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Gene R. Shreve

Indiana University Maurer School of Law, shreve@indiana.edu

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GENE SHREVE

Fact, Value and Action in Nonconceptual Jurisprudence

Our topic, "The Structure of Legal Systems,"¹ has long been a playground for academics in this country. It is, to use Professor Jacques Vanderlinden's term, "professors' law."² To ponder the structure of a legal system in any concrete way is to traffic in nonconceptual jurisprudence.³ That is, to consider, as a scholar would in the social sciences, matters of evidence, cause and effect, and predictive possibility.⁴ Nonconceptual jurisprudence therefore includes far more than self-consciously "jurisprudential" writing. It is a paradigm for much legal literature: "This is what is happening; this is why it is undesirable; this is how we can fix the law to make the problem go away."

Nonconceptual jurisprudence conveys theories in abundance, but, unlike those of conceptual jurisprudence,⁵ the theories of nonconceptual jurisprudence are falsifiable.⁶ The goal of nonconceptual

GENE SHREVE is Richard S. Melvin Professor of Law, Indiana University—Bloomington. The author wishes to thank Brian Bix, Brian Jamahaha, and Susan Williams for their comments on the manuscript.

1. I am grateful to the American Society of Comparative Law for inviting me to serve as the United States reporter for this subdivision of the second topic set for the Sixteenth International Congress of Comparative Law: "General Legal Theory and Legal Philosophy."

2. Jacques Vanderlinden, "The Structure of Legal Systems 4 (unpublished memorandum) (2001).

3. In his useful study of jurisprudence, Brian Bix distinguishes the conceptual from the nonconceptual:

A conceptual claim, as opposed to a claim that is meant to be predictive or explanatory, is not falsifiable (rebuttable). * * * I am referring to theories which *divide up* the world into categories: this is "law" and this is not; or this is "art" and this is not. * * * Conceptual theories define terms by necessary and sufficient conditions. Such definitions cannot be directly verified or rebutted by empirical observation. . ."

Brian Bix, *Jurisprudence: Theory and Context* 14 (2nd ed. 2001) (emphasis in original).

4. Non-conceptual theories in the social sciences. . . tend toward conclusions about causation and causal regularities, but (in contrast to non-conceptual theories in the natural sciences) the selection of relevant data tends to turn at least in part on complicated, and contested, value judgments."

Bix, *supra* note cb, at pp. 13.

5. See n. 3, *supra*.

6. These theories. . . are falsifiable (if "falsifiable" is too strong for some tastes, one might be able to use "rebuttable" as a substitute). If the data we

theory is to state something intellectually interesting and socially useful about the law and its effects that can withstand disproof.

Legal dialogue⁷ provides the crucible for testing theories of non-conceptual jurisprudence. Academic debates are an inevitable and continuing part of the dialogue.⁸ Yet, as in jurisprudence literature generally, the debates are often "best understood as theorists talking past one another."⁹ The purpose of this paper is to offer a means for facilitating something closer to true legal dialogue—where participants talk to rather than past each other.

A shared concern about the effect of law on society sustains legal dialogue. That dialogue, or debate, is a fabric of assertions and counter-assertions. My suggestion is that all assertions (made or implied) are means by which participants in legal dialogue attempt representations about one of three very different things: fact, value and action.

Assertions of Fact (Empiricism)

Assertions about facts attempt to represent what is really going on in the world. A term for the scholarly examination of facts would be empiricism.¹⁰

It helps in understanding empiricism to see it as a thing apart from theory. Empiricism and theory are coordinate features of human belief. "[A]n empirical belief is one capable of being confirmed or disconfirmed by sense experience."¹¹ "[A]n empirical quality of

collect in the future does not fit the predictions made according to the theory, we should at least begin to suspect that the theory might be wrong.

Bix, *supra* n. 3, at 13.

7. I mean the ordinary meaning of this term: "[a] conversation carried on between two or more persons" (*The Compact Edition of the Oxford English Dictionary* (1971); "[a] traditional semitechnical term for a conversation, especially if it is formal" (*The Oxford Companion to the English Language* 301 (Tom McArthur ed., 1992)). This includes written conversation, usually by scholarly works.

I have chosen the term dialogue over others, including discourse and dialectic. The last two carry more baggage, as in discourse theory (see, e.g., *The Johns Hopkins Guide to Literary Theory and Criticism* 210-12 (Michael Groden & Martin Kreiswirth eds., (1994) or dialectical materialism (see, e.g., *The Cambridge Dictionary of Philosophy* 465 (Robert Audi ed., 1995)). The term dialogue carries some baggage also, as in the use of dialogue as a model for critical social science theory (see, e.g., Comstock, "A Method for Critical Research," appearing in *Readings in the Philosophy of Social Science* 625-39 (Michael Martin & Lee C. McIntyre eds., 1994)).

8. So much so that the words dialogue and debate will be used interchangeably in this paper.

9. Bix, *supra* n. 3, at 9. "[D]ifferent theories seem to be responding to different types of inquiries and are making different kinds of claims." *Id.* at 12.

10. Of the three kinds of assertions made in legal dialogue, empirical claims are the least familiar to academic lawyers. Therefore, I will explain them at greater length. The discussion of empiricism in this paper borrows freely from Shreve, "Conflicts Empiricism," 37 *Willamette L. Rev.* 249 (Symposium-2001).

11. Simon Blackburn, *The Oxford Dictionary of Philosophy* 118-19 (1994). "A statement, proposition, or judgment is empirical if we can only know its truth or fal-

things is one that can be represented in sense experience, as opposed to an inferred or postulated theoretical property."¹² Theory is "the sense of the principles or methods of a science or art rather than its practice."¹³ It is "the sense of an explanation based on observation and reasoning." Theory is something we create; "it sets rules and thus functions like fundamentalism."¹⁴

The acquisition of human knowledge requires incessant travel between the realms of empiricism¹⁵ and theory. For example, we have a succession of experiences as children where touching something hot causes pain. Our recollection of these experiences (a simple form of empiricism) eventually stirs something in us, providing the incentive and inspiration to develop a theory about hot things: (1) touching them causes pain; (2) pain makes us unhappy;¹⁶ (3) therefore, we will avoid touching hot things whenever we can.

Even the most commonplace exercises of empiricism are important because they enable us to add things up, to make sense out of our existence. But it is scientific empiricism—the disciplined, systematic empiricism of the natural and social sciences—that best informs academic theory. Academic theory is both altruistic and self-seeking, the latter because it secures for academics a privileged place within their formal subcultures of expertise.¹⁷ They are responsible for the epistemologies of their fields: the communication of justified true belief.¹⁸ Scientifically empirical "data"¹⁹ most convincingly justify true belief (academic theory), enhancing the academic's communication of knowledge and claim to expertise.²⁰

Data in this sense represent the results of controlled, repeated factual investigations. The scientific empiricist creates a research

sity by appealing to experience." Lacey, "Empirical," in *The Oxford Companion to Philosophy* 226 (Ted Honderich, ed. (1995).

12. Blackburn, *supra* n. 11, at 119.

13. *The Barnhart Dictionary of Etymology* 1132, (Robert K. Barnhart ed. 1988).

14. Mieke Bal, "Scared to death," appearing in *The Point of Theory* 33 (Mieke Bal & Inge E. Boer eds., 1994).

15. I intend for "empiricism" its generic application: "The use of empirical methods in any art or science." *Oxford English Dictionary*, *supra* n. 7. That is to say, I do not intend for the term the meaning it carries in philosophical movements of empiricism: "that experience has primacy in human knowledge and justified belief." Wolterstorff, "Empiricism," appearing in *The Cambridge Dictionary of Philosophy* 224 (Robert Audi ed., 1995).

16. Here we also draw on experiences with pain not caused by hot things.

17. Cheryl Geisler, *Academic Literacy and the Nature of Expertise* 70-75 (1994).

18. On the character of knowledge as justified true belief and the features of such knowledge, see Shreve, "Every Conflicts Decision is a Promise Broken," 60 *La. L. Rev.* 1345 (Symposium-2000).

19. Or, perhaps more accurately, the causal inferences from such data. Hubert M. Blalock, Jr., *Causal Inferences in Nonexperimental Research* 62 (1964).

20. For academics, "the professional privileges of autonomy and high social status, constrained by a normative commitment to service, were all built upon a foundation of cognitive expertise." Geisler, *supra* n. 17, at 73.

"model"²¹ for the inquiry, seeking in the same way the same facts from a category of like sources.²² This may take the form of data from experimentation;²³ collection of data from inert, passive sources²⁴ or collection of data from active (perhaps interactive) sources.²⁵ Unscientific empiricism occurs without the discipline of a research model. Investigations are casual, episodic and largely unexplained. They rest to a large degree on "a priori" or "common sense" assumptions.²⁶ The results are, in a word, anecdotal.²⁷

In the natural sciences it is usually enough for theory to state and support a causal rule, *viz.*, to explain why a particular phenomenon occurs and will repeat itself.²⁸ But often for law (and social sciences generally) theory must also be an instrument for good. That is to say, it is not enough for theory to explain a causal rule (touching hot things causes pain). It must also set a direction for behavior in light of the causal rule (avoid touching hot things).

An empirical assertion in legal dialogue would be: "this (and not something else) is happening." Empirical counter-assertions may attempt refutation—"this is not what is happening (something else is happening instead)." Or they may attempt skepticism—"we do not know what is happening." Empirical arguments involve the search for facts.

Assertions About Value (Normativism)

Assertions about value attempt to judge the desirability of empirical phenomena (what is happening) or the desirability of what could happen. Another term for value would be normativism.²⁹

21. See Russell L. Ackoff, *The Design of Social Research* 5 (1953); Johan Galtung, *Theory and Methods of Social Research* 29-36 (1969).

22. The shape of the model must be explained and justified as the research methodology. Ackoff, *supra* n. 21, at 6.

23. Generally, see Herbert Butterfield, *The Origins of Modern Science* 60-61 (1962); Kincaid, "Defending Laws in the Social Sciences," in *Readings in the Philosophy of Social Science* 127-28 (Michael Martin & Lee C. McIntyre eds., 1994).

24. See, for example, John D. Bessler, *Death in the Dark—Midnight Executions in America* 213-20 (1997) (compiling the time of day (or night) when all executions occurred in the United States from 1977-1995).

25. Generally see A.R. Louch, *Explanation and Human Action* (1966); *Issues in Participant Observation* (George J. McCall & J.L. Simmons eds., 1969). For an interesting example, see Austin Sarat & William L.F. Felstiner, *Divorce Lawyers and Their Clients—Power and Meaning in the Legal Process* (1995).

26. Keith Smith, "Distribution-free Statistical Methods and the Concept of Power Efficiency," in *Research Methods in the Behavioral Sciences* 536 (Leon Festinger & Daniel Katz eds., 1953).

27. Our colleagues in the social sciences would be quick to add that the plural of "anecdote" is not "data".

28. Numerous examples appear in Thomas S. Kuhn, *The Structure of Scientific Revolutions* (3rd ed. 1996).

29. "Normative" is the adjective derived from the noun 'norm', which signifies . . . in philosophical discussion a standard, rule, principle used to judge or direct human conduct as something to be complied with." Nicholas Dent, "Normative," ap-

Accepted empirical assertions that certain facts do (or do not) exist invite normative assertions that such factual conditions are good or bad. Even procedural law has a normative quotient.³⁰ For present purposes, however, it is easier to confine the concept to the norms of political philosophy or morality in substantive law.

It has been said that there are only two questions in political philosophy: 'who gets what?', and 'says who?' Not quite true but close enough to be a useful starting-point. The first of these questions is about the distribution of material goods, and of rights and liberties. On what basis should people possess property? What rights and liberties should they enjoy? The second question concerns the distribution of another good: political power. * * * Political power includes the right to command others, and to subject them to punishment if they disobey. Who should hold this power?³¹

Such norms are explicit in public law subjects like constitutional and criminal law, but they are also central to torts, property, contracts and other areas of private substantive law. Law exists to secure certain values. The processes of government will enforce law to make those values real in the life of the community.

A normative assertion would be, "what is happening is undesirable because a particular something that could happen instead would be better." Normative counter-assertions may attempt refutation—"what is happening is not undesirable because it is as good or better than the particular something else that could happen instead." Or they may be competitive—"the normative judgment is itself undesirable because it distracts attention from an entirely different and more important normative inquiry." Normative arguments involve the search for problems.

Assertions About Action (Instrumentalism)

Assertions about action are about the capacity of law to affect society. Another term for action would be instrumentalism.³² When

pearing in *The Oxford Companion to Philosophy* 626 (Ted Honderich ed., 1995). "A norm is a rule for behavior, or a definite pattern of behavior, departure from which renders a person liable to some kind of censure." Blackburn, *supra* n. 11, at 265. "The nature of norms, the source of their authority, and the form they should take, occupy centre-stage in any theory of ethics, philosophy of language, and law." Blackburn, *id.*

30. "The foremost quality of good procedural rules is fairness." Shreve, "Questioning Intervention of Right," 74 *Nw. U. L. Rev.* 894, 907 (1980).

31. Jonathan Wolff, *An Introduction to Political Philosophy* 1 (1996).

32. Some item has instrumental value just to the extent that it lends itself (fortuitously or by design) effectively to the achievement of some desired or valued purpose. It is that which is 'good as a means to. . .'. Hammers, chisels, and tools of all kinds are palmary instances of instrumentally valued items. Dent, "Instrumental Value," appearing in *The Oxford Companion to Philosophy* 410 (Ted Honderich ed., 1995). The form of instrumentalism intended here is that represented in the philosophy of John Dewey.

we accept empirical assertions that certain facts do (or do not) exist, and when we further accept normative assertions that factual conditions are problematic (undesirable), instrumentalism in legal theory³³ searches for changes in the law that would produce more desirable factual conditions.

An instrumental assertion would be: "a new legal rule will in operation displace the wrong thing happening with something more desirable." Instrumental counter-assertions may attempt refutation—"nothing will change." Or they may be skeptical. Or they may ascribe excessive cost, inefficiency, or mischief to the reform proposed. An example of the last would be, "the new rule will have the incidental effect of disrupting things that are desirable." Instrumental arguments involve the search for solutions.

Naturally, these three types of legal assertion do not always appear in legal dialogue in the order described above. Rather they exist in dynamic, interactive relation. Problem assertions may set off a fresh round of empirical investigations, and so forth.

Toward an Ethic and Critique of Legal Dialogue

Why attempt to differentiate in this manner forms of assertion in nonconceptual jurisprudence? The answer is: to better follow what has been done and what has been left undone in legal dialogue. But that in turn raises a question. What should be the purpose of legal dialogue?

Deweyan instrumentalism is a general functional account of all concepts (scientific ones included) wherein the epistemic status of concepts and the rationality status of actions are seen as a function of their role in integrating, predicting, and controlling our concrete interactions with our experienced world.

C.F. Delaney, "Instrumentalism," appearing in *The Cambridge Dictionary of Philosophy* 379 (Robert Audi ed., 1995).

33. Professor Robert Summers attributed four features to legal instrumentalism:

First, it views law not as a set of general axioms or conceptions from which legal personnel may formally derive particular decisions, but as a body of practical tools for serving specific substantive goals. Second, it conceives law not as an autonomous and self-sufficient system, but as merely a means to achieve external goals that are derived from sources outside the law, including the dictates of democratic processes and the 'policy sciences.' Third, it assumes that a particular use of law cannot be a self-justifying 'end in itself.' Uses of law can be justified only by reference to whatever values they fulfill. Finally, the law is considered to serve generally instrumental values rather than intrinsic ones. That is, law's function is to satisfy democratically expressed wants and interests, whatever they may be (within constitutional limits).

"Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use," 66 *Corn. L. Rev.* 861, 863 (1981). "Some instrumentalists, however—the radical fringe on the edge of legal realism—are 'rule skeptics.'" Lyons, "Legal Formalism and Instrumentalism—A Pathological Study," 66 *Corn. L. Rev.* 949, 952 (1981).

It helps at this point to recall the falsifiable character of nonconceptual jurisprudence. If dialogue is a crucible, we determine that ideas about what the law is (or should be) emerge tested and strengthened from that crucible only in those instances where the related assertions about fact, value and reform EACH seem persuasive.³⁴ For all the personal antagonisms that have littered legal dialogue, it is possible to see that the dialogue (debate) is a positive, collaborative—even altruistic—venture. Ideally, a speaker making assertions is herself still in the process of questioning them. Thus the speaker seeks help from others in the dialogue in answering the question whether her own assertions are falsifiable. Few assertions in legal dialogue are sacred.³⁵ Most all are open to disproof.³⁶

Benign as these suggestions may sound, they place me in apparent disagreement with a number of other writers. For example, they suggest a rational, progressive conception of the law that postmodernists would not share.³⁷ And, by insisting on persuasive normative—well as empirical and instrumental—assertions, my view is at odds with many in the law and economics movement.³⁸

APPENDIX

An Introductory Note on Postmodernism

Beginning in the arts, postmodernism has become a force in critical theory for many areas including law.³⁹ A reference to it appears

34. This is not to say of course that a single speaker in the dialogue is always required persuasively to present all three types of assertions. Just as speakers are entitled to build on the work of earlier participants in the dialogue, so are earlier or initial participants permitted to provide assertions that merely start us off in our thinking.

35. A few taboos remain in our society, e.g., incest, cannibalism, child pornography. The only normative assertions about taboos that are socially and culturally acceptable are that taboos are bad and to be avoided. To that extent, such assertions are not really open to falsification in legal dialogue.

36. Of course, to persuasively challenge some, e.g., the empirical assertion that night follows day, might seem too difficult to merit the effort.

37. For my domestic and international colleagues who have puzzled as I have over the meaning of postmodernism, I have attached an explanatory note as an appendix to this paper.

38. That body of legal-economic thought which emphasizes the ethic of wealth-maximization . . . 'does not and cannot give a unique determinate solution to the question of the choice of right' to be protected in the process of adjudication. . .

Neil Duxbury, *Patterns of American Jurisprudence* 311 (1995) (quoting Warren J. Samuels and Nicholas Mercuro, "Posnerian Law and Economics on the Bench," 4 *Int. Rev. Law & Econ.* 107, 123 v(1984)). "There appear to be more important types of reasons for legal decisions—'rightness reasons'—that are not obviously collapsible into future-regarding consequentialist reasons of the kind that appeal so strongly to economists." Summers, "The Future of Economics in Legal Education: Limits and Constraints," 33 *J. Leg. Ed.* 337, 339 (1983).

39. See, e.g., Helen Stacy, *Postmodernism and Law* (2001); Feldman, "Playing with the Pieces: Postmodernism in the Lawyer's Toolbox," 85 *Va. L. Rev.* 151 (1999); Gary Minda, *Postmodern Legal Movements—Law and Jurisprudence at Century's*

in this paper.⁴⁰ This is not the first time I have raised the specter of postmodernism in my writing. I have always done so with some discomfort, because the term has been daunting not only to me but to many other academic lawyers here and abroad. I have been tempted to try to explain postmodernism in footnotes, but I always rejected the idea because the size of the notes would have dwarfed the text. This rather curious appendage to my paper is an attempt to address that problem.

Postmodernism is largely a critique and rejection of modernity. Beginning roughly at the conclusion of the Middle Ages, the modern period marked the passing of the ecclesiastical domination of Western culture. By one account, "the early humanist notion of human creativity came to form a combustive mixture with the negative conclusions of nominalist theology" causing "the cultural explosion that we refer to as modernity."⁴¹ Rationality⁴² was the linchpin of modernism. And from its faith in the power of reason, modernism drew its perennial optimism, its idea of human progress (humanism).⁴³

Many in addition to postmodernists believe that modernism is now in a state of crisis. Faith in the modernist assumption that improvement of the human condition will follow reason has faltered.⁴⁴

End 224-46 (1995); "Postmodernism and Law: A Symposium," 62 *Univ. of Colorado L. Rev.* 439 (1991); "Symposium: Deconstruction and the Possibility of Justice," 11 *Cardozo L. Rev.* 919 (1990).

40. See the text accompanying *supra* n. 37.

41. At the end of the Middle Ages, . . . nominalist theology effectively removed God from creation.***The divine became relegated to a supernatural sphere separate from nature, with which it retained no more than a causal, external link. This removal of transcendence fundamentally affected the conveyance of meaning. Whereas previously meaning had been established in the very act of creation by a wise God, it now fell upon the human mind to interpret a cosmos, the structure of which had ceased to be given as intelligible. Instead of being an integral part of the cosmos, the person became its source of meaning.***[T]he mind became the spiritual substratum of all reality. Only what it objectively constituted would count as real.

Louis Dupre, *Passage to Modernity* 3 (1993).

42. Rationality denotes following a rule as opposed to acting on impulse or at random. Rationality means consistency in linking our thoughts or statements, creating the logical order of premise to conclusion. It also means consistency in linking our actions, creating the efficient order of means to end.

David Kolb, *The Critique of Pure Modernity* 10 (1986).

43. "Belief in progress requires a level of abstraction unknown to premodern peoples." Thomas Fleming, *The Politics of Human Nature* 14 (1993).

The theoretical discourses of modernity from Descartes through the Enlightenment and its progeny championed reason as the source of progress in knowledge and society, as well as the privileged locus of truth and the foundation of systematic knowledge. Reason was deemed competent to discover adequate theoretical and practical norms upon which systems of thought and action could be built and society could be restructured.

Steven Best & Douglas Kellner, *Postmodern Theory* 2 (1991).

44. See Dupre, *supra* n. 41, at 1 ("Undoubtedly, there are good reasons to distrust the equation of the real with the objectifiable, progress with technological advances, and liberty of thought and action with detachment from tradition and social bonds.").

Consider, for example, the descent of the idea of progress in the United States over the twentieth century. At the beginning of the century, progressivism sounded a strong note of modernist optimism and declared progress inevitable.⁴⁵ The picture had become more complicated and more troubled by mid-century; progress was no longer certain.⁴⁶ Now, with the end of the century, we have to be convinced that progress is even possible.⁴⁷

Moreover, doubts have increased about the sufficiency of modernism's rationalist foundation. Of particular concern is the question whether, after banishing as irrational the value-laden "taboos" of the premodern period, modernism retains in rationalism a means for equipping a moral society.⁴⁸ The crisis of modernism may be that it can neither move backward to premodern regimentation nor forward out of its stalled, aimless condition.⁴⁹

What sets postmodernism apart is its extreme reaction to this problem.⁵⁰ Influenced by Friedrich Nietzsche and Martin Heidegger, by French cultural theorists Michel Foucault and Jaques Derrida,⁵¹

45. See, e.g., Herbert Croly, *The Promise of American Life* (1909).

46. See, e.g., Arthur M. Schlesinger, Jr., *The Vital Center* (1949).

47. See, e.g., Michael J. Sandel, *Democracy's Discontent—America in Search of a Public Philosophy* (1996).

48. [I]n the normal sense of "rationality" there are no more rational grounds for respecting human life and human personal rights than there are, say, for forbidding the consumption of shrimp among Jews, of meat on Friday among Christians, and of wine among Muslims. They are all "irrational" taboos. And a totalitarian systems which treats people as exchangeable parts in the state machinery, to be used, discarded, or destroyed according to the state's need, is in a sense a triumph of rationality.

Leszek Kolakowski, *Modernity on Endless Trial* 13 (1990). Cf. Best & Kellner, *supra* n. 43, at 3 ("the construction of modernity produced untold suffering and misery for its victims. . . *** Modernity also produced a set of disciplinary institutions, practices, and discourses which legitimate its modes of domination and control").

49. There is no obvious way to put the pieces back together. If we could return to tradition, we would have meaning and humane living but at the price of freedom. . . Modernity promises freedom and rationality but may give us deadening routine. It also forces us to choose, without any grounds for our choice, what values we will hold. *** Can we avoid the dilemma of rootless freedom versus oppressive tradition?

Kolb, *supra* n. 42, at 16-17.

50. There were always doubts about the modernist project. They proliferated and became bolder and more systematic over time. For a description of their "pre-postmodern" development, see Bruno Latour, *We Have Never Been Modern* 49-62 (1993). "They raise what had been only a distinction, then a separation, then a contradiction, then an insurmountable tension, to the level of an incommensurability." *Id.* at 59.

51. For a book-length study of contributions of the four to postmodernism, see Allan Megill, *Prophets of Extremity—Nietzsche, Heidegger, Foucault, Derrida* (1987). Additional sources on their influence on postmodernism include Hillary Lawson, *Reflexivity—The Post-modern Predicament* (1985) (Nietzsche, Heidegger and Derrida); Gianni Vattimo, *The End of Modernity* (1988) (Nietzsche and Heidegger); Stephen K. White, *Political Theory and Postmodernism* 31-84 (1991) (Heidegger and Derrida); Eric Matthews, *Twentieth-Century French Philosophy* 147-57, 165-78 (1996) (Foucault and Derrida); Steven Best, *The Politics of Historical Vision* 85-144 (1995) (Foucault); *The Cambridge Companion to Foucault* (Gary Gutting ed., 1994).

and others, postmodernism attacks modernism root and branch. It proceeds from a "fundamental assumption of cultural crisis, of a derelict present, of a nothing out of which everything must be created."⁵² Against rationalism, postmodernists make "a frontal assault on methodological unity" and attempt to pull down "philosophical pillars. . .the most notable of which are the 'unities' of meaning, theory and self."⁵³ Seeing humanism as the false (perhaps deceitful) boast of rationalism, they reject humanist justification.⁵⁴ Suspicious and hyperactive, postmodernists try "to take the temperature of the age without instruments," unsure that "there is so coherent a thing as an 'age,' or zeitgeist or 'system' or 'current situation' any longer."⁵⁵

52. Megill, *supra* n. 51, at 183 (attributing this view to Foucault).

53. Hassard, "Postmodernism and Organizational Analysis: an Overview," in *Postmodernism and Organizations* 1 (John Hassard & Martin Parker, eds. 1993).

54. Best & Kellner, *supra* n. 43, at 19-20.

55. Fredric Jameson, *Postmodernism or, the Cultural Logic of Late Capitalism* xi (1991).

The statements appearing in the text may seem less like a definition of postmodernism than a report of postmodernist behavior. It has in fact much easier to present the latter. "An industry of definition and subdefinition has grown up around the question of the postmodern." David Simpson, *The Academic Postmodern and the Rule of Literature* 1 (1993). "The confusion involved in the discourse of the postmodern results from its usage in different fields and disciplines and the fact that most theorists and commentators on postmodern discourse provide definitions and conceptualizations that are frequently at odds with each other and usually inadequately theorized." Best & Kellner, *supra* n.43, at 29. Writers who seem postmodern do not always accept the label, *id.* at 30-31. Foucault declared at times that he was a modernist. Kelly, "Introduction," appearing in *Critique and Power—Recasting the Foucault/Habermas Debate* 3 (Michael Kelly ed., 1994).