of the fundamental values underlying the concept of the Rule of Law is undoubtedly the result of his focus on the challenges of a future post-capitalist, post-Enlightenment society, although I argue that he doesn't go far enough. *See infra* part II.A.

the rule book of laws.[29] Walker admits the need for some substantive limitation on laws if the notion of the Rule of Law is to have any content for real world applications, which leads him to constrain legal authority not only with institutional protections but also by requiring that laws exhibit a general substantive congruence with social values. Because this move explicitly undercuts the distinction between the positive rule embedded in empirical legal institutions and the substantive goal of value-laden politics, it is important to examine in greater detail the manner in which Walker distinguishes institutional/procedural principles of natural justice from the substantive limitations of "social values."

Walker defines principles of natural justice as the minimal and basic institutional protections necessary to preserve the other elements of the Rule of Law from becoming a "hollow mockery," and so these principles do not suggest a full-scale social theory of human rights.[30] In this way, Walker follows Hayek's principle of spontaneous order, under which society is viewed as the complex result of individuals interacting in a way that could never be dictated by a centralized planning authority.[31] The principle of spontaneous order most frequently is used to justify a laissez-faire economic system, but it is also a central pillar of classical liberal political theory because it privileges individuals as the ultimate domain of reality rather than society. Hayek rejects any attempt to enact social justice through positive law because the planning authority can never acquire the infinite pieces of information necessary to choreograph the social order, but he does believe that the guiding value of individual freedom demands that principled conditions be met in social organization.[32] The Rule of Law, then, is the implementation of conditions under which people may pursue their

29. WALKER, *supra* note 12, at 3–4.

30. *Id.* at 5. For example, keeping courtrooms open to the public is a socially contingent practice that Walker believes is a requirement of natural justice, because he can not conceive of how the Rule of Law could be realized without this institutional feature. Walker's point is that the institutional approach to defining the Rule of Law "is concerned with values and purposes only in so far as they are inherent in the institutions that support the rule of law." *Id.* at 11.

31. Hayek connects the Rule of Law to the principle of spontaneous order most clearly in his later work, *Law, Legislation and Liberty: Rules and Order. See* HAYEK, *supra* note 14.

32.

> We shall see that it is impossible, not only to replace the spontaneous order by organization and at the same time to utilize as much of the dispersed knowledge of all its members as possible, but also to improve or correct this order by interfering in it by direct commands. . . .
>
> . . . [A]lthough we can endeavour to improve a spontaneous order by revising the general rules on which it rests and can supplement its results by the efforts of various organizations [such as government, a man-made order], we can not improve the results by specific commands that deprive its members of the possibility of using their knowledge for their purposes.

individual projects, secure in the knowledge that a stable system girds their freely chosen social interaction. In Walker's view, only those institutional features that are necessary to this general framework constitute principles of natural justice.

Institutional principles of natural justice implicate political and social values only in a very general sense. However, Walker does not limit his definition of the Rule of Law to the narrowly circumscribed principles of natural justice. Although contemporary social values do not constitute principles of natural justice, they do stand as an independent check on legal authority. Positive law enacted by governments has the limited function of helping to create the conditions in which a free and spontaneous social order can develop, and so these laws must not diverge significantly from contemporary social values.

Walker's anti-positivist theme is clear: the customs and values of the citizens rather than the commands of the government are the makers of true law.[33] It is imperative that the legal system facilitate and also mirror social customs and values, which it does best through the jury system and common law adjudication.[34] With his "democratic theory of law," Walker rejects the belief that future arrangements of customary laws can be anticipated, promulgated, and enforced by government. Instead, the legal order must facilitate the continual evolution of social values and then keep pace with the developmental path.

Walker's distinction between natural justice and social values, and the important status of both in his theory, evidences a paradoxical attitude. Walker does not attempt to reduce the Rule of Law solely to a theory of institutionalized rule-following because a self-implementing rule book is impossible to achieve. Nevertheless, he does reject the elitism inherent in prescribing the "proper" values to be respected by society, and he attempts to protect the free development of social val-

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. . . .

. . . We can never produce a crystal or a complex organic compound by placing the individual atoms in such a position that they will form the lattice of a crystal or the system based on benzol rings which make up an organic compound. But we can create the conditions in which they will arrange themselves in such a manner.

Id. at 51, 39–40.

33. WALKER, *supra* note 12, at 361–62.

34. *Id.* at 364, 366. Walker scorns the legislature as an embodiment of the problems threatening the Rule of Law and argues that direct citizen intervention by means of the procedures of initiative and referendum is necessary. *Id.* at 367. Although he explicitly adopts Lon Fuller's preference for adjudication over legislation, it is obvious that a system of representative democracy with regular elections goes a long way toward keeping legislation in general congruence with social values. Even still, Walker regards the judiciary as the necessary check to prevent the inevitable capture of political power by special interest groups. *Id.* at 172–74.

ues from legal analysis by arguing that social values can only unfold naturally against the backdrop of the legal order.[35] The model of spontaneous order requires that certain very basic "rules" establish the boundaries for unplanned interactions that create the law of the community. In Walker's view, the Rule of Law demands both a short, fundamental rule book and a vibrant and indeterminate social practice generating ethical values to guide society.

By incorporating contemporary social values into his definition, Walker appears subject to the standard criticism directed at Hayek: It is all well and good to speak of the spontaneous order of society, but the effect is to justify existing political and economic inequality and to posit the laissez-faire market regime as an ultimate and universal social value.[36] However, Walker's approach does not parallel Hayek's. Hayek's model of the spontaneous order is self-consciously and thoroughly value-laden, celebrating a traditional understanding of individual liberty as the preeminent value to be advanced.[37] In Walker's terminology, Hayek divorces his overriding normative com-

35. Walker does not expend much effort to buttress the normative foundation for his analysis. Critiquing fundamental ordering values presumably is a project for ethical and political theory, and Walker plainly regards it as a mistake to subsume these problems under the Rule of Law. Once again, this is an unabashed liberal position because it rests on the methodological distinction between institutional facts and guiding values. For example, Richard Epstein divorces Hayek's traditional approach from its normative underpinning by contending that there is

> a clear need to go beyond the form of a law to decide whether it is just or wise, and a normative theory of human behavior and political institutions is needed to explain why Dicey's and Hayek's intuitions about markets and government power, for example, are correct. There are no shortcuts in the process. Too much weight therefore is placed upon the rule of law to filter out good from bad legal rules. . . . The harder question therefore is how does one choose among different types of legal orders, all of which satisfy the formal requirements of the rule of law. The answer to that question again drives us beyond the rule of law . . . .

Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure,* 56 GEO. WASH. L. REV. 149, 154 (1987).

Discussing what constitutes good law is far less important to Walker than the continued organic development of social values, a development that occurs under some conditions but not under others. Concretizing more than the most fundamental structural rights necessary to this spontaneous development of social values would ossify the legal structure against inevitable change. Failure to concretize these fundamental rights would result in anarchy or tyranny, conditions under which social values are warped or extinguished.

36. Hayek's claim that he is interested in transcultural "principles which claim universal validity" is remarkable given the fact that the principles that he espouses are those of a modern, market-driven, Western society. HAYEK, *supra* note 6, at 4. Walker attempts to steer clear of Hayek's failing without explicitly acknowledging the need to do so.

37. In *The Constitution of Liberty,* Hayek entitles part I *The Value of Freedom* and sets out first to establish the principle of individual freedom. Part II, *Freedom and the Law,* then follows with a discussion of the Rule of Law as an instrument for securing this concept of freedom. HAYEK, *supra* note 6.

mitment to individual liberty from contemporary community values by according it the status of a principle of natural justice. Critics then are able to demonstrate that Hayek's position is indefensible. For example, Allan Hutchinson and Patrick Monahan characterize Hayek's theory as a "thick version" of the Rule of Law because it supplements a discussion of bare procedural requirements of institutionalized rule-following with an overriding theory of political justice founded upon a conception of individual liberty.[38] Hutchinson and Monahan then provide a normative critique of Hayek's individualism by arguing that participatory democracy rather than individual liberty should be the regulative principle of social organization. In effect, Hutchinson and Monahan indict Hayek's approach to the Rule of Law as an ineffective means to an unattainable and illegitimate end.[39]

Walker would argue that Hayek erred when he characterized Western conceptions of individual freedom as essential and unchanging principles of the Rule of Law. Notably absent from Walker's theory is an explicit and passionate defense of individual liberty and the laissez-faire economy. He even suggests that the Rule of Law can be realized in communist, Islamic, and new age communitarian societies.[40] In contrast to Hayek, Walker envisions a more flexible concept of legal freedom, one that rises above the political oscillations between communitarian republicanism and laissez-faire individualism, thereby providing a framework in which a dynamic society can break free from current forms of social interaction without devolving to anarchy. In response to the critique by Hutchinson and Monahan, Walker undoubtedly would point out that their democratic vision ultimately reintroduces familiar features of the Rule of Law to the extent that these features are necessary to preserve democracy rather than to preserve individual liberty.[41] Walker would regard this as a distinction without a difference. He argues that the Rule of Law will protect the fabric of society in any transition to more radical democratic politics,

38. Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law, in* THE RULE OF LAW: IDEAL OR IDEOLOGY 97, 101, 106 (Allan C. Hutchinson & Patrick Monahan eds., 1987). Clifford Geertz employs the term "thick description" in CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973).

39. Hutchinson & Monahan, *supra* note 38, at 111. In their view, "the Rule of Law sustains elitist politics" against the claims of democracy. *Id.; see also* Michael J. Sandel, *The Political Theory of the Procedural Republic, in* THE RULE OF LAW: IDEAL OR IDEOLOGY, *supra* note 38, at 85–96.

40. *See* WALKER, *supra* note 12, at 12–14, 32–33, 208–12.

41. Hutchinson & Monahan, *supra* note 38, at 122 (admitting the need to preserve free elections, debate and assembly, and the promulgation of general laws that are applied in a nondiscriminatory fashion).

and in fact the Rule of Law is indispensable if such a transition is to occur.

Walker defines the Rule of Law as a political environment of constraining rules that nevertheless constantly are infused with contemporary social values.[42] Contemporary values do not form fixed and timeless values that define the Rule of Law because they constantly are in flux. Only principles of natural justice, stripped even of traditional liberal individualism, remain as fixed elements within Walker's definition of the Rule of Law. Walker's definition attempts to negotiate an uneasy alliance between a positivist, institutional approach and a values approach. Walker claims that the merit of his definition is that it accords with post-Enlightenment thought. In part two, I demonstrate that Walker's uneasy alliance is unsatisfactory, but first it is necessary to relate Walker's description of the post-Enlightenment world view.

B. The New Physics and the Rule of Law

The intriguing character of Walker's book is not that he defends the Rule of Law, but that he does so while acknowledging that society is undergoing a profound transformation from the modern Enlightenment period to a post-Enlightenment world view.[43] Walker believes that his definition of the Rule of Law captures this profound transformation, and so it is important to describe his characterization of the challenge of post-Enlightenment thought. Walker contends that we can best appreciate the importance of the Rule of Law for the emerging post-Enlightenment world by recalling past challenges to the doctrine. Walker emphasizes that the Rule of Law not only overcame the *ancien regime* but also stood as a bulwark against the excesses of Enlightenment political theory. Remembering and conserving the Rule of Law heritage is an important preparatory step to defending the doctrine as being consonant with post-Enlightenment thought.

Walker argues that the spirit of Enlightenment threatens to undermine the Rule of Law. Enlightenment thinkers equate the Rule of Law with a static, tradition-bound system of rules that impedes the reorganization of society along more just or rational lines.[44] On one hand, extreme legal positivists claim that the "slow, tentative, unsystematic and small-time"[45] procedure of the common law is inferior to the use of command to remake society, and that legislatures are and

42. WALKER, *supra* note 12, at 8–42.
43. *Id.* at 54–92.
44. *Id.* at 52–54.
45. *Id.* at 375.

should be unshackled from limits imposed on their power by irrational tradition.[46] On the other hand, extreme legal realists claim that judges simply create positive law and are never really bound by principle, nor should they be, and that their presumed separate role in a constitutional system largely is a charade.[47] Walker views these contemporary challenges as similar in kind to the earlier challenge to the developing Rule of Law in seventeenth century England.[48] Walker argues that the battle between Francis Bacon, allied with the King's claim to royal prerogative, and Sir Edward Coke, who championed the sovereignty of the common law applied by judges, is being replayed in response to modern thinkers embracing the tenets of Enlightenment.[49] In the past battle, Coke was able to preserve the common law and his successor, Sir Matthew Hale, firmly ensconced the common law as the central feature of English jurisprudence, thereby precluding the unconstrained exercise of power by the sovereign.[50] Walker's claim, simply put, is that the Enlightenment quest to control social organization by challenging the Rule of Law was properly rebuffed three hundred years ago, and similarly should be rebuffed today.

46. *Id.* at 140–61.

47. *Id.* at 172–99. Notably, "[t]he doctrine of legal realism, which was conceived only as an explanation for aspects of the judicial process, has been twisted into serving as a guide to how courts *ought* to go about their functions." *Id.* at 375.

48. Walker refers to this period as a "distant mirror," *id.* at 104, perhaps an allusion to Barbara Tuchman's investigation of the "calamitous fourteenth century" as a distant mirror reflecting the social upheavals reverberating throughout the West in the latter half of the twentieth century. BARBARA W. TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY (1978). As Tuchman explains, "If our last decade or two of collapsing assumptions has been a period of unusual discomfort, it is reassuring to know that the human species has lived through worse before." *Id.* at xiii. Similarly, Walker believes that the Rule of Law "seems to gain its brightest lustre when it is under threat and there is a sense of danger surrounding its prospects for survival." WALKER, *supra* note 12, at 127.

49. Walker writes:

> Those times had much in common with our own. . . .
>
> Two paths to the future lay open. One, the "modern" model as it then appeared, was the continental system of a sovereign king, backed by a standing army and a royal career bureaucracy, to maintain order and foster economic development and the humane sciences. The other was the parliamentary model, which drew its inspiration from the medieval past, especially from the conception of the rule of law. This seemed to be the conservative, old-fashioned side of the argument. . . . The prerogatives of the king of England had to be increased, as the prerogatives of the continental kings had been, if England were to keep its place among the civilized states of Europe, or so it seemed.
>
> Then, as now, the vision of strong centralized power, of rational and expert administration, of breaking with the traditions of an old governing class and making a new start in a new era, exercised a powerful attraction for intellectuals [such as Bacon].

WALKER, *supra* note 12, at 104–05. The "modern model" described by Walker invoked a theory of pure legal positivism as its underlying justification because the command of the rationalizing sovereign would be unencumbered by values rooted in tradition. *See supra* note 21.

50. WALKER, *supra* note 12, at 107–14, 119–25.

Walker asserts that current attacks on the Rule of Law do not reflect new insight, but rather amount to the most recent expressions of an essential tension between power and law.[51] The modern corollaries to Francis Bacon are the members of an expanding social class of the political-intellectual elite, whom Walker dubs the "clerisy."[52] The clerisy embraces the ideals of the Enlightenment. Experience and tradition are ruthlessly rejected in favor of truths developed in critical discourse where one may only appeal to the better argument and never to the authority of tradition. Legislative programs to reshape society have replaced Bacon's support for a strong monarchy to maintain peace, but the glorification of the use of power is similar. Ostensibly, there is concern for the individual as a participant in dialogue, but Walker argues that the framework of the dialogue envisioned by the clerisy is foreign to the Rule of Law.[53]

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51. *Id.* at 405.

52. *Id.* at 246–55. Walker's notion of the "clerisy" is not new nor particularly insightful. Walker contends that a highly educated, relatively wealthy group of individuals plays increasingly important roles in the technocratic world, and that these individuals view themselves as proper managers for society. In an unintentionally humorous chapter, Walker describes the critical legal studies (cls) movement, which he compares to Lenin's Bolshevik party, *id.*, as a vanguard for the clerisy that is "bringing about a cultural revolution that is shaking every corner of our society." *Id.* at 284. Hardly. The cls merry pranksters can only dream of being half as important and effective as agents for political change. At another point, Walker contradicts himself by describing the cls movement as having had "little direct influence outside the law schools." *Id.* at 256. More importantly, Walker badly misreads the more interesting (deconstructive) variants of cls that are committed to exposing and overcoming Enlightenment ideology.

Nevertheless, Walker's point is well taken that the Faust legend is a principle archetype of modernity for good reason: bold attempts to remake society through the alchemy of rationalism are just as dangerous to society as the effort to avoid change by adhering to a dogmatic traditionalism. Walker believes that modern critics of the Rule of Law are definitively answered if legal theorists conserve the dynamic character of the doctrine, and once again refuse the temptation to succumb to the Mephistophelian false promise of untrammeled power.

53. The new clerisy . . . is dedicated to removing the constitutional barriers to the exercise of government power and to recasting all social relations into the currency of power, as opposed to law or tradition or consent. . . . [I]t stands for the rejection of what it sees as outmoded legal institutions and for the adoption of a view of law based on sovereign power guided by reason and utility . . . .

Id. at 246. Morton Horwitz articulates what might be regarded by Walker as the clerisy credo:

> I do not see how a Man of the Left can describe the rule of law as an "unqualified human good"! It undoubtedly restrains power, but it also prevents power's benevolent exercise. . . . It may be true that restraint on power (and simultaneously on its benevolent exercise) is about all that we can hope to accomplish in this world. But we should never forget that a "legalist" consciousness that excludes "result-oriented" jurisprudence as contrary to the rule of law also inevitably discourages the pursuit of substantive justice.

Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (reviewing and criticizing E.P. Thompson's discussion of the Rule of Law as expressed in E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975)).

To resist the elevation of rational power over traditional law, Walker borrows the Taoist idea that polar opposites, as represented by the interplay of Yin and Yang, are in fact dynamically related. Based on this framework, he constructs a defense of the Rule of Law not as an absolute, but as a balance or compromise.[54] Social organization is a dynamic equilibrium that balances the Yin of law (conservative, responsive, and contractive) with the Yang of power (aggressive, demanding, and expansive). "The rule of law doctrine is in essence a set of operating instructions for maintaining that equilibrium."[55] Social development requires an interplay of law and power, and Walker vigorously defends the equilibrium achieved by the Rule of Law.

In response to critics who wrongly characterize the Rule of Law as a dogma that is unbalanced toward order, stability, and tradition, Walker reaffirms flexibility as an integral part of the Rule of Law and emphasizes that the substantive requirement that laws conform to prevailing social values is a key feature of his definition for this very reason.[56]

> The contemporary critics of the rule of law see it as one branch of a dichotomy—on the one side, the rule of law, representing the status quo, and on the other side, and in complete opposition, flexibility, change and progress. J. A. G. Griffith, for example, maintains that the rule of law is only a mask for the rule of "conventional, established and settled interests."
>
> This view is mistaken. Excessive rigidity, legalism and undue solicitude towards vested rights per se are as much of a threat to the rule of law as arbitrariness, legal inconstancy and lack of regard for natural justice. That is the reason for [requiring congruence with social values to be part of the definition].[57]

54. WALKER, *supra* note 12, at 46–48.

55. *Id.* at 48.

56. *Id.* at 53–54. Walker states that "the true opposite of the rule of law is not change, but anarchy and tyranny." *Id.* at 54.

57. *Id.* at 52–53. Walker emphasizes the flexibility of the Rule of Law doctrine in a way that underscores the shift in thinking that he envisions.

> There is no process of genuine social change so fundamental that the rule of law can not accommodate and facilitate it. Indeed, to apply the checks inherent in the rule of law without giving play to the principle of flexibility [i.e., the requirement of general congruence of law with social values] is both to misunderstand the relationship between the rule of law and change and to endanger the rule of law's survival. This much is made clear from the history of the French *parlements,* which obstructed the necessary, and popular, legislative reforms sought by the kings, thereby helping to ignite a conflagration that consumed *parlements,* kings and the rule of law all together.

Id. at 402.

Walker does not equate the Rule of Law with slavish traditionalism because he allows for innovation by requiring the law to embody changing social values.

Walker equates critical legal studies (cls) with Enlightenment social theory in the Marxist tradition. He stresses that cls scholars continue to make the same tired attacks on the Rule of Law that overlook the necessity of maintaining an equilibrium of stable law and assertive power.

> With their campaign against rule of law concepts, CLS and the clerisy are engaged in removing the safeguards against tyranny and anarchy that the lawyers of previous centuries built up with such effort and at such cost. The very institutions that most allow for development and free experimentation are being derided as closed and unresponsive.
>
> . . . .
>
> . . . Here, as elsewhere, we neglect the theory of dynamic equilibrium at our peril. If we want change, we must allow for a certain amount of its opposite, stability. The rule of law can provide that. But if we pursue change ruthlessly and single-mindedly, the newly rediscovered theory tells us that the forces we unleash will swing back on themselves and leave us with less constructive change and progress than was ever thought possible.[58]

Walker asserts that the dynamic equilibrium afforded by the Rule of Law is the bulwark of a progressive society, and that the cls call for a revolutionary reorientation of society has a hollow ring. Walker seemingly meets these critics on their own turf: law is politics, but rejecting the Rule of Law is bad politics.[59]

Walker recognizes that because the Enlightenment era is drawing to an end it is not enough to recall that the Rule of Law countered the Enlightenment glorification of the exercise of rational power. He believes that it is also important for theorists to demonstrate the "affirmative" value of the Rule of Law for the post-Enlightenment era that we are now entering.[60] Just as the paradigm of objective scientific inquiry in the natural sciences epitomized and fueled the Enlightenment world view, the tumultuous changes in our conception of science are defining the post-Enlightenment world view. The shift from the Newtonian/Cartesian paradigm of nature as a machine

58. *Id.* at 284–85, 287.

59. *Cf.* Jeffrey M. Blum, *Critical Legal Studies and the Rule of Law,* 38 BUFF. L. REV. 59, 59 n.* (1990) (arguing from the left that critics "are contributing to a growing academic sophistication about legal principles while diverting radicals from developing effective forms of political rhetoric, many of which will at least implicitly rely on the idea of Rule of Law").

60. WALKER, *supra* note 12, at 54–92 ("The Affirmative Aspect: Law and Pardigm Change").

transparent to the human mind is giving way to a post-Einsteinian physics that views reality as an undifferentiated whole in which we are situated as participants rather than as observers.

Walker argues that this shift in scientific thought holds important implications for legal theory and practice.

> [I]f society is seen as an organism, any part of which can be impaired by an action on any of the others, a different picture takes shape. Government and parliament are no longer in the role of a mechanic, indeed they are no longer entitled to see themselves as separate from society at all. . . . The new world view sees social groupings as wholes and systems; but by admitting that the complex, non-linear, not-a-priori-predictable interactions of each individual component will affect the result, it gives a new importance and dignity to the individual.[61]

The connections between an emerging scientific paradigm and developing notions of a proper legal system were an understandable feature of seventeenth century England where many intellectuals were proficient in both natural sciences and legal theory. Today it is more difficult for the lawyer or legal scholar to appreciate and assimilate the emerging scientific paradigm, but Walker regards the task as vital.[62]

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61. *Id.* at 56.

62. *Id.* at 70–71. In fact, there is significant recent interest in this area. *See, e.g.*, Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989) (outlining the basic implications of relativity theory [space is not a neutral backdrop, but an actor] and quantum theory [by observing the physical world, it is altered] for developing a constitutional discourse that better explains our social world); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987) (arguing that critical legal studies scholars have failed to grasp the broad implications of the "new epistemology," which is strongly influenced by quantum theory); R. George Wright, *Should the Law Reflect the World?: Lessons for Legal Theory from Quantum Mechanics*, 18 FLA. ST. U. L. REV. 855 (1991) (discussing how contemporary schools of legal theory might benefit from the "inherent indeterminacy" model of quantum theory).

I am mindful of Mark Tushnet's caution that lawyers have an unfortunate tendency to believe themselves capable of understanding these complex and highly specialized issues in other disciplines. Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1338 n.140 (1979) (criticizing the "lawyer as astrophysicist" assumption). However, without defending Walker's intentions, it should be clear that my references to developments in quantum philosophy are not intended to use the natural sciences to *validate* my argument, and that I regard any such effort of validation as misguided. *See infra* note 116 and accompanying text. It is not necessary to be trained in quantum physics to appreciate how the debates in quantum philosophy touch on issues relevant to jurisprudential inquiry. I would not want to encourage a division of labor between legal practice and philosophy any more than I would urge a separation of physics and philosophy. *But cf.* Mark Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325, 2347 n.94 (1992) (commenting on Andrew Altman's suggestion that a division of labor emerge whereby law professors engage in small-scale reform while philosophers develop leftist theory). One need only consider the works of Karl Llewellyn and Michael Polanyi, which demonstrate that philosophy, often viewed as sterile and quite uninteresting if not practiced within a specific

The changing scientific paradigm is mirrored in changes occurring in other disciplines, and the legal system will be altered no less by the new world view.

Walker briefly summarizes some of the developments in theory over the last fifty years that serve as signposts for the emerging world view.[63] Walker does not pretend to have comprehensive knowledge of these (often extremely controversial) developments in other fields; instead, he uses these examples to make a simple point. Our conception of the way that we perceive, understand, and live is undergoing a transformation that Walker believes will have a significant impact on how we understand law. Lawmakers no longer will view society as a machine to be modified and maintained through the exercise of power, but rather as a dynamic and interrelated system that cannot be subjugated to the understanding or will of a ruling elite. Walker contends that we will come to regard the Enlightenment view that a law is an object standing on its own to be as wrongheaded as the Enlightenment view that physical matter is an object that stands on its own apart from the scientific investigator. Walker optimistically predicts that

discipline, benefits from the contextual perspectives of lawyers and scientists. *See, e.g.*, KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962); POLANYI, *supra* note 9. Certainly one of Gadamer's themes (and a theme of postmodernism generally) is that philosophy as a separate meta-discipline is all but dead. This is why Gadamer emphasizes the experience of art and the exemplary significance of legal practice in developing his philosophical hermeneutics. GADAMER, TRUTH AND METHOD, *supra* note 10, at 101–69, 324–41.

63. Walker uses Pitirim Sorokin's theory of social dynamics as the overriding metaphor of the social changes underway, WALKER, *supra* note 12, at 58–63, but Walker also looks to Jung's acausal notion of synchronicity, the impact of quantum theory, general systems theory, parapsychology, and the use of the structure of holograms as a metaphor of both mind and matter. *Id.* at 64–76. The connecting theme of these disparate developments is that reality is not simply a collection of discrete things and events, but instead is a holistic relationship.

For example, Jung's theory of synchronicity rejects a solely causal and mechanistic approach to the world and accepts that there can be a "coincidence in time of two or more causally unrelated events which have the same or similar meaning," *id.* at 71, and that this principle of coincidence manifests a universal principle in nature. *Id.* at 71–72. In fact, Jung's alleged "mysticism" has affinities with the conclusions drawn from the principle of nonlocality, which radical quantum philosophers take to be a fundamental aspect of reality. BOHM, *supra* note 9, at 186–89; Kevin J. Sharpe, *Relating the Physics and Religion of David Bohm*, 25 ZYGON 105, 106–07 (1990).

Similarly, the work being done based on the structure of holograms points toward a holistic view. A hologram is constructed by laser light to produce a three dimensional image. The interesting feature of this resulting "picture" is that even a portion of the picture, when magnified to the original size of the picture, reveals the whole image (albeit with some distortion) rather than just a portion of the image. Walker notes that the hologram is a powerful symbol that leads some philosophers and scientists to conclude that the picture of nature is not simply composed of discrete, self-contained building blocks. WALKER, *supra* note 12, at 74–76. A more radical account is that the hologram is not simply a symbol, but rather exemplifies the structure of the universe in which various presumed discrete "parts" actually are explicit abstractions from the implicit wholeness of the universe. *See generally* BOHM, *supra* note 9, at 143–50.

future generations of lawyers raised in the new paradigm "will refashion our law so thoroughly that in the future our present legal order will look as chaotic, unenlightened and brutal as the old mediaeval law seems to us today."[64] But Walker also cautions that this wonderful new age is not inevitable. Walker's defense of the Rule of Law primarily is motivated by his assessment that the Rule of Law will be an essential political feature of any society that is able to follow through on the vague intimations of the new age that the world is now experiencing.[65] Walker's thesis of the coming age comes off sounding like a strange admixture of Friedrich Hayek and Shirley MacLaine, but his attentiveness to the need to rethink the Rule of Law from a post-Enlightenment perspective properly directs his inquiry.

Walker argues that commitment to the Rule of Law is desirable during this time of transition for several reasons. First, as with all social transformations, there will be a rough and uneven period as the old views slowly expire and new views become the dominant feature of the social world; in this turbulent period the Rule of Law can prevent anarchy.[66] Second, the transition cannot be mapped out in advance, and will consist of various experiments in social interaction. The Rule of Law protects the pluralism necessary for society to stumble along its way to a post-Enlightenment world, the beginnings of which Walker sees in the communitarian movement's effort to build ecologically sound and peaceful "new age communities."[67] After all, Walker notes, it is important to remember that there are "no new-age commu-

64. WALKER, *supra* note 12, at 86–87.

65. Walker argues that we need the Rule of Law

> as a framework for the period of experimentation and transition on which we are embarked, to facilitate the working out of new values and approaches and to prevent friction and violence between different groups taking different ways. Without it we may not succeed in making the conversion to a new value system.

Id. at 234. In addition, Walker asserts that

> [w]ithout the rule of law the necessary transformation will be unnecessarily painful, so painful that it may not be accomplished at all. On the other hand, without the transformation, the rule of law itself will not survive in the longer term. The two need each other.

Id. at 379.

66. *Id.* at 56, 91–92. "Outbreaks of lawlessness or coercion at such a time would so increase the dislocation and hardships associated with change that the disruptive stress could prove too much. Society could fail to make the transition at all." *Id.* at 92.

67. *Id.* at 211–12, 405–06. Walker defines the new age themes to include:

> voluntary simplicity lifestyles, networking as opposed to hierarchy in organizations, meditation and transcendental conciousness, self-improvement techniques through the tapping of the 'inner source', decentralization as opposed to centralization, soft technology, holistic health and healing, parapsychology and innumerable others. Though these other strands may in some cases be less scientific, and in parts may be cultish, facile or fraudulent, they are in their own ways evidence of a new perspective on reality.

Id. at 81. Walker elaborates thus:

nities in the Soviet Union or China."[68] Finally, and most importantly, the Rule of Law as a doctrine of balance between law and power has a strong affinity with the post-Enlightenment themes of the developing world view and therefore is well-suited to serve as a guiding principle.[69] The Rule of Law, then, stands not only as a tradition that properly survived the rationalizing forces of the Enlightenment and must be conserved as a political necessity for the impending social transformation,[70] but also as a doctrine that complements the emerging world view of society as a holistic system.

C. The Political Challenge to the Rule of Law

Walker insists that modern politics directly challenges the continued viability of the Rule of Law because modern politics continues to be defined by Enlightenment ideology. Today, Walker contends, the

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> For such a pattern of experimentation, innovation and mutual toleration to exist, certain conditions must prevail. People must be free to follow their own paths without being coerced by others; the law must be reasonably stable and predictable so that people can plan their ventures and their explorations of new values; the same legal rules must apply equally to all, otherwise a sense of injustice, entailing threats to the peace, will arise between different groups; government leaders will need to refrain from seeking arbitrarily to impose their own solutions on all. In short, the rule of law is the best environment for such a time of innovation and discovery. A renewed appreciation of the rule of law will enable our legal system, and perhaps our whole society to adapt more smoothly and successfully to some profound cultural changes that appear to be under way.

Id. at 57.

68. *Id.* at 91. In the years since 1988 when Walker's book was published, the prospects for new age communities in some of the republics formerly constituting the Soviet Union would seem to have greatly improved, presumably due to the introduction of the Rule of Law.

69. On the other hand, critics of the Rule of Law glorify power over law, and are seen as the last gasps of the old order.

> [A]ll the attacks made on the rule of law have as their philosophic basis the same narrow, late sensate, mechanistic thinking. Both the right-wing activists who urge that civil liberties be abridged pursuant to the 'war against crime', and left-wing critics from the Critical Legal Studies movement who regard the rule of law as an archaic obstacle to the forcible reconstruction of society, are viewing law through the identical constricted windows of the sensate mind. Although the latter group see their position as 'progressive', it is in fact only a manifestation of the decomposing sensate order in its most extreme form. So far from being the burgeoning greenwood of the new age, it is merely a florid fungus on the rotting trunk of the old.

Id. at 88–89.

70. Walker's pragmatic insistence on Rule of Law values for the turbulent period that society now faces mirrors the political battles fought by Coke. *Cf.* Don Herzog, *As Many as Six Impossible Things Before Breakfast,* 75 CAL. L. REV. 609, 624–27 (1987) (arguing that Coke was no detached theorist but rather a shrewd politician who used liberal principles to improve and sustain social reforms). For a different view of Coke's impact, see Hutchinson & Monahan, *supra* note 38, at 100–03 (contending that Coke was part of a historical progression in which the Rule of Law "occasionally proved to be an effective principle to check the indulgent abuse of power by the few over the many," but that the attention to the Rule of Law ultimately displaced the more important movement toward a democratic society).

Rule of Law is undermined in two principal ways. First, legislation no longer provides general and universally applicable guides for behavior; instead, special interest groups vie for protective legislation in an era of universal legislative plunder.[71] Second, adjudication no longer preserves the Rule of Law because judges either relinquish unlimited sovereignty to the legislature, or, when they do act, they openly render ad hoc judgments in response to the equities surrounding the litigants at bar rather than applying the law to the case before them.[72] Walker contends that these broad-based political failings stem from two related trends that contradict the Rule of Law: the acceptance of positive law (legislation and administrative command) as sovereign and unbounded, and the disabling of the judiciary's ability to serve as a check on the sovereignty of positive law.[73] In the former case, legislation becomes the tool for economic and social engineering by those groups with access to power. In the latter case, adjudication either ignores or exacerbates the problems created by the modern, bureaucratized state.

The cornerstone of positivism is that the commands of a legitimate sovereign must be recognized as law. Walker traces the history of positivism to its roots in the transition to the Enlightenment era.[74] The Rule of Law first weathered the claim by Tudor monarchs that a divine right to exercise unfettered power was necessary to put an end to the private violence that threatened the social fabric of sixteenth century England.[75] Later, the doctrine was endangered by the emerging view that an omnipotent parliament was the only sufficient counterbalance to the threat posed by the residual power of the monarch.[76] Although this view never succeeded in suppressing the Rule of Law, with the advent of modern positivism it has again resurfaced with greater vitality. A. V. Dicey is widely recognized as having pro-

71. *See* WALKER, *supra* note 12, ch. 8, at 235–45 ("The Legislative Explosion"), ch. 11, at 288–310 ("Immediate Consequences of the Legislative Explosion").

72. *See id.* ch. 6, at 162–99 ("Dangerous Distortions in Adjudication").

73. This focus is instructive. Although Walker believes that it is fundamentally important for laws to track social values, unlimited majoritarian democracy is perceived as a significant threat to the Rule of Law.

> A substantial congruence between government objectives and popular attitudes, by whatever means achieved, therefore seems to be a prerequisite. At the same time, it does not follow that the rule of law is in force merely because a majority of the people supports a government's actions and outlook. A lynch mob is an example of pure, popular democracy of the most direct kind, but it is the antithesis of the rule of law.

Id. at 14.

74. *See supra* note 21.

75. WALKER, *supra* note 12, at 97–102.

76. *Id.* at 102–04.

pounded the classic statement of the traditional understanding of the Rule of Law,[77] but Walker emphasizes that Dicey's status as a modern positivist raises a paradox.[78] If the Rule of Law forecloses arbitrary or selective assertions of government authority, it appears impossible to reconcile the Rule of Law with the positivist view that even arbitrary and selective legislation must be considered law. The paradox of Dicey's jurisprudence, for Walker, is symptomatic of the attitude leading to the contemporary situation where the Rule of Law is reduced to an empty formulation at best, or regarded as an obstacle to legislative reform at worst.

Walker resolves Dicey's paradox by relying on the tradition of separation of powers.[79] Legislation is never self-executing, but must always be applied (interpreted) by administration officials and, in the case of a conflict, by judges.[80] As a positivist, Dicey acknowledged only pragmatic constraints on the legislature,[81] but Walker argues that the latitude to innovate afforded the legislature under the positivist perspective is incompatible with the Rule of Law. Walker believes that adjudication provides the answer to the paradox of legislative sovereignty because judges constrain the effects of legislation by interpreting it. But Walker's solution affords him no comfort, as he argues that positivism has been coupled with the dismantling of the judiciary's ability to serve its vital function.[82]

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77. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202–03 (10th ed. 1959). As described by Walker, Dicey's definition comprised three requirements:

> (1) the absolute supremacy of regular law as opposed to the influence of arbitrary power; a man might be punished for a breach of law, but could be punished for nothing else; (2) equality before the law of all persons and classes, including government and government officials; (3) the full incorporation of constitutional law as part of the ordinary law of the land, not as a separate constitutional code which might be vulnerable to suspension in times of trouble.

WALKER, *supra* note 12, at 20.

78. *See* WALKER, *supra* note 12, ch. 4, at 128–39 ("The Dicey Paradox").

79. T.R.S. Allan favorably compares Dicey's alleged dogmatic positivism with Ronald Dworkin's continuing development of a jurisprudence that recognizes a principled basis for law. In contrast to Walker, Allan argues that Dicey did appreciate the importance of judicial review as a limitation on legislative authority. T.R.S. Allan, *Dworkin and Dicey: The Rule of Law as Integrity*, 8 OXFORD J. LEGAL STUD. 266, 269 (1988) ("Powers, however extraordinary, which are conferred or sanctioned by statute, are never really unlimited, for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges." (quoting DICEY, *supra* note 77, at 413)).

80. WALKER, *supra* note 12, at 130–40.

81. Dicey contended that members of Parliament by nature are not outrageous people who would abuse their position, and noted further that outrageous laws simply would not be obeyed. *Id.* at 146.

82. *See supra* note 72 and accompanying text.

Walker believes that since courts are the ultimate arbiter of what the law is, they have less discretion than the legislature.[83] Indeed, this premise necessarily follows from the fact that the purpose of courts in a constitutional structure is to counterbalance the legislature's otherwise institutionally unlimited discretion. In response to the realist/cls assertion that courts do not fulfill the "limited discretion" role they are assigned to play, Walker's admitted challenge is to justify a belief that judges can be independent but not too independent, thereby striking the balance of law and power that is essential to his view of the Rule of Law.[84] Walker identifies two obstacles to the judiciary realizing their crucial role in practice. First, judges may refuse to assert their role as a check on attempts to establish complete legislative supremacy. Walker terms this the problem of abdication.[85] Second, judges may refuse to adhere to the law in an attempt to accept for themselves the mantel of legislative supremacy. Walker terms this the problem of judicial usurpation of the executive and legislative functions.[86]

Judicial abdication occurs more frequently in England, which operates without a formal written constitution. Walker argues that a key feature of the English common law is the practice that courts will interpret Acts of Parliament to be consistent with the principles of the common law, and will overturn those Acts that cannot be interpreted as consistent.[87] Walker heralds the early assertion by English courts of a wide latitude to interpret statutes.[88] However, in the twentieth century the spirit of Enlightenment and the jurisprudence of legal positivism reached their full effect, leading to an abdication of power by jurists in England and in other Commonwealth countries that is only

83. WALKER, *supra* note 12, at 131.

84. *Id.* at 42.

85. *See id.* at 177–81.

86. *See id.* at 181–94.

87. *Id.* at 153–54. Even with written federal and state constitutions, American jurisdictions generally still pay lip service to the interpretative maxim that statutes in derogation of the common law must be construed strictly by the courts. SUTHERLAND STAT. CONST. § 50.01 (4th ed. 1984) ("Absent an indication that the legislature intends a statute to supplant common law, the courts should not give it that effect."); *id.* § 58.03 (noting that modern courts tend to view the maxim as a "judicially fabricated obstacle[] to progress through legislation"); *id.* §§ 61.01–.06 (detailing the maxim and the criticisms lodged against it, but concluding that, in spite of criticisms, "the rule has remarkable staying power in the judicial process").

88. Walker sees the culmination of this practice in the 1609 decision in *Dr. Bonham's Case,* in which Chief Justice Coke wrote, "the common law will . . . controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void . . . ." *Dr. Bonham's Case,* 77 Eng. Rep. 646, 652 (K.B. 1609).

now beginning to abate.[89] Walker draws a parallel between the English experience and the current solicitous attitude displayed by American courts toward administrative agencies.[90]

Walker believes that the American experience most clearly demonstrates the threat of judicial usurpation. The American political tradition is defined by a written constitution, and the early and firmly

89. Walker identifies the period of 1920 to 1960 as the nadir of judicial review in the Commonwealth countries. WALKER, *supra* note 12, at 177–81. This period ended with the rise of a new administrative law, and particularly the judicial rejection of ouster clauses. *Id.* at 155–56. For a negative account of this new judicial attitude, see HUTCHINSON, *supra* note 4, at 85–124.

90. WALKER, *supra* note 12, at 180–81. During the last several decades, the abdication of judicial supervision of regulatory affairs in America came to be one of the primary topics in Rule of Law literature. *See* ALTMAN, *supra* note 6, at 51–56; HAYEK, *supra* note 6, at 193–204; Frank E. Cooper, *The Executive Department of Government and the Rule of Law,* 59 MICH. L. REV. 515 (1961). The adoption of the Administrative Procedures Act (APA) in 1946 was intended to preserve judicial review of administrative agencies, but it hardly rectified the problem of inadequate judicial review in the classical understanding. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State,* 89 COLUM. L. REV. 452, 472–74 (1989). Farina argues that the APA was a direct response to the claim that modern administrative agencies were not subject to the Rule of Law under judicial review and notes that Congress subsequently has expressed interest in strengthening the judicial review provisions. However, the APA simply did not address the deeper problem: the abdication of legality by a legislative branch incapable of directly governing modern bureaucratic society. *See also* Theodore J. Lowi, *The Welfare State, the New Regulation and the Rule of Law, in* THE RULE OF LAW: IDEAL OR IDEOLOGY, *supra* note 38, at 17 (extending his earlier thesis in THE END OF LIBERALISM (2d ed. 1979) to encompass the "new regulation" of the 1970s which threatens to displace entirely adherence to the Rule of Law ideal in favor of administrative discretion). In this context, administrative agencies assume new importance as the bodies that interpret and enforce a great deal of legislation. For recent commentary, see generally Farina, *supra*; Edward L. Rubin, *Law and Legislation in the Administrative State,* 89 COLUM. L. REV. 369 (1989).

The Supreme Court has determined that in this legislative vacuum it is appropriate for courts to defer to expert policy decisions made by agencies that are charged with implementing the policy objectives of the executive branch. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865–66 (1984). This position has drawn support from commentators. *See, e.g.,* Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s,* 43 ADMIN. L. REV. 7 (1991) (contending that systematic agency policymaking is stunted and deflected by judicial review because the numerous federal judges are then able to substitute their own policy beliefs for those of the agency under the indeterminate "adequate consideration" doctrine); *see also* HUTCHINSON, *supra* note 4, at 102–14. Other commentators view *Chevron* as an abdication of legitimate and desirable power by the courts. *E.g.,* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era,* 32 B.C. L. REV. 757, 759 (1991) ("*Chevron* represents a usurpation of judicial power and results in excessive concentration of power in administrative agencies." Instead, courts should defer to agencies on the basis of a prudential case-by-case examination determined *by the courts.*); *cf.* Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275 (viewing *Chevron* as a self-imposed prudential limitation that allows continued flexibility in adjudication).

established tradition of judicial review after *Marbury v. Madison*[91] has emboldened judges not to defer to the doctrine of legislative superiority.[92] Far from relinquishing their roles, American judges have enlarged the scope of their authority to the point that Walker questions whether there is any limit on the extravagant judicial innovation of American courts during the past several decades.[93] Walker traces judicial usurpation to the legal realism movement that particularly caught hold in America.[94] He admits that legal realism might have been a correct description of judicial practice but that it has been misused as a prescription for judicial activism, particularly by the later cls realists.[95] The fact that the emperor-judge is naked apparently is to be ignored, most especially by the exposed judge who, after all, will find it hard to do her job correctly if she is self-consciously bare of any legitimacy.[96] As a solution to this problem of judicial tyranny, Walker

91. 5 U.S. (1 Cranch) 137 (1803).

92. *See* WALKER, *supra* note 12, at 182–85 (citing Roe v. Wade, 410 U.S. 113 (1973), as an example of decision making not grounded in law); *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973) (arguing that *Roe* is "bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be"). One commentator argues that American judicial method developed to reflect a legislative concern with controlling future cases rather than a more traditional (English) judicial concern with fidelity to precedent, and that contemporary American judicial method is moving toward a focus on the issues raised by the case at hand rather than concerns with either the past or the future. James H. Hardisty, *The Effect of Future Orientation on the American Reformation of English Judicial Method,* 30 HASTINGS L.J. 523 (1979). Professor Hardisty's description is similar to Walker's description of the demise of the Rule of Law: "[T]here appears to have been a recent American trend toward present orientation, and this has been reflected in the movement of the legal system away from rules." *Id.* at 543.

93. WALKER, *supra* note 12, at 182.

94. *Id.* (arguing "[w]ell-intentioned judicial realism [in America] has come close to what some observers see as judicial tyranny"). Walker closely follows Lon Fuller's efforts to steer a pragmatic course that avoids both positivism and radical realism by stressing the internal morality of Law. *Id.* at 364–65. For recent histories of the American legal realism movement, see GARY J. AICHELE, LEGAL REALISM AND TWENTIETH-CENTURY AMERICAN JURISPRUDENCE: THE CHANGING CONSENSUS (1983); JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870–1970: A HISTORY 147–93 (1990); LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 (1986); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

In a famous article, Karl Llewellyn, a prominent though by no means radical realist, attempted to characterize the loosely organized movement known as legal realism. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound,* 44 HARV. L. REV. 1222 (1931). For Fuller's assessment of Llewellyn's realism, see L. L. Fuller, *American Legal Realism,* 82 U. PA. L. REV. 429 (1934).

95. WALKER, *supra* note 12, at 172–77, 256–59.

96. *Cf.* Scott Altman, *Beyond Candor,* 89 MICH. L. REV. 296 (1990) (arguing that judges should always be candid [that is, never consciously duplicitous], but that introspection on the act of judging would be counterproductive because it would tend to make the law less constraining and more subject to legal "houdinis" who view legal rules as deconstructible binds that rarely limit discretion).

urges judges to revitalize and hearken back to a "classical theory" of the judicial role. As was clear from his definition of the Rule of Law, in the final analysis, Walker contends that adjudicative practice girds the realization of the Rule of Law.

Walker describes the classical tradition of the common law, which regarded the judge as a participant in a long history of decision making. Classical judges carefully preserved yet also extended the customary law of the people by cultivating a tradition that was anterior to the aims and desires of both the parties and the judge.[97] "It is because common law rules are not the conscious invention of the judge that the judge's role is accepted in society."[98] Judges undoubtedly bring a certain expertise and technical knowledge to bear on the social values that form the basis of the common law, but this filtering process can never altogether ignore the essential relationship of adjudication and preexisting social values if the Rule of Law is to survive.[99] The core concept at work under this view is the realization and protection of reasonable expectations. Parties expect that when disputes arise the courts will do substantial justice in accordance with their expectations, based upon the social context in which the dispute occurs. The situation is not very different when one moves from private law to public law. The parties view the judge who applies a statute as a mediator between the power of government and the impotence of citizens. "The court's role as intermediary and the process whereby it becomes in effect a breakwater protecting the public from the legislature, is formally rationalized as being a search for the 'true intention of parliament' that is made necessary by the inherent ambiguity of language."[100] In both situations the judge stands as an independent check on the abuse of power in contravention of the scheme of social values. In the private law context, it is a fellow citizen who threatens to abuse the petitioning party; in the public law context, it is the government that transgresses the normative boundaries.

Walker contends that this classical style of adjudication accords with the emerging post-Enlightenment world view because it promotes a practice that is humble and patient.[101] The dynamic balance of power and law that Walker regards as the essence of the Rule of Law is realized in the classical case-by-case practice of the common law. He argues that this practice does not presume to break critically from

97. WALKER, *supra* note 12, at 162–72.
98. *Id.* at 163.
99. *Id.* at 166.
100. *Id.* at 172.
101. *Id.* at 194.

tradition and to rationalize legal relations. Adjudication should never aspire to articulate an abstract theory of just governance, but should instead be concerned with the practical question at bar in a manner that draws upon an embryonic tradition that is constantly being renewed in the context of contemporary social values. At bottom, Walker regards good judging as an essential practice if the Rule of Law is to survive.

II. OVERCOMING THE METAPHYSICS OF ENLIGHTENMENT

Post-Enlightenment thought challenges the possibility of the Rule of Law. Dean Walker confronts this challenge by arguing that the Rule of Law is not only possible in a post-Enlightenment world, it is a political necessity. In this part of the Article, I first critique Walker's position because it remains predicated on Enlightenment metaphysics despite his efforts to the contrary. I then undertake to describe a hermeneutical approach that better incorporates the challenge of post-Enlightenment thought without abandoning the possibility of the Rule of Law.

A. Critiquing Walker's Enlightenment Metaphysics

My detailed discussion of Walker's book will serve as the basis for outlining a post-Enlightenment jurisprudence of the Rule of Law. Although Walker correctly sees that the Rule of Law must be rearticulated for the post-Enlightenment world, his vision is too limited. Walker remains firmly within the methodological premises of the Enlightenment, as is evident in the manner in which he constructs his definition of the Rule of Law. Walker first defines the state of affairs that constitutes the Rule of Law and then assesses current practice by comparing it to this definition. Walker's inability to sustain the Rule of Law flows from this initial mistaken perspective. The Rule of Law is not an abstract, timeless, and independent political ideal against which we can measure our legal practice. Instead, the doctrine of the Rule of Law designates certain features of legal practice that must be carefully and critically nurtured. Walker's methodology largely is conceived in the Enlightenment spirit of objectively discerning the foundations of social organization, even though he tempers his approach with a post-Enlightenment concern about the social context of the practices in question.

Walker's solution to the problem of realizing the Rule of Law in practice is to rely on the English common law tradition of adjudica-

tion. His proposed specific institutional reforms are subsidiary to the preeminent goal of reestablishing an independent judiciary that nevertheless is constrained by the Rule of Law.[102] Adjudication counterbalances the concentration of unlimited discretion within the legislative, executive, and law enforcement organs of government, and also provides the link between law and current social values. The common law court, both judge and jury, is the embodiment of the dynamic balance of the Rule of Law, curbing the power of government in accordance with law, but also incrementally changing the law in response to a developing society.

In Walker's view, the Rule of Law requires that decision makers are constrained by law but still are able to recognize and incorporate socially evolving notions of law. This tension in Walker's definitional structure confirms Judith Shklar's thesis that much of the modern confusion surrounding the Rule of Law stems from the fact that

> there are two quite distinct archetypes of the Rule of Law and that these have become blurred by now and reduced to incoherence because the political purposes and settings that gave them their significance have been forgotten. . . . The upshot is that the Rule of Law is now situated, intellectually, in a political vacuum.[103]

Shklar identifies one archetype as derivative of Aristotle's idea of the Rule of Law as the rule of reason by one constantly disposed to act fairly and justly, which she regards as now being embodied principally in Ronald Dworkin's emphasis on the rationality of judging.[104] The other archetype derives from liberalism's later emphasis on the Rule of Law as a restraint against rulers, exemplified by Montesquieu's project to preserve freedom in the face of threats by violent kings and arbitrary legislatures. This second archetype is the principal battleground for the modern debates about the desirability of a liberal political order.[105] The distinction between the two models is manifest not only in the nature of the constraint on power (substantive vs. procedural), but also in the purpose to which legitimate power is directed. Under the ancient model, the Rule of Law was seen as a means of inculcating all citizens with virtue, whereas the modern model views the Rule of

102. *Id.* at 387–99 (discussing his proposals for executive, legislative, and judicial reform).

103. Judith N. Shklar, *Political Theory and the Rule of Law, in* THE RULE OF LAW: IDEAL OR IDEOLOGY, *supra* note 38, at 1; *cf.* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 51–61 (2d ed. 1984) (arguing that ethical theory has been rendered incoherent in similar fashion).

104. Shklar, *supra* note 103, at 12–16.

105. *Id.* at 7–12 (citing as an example Hayek's defense of the free market versus Roberto Unger's critique of this never-to-be-realized ideal).

Law as a means of demarcating a wide sphere of individual freedom, enabling citizens to pursue their own conception of a virtuous life.[106]

As the noted political philosopher, Fred Dallmayr, notes, the confrontation of these two conflicting archetypes ends in aporia, threatening the very idea of the Rule of Law unless we approach the problem from a new perspective.[107] These two archetypes are linked in historical progression. The ancient model of law, with its material (substantive) element, was eclipsed by positivist interpretations. In its extreme manifestations, the legal positivism of the Enlightenment period attempted to divorce material law from the positive essence of the rule set out in a given legal text:

> By solidifying into a doctrine [in the Enlightenment period], rule-governance or the rule of law . . . underwent a subtle change: namely, in the direction of a steady formalization and legalization . . . . In earlier formulations, law and lawfulness were still closely linked with notions of the common good and thereby with broader substantive concerns.[108]

The pure positivist vision of legal dogmatics proved to be a mirage. In order to be applied in a given situation, all positive rules must first be interpreted. However, it was not long before theorists acknowledged that "issues of interpretation cannot rigorously be exiled or segregated from normative rule-governance; in fact, the more normativity is formalized and elevated above contingencies, the more its content appears in need of interpretive retrieval and assessment."[109] But if contemporary commentators are unable to sustain the positivist project, neither are they able to resuscitate the ancient substantive model. Contemporary theory is an amalgam of the residues of these two archetypes, both of which are no longer persuasive in their own right.

Walker attempts to reconcile the conflicting archetypes instead of recasting the problem, but his mediative tightrope performance is unsatisfactory. Walker argues that a central feature of the Rule of Law is constraint, both of private coercion and governmental coercion.[110] Constraint is problematic for Walker, however, because he envisions constraint on several different levels. Constraint first depends on the ability to derive meaning from legal texts that are fashioned to be generally applicable, prospectively enforced, and clearly understood. However, as an overriding substantive matter, constraint

106. ALTMAN, *supra* note 6, at 68–69.

107. Dallmayr, *supra* note 6, at 1464–69.

108. *Id.* at 1456; *see also* ALTMAN, *supra* note 6, at 20–27 (contrasting the "generic liberal" (thoroughly positivist) model of the Rule of Law with Plato's and Aristotle's models).

109. Dallmayr, *supra* note 6, at 1461.

110. WALKER, *supra* note 12, at 11–14.

also requires that the laws of society cannot significantly diverge from social values, which order society in a more fundamental way than the laws. Walker relies on a complex dynamic: guiding principles of social organization must be concretized in practice, and yet legal texts must stand as distinct repositories of stable and knowable rules. Requiring that laws keep pace with the dynamic evolution of social values demands that the law remain malleable, but this seems impossible in the face of the traditional understanding of constraint as adherence to a separate and objective legal rule. Aporia appears inevitable.

Despite his promise of a more productive path of inquiry drawing on the lessons of post-Enlightenment science, and in particular on the new physics, Walker's effort illustrates the intellectual cul de sac in which contemporary jurisprudence finds itself. Walker wants it both ways: the judge is a government clerk collating and applying the rules but also is Hercules infusing the written code with the democratically developed law of socially defined reasonable expectations. Needless to say, Walker's approach sounds disappointingly familiar. During this century, the judicial role has been critically examined and challenged. Some theorists conclude that judges simply are not constrained to the degree that Walker and other scholars believe they must be in order to sustain the Rule of Law because the act of interpretation is a creative and indeterminate practice that cannot be corralled by rules or institutional constraints. By focusing on judicial review, Walker subjects himself to the now time-worn question: How can the judge rationally determine what the law is when the legal tradition is incoherent and contradictory, and when judicial decisions are a matter of political commitment rather than rational deduction? Walker's anaemic call for judges to adopt the classical style of adjudication leads nowhere if there are no legal principles to be discerned from precedent, independent of the decision maker's biases. Walker's view of the common law is predicated on a belief that language is perspicuous, that the tradition of the common law is a distinct statement of principles and policies that are available to the judge like so many tools (perhaps not so neatly) arrayed in her workshop. This view is untenable, however, if post-Enlightenment thought is embraced fully.

It is apparent from his attack on the critical legal studies movement that Walker misses the real bite of the indeterminacy critique that gives rise to the conclusion that law is politics. Undoubtedly the picture of the Rule of Law that he paints is one that would garner wide acceptance and deep loyalty, but the point of the indeterminacy critique is that his portrait is more an impressionistic fantasy than a real depiction of the legal landscape. Law is political not only because

political settlements shape the guiding norms of the legal system, but also because even in its everyday mundane manifestations there is no substance to legal reasoning beyond political commitment.

Decisions by common law judges are inevitably political, which in this context means that they can not be determined by formal rationality. In this regard, adjudicative decisions are no less political than a decision by a legislative body to pass certain environmental legislation, or a decision by a regulatory agency to set permissible pollution discharges at a certain level. Walker predicates his defense of the Rule of Law on a judiciary capable of implementing the law in a distinctly legal manner, but the indeterminacy critique undermines the idea that there is a methodology called "legal reasoning" that is able to bracket the rambunctious give-and-take of political engagement. Critical legal studies scholars do not argue that the pole of power is valued more highly than the pole of law, they argue that we exist in a world in which power is the only currency and law is a counterfeit ideology.[111] The pole of law is obliterated by the indeterminacy critique.[112]

Post-Enlightenment thought would appear to dissolve the possibility of legal constraint, but this seemingly removes the obstacles to innovation within the law. If judges are not constrained, the common law should be able to serve nicely in adjusting the legal structure to reflect the constantly evolving "law" of the society. No longer would an outdated rule be in need of appropriate revision or reversal—the judge would simply act within the immediate social context. But post-Enlightenment thought also challenges the capacity for innovation. Simply reducing (or expanding?) the judge to an arbiter of social values does not secure the practice of innovation. Just as it is impossible to insulate a legal text from socially contingent practices that erode the text's claim to objectivity, it is impossible to insulate the decision maker from these same social practices that render problematic any innovative effort to break free from tradition.[113] The problem of innovation becomes even more acute if attention simultaneously is directed to the problem of constraint. Walker joins with Raoul Berger's criticism of the United States Supreme Court for substituting an unwritten constitution for the written Constitution having the force of law,[114]

111. *See generally* Singer, *supra* note 3. *See also* HUTCHINSON, *supra* note 4.

112. I describe and critique the deconstructive variant of the indeterminacy critique more fully in Mootz, *supra* note 7.

113. *See* J. M. Balkin, *Ideology as Constraint,* 43 STAN. L. REV. 1133 (1991) (arguing that the apparent freedom of linguistic free play is severely curtailed by the ideological instantiation of the interpreter).

114. WALKER, *supra* note 12, at 185 (making reference to RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 297–98 (1977)).

but innovation demands change in the constitutional arena no less than the domain of private law. Clinging to the stability and certainty of a written document seems to run counter to the image of a judge as a creative actor retiring principles that have served their day and articulating new principles to replace them.[115]

Walker's inability to deal with these basic and troubling issues stems from his insufficient appreciation of the profound implications that follow from what he takes to be the importance of contemporary quantum philosophy for legal theory. Walker misses the mark by not recognizing that this century's developments in physics were matched by equally revolutionary developments in metaphysics. A mechanistic view of the universe has given way to a holistic perspective, but this shift is not simply a change in attitude toward a given object (nature) by certain subjects (autonomous individuals). Instead, post-Enlightenment metaphysics corresponds to a rather dramatic conclusion reached by some members of the scientific community: There is no object "out there" that is under study. General relativity theory undermined the belief that objects are arrayed against the neutral and absolute backdrop of space (through which time "flows") by substituting in its stead an image of four-dimensional reality. Quantum physics has also disintegrated the subject/object distinction by establishing that observation creates the field of observation. A more radical quantum philosophy agrees that there are no "real" building blocks of nature, but argues further that our world is a relational and holistic system that is not subject to unlimited dissection, and in which the dissection of the world into constituent parts is always an abstraction from reality. As George Wright notes,

> A large and increasing number of scientists and quantum philosophers have begun to see the world as more deeply relational and holistic, and less a matter of discrete individuals, than most of us had imagined. . . .
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> . . . .
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> . . . [T]he state of the overall system can not be reduced to the states of its component parts, because the parts are simply not in definite states in and of themselves.[116]

The philosophical implications of quantum physics are far from settled, but the undeniable effect under any interpretation is to discredit the Enlightenment world view.[117]

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115. *Cf.* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166 (1921).

116. Wright, *supra* note 62, at 864, 867–68.

117. Quantum physicists have developed an incredibly successful theory for predicting quantum phenomena, but generally they have avoided the profound questions regarding the nature of the quantum reality giving rise to the phenomena. Under the reigning orthodoxy,

Walker follows the radical quantum theorists who argue that there is a relation with the world that lies behind the later abstractions of

known as the Copenhagen view after Niels Bohr's home city, quantum physicists claim that quantum mechanics holds no ontological significance. From this perspective,

> the new theoretical entities upon which physicists base their understanding of quantum phenomena must be interpreted not as theoretical counterparts of entities existing in nature itself, but merely as elements of a computational procedure that allows scientists to form expectations pertaining to observations that appear under certain kinds of conditions.

NICK HERBERT, QUANTUM REALITY: BEYOND THE NEW PHYSICS 143 (1985) (explaining that the strict Copenhagen view is that it is nonsensical to talk about a quantum world existing between measuring events because the "[q]uantum theory is not a representation, much less a description, of quantum reality, but a *representation of the relationship* between our familiar reality" of classical physics and the utterly unfamiliar realm of quantum mechanics); Henry P. Stapp, *Quantum Nonlocality and the Description of Nature, in* PHILOSOPHICAL CONSEQUENCES OF QUANTUM THEORY: REFLECTIONS ON BELL'S THEORUM 154 (James T. Cushing & Ernan McMullin eds., 1989) [hereinafter PHILOSOPHICAL CONSEQUENCES]. Under the Copenhagen view, quantum mechanics only amounts to probabilistic predictions of the definite value that will be manifest when the classical world, in the form of an experimenter and an experimental apparatus, intervenes in the quantum world and collapses an indeterminate wave function.

As a challenge to the Copenhagen view, various philosophers and theorists have attempted to draw ontological conclusions from quantum mechanics. *See, e.g.*, RICHARD A. HEALEY, THE PHILOSOPHY OF QUANTUM MECHANICS: AN INTERACTIVE INTERPRETATION 195 (1989) (Although quantum mechanics correctly predicts observable correlations in phenomena, "adoption of the strong Copenhagen interpretation effectively precludes the theory from explaining how they come about," a project that Healey undertakes by modifying the Copenhagen view.). Holistic theorists contend that the Copenhagen view is correct to focus on the "entire experimental arrangement" as "creating" the quantum phenomena, but they argue that the entire universe is always part of the "entire experimental arrangement" because the universe is deeply relational in a way that can not be detected by human measurement. *See* BOHM, *supra* note 9, at 1–26, 117–213; Paul Teller, *Relational Holism and Quantum Mechanics*, 37 BRIT. J. FOR PHIL. SCI. 71 (1986). As Bohm notes, once we accept that the "interference" of experimental conditions affects the "potentialities" of an electron we already seem committed to the view that there is a reality under study. David Bohm, *Heisenberg's Contribution to Physics, in* THE UNCERTAINTY PRINCIPLE AND FOUNDATIONS OF QUANTUM MECHANICS: A FIFTY YEARS' SURVEY 559 (William C. Price & Seymour S. Chissick eds., 1977).

The distinction between the anti-realist orthodoxy of the Copenhagen view and the realist holism advocated by Bohm and others is brought into sharper focus by considering the now experimentally confirmed necessity of accepting some manner of nonlocality within quantum mechanics in order to predict phenomena correctly. *See, e.g.*, Abner Shimony, *The Reality of the Quantum World*, 258 SCI. AM. 46 (1988). Nonlocality essentially amounts to acausal instantaneous connections between quantum phenomena. Although related to holism, nonlocality evidences nonseparability, which concerns spatial relationships. Richard Healey, *Holism and Nonseparability*, 88 J. PHIL. 393 (1991). Nonlocality might be explained by faster than light communication between quantum events, which really amounts to redefining "local" causation, but this supposition violates the theory of special relativity. Nonlocality is one of several baffling events predicted by quantum mechanics that "not only resist explanation, they actually undermine a cluster of metaphysical beliefs. . . . Thus scientific theory, far from being derived from metaphysical beliefs, may require us to revise them." R.I.G. Hughes, *Bell's Theorem, Ideology, and Structural Explanation, in* PHILOSOPHICAL CONSEQUENCES, *supra*, at 195–96. As one commentator succinctly states: "Metaphysics follows physics in fact as well as in Aristotle." Healey, *Holism and Nonseparability, supra*, at 393.

The orthodox reponse to the problem of explaining nonlocality is straightforward: Nonlocality is a feature of the mathematical models but does not exist in the real world. For example, Arthur

Enlightenment thought in general and Enlightenment science in par-

Fine agrees that the hypothesis of superluminal influences provides the best *explanation* of the correlations of pairs of events, but further argues that there simply is no need for an explanation of patterns existing between random sequences in an algorithm. Arthur Fine, *Do Correlations Need To Be Explained?, in* PHILOSOPHICAL CONSEQUENCES, *supra,* at 175, 182–83, 192. These anti-realists argue strenuously that the presumption of realism simply is inconsistent with quantum mechanics. HENRIK SMITH, INTRODUCTION TO QUANTUM MECHANICS 255–57 (1991); N. David Mermin, *Quantum Mysteries Revisited,* 58 AM. J. PHYSICS 731 (1990).

In contrast, Bohm and other holistic theorists contend that it is unnecessary to embrace anti-realism if we are willing to surrender our fragmented conception of reality and accept the holistic character of nature. Holistic theorists argue that the experimental data confirming nonlocality and the constraints of special relativity can both be accomodated under their approach. Nonlocal influences are not a matter of faster-than-light communication between two separate objects. Instead they evidence a fundamental undivided wholeness that precedes our fragmentary view that there is need for causal communication between distinct objects. BOHM, *supra* note 9, at 1–26, 48–64. Paul Teller contends that it is only our prejudicial adherence to "particularism" that renders quantum mechanics incompatible with relatavistic theories. Teller defines particularism as the commitment to a world composed of individuals bearing nonrelational properties such that relations between individuals supervene on these nonrelational properties. In contrast, Teller argues in favor of "relational holism," under which relations exist "which do not supervene on the nonrelational properties of the relata." Paul Teller, *Relativity, Relational Holism, and the Bell Inequalities, in* PHILOSOPHICAL CONSEQUENCES, *supra,* at 208, 214. Reasoning that relational holism permits us to make sense of nonlocality because it rejects the ontology of particularism, Teller writes that:

> To say that causal locality has been violated most plausibly should be taken to mean that there are nonrelational properties of space-time points which are related in some other way—by action (lawlike dependencies) at a distance or through superliminal causal chains. On the other hand, when we are concerned with nonsupervening relations, this circle of ideas has no grip. There is no question of superluminal or distant action between nonrelational, definite values.

Id. at 215; *cf.* Stapp, *supra,* at 159 ("Far more likely, in my opinion, than anything actually *traveling* faster than light is the likelihood of an intrinsic connectedness of Nature that is alien to the classical notion that spatial separation entails intrinsic separation."). This holistic approach does not render science meaningless:

> Perhaps it is possible to adopt a kind of radical ontological holism in which the whole of the forward light cone of any event is regarded as one nonseparable whole because of the pervasiveness of physical interactions, and yet to do this without lapsing into the silence of scientific nirvana. That is to say, maybe we can opt for radical ontological holism and still do some physics.
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> . . . .
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> . . . Or to put the idea differently, the universe is "really" one, but once we put a specific question to it, it falls apart quite naturally into apparent parts.

Don Howard, *Holism, Separability, and the Metaphysical Implications of the Bell Experiments, in* PHILOSOPHICAL CONSEQUENCES, *supra,* at 252–53.

Although I argue that the holistic and nonseparability themes relied on by Walker have strong affinities with the post-Enlightenment metaphysics of Gadamer's hermeneutics, the Copenhagen interpretation of quantum mechanics also lends itself to the metaphysical shift away from the subject/object framework that is signalled by hermeneutics. *See* Hans Siegfried, *Autonomy and Quantum Physics: Nietsche, Heidigger, and Heisenberg,* 57 PHIL. SCI. 619, 629 (1990) (arguing that "[w]hat quantum physics provides is not a representation of nature (*Bild von der Natur*), but a representation of our relationship to nature . . . quantum physics deals this ontology [the Cartesian dichotomy of reflecting mind and objective matter] a much harder blow than Heideggarian

ticular. A prominent theoretical physicist, David Bohm, believes that only a holistic view accords with quantum mechanics. Bohm writes of the "implicate order" of reality that subtends the subtotalities comprising the objects of everyday existence.[118]

> [T]he attempt to live according to the notion that the fragments [i.e., our conception of objects] are really separate is, in essence, what has led to the growing series of extremely urgent crises that is confronting us today.
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> . . . .
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> . . . [S]cience itself is demanding a new, non-fragmentary world view, in the sense that the present approach of analysis of the world into independently existent parts does not work very well in modern physics . . . both in relativity theory and quantum theory, notions implying the undivided wholeness of the universe would provide a much more orderly way of considering the general nature of reality.
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phenomenology"); Williams, *supra* note 62, at 449. Of course, Gadamer's philosophy is not validated by any particular scientific discovery, theory, or philosophy.

Gadamer's approach is meant to breach the realist/anti-realist vocabulary that characterizes much of the quantum philosophy debate. *See, e.g.*, Joseph J. Kockelmans, *Beyond Realism and Idealism: A Response to Patrick A. Heelan, in* GADAMER AND HERMENEUTICS 229 (Hugh J. Silverman ed., 1991). Orthodox theorists who deride the holistic position as being wrong and outlandish reinscribe Enlightenment prejudices that there can be neutral and rational scientific knowledge that accumulates according to ahistorical criteria. In fact, the Copenhagen interpretation is just that: an interpretation that has a social history. *See* DAVID C. CASSIDY, UNCERTAINTY: THE LIFE AND SCIENCE OF WERNER HEISENBERG 247–66 (1992).

118. *See* BOHM, *supra* note 9, at 207. Bohm describes his central theme to be "the unbroken wholeness of the totality of existence as an undivided flowing movement without borders. . . . So whatever part, element, or aspect we may abstract in thought, this still enfolds the whole and is therefore intrinsically related to the totality from which it has been abstracted." *Id.* at 172. One commentator, drawing in part on Bohm's work, explains further:

> This entirety of interrelation is so vast in its extent across cultural meaning and historical space and time that from a long anthropological perspective we begin to see in it but one large tissue of distributed life and cognition woven across the sphere of the earth. In all its flux of intensity and exchange, this noetic web is the ecology of conciousness—the field of conciousness of which each of us is a dynamic and reflexive node.

Guy Burneko, *It Happens by Itself: The Tao of Cooperation, Systems Theory, and Constitutive Hermeneutics*, 31 WORLD FUTURES 139, 140 (1991). For additional commentary on the philosophical and religious implications of Bohm's work, see PHYSICS AND THE ULTIMATE SIGNIFICANCE OF TIME: BOHM, PRIGONINE AND PROCESS PHILOSOPHY (David R. Griffen ed., 1986); Ronald H. McKinney, *Beyond Objectivism and Relativism: Lonergan Versus Bohm*, 64 MODERN SCHOOLMAN 97 (1987); Alicia J. Roque, *Could Bohm's Hologram Succeed Where Rorty's Mirror Couldn't?*, 121 SCIENTIA 141–51 (1986); John A. Schumacher, *Prolegomena to Any Future Inquiry: The Paradigm of Undivided Wholeness*, 21 INT'L PHIL. Q. 439 (1981); Sharpe, *supra* note 63; Symposium, *David Bohm's Implicate Order: Physics, Philosophy and Theology*, 20 ZYGON 107 (1985).

> . . . [W]hat is needed is for man to give attention to his fragmentary thought, to be aware of it, and thus bring it to an end.[119]

Bohm argues that it is only the supposition of undivided wholeness that provides the much sought-after unified theory that enables us to reconcile relativity and quantum mechanics.[120] Bohm's philosophy is as contested as post-Enlightenment thought generally, but if Walker is serious about reformulating the Rule of Law in accordance with the post-Enlightenment condition, he must follow through on the far-reaching ramifications of the new physics that he considers.

It is obvious, however, that Walker draws back from the radical subject-decentering conclusions of the holistic theorists. Under Walker's view, a judge is presumed to be a dispassionate observer who first determines the facts of a dispute and then objectively extracts from prior decisions time-tested neutral principles that always stand apart from the judge's subjective aims. Walker interprets the new physics as simply confirming the older metaphysical belief in individuals who are distinct from the natural and social worlds even as they are inevitably interactive with both. Walker looks in the right direction, but he fails to move. Relativity and quantum theory have profound implications for legal theory, but Walker only skims the surface by concluding that legislation cannot treat the ills of society like so many broken crankshafts on the social engine. What is at issue is our relationship with the world, which under the emerging view is irremediably context-driven and interpretive.[121] This is the milieu in which cls scholars intensified the realists' attack on the formalist conception of adjudication. Walker stands mute before this challenge and appears to recoil from the deeper implications of the shifting world view of which he purportedly takes account.

Walker contends that the lessons of post-Enlightenment thought afford a "new importance and dignity to the individual" because social engineering is rendered practically impossible and therefore obsolete.[122] With this claim, Walker makes the mistake of according fundamental significance to autonomous individual actors who spontaneously collide and thereby produce a social content that is

119. BOHM, *supra* note 9, at 2, xi–xii, 7.

120. *Id.* at 176.

121. Joan Williams provides a lucid account of the broad contours of a "new epistemology" that has followed in the wake of the breakdown of the positivist model, under which there is no false hope of "neutral" interpretation of objective meanings. Williams, *supra* note 62. Williams criticizes critical legal studies scholars for not adhering to the broadest "second wave" implications of the new epistemology and instead remaining within the ambit of (modified) Enlightenment epistemology. *Id.* at 471–95.

122. WALKER, *supra* note 12, at 56.

beyond any individual ken. Walker fails to recognize that the notion of an "individual" must take on new meaning in the post-Enlightenment world. As George Wright argues,

> Perhaps the best way to accommodate this [traditional Western] sense of individualism with the experimentally revealed facts of the world is to think, as the philosopher Paul Teller suggests, in terms of "relational holism." According to relational holism, "objects which in at least some circumstances we can identify as separate individuals have *inherent relations*, that is, relations which do not supervene on the non-relational properties of the distinct individuals." We do not, as it were, start with non-social human beings who then contingently choose to, or somehow wind up, changing their identities by entering into social relationships—altruistic, manipulative, sacrificial, or exploitive. Rather, the identity of the human being is constituted as primarily or fundamentally by social relationships as by any other aspect of that person. Identity is, in part, identity-sharing. What some mystics and sociologists have long argued for turns out to be suggestively reinforced, if not confirmed, by physics.[123]

Individuals exist, but they are socially defined and historically situated. It no longer makes sense to talk of individuals as the separate component parts of the social world. In fact, Bohm's claim that a holistic quantum reality subtends the curious phenomena observed by quantum physicists leads him to suggest that even the distinctions between animate and inanimate, consciousness and matter, and space and time must all be considered explications of a more fundamental implicate unity. The self-aggrandizing notion of a secure subject is quite simply incoherent once one abandons the mechanistic view of the universe that marked the period of Enlightenment.[124]

The holism suggested by radical quantum theorists is anathema to Hayek's liberalism. Although Walker attempts to avoid Hayek's limited approach, Walker's residual commitment to traditional individualism is apparent from the way in which he bifurcates the legal and social systems. Although he notes that under a post-Enlightenment understanding the government cannot view itself as distinct from society, Walker's entire definitional structure belies this insight. Purporting to champion only a "negative state" that does not proactively

123. Wright, *supra* note 62, at 868 (quoting Teller, *Relational Holism and Quantum Mechanics*, *supra* note 117, at 73 (footnotes omitted)).

124. Thus, an illusion may arise in which the manifest static and fragmented content of consciousness is experienced as the very basis of reality and from this illusion one may apparently obtain a proof of the correctness of that mode of thought in which this content is taken to be fundamental.

BOHM, *supra* note 9, at 206–07.

intervene in the social world, Walker sees the legal system as a neutral backdrop for the social interaction of individuals. At its core this is simply Hayek's individualism, a perspective that does not take account of the "curvature of legal space."[125] It hardly seems to make sense to talk about "social values" that develop against the backdrop of a neutral legal order when the legal system indelibly shapes the social world and is indivisibly one with it.

Walker looks to the developing post-Enlightenment world view for guidance, but he fails to assimilate the radical quality of its central theme: individuals are constituted socially and legal relations are bound up inextricably with social relations. The old vision of common law judges breathing life into legal doctrine must be revised by acknowledging that social traditions, such as are expressed in the law, breathe life into the judge. Theorists must reconcile the desire for a purely formal and procedural implementation of the Rule of Law with the substantive conception of prudential governance by utilizing post-Enlightenment terms that erase the supposed sharp distinction between a positive legal rule and the social context of its proper application. To put it differently, the Rule of Law must be reconceived in terms that avoid the unhelpful bifurcation of subjects and objects. Although Walker ultimately fails to reconceive the Rule of Law in this manner, his efforts provide a backdrop for exploring the way in which Hans-Georg Gadamer's philosophy undertakes this task in a more profitable manner.

B. A Post-Enlightenment Understanding of the Rule of Law

Walker's attempt to render the Rule of Law coherent in post-Enlightenment terms is not doomed to failure. The Rule of Law can be preserved as a useful description of certain features of legal practice by eschewing Enlightenment metaphysics. Walker's thesis is on the

125. *See generally* Tribe, *supra* note 62. In his discussion of the "curvature of constitutional space," Tribe writes that:

> In Einstein's view, space is not the neutral "stage" upon which the play is acted, but rather is merely one actor among others, all of whom interact in the unfolding of the story.
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> . . . .
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> A parallel conception in the legal universe would hold that, just as space can not extricate itself from the unfolding story of physical reality, so also the law can not extract itself from social structures . . . .
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> . . . .
>
> Discerning the social meaning of a [constitutionally] challenged practice . . . demands less an effort to uncover the hidden levers, gears or forces that translate governmental actions into objective effects, than an attempt to feel the contours of the world government has built
>
> . . . .

Id. at 7, 39.

mark, but his failure to break free of Enlightenment metaphysics problemizes his effort. If the Rule of Law is to be preserved in the face of the demands for power by the technocratic elite, it is apparent that Walker's entire project must be recast. Elsewhere, I have articulated a critical hermeneutical approach that draws upon post-Enlightenment Continental philosophical traditions and provides an appropriate vocabulary with which to discuss legal practice.[126] Viewed from the perspective of hermeneutics, Walker's reliance on an adjudicative model rather than on legislative competencies to defend the Rule of Law is not happenstance. Walker's commitment to the Rule of Law is grounded in the practice of judging because the Rule of Law is experienced most acutely in this practice. However, Walker is unable to break free completely from wrongheaded notions of how the features of the Rule of Law are related and grounded in practice because he remains committed to Enlightenment metaphysical presuppositions. Although Walker's analysis leaves much undone, a hermeneutical approach helps carry forward the impulse to regard the Rule of Law as a useful political doctrine by rethinking it based on our experience of legal practice.[127]

In this section, I provide a hermeneutical account of legal practice that accords with the powerful challenges to the activities of understanding and knowing posed by post-Enlightenment conceptions of science. Fred Dallmayr recently outlined a persuasive argument that Rule of Law jurisprudence inevitably must incorporate the lessons of contemporary hermeneutics if we are to avoid incoherence and aporia.[128] In doing so, Dallmayr highlights many of the issues that are raised in Walker's analysis. Dallmayr traces the intellectual lineage of the concept of the Rule of Law from its original close nexus with full-bodied political philosophy to the formal and procedural positivist vision that gained supremacy in the Enlightenment period.[129] This development engendered a political crisis because Western democracies simultaneously were committed to the sovereignty of positive law and also to the "material dimension" of law—the linkage of law to foundational social norms.[130] As related above, Walker dubs this apparent aporia "Dicey's paradox," and argues that aporia is avoided

126. *See generally* Mootz, *supra* note 5.

127. Of course, legal judgments evidencing the Rule of Law are made not only by judges but also by lawyers and clients.

128. Dallmayr, *supra* note 6, at 1464–69.

129. *See supra* note 108 and accompanying text.

130. Dallmayr, *supra* note 6, at 1458–59 (discussing FRANZ NEUMANN, THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY (1986), as keenly perceiving the aporia of might and right). Dallmayr notes that "the rift between rule-governance

because all positive law must be interpreted and is not self-executing.[131] Implicit in Walker's approach is the belief that when positive law is interpreted it is infused with material law, thereby dissolving the conflict, but Walker's metaphysical presuppositions prevent him from exploring this practice in a satisfactory way. In Dallmayr's estimation, contemporary hermeneutics enables the political theorist to wend a path between the opposing traditions by bringing together the convention of rule-governance and the invention of politics in a post-Enlightenment articulation of legal practice.[132] Only if we remain wedded to the Enlightenment perspective do we perceive as distinct and irreconcilable the dual objectives of propounding constraining rules and fostering innovative practice.

The rejection of the Enlightenment perspective within contemporary hermeneutics largely is defined by the German philosopher Hans-Georg Gadamer and his *magnum opus, Truth and Method.*[133] Prior to Gadamer's efforts, hermeneutics traditionally had been regarded as the discipline of formulating rules to serve as pragmatic aids to understanding particular types of texts. Theological, legal, and literary hermeneutics developed as separate disciplines that at most tended to share general characteristics. Under the influence of the Enlightenment, however, hermeneutics was transformed in an attempt to develop a unified science of meaning divorced from the dogmatic and practical aims of the various disciplines. Gadamer rejects the Enlightenment goal of developing a unified science of hermeneutics. He contends that this general methodological view of hermeneutics is derivative of a more fundamental inquiry into what it means to interpret and understand, an investigation of the way we exist in the world. Contemporary hermeneutics is concerned with the seamless web of truth and meaning that we constantly renew, an intersubjective belonging that lies behind the later methodological attempts to repair localized problems of meaning. In Gadamer's hands, hermeneutics becomes nothing less than the philosophical investigation of existence, and so Gadamer describes his inquiry as "philosophical hermeneutics."[134]

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and politics or between reason and willing has been intensified in our century to the point of antithesis and complete incommensurability." *Id.* at 1458.

131. WALKER, *supra* note 12, at 128–39.

132. Dallmayr, *supra* note 6, at 1450.

133. *See generally* GADAMER, TRUTH AND METHOD, *supra* note 10.

134. *See* HANS-GEORG GADAMER, *On the Origins of Philosophical Hermeneutics, in* PHILOSOPHICAL APPRENTICESHIPS, *supra* note 10, at 177–93.

Gadamer is the quintessential post-Enlightenment philosopher inasmuch as the guiding premise of his philosophical hermeneutics is to leave behind the ahistorical subject that is presumed by Enlightenment physics and Cartesian metaphysics and to uncover the historical and intersubjective (interpretive) mode of being that we embody. In the Introduction to *Truth and Method,* Gadamer sets his agenda in plain terms.

> The understanding and the interpretation of texts is not merely a concern of science, but obviously belongs to human experience of the world in general. The hermeneutic phenomenon is basically not a problem of method at all. It is not concerned with a method of understanding by means of which texts are subjected to scientific investigation like all other objects of experience. It is not concerned primarily with amassing verified knowledge, such as would satisfy the methodological ideal of science—yet it too is concerned with knowledge and with truth. In understanding tradition not only are texts understood, but insights are acquired and truths known. But what kind of knowledge and what kind of truth?
>
> Given the dominance of modern science in the philosophical elucidation and justification of the concept of knowledge and the concept of truth, this question does not appear legitimate. Yet it is unavoidable, even within the sciences. The phenomenon of understanding not only pervades all human relations to the world. It also has an independent validity within science, and it resists any attempt to reinterpret it in terms of scientific method. The following investigations start with the resistance in modern science itself to the universal claim of scientific method. They are concerned to seek the experience of truth that transcends the domain of scientific method wherever that experience is to be found, and to inquire into its legitimacy.[135]

Gadamer directs his inquiry to the truthful relation that subtends modern science, a truthful relation defined by our historical and finite existence.[136] As the tremors within the Enlightenment self-understanding of modern science begin to manifest themselves, Gadamer's philosophy reverberates the shared message: The picture of a monadic subject decoding the world of objects is a mirage.

An overview of some of Gadamer's principal themes reveals that his philosophy has strong affinities with holistic quantum philosophy.[137]

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135. GADAMER, TRUTH AND METHOD, *supra* note 10, at xxi–xxii.

136. Gadamer writes that his purpose is not "to make prescriptions for the sciences or the conduct of life, but to try to correct false thinking about what they are." *Id.* at xxiii

137. While writing this Article, I was rather surprised to find an article by Guy Burneko in which he relies on themes of Taoist philosophy, Bohm's quantum theory, and Gadamer's philosophical hermeneutics to develop his theory that the processes of the universe are inherently

Gadamer stresses that interpretation is never an attitude of a subject toward the world, but instead is something that precedes and informs our notion of subjectivity. In the parlance of Continental philosophy, interpretation is not an activity, it is a mode of being-in-the-world. This distinction underscores Gadamer's rejection of the view of the individual subject as a self-directing center of knowledge. The belief that we exercise power over the world by casting our interpretations (be they scientific or aesthetic) over the objects comprising the world arises from the metaphysical foundations of Enlightenment thought. In contrast, being-in-the-world undermines the prominence accorded to the subject by capturing the truthful relation from which we derive our conceptions of subjectivity.[138]

Gadamer describes the mode of being that precedes subjectivity as a playful fusion of horizons.[139] This characterization requires unpacking. Both the subject as interpreter and the text as interpreted are finite and historical; each are limited by a "horizon" and are incapable of achieving an acontextual bird's eye view of the whole. The interpreter comes to the text with certain prejudices, or prejudgments, that define her personal history. Similarly, the text comes to the interpreter with a certain history of interpretations and uses that shape what Gadamer terms its "effective-history." It is important not to confuse Gadamer's use of the image of a horizon with a resuscitation of the subject/object bifurcation of Enlightenment thought. For Gadamer, the horizons of the interpreter and the text are never closed or fixed, just as the horizon of the landscape is not fixed as we drive toward it. The interpreter and the text are never distinct entities because they share a tradition embodied in language. Both horizons are rooted in tradition and open to the experience of meaning through

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cooperative. *See* Burneko, *supra* note 118. Burneko articulates his holistic theory of cooperation in familiar Gadamerian terms:

> [W]e can never come to an overview of the whole with systematic "method" but always find ourselves "underway" . . . .
>
> . . . [T]here is no foundational apodicity to be derived from any of the cooperating elements; they are all reciprocally and mutually constitutive in their being and meaning. Only in the light of this (never complete) whole, perhaps, then, is there truth and ethical good . . . . The path is the goal.

Id. at 154.

138. Gadamer captures the ego-decentering thrust of his philosophy by using the give and take of a conversation as a model. GADAMER, TRUTH AND METHOD, *supra* note 10, at 383 ("[T]he more genuine a conversation is, the less its conduct lies within the will of either partner.").

139. Mootz, *supra* note 5, at 534–38. *See generally* GADAMER, TRUTH AND METHOD, *supra* note 10, at 101–10, 300–07 (describing the concept of play and the fusion of horizons).

a "fusion" based on the commonality of tradition. As a result, the interpreter's

> interpretation is itself a reappropriation, a further development of the very tradition to which both he and his object belong. In Gadamer's view, this substantive circle has a positive significance, for it ensures that there is some common ground between the interpreter's horizon of expectations and the material that he is studying, that his points of reference for understanding the tradition have a basis in that tradition itself.[140]

The interpreter and the text, then, are always historical manifestations of a shared tradition, and interpretation is always a reappropriation of this shared tradition to the questions of the present.

Gadamer argues that the experience of playing a game is a model of the fusion of horizons.[141] When a game is played it is not the participants who play the game so much as it is the game that plays the participants.[142] Gadamer emphasizes that the "mode of being of play is not such that, for the game to be played, there must be a subject who is behaving playfully," but rather the playing occurs "not only without goal or purpose but also without effort. It happens, as it were, by itself."[143] Understanding is a putting at risk before the force of the text that results in the playful testing of both the text's effective-history and the individual's prejudices. By virtue of interpretation the individual, the text and the tradition are transformed in an event of understanding.[144]

Gadamer's philosophical hermeneutics restructures metaphysics in a fashion similar to the restructuring of physics by radical quantum theorists. Wholeness and unity pervade both perspectives, and any attempt to divorce the knowing subject from that which is known is viewed as an abstraction from the truthful relation that makes all knowledge possible. As a physicist, Bohm argues that we must view the natural world as a unity that precedes and makes possible our later

140. THOMAS MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS 175 (1978).

141. GADAMER, TRUTH AND METHOD, *supra* note 10, at 101–34; Mootz, *supra* note 5, at 531–32.

142. GADAMER, TRUTH AND METHOD, *supra* note 10, at 106.

143. *Id.* at 103, 105.

144. Gadamer is well aware that individuals may refuse to play along, or may even cheat, in order to secure advantages and to insulate their prejudices from the challenges of interpretation. As an example, Gadamer cites the problem of the despotic ruler who is able to enforce his decisions "without regard for the law—that is without the effort of interpretation," and concludes that in this circumstance "hermeneutics can not exist." *Id.* at 329. Gadamer's entire effort is to demonstrate that such a situation runs counter to our way of existing and exemplifies one of the more troubling consequences of the misconceived glorification of the subject by Enlightenment thought.

attempts to extricate ourselves and to dismantle it like a machine.[145] As a philosopher, Gadamer argues that we must view our cultural world as an all-encompassing tradition that precedes, motivates, and permits our later attempts to take up a position regarding our traditional knowledge. For both thinkers, the cardinal error of modernity is the violent fragmentation of the natural and cultural worlds ushered in by the Enlightenment.

Ultimately, the very idea of different natural and cultural worlds of inquiry must fall in the face of our situated hermeneutical condition.[146] Bohm admits that his vision of the "implicate order" of the universe is itself a tradition-bound inquiry that will never be able to seize the essential truth of an "objective world" that stands distinct from our involvement with it. Bohm carefully rejects an Enlightenment reduction of his holism to a notion of the world of nature existing undisturbed "out there."

> Is this ground [the "implicate order"] the absolute end of everything? In our proposed views concerning the general nature of "the totality of all that is" we regard even this ground as a mere stage, in the sense that there could in principle be an infinity of further development beyond it. . . . [T]his proposal becomes itself an *active factor* in the totality of existence which includes ourselves as well as the objects of our thoughts and experimental investigations. Any further proposals on this process will, like those already made, have to be *viable.* That is to say, one will require of them a general self-consistency as well as consistency in what flows from them in life as a whole. Through the force of an even deeper more inward necessity in this totality, some new state of affairs may emerge in which both the world as we know it and our ideas about it may undergo an unending processes [sic] of yet further change.[147]

145. *See supra* notes 9, 63, 117, 118, and 138.

146. *See* RICHARD W. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS AND PRAXIS (1983) (discussing the failure of the Enlightenment model of knowledge for both natural science and the humanities and the necessity of recovering a sense of rationality through a hermeneutical project of cultivating a vibrant community of dialogue). For example, Patrick Heelan argues that perception is a hermeneutical activity, thereby rejecting the Enlightenment idea that perception amounts to the reception of pre-existing, brute sensory data that exists independently of the act of perception. PATRICK A. HEELAN, SPACE-PERCEPTION AND THE PHILOSOPHY OF SCIENCE (1983); *cf.* M. MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION (Colin Smith trans., 1962). "Since perception is hermeneutical, its contents, and a fortiori the contents of scientific observation, will never be unique, final, definitive, absolute, and apart from history and particular social and cultural milieux. From this it follows that there is a history of perception." Patrick A. Heelan, *Perception as a Hermeneutical Act,* 37 REV. METAPHYSICS 61, 75 (1983). Gadamer's discussion closely parallels Heelan's, with Gadamer concluding that "[p]ure seeing and pure hearing are dogmatic abstractions that artificially reduce phenomena. Perception always includes meaning." GADAMER, TRUTH AND METHOD, *supra* note 10, at 89–92.

147. BOHM, *supra* note 9, at 213.

Gadamer captures this idea of an underlying dynamism by emphasizing the never-ending dialogical development of tradition through its constant and unavoidable appropriation by contemporary interpreters. Gadamer discusses the way in which the world reveals its meaning to us, a revelation that always precedes both the natural and social sciences. Therefore, the traditional methodological disputes between the natural and human sciences only obscure the more fundamental question addressed by Gadamer. "The question I have asked seeks to discover and bring into consciousness something which methodological dispute serves only to conceal and neglect, something that does not so much confine or limit modern science as precede it and make it possible."[148]

Having demonstrated that Gadamer's historical, non-subjectivist philosophy is in accord with post-Enlightenment thought as exhibited by Bohm's holistic quantum philosophy, the question remains whether Gadamer's philosophy is able to make sense of the Rule of Law in post-Enlightenment terms. Discussing this issue does not require an extrapolation of Gadamer's thesis because Gadamer directly argues

148. GADAMER, TRUTH AND METHOD, *supra* note 10, at xxix. Gadamer does not claim that philosophy is the "master science" that grounds the natural and human sciences, but only that the style of questioning that is philosophy is instructive for all our modes of knowing. The French phenomenologist, Maurice Merleau-Ponty, explored this distinction as part of his discussion of the uneasy relationship between philosophy and sociology.

> We need neither tear down the behavioral sciences to lay the foundations of philosophy, nor tear down philosophy to lay the foundations of the behavioral sciences. Every science secretes an ontology; every ontology anticipates a body of knowledge. It is up to us to come to terms with this situation and see to it that both philosophy and science are possible.
>
> . . . .
>
> . . . Since we are all hemmed in by history, it is up to us to understand that whatever truth we may have is to be gotten not in spite of but through our historical inherence. Superficially considered, our inherence destroys all truth; considered radically, it founds a new idea of truth. As long as I cling to the idea of an absolute spectator, of knowledge with no point of view, I can see my situation as nothing but a source of error. But if I have once recognized that through it I am grafted onto every action and all knowledge which can have a meaning for me, and that step by step it contains everything which can *exist* for me, then my contact with the social in the finitude of my situation is revealed to me as the point of origin of all truth, including scientific truth. And since we have an idea of truth, since we are in truth and can not escape it, the only thing left for me to do is to define a truth in the situation.
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> . . . .
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> . . . Philosophy is not a particular body of knowledge; it is the vigilance which does not let us forget the source of all knowledge.
>
> . . . .
>
> . . . Philosophy is irreplaceable because it reveals to us both the movement by which lives become truths, and the circularity of that singular being who in a certain sense already *is* everything he *happens to think.*

MAURICE MERLEAU-PONTY, SIGNS 98–113 (Richards C. McCleary trans., 1964).

that the practice of law has exemplary significance for expressing our post-Enlightenment interpretive relation with the world.[149] Gadamer argues that legal hermeneutics "serves to remind us what the real procedure of the human sciences is" because legal interpretation, unlike biblical and literary hermeneutics, retained its pragmatic character rather than becoming ensnared in Enlightenment methodology.[150] Gadamer believes that the real procedure of humanistic inquiry is captured by Aristotle's notion of ethical knowledge as *phronesis,* roughly translated as deliberative-practical wisdom, and that the practice of common law judging exemplifies *phronesis.*[151] Because the practical demands placed on the judge to render a judgment do not permit the judge to adopt the pretense of a disengaged commentator as literary critic, the practice of judging embodies a particular knowledge that holds important lessons for a post-Enlightenment world.

To develop the concept of *phronesis,* Gadamer recalls Aristotle's discussion of different ways of knowing. Aristotle distinguishes *phronesis* from both *techne* and *episteme.*[152] *Techne* is knowledge oriented toward making rather than acting, and includes knowledge of arts like architecture rather than knowledge in the form of practical wisdom exercised by moral actors within a community.[153] *Episteme* is knowledge of "things that are universal and necessary," and includes knowledge of indubitable and timeless truths such as mathematical relationships.[154] In contrast, however, *phronesis* as moral judgment plainly is not reducible to a calculus of certain truths, nor is it simply the application of a learned skill to a concrete situation. Therefore,

149. GADAMER, TRUTH AND METHOD, *supra* note 10, at 324–41.

150. *Id.* at 327. Gadamer compares legal and theological hermeneutics thus:

> Schleiermacher consciously placed [theological hermeneutics] wholly within *general hermeneutics* and merely regarded it as a special application of it. Since then, scientific theology's claim to be a discipline on a par with the modern historical sciences seems to depend on the fact that no laws and rules are to be applied in interpreting Scripture other than those used in understanding any other traditionary material. Thus there could no longer be any such thing as a specifically theological hermeneutics. . . . [In contrast, legal hermeneutics] was separated from theory of understanding as a whole because it has a dogmatic purpose, just as, by giving up its dogmatic commitment, theological hermeneutics was united with philological-historical method.

Id. at 324–25

151. *Id.* at 312–24 ("The Hermeneutic Relevance of Aristotle").

152. ARISTOTLE, *Ethica Nicomachea, in* 9 THE WORKS OF ARISTOTLE 1140a–1140b (W. D. Ross trans., 1925).

153. *Id.*

154. *Id.* at 1140b.

> [t]he task of making a moral decision is that of doing the right thing in a particular situation—i.e., seeing what is right within the situation and grasping it.
>
> . . . .
>
> . . . [W]e do not possess moral knowledge in such a way that we already have it and then apply it to specific situations.[155]

Aristotle's analysis of ethical knowledge is a model of hermeneutical understanding because applying a text is never "relating some pre-given universal to the particular situation," but instead is always the work of an interpreter relating a text to his particular situation, which always involves a creative fusion of horizons.[156] Gadamer argues that this is precisely the situation of a judge rendering a decision, and that the character of legal practice tells us something of the nature of truth in a post-Enlightenment world.

Gadamer explains that judging exemplifies the hermeneutical act because applying "the law is not simply a matter of knowing the law" as a universal prescription.[157] A judge makes the law concrete by rendering a judgment. Legal judgment can not be determined in advance according to a neutral calculus. Nor can legal judgment simply be the result of the interpreter's skill at approximating the model "decision" in the way that a carpenter might skillfully build a table, having in mind the model "table."[158] The judge must render a decision in

155. GADAMER, TRUTH AND METHOD, *supra* note 10, at 317. Aristotle makes this point as follows:

> Regarding *practical wisdom* we shall get at the truth by considering who are the persons we credit with it. Now it is thought to be the mark of a man of practical wisdom to be able to deliberate well about what is good and expedient for himself, not in some particular respect, e.g. about what sorts of thing conduce to health or to strength, but about what sorts of thing conduce to the good life in general. This is shown by the fact that we credit men with practical wisdom in some particular respect when they have calculated well with a veiw to some good end which is one of those that are not the object of any art. It follows that in the general sense also the man who is capable of deliberating has practical wisdom. . . . [P]ractical wisdom can not be scientific knowledge nor art; not science because that which can be done is capable of being otherwise, not art because action and making are different kinds of thing. The remaining alternative, then, is that it is a true and reasoned state of capacity to act with regard to the things that are good or bad for man. For while making has an end other than itself, action can not; for good action itself is its end. It is for this reason that we think Pericles and men like him have practical wisdom, viz. because they can see what is good for themselves and what is good for men in general . . . .

ARISTOTLE, *supra* note 152, at 1140a–1140b.

156. GADAMER, TRUTH AND METHOD, *supra* note 10, at 324.

157. *Id.* at 330.

158. P. Christopher Smith makes this point with clarity and precision in his critique of pragmatic ethical theory in the tradition of *techne* by drawing out the ethical implications of Gadamer's hermeneutics. P. CHRISTOPHER SMITH, HERMENEUTICS AND HUMAN FINITUDE 68–94 (1991).

response to the demands of the case at hand, which amounts to nothing less than the "just weighing-up" of the whole tradition as it is embodied in her prejudices and in the effective history of text.[159] In judicial reasoning the hermeneutical situation is clearly presented: Our interpretive relation with the world is not a subjective attitude but is instead belonging to a shared tradition in which the notion of the good or just is constantly renewed and created. The Rule of Law is preserved in the post-Enlightenment world, then, to the same degree that the status of moral reasoning is preserved. Of course, it is more accurate to say that Gadamer's philosophical hermeneutics rescues both the Rule of Law and moral reasoning from their current desuetude in the wake of the Enlightenment's glorification of epistemic and technical-practical knowledge at the expense of *phronesis.* From Gadamer's perspective, the Rule of Law demands that legal actors suspend the subjectivist strategies that blunt the powerful openness that reasoning within a tradition affords.

It may not be clear what we have gained by following the route suggested by Gadamer's philosophical hermeneutics rather than the tack taken by Walker, inasmuch as both Gadamer and Walker look to the practice of judging as the sine qua non of the Rule of Law.[160] Is Gadamer's philosophy simply theoretical window-dressing for the justification of the same judicial practice defended by Walker from an Enlightenment perspective? Certainly not. Gadamer analogizes legal reasoning to moral reasoning because both develop an ongoing traditional knowledge without a fixed *telos* in view. In contrast, Walker recognizes that the judge is given over to tradition, but the judge remains central as the creative actor carefully adjusting tradition when the need arises. For Walker, the judge is a subject who displays a practical skill or craft in fashioning from the unfinished common law the legal doctrine that is called for by the circumstances. In short,

159. GADAMER, TRUTH AND METHOD, *supra* note 10, at 329. The capacity to make judgments in this way is often characterized as practical reasoning. In response to critics who argue that positivist formalism is necessary for the Rule of Law because practical reasoning is too uncertain to guide judicial decisions, Daniel Farber describes current understanding of cognitive processes utilized by experts as being neither intuitionistic nor the application of a formal, deductive logic. Farber, *supra* note 15, at 541–42. Farber equates practical reasoning with Llewellyn's notions of a judge using her "situation sense," and describes it as "the ability to take a complex set of facts, identify the key relevant attitudes, and understand their societal significance." *Id.* at 536. Just as an expert radiologist learns his skill by following examples of others and by a process of trial and error, a judge is able to "understand and reason through a problem, which is subject to criticism and assessment by legal observers." *Id.* at 558.

160. It is important to emphasize that judges are not the only persons who must exercise legal judgment, although judges have the last word. Walker properly emphasizes that the judgment of police officers, prosecutors, and legislators also should be subject to the Rule of Law.

Walker's judge is no less a rationalizing figure than a Newtonian physicist, and Walker would most likely rebel against the notion that the Rule of Law should be construed on the model of ethical reasoning. Gadamer's philosophy does not simply secure Walker's project, it transforms our understanding of the Rule of Law.

We saw above that Walker is held captive by the powerful Enlightenment metaphysical assumption that subjects and objects are fundamentally distinct entities.[161] Recognizing that laws will never form a rule book of objective rules that direct subjective behavior, Walker embraces the conflicting archetypes of contemporary jurisprudence: The Rule of Law is the restraint of the ruler by objective rules, but is also always the exercise of prudential governance by leaders within the community. The result is an intellectual thaumatrope in which the complete picture of the Rule of Law emerges from an alternating reliance on the creative subject and the objective text.[162] Laws stand as knowable, stable, and prospective directives, yet they are also interpreted by the judge to effectuate the community's sense of the legal rule. This slight of hand is a familiar defensive posture by supporters of the Rule of Law. Walker ultimately wants to preserve the objective character of rules, but in order to do so he uses the subjective efforts of the interpreter to prop up what he recognizes to be a tottering edifice.

Philosophical hermeneutics directly challenges the assumptions that animate Walker's approach. Rather than positing objective rules that stand distinct from the subjective aims of the interpreter, Gadamer describes legal interpretation as a fusion of horizons that always rearticulates the tradition even when the interpreter believes that he is merely acting out the dictates of the traditional rule. The judge does not refashion objective legal rules to serve the ends of a delineated concept of justice, rather the tradition-bound practice of creating a sense of justice is carried out in each legal decision. For Gadamer, the postmodern "free play" of the text is not equated with a subjectivist power of interpreters to determine textual meaning, but neither is it equated with an utterly indeterminate text that always confronts the reader with innumerable, equally plausible readings. Instead, the playful fusion of horizons is an openness from a traditional under-

161. *See supra* text accompanying notes 102–25.

162. I borrow this image from Professor Lipson's characterization of Chief Judge Benjamin Cardozo's virtuoso performance in Allegheny College v. National Chautauqua County Bank, 159 N.E. 173 (N.Y. 1927). Leon S. Lipson, *The Allegheny College Case,* YALE L. REP., Spring 1977, at 8, 11 (Arguments that promote each other by oscillation are similar to a thaumatrope, on which two pictures (e.g., one of a bird and one of a cage) are painted on opposite sides of a card such that when the card is spun quickly, the two objects appear to comprise one picture (e.g., a bird in a cage).).

standing to an understanding in progress that precedes our conscious strategies. We constantly renew the truth of tradition in our judgments, but this is neither a random happening nor a preplanned effort of the interpreter.

The contrast between the approaches adopted by Walker and Gadamer is brought into sharper focus by recalling the attributes that they share. It is not so much the case that Walker is talking about the wrong features of legal practice as it is that Walker is viewing them in an unproductive light. Walker misconceives legal texts as repositories of objective rules, but by recognizing the importance of written texts, his theory in some respects accords with our hermeneutical situation. The Rule of Law must be recast as a givenness to the texts of our legal tradition, and the political implementation of the Rule of Law must be viewed as nothing more than an institutionalized listening to texts. Walker also misconceives the interpreter as a subject able to tie objective meanings in texts to contemporary values, but by recognizing the crucial importance of application, his theory accords with our hermeneutical situation. The texts of a tradition are never encountered as historical artifacts but are always appropriated against a backdrop of a shared tradition by a situated interpreter to whom the effective-history of the text poses certain questions or insights.

Consider as an example the judge faced with the question whether affirmative action strategies adopted by an employer in a given case amount to impermissible (reverse) discrimination. Gadamer argues forcefully that a judicious weighing of the whole in the context of a legal dispute accords with the aspirations embodied in the doctrine of the Rule of Law.[163] The Rule of Law does not depend on a belief that anti-discrimination legislation confronts the judge as a "rule" that must then be infused with contemporary "values." In these terms we would view the statute under question as a command that can be understood in itself, i.e., as a rule forbidding any preferential treatment on the basis of race, but which must then (later) be applied to the factual situation at hand. Gadamer's response is that we only understand the statute in application. More precisely, Gadamer's argument is that understanding *is* application. The contours of the statute are not known except within the decision that is made. The Rule of Law is experienced when the judge relinquishes subjective designs and places herself at risk in play with the relevant texts and allows them to speak to her about the present controversy. The correct decision is reduced neither to the "plain meaning" of the legislation that precedes

163. *See supra* note 151.

the judgment, nor to the artful prudence of the judge taking a given rule and applying it with discretion. A judgment follows the dictates of the Rule of Law only when both of these possibilities are rejected and she allows the statute to speak to the case at hand. "Taken from this perspective, hermeneutic philosophy understands itself not as an absolute position but as a way of experience. It insists that there is no higher principle than holding oneself open in conversation."[164]

Walker is drawn toward a reorientation of traditional thought, as evidenced by his preoccupation with the powerful suggestive impact of post-Einsteinian physics and the ancient model of Yin/Yang. Gadamer's hermeneutics embraces these themes and renders them coherent by abandoning the Enlightenment metaphysical presuppositions permeating Walker's theory. Walker's reference to Yin/Yang evokes Gadamer's idea of play in which there are not two distinct entities but rather a dynamic unity.[165] Similarly, Walker's attention to the new physics confirms the limitations of the scientific attitude in general and suggests that Gadamer's description of being-in-the-world as cultural sedimentation is compatible with what some scientists now regard as our situatedness in the physical universe. For Gadamer, the Rule of Law is not an empirical political institution. The doctrine poses a challenge to disregard the deceptive and unhelpful strategies of the Enlightenment and to embrace our truthful relation to tradition. Gadamer makes good on Walker's attempt to preserve our faith in the Rule of Law for the post-Enlightenment world by rethinking the experience of legal practice and refusing to seek the false comforts of objective rules or subjective virtuosity.[166]

CONCLUSION

Only he who already understands can listen.
—Martin Heidegger, *Being and Time*[167]

Post-Enlightenment thought renders problematic a traditional understanding of the Rule of Law as subjective obedience to an objective rule. It is no longer tenable to dismiss post-Enlightenment

164. GADAMER, PHILOSOPHICAL APPRENTICESHIPS, *supra* note 10, at 189.

165. *See supra* notes 141–44 and accompanying text.

166. In the first part of *Truth and Method,* Gadamer plainly sets out his position in this regard by critiquing aesthetic theory to the extent that it seeks validation by objective methods of criticism or surrenders to a wholesale subjectivism. GADAMER, TRUTH AND METHOD, *supra* note 10, at 1–169 ("Part One: The Question of Truth as it Emerges in the Experience of Art"); *see* Mootz, *supra* note 5, at 530–33.

167. MARTIN HEIDEGGER, BEING AND TIME 208 (John Macquarrie & Edward Robinson trans., 1962).

thought or to ignore the troubling implications that it holds. Dean Walker confronts the challenge of post-Enlightenment thought in a direct and forceful manner, but his effort is wholly unsatisfactory. Rather than leading us to conclude that post-Enlightenment thought and the Rule of Law are irreconcilable, however, Walker's failure is instructive in pointing the way toward a genuine post-Enlightenment discussion of the Rule of Law. There are strong affinities between the attack launched by radical quantum philosophers on the Enlightenment scientific edifice and the attack launched by philosophical hermeneutics on the Enlightenment's overbearing distortion of knowledge. Philosophical hermeneutics is a post-Enlightenment discourse that does not regard the Rule of Law as incoherent but instead sustains the Rule of Law as a doctrine that captures an important dimension of our legal practice, although the doctrine must be stripped of the vestiges of Enlightenment conceit. Post-Enlightenment thought does not pose a threat to the Rule of Law; it opens the possibility of the Rule of Law by challenging us to listen to the truth of tradition, a truth that we have already heard and acted upon regardless of whether we decide to adopt the posture of a listener.