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FINDING FOOTING IN A POSTMODERN CONCEPTION OF LAW

Bryan Druzin

INTRODUCTION

To what extent are the basic principles that underlie our legal system universal? To what extent do they follow the dictates of human reason and appeal to an intuitive sense of what is fair, and are not simply the products of specific historical, economic, and cultural circumstances? If one believes they are in fact universal in character, one would expect to find general symmetry between the concepts that gird our legal systems. Criminal codes between legal cultures should mirror one another, as should other areas of law ranging from family law to constitutional law. The law of tort, for instance, where the chief aim is *restitutio in integrum*,¹ namely a remedy that is fair to all parties involved, a body of law founded upon an intrinsic sense of fairness applied to the mundane particularities of human interaction—should likewise exhibit homogeneity between legal cultures.

Yet, we do not find this degree of uniformity.² Legal conceptions of what is fair are not always identical between legal systems, influenced significantly by religious, cultural, and arguably, economic factors. Not only do understandings of fair play sometimes differ between legal systems, even within a single unified system of law, such as the English common law, the concepts that underlie the law have changed over time. Wholly new principles, such as criminal insanity and negligence have been introduced. The law has transformed significantly over time, adapting to the trappings of its historical age. Conceptions of nuisance, trespass to land, and trespass to chattels have evolved in a fashion that seems inseparable from

¹ “Restoration to the original position.” *Oxford Dictionary of Law* 464 (6th ed. 2006).

² As one justice opined, there is indeed “a jungle of separate, broadly based jurisdictions all over the world.” Lord Goff in *Airbus Industrie GIE v Patel* 1 AC 199 (1999).

principles of private property and economic necessity—concepts integrally linked to specific economic systems such as capitalism.³ Many areas of tort such as economic torts are explicitly connected to certain economic positions that have emerged over time. This includes areas such as consumer protection, product liability, and restraint of trade. Even damages for intangible losses such as pain and suffering in the form of pure mental anguish reflects a certain cultural perspective. Family law, commercial law, and criminal law have all similarly undergone varying degrees of transformation. Thus, we do not find a static view of fairness as defined by law; rather, we have a shifting body of conceptions, in a state of subtle flux, continually experiencing change in reaction to general shifts in cultural attitudes.

What then are we left with when we consider the possibility that these legal principles are not extracted from immutable natural truths, but rather are largely subjective concoctions of the cultures that formulate them, specific to the values of that particular age? It is, in a sense, frightening. It strikes at the very heart of our sense of justice. It seems that upon the shifting sands of postmodern moral relativism, there is no firm footing on which to stand. So what are we left with? Does not the denial of objective truth ultimately undercut the premise that there is objective value—the very notion of justice? Are we left with only the prospect of uncertainty and moral anarchy? Is this Nihilism?⁴ The argument of postmodernism is a powerful one.

³ See Simon Deakin, Angus Johnston & Basil Markesinis, *Markesinis and Deakin's Tort Law* 113 (6th ed. 2008), writing on negligence in particular (“Its expansion, in particular in the course of the twentieth century, reflects the pressures that the rise of an industrial and urban society have brought to bear upon the traditional categories of legal redress for interference and protected interests. The growth and increasing sophistication of insurance have also contributed to this expansion. A doctrinal examination of negligence must not lose sight of this wider social and economic context within which the tort has developed, which is reflected in fluidity of the central legal concepts and the courts’ ever-increasing recourse to ‘policy’ as an explanation of their decisions.”) (footnotes omitted).

⁴ The fact that most people find the possibility that our beliefs are not grounded upon any objectively valid criteria frightening, perhaps points to the very motivation for believing in the conventions we do. That is, there is a deep human need to affix certain moral truths to our systems of value as it provides a degree of emotional certainty that we are indeed

Its implications are profound, and thus, we must address it. This short paper will do just that, suggesting that, despite the absolute, all-consuming nihilism towards which postmodernism seems to lead in its most extreme form, the acceptance of postmodern relativism in fact in no way undermines the possibility of finding firm footing on which to stand, of finding moral certainty, and thus solid ground for our legal principles. To do this, the discussion that follows detours significantly from the conventional route of a law paper; I ask for the reader’s patience in travelling this circuitous path through the terrain of philosophy. Notwithstanding this, however, the discussion’s final destination indeed directly addresses the very foundations upon which our conceptions of law are typically constructed, the heart of law—our sense of what is just.

I. THE JETTISONING OF OBEJCTIVE MORAL TRUTH

A. Subjectivity In The Law

To an extent, we already tacitly acknowledge a degree of moral relativism in the law. We establish legal standards to govern our society presumably founded upon moral imperatives, yet readily accept the validity of quite different legal standards within other cultures. I say to an extent because if the difference is too extreme, too egregious, we do not accept it. However, it is remarkable how high the threshold actually is for this measure of acceptance. It is

correct in our beliefs, and our beliefs are not simply subjective concoctions, but rather are out there, existing as objective moral truths. In a sense, our reaction to the argument of postmodernism goes far in explaining why we believe there is objective truth in the first place, i.e. we simply need to. To pose the question differently, do we need to believe in the value systems we do because they are true, or do we believe them to be true because we need to? Perhaps, there is a greater emotional compulsion lurking behind our beliefs than we are willing to acknowledge. A good example of this is religious belief. The vast majority of individuals who boast deeply held religious beliefs, subscribe to the very religion in which they were raised to believe. It is remarkable how this fact does not cause intelligent people to question at least the motivation behind their religious convictions.

astonishing how easily we can simply chalk the disparity up to a simple difference in cultural mores.

The age for sexual consent is a good example. In many jurisdictions the age is eighteen. However the age of consent under Danish law is fifteen.⁵ While an adult engaging in sexual relations with a 15 year-old in the United States would be convicted of child molestation and seen generally by society as a paedophile, the exact same scenario would be tolerated by Danish society. And although this is the case, the rest of the world does not view the Danish legal system as sanctioning child molestation. But why not? How can this conform to the idea that our laws related to an issue of such importance as child molestation are grounded upon universal moral truths? Should not most Americans logically view Danish society as endorsing child molestation? Similarly, as British, French, German, Italian, Australian and Canadian law prohibits the use of execution in their respective legal systems, should these judiciaries, in the spirit of the law, not then view most U.S. nationals as being accessories to murder?⁶ The Canadian Criminal Code, for instance, provides “that every one is a party to an offense who: does or omits to do anything for the purpose of aiding any person to commit it; or abets any person in committing.”⁷ Is not the whole of American society then culpable in that they fail to change these laws? The answer of course is no, and the mere mention of the idea seems absurd, as we feel each society is free to establish laws that are in line with their own moral standards. But again, how can this be reconciled with our notion that there is a fixed moral underpinning to the laws we enact? Clearly, we do tacitly acknowledge a degree of moral

⁵ The Danish Penal Code 1995, s. 222 (1) states: “Any person who has sexual intercourse with any child under the age of 15 shall be liable to imprisonment for any term not exceeding 6 years”; See also Interpol, *Legislation Of Interpol Member States On Sexual Offences Against Children* (2009), <http://www.interpol.int/public/Children/SexualAbuse/NationalLaws/csaDenmark.asp> (“Age of consent for sexual activity: When a person is fifteen (15) years old s/he can consent to sexual intercourse”).

⁶ For an informative listing of abolitionist states, see Hugo Adam Bedau, *The Death Penalty in America: Current Controversies* 78-83 (1997).

⁷ Canadian Criminal Code 1985, s. 21(1) (a).

subjectivity beyond mere technical issues of jurisdiction. This is the deeper issue at play within the area of Conflicts of Law. On a purely practical level, our legal system often collides with other systems of law predicated on slightly differing notions of right and wrong. National laws at variance bring the issue of relativism to the fore in stark clarity.

B. Legal Positivism

Perhaps, it was as a result of a growing realization of the palpable disparity between our systems of law in the area of Conflicts of Law that legal positivism appeared within the margins of late nineteenth and early twentieth century jurisprudence, eventually replacing earlier natural law notions that held law as inextricably linked with a basic sense of justice and yes, morality. This separation of law and ethics is profoundly significant. With it, one could simply divorce law from morality, and leave legal regulation as a shallow vessel of legal positivism, bereft of ethical significance. One could bark out the separation thesis as espoused by many legal positivists, the idea that legal validity has no inherent connection with morality or a conception of justice, and be done with it.⁸ However, anything short

⁸ The Separation Thesis essentially posits the idea that there is “a conceptual separation between law and morality, that is, between what the law is, and what the law ought to be Once again, the Separation Thesis, properly understood, pertains only to the conditions of legal validity. It asserts that the conditions of legal validity do not depend on the moral content of the norms in question. What the law is cannot depend on what it ought to be in the relevant circumstances. Many contemporary legal Positivists would not subscribe to this formulation of the Separation Thesis. A contemporary school of thought, called Inclusive Legal Positivism, endorses the Social Thesis, namely, that the basic conditions of legal validity derive from social facts, such as social rules or conventions which happen to prevail in a given community. But, Inclusive Legal Positivists maintain, legal validity is sometimes a matter of the moral content of the norms, depending on the particular conventions that happen to prevail in any given community. Those social conventions on the basis of which we identify the law may, but need not, contain reference to moral content as a condition of legality.” See Andrei Marmor, *Stanford Encyclopedia Of Philosophy*, “The Nature Of Law” (2001), <http://plato.stanford.edu/entries/lawphil-nature/>. See also, Mark C. Murphy, *Natural Law in Jurisprudence and Politics* 20-26 (2006).

of absolute postmodern relativism must ultimately be grounded upon some form of overarching justification for a given system of law, be it some form of natural law, class struggle, or simple utilitarianism—there must be an underlying sense that it is correct and justified. Without this sense, why then would we even need to have it? Does not the fact that we still find it necessary to institute laws imply that there is an underlying justification and that this rationale is predicated on some semblance of objective truth offering at the minimum, pragmatic guidance if not moral direction?

Legal positivism, however, we should remember, is not wholly removed from an underlying idea of social control, or that maintaining a certain societal order, or simply the notion that staving off anarchy is a ‘good thing.’⁹ In a sense it replaces one rationale with another. But all rationales must be grounded upon an overarching notion of what is ‘good’ (for lack of a better word). Without this, the whole construction crumbles.¹⁰ Carried to its extreme, the postmodern position, however, scratches mercilessly at this wound, thus threatening to undermine all possible constructions regardless of its rationale, by obliterating the idea of objective truth itself. Legal positivism, to be sure, is singularly important in that it is a stepping-stone towards the metastasising of postmodern thought within law. By snapping the tether that, for hundreds of years (arguably throughout all of human history), bound law to underlying bedrock of moral justice, it opens the door towards absolute relativism, and leaves us with a fundamental problem yet to be resolved: if law is

⁹ See Marmor, *op. cit.* (“Legal Positivism can accept the claim that law is, by its very nature or its essential functions in society, something good that deserves our moral appreciation. Nor is Legal Positivism forced to deny the plausible claim that wherever law exists, it would have to have a great many prescriptions which coincide with morality. There is probably a considerable overlap, and perhaps necessarily so, between the actual content of law and morality”).

¹⁰ Indeed, the Law and Economics approach to legal study which flourished in the latter part of the twentieth century might be conceptualised as yet another attempt to ground law in some underlying rationale, this being the idea of economic efficiency, or the rationale of utility as borrowed from the discipline of economics. The rationale is certainly distinct from, for instance, natural law thinking, but they are in a sense similar in that the approach is pinned to an underlying explanatory justification of sorts.

not morality, what is it? Is the concept of justice, the shared human recognition of fairness—a grandiose historical myth? What is it, a social construction, a hastily written provision in our social contract, an internalised norm¹¹ born from an adaptive quality? To use a legal turn of phrase, the floodgates open.

C. Critical Legal Studies

The idea that there exists a relativist quality to law lingering just beneath our formalistic assumptions is expressed in the Critical Legal Studies (CLS) movement which emerged in the 1970s and 1980s as an independent subset of legal theory.¹² Influenced significantly by the ideas of the Frankfurt school (with the exception of Habermas) and French poststructuralism, CLS strove to expose as arbitrary the received social and political beliefs that underlie and shape our systems of law.¹³

Postmodern theorists, also known as “anti-foundationalists” and “critical legal students,” claim “the law cannot have any foundation because there is no foundation for objective knowledge of any kind. They say we cannot objectively understand reality because all knowledge is contingent on social convention (especially language).”¹⁴

¹¹ In the social norm literature see, e.g., Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy* (Yale Law School, Program for Studies in Law, Economics and Public Policy, Working Paper No. 230, 1999); Robert C. Ellickson, “The Aim of Order Without Law,” 97 *Journal of Institutional and Theoretical Economics* 150 (1994); Robert Cooter, “Expressive Law and Economics,” 27 *Journal of Legal Studies* 585 (1998); Richard H. McAdams, “The Origin, Development, and Regulation of Norms,” 96 *Michigan Law Review* 338 (1997); Mark J. Roe, “Chaos and Evolution in Law and Economics,” 109 *Harvard Law Review* 641 (1996); Cass R. Sunstein, “Social Norms and Social Roles,” 96 *Columbia Law Review* 903 (1996); Eric Posner, *Law and Social Norms*, (2000); Edna Ullmann-Margalit, *The Emergence of Norms* (1978).

¹² See Reza Banakar, and Max Travers, *An Introduction to Law and Social Theory* 119 (2002).

¹³ See generally, Roberto Mangabeira Unger, “The Critical Legal Studies Movement” *Harv. Law Rev.* 561-675 (1983).

¹⁴ Gary Saalman, *Postmodernism And You: Law* (1996), <http://www.xenos.org/ministries/crossroads/dotlaw.htm>

Thus, there are no foundational principles upon which to position the edifice of law. “Principles of law” these theorists go on to conclude “could never reflect universal truths . . . only allocations of power among social groups. According to these scholars, it is senseless to talk about whether a law is right or wrong or moral or amoral. Law is whatever the most powerful cultural group in society makes it.”¹⁵ Indeed, in the CLS perspective of law, all legal “truths” are mere mental constructs shaped by social convention. CLS boldly contends that objective ethical truth is a fiction, thus “consensus within a viable community is all we mean by the truth of ethical propositions . . .”¹⁶ CLS theorists pointedly reject the notion that there is “good,” or objective morality.¹⁷ We are instead confronted by the subjective, cultural constructions that society erects to stand like ethical fortifications for us to retreat inside. Ultimately, anti-foundationalist theorists argue, these fortifications are arbitrary creations built upon a foundation of sand, the search for objective truth “misguided.”¹⁸

D. The Flux Of Mere Opinions

So how deep does this go? The postmodern method of deconstruction begins like peeling an onion. Layer after layer is pulled away to see what lies underneath, and layer by layer the onion is made smaller, until eventually one is left with only its empty core—nothing. Carried to its extreme, postmodernism deconstructs the very foundations on which the possibility of ever arriving at truth with a capital ‘T’ is built. Indeed, it puts forward the proposition that truth in this sense does not exist, that there is never indeed anything true apart from the values that arise from our own subjective constructions, or in the terminology of Foucault, that

we create entire belief structures through the ‘discourses’ through which we engage the world.¹⁹ Apart from the very process itself of creating value, there does not exist any objective truth.

It is important for us to be clear; it is not that we can never achieve objectivity, but rather the whole notion of objectivity itself is an unreal concept. It is a figment of our imagination. It simply does not, nor ever has existed. This is not the denial of things in themselves. It is not solipsism.²⁰ No one is saying the chair is not there, or that fire does not burn. Rather, it is a complete denial of the objective validity of the value systems we construct around the external world. That is, the views that proliferate in relation to the objective world. Thus, as there is no ‘real’ in this sense, there is simply no hope of objectivity, only perspective. All we can ever know is one particular view as an alternative for another. And we are forever swimming in these perceptions. Whatever perspective the individual or culture engages in, takes on the illusion of truth for that individual or culture.

In a sense, one could argue that the very concept of truth is a by-product of view. Let us examine this idea by way of illustration using two mutually exclusive hypothetical opinions predicated on value: opinion A and opinion B. Opinion B necessitates that we see opinion A as implicitly wrong. We could never develop opinion B without doing so. It is important to understand that it is not that opinion A is necessarily wrong; it is that opinion B manifested itself, and thus made opinion A appear wrong. Thus, the moment we subscribe to opinion B, opinion A will seem erroneous. This is the consequence of believing opinion B is right; for opinion B to be right, opinion A must become wrong. It is a self-defining process. Likewise, when opinion C is adopted, opinions A and B will both appear to be wrong. And this is equally true when one goes on to adopt opinion D, E, F

¹⁵ Ibid.

¹⁶ Mark Kelman, *A Guide to Critical Legal Studies* 14 (1987).

¹⁷ Ibid. at 70.

¹⁸ Ibid. at 14.

¹⁹ M. Foucault, *The History of Sexuality Volume I: An Introduction* 144 (1978).

²⁰ “The views that nothing exists outside one’s own mind, or that nothing such can be known to exist, are called Solipsism (literally, ‘only-oneself-ism’).” Alan Robert Lacey, *Dictionary of Philosophy* 305 (3rd ed. 1996).

and so forth, and along we go. With each opinion there will be an underlying sense it is at last objectively correct, and this sense will persist until it is replaced by a new opinion, a new view.

On the surface of things, there will appear to a breaking away from previously held wrong notions—a general advance towards clarity. However, there is no reason to assume that in developing opinion B we have become any less deluded as before. There is no reason to believe that we are progressing through gradated levels of clarity. Instead, all we are left with, with any real certainty, is that there is change. Not progressive enlightenment, but mere change. And change does not imply that the new standpoint is any more inherently valid. Arguably, it will be “valid” precisely until one develops a new opinion. If the reader would honestly examine his or her own views, his or her own values, and note how they have changed over the course of his or her life, it becomes difficult to insist that one’s present value system is definitively correct, and will not go on to change just as previously held viewpoints have done. Likewise, this is true for entire cultures, entire periods of human history.

II. FINDING OUR FOOTING

A. Bartley And Torture By Unwashed Grapes

So as asked at the beginning of this paper, where does that leave us? If our value systems are no more than subjective concoctions, none with any exclusive claim to truth, is not a value system that condones slavery equally as valid as one that condemns it? What about murder? What about genocide? In this wash of subjectivity, where is there the possibility for any moral compass? In the blind morass of moral relativism, do we not lose our only tether hold to truth, to value? The answer is no: we do not. But to understand why, we must examine the nature of our most basic conceptions of right and wrong.

To illustrate this point, let us examine a hypothetical situation involving a man, Bartley, who suffers from a very peculiar and unique condition: a crippling fear of unwashed grapes. For some inexplicable reason, the mere sight of unwashed grapes is enough to instill absolute terror into the heart of this man. There is no rational reason behind his fear. It is wholly arbitrary, without rhyme or reason. Now, what are we supposed to tell this man? Is Bartley’s fear objectively valid? No. Does Bartley’s reaction seem correct to us? No. Is Bartley’s fear real? This is not as simple. Clearly, his fear, or let us refer to it as Bartley’s value system, is real. While his value system may not reflect what we understand as real, his fear is very real. We cannot deny this fact, no more than we can tell a man who hears beauty in a particular piece of music that it is not beautiful.

Now, to torture Bartley by say locking him in a small room filled with crates of unwashed grapes would be, in very real sense, immoral. No sane person could make sense of, nor justify, Bartley’s intense fear of unwashed grapes. Unquestionably, it presents itself as an arbitrary, subjective reaction, solely the product of Bartley’s perception. However, equally there is no way to deny that as a result of his perception, this man is suffering, and therefore, it then becomes, in a very real sense, immoral to intentionally cause him to suffer in this way.²¹ In the case of this man, to torture him with unwashed grapes *is* immoral. It is no longer a subjective view; it is an objective reality. There is suffering. When suffering comes into being, morality comes into being.²² Likewise, there could not be morality without an act having at least the potential to cause suffering, or lessen it. Indeed, if the majority of human beings shared Bartley’s value system, leaving unwashed grapes lying around might be seen as an unspeakable breach of moral behaviour. And it would be.

²¹ Assuming no greater good could come of it.

²² Here, and throughout the remainder of the paper, the term ‘suffering’ is used for lack of a better word. However, what is meant here by ‘suffering’ is any experience of that which we define as negative. This may not necessarily be as profound an experience as the word suffering implies. Indeed it may range from the mildest feeling of agitation, or discomfort, to the deepest depths of human anguish.

But we must go further and ask the question: why is Bartley's fear of unwashed grapes any less credible than our fears? Why should we not extend this same analysis to our fear of loneliness, cold, starvation, or even our fear of death? Equally, why should we not question our love of warmth, food, security, power, and beauty? To imagine these things may be totally arbitrary seems grossly counter-intuitive. They appear to be extracted from indelible truths prescribed by nature itself. One would of course reply that Bartley's fear is unfounded as nothing 'harmful' would result from contact with unwashed grapes, while our fear of cold is rational because our bodies may become sick as a result of overexposure to cold. But we must not stop here let us keep going. Well, if the body becomes sick, it may cease functioning. If it ceases functioning, we may die. And . . . if we die, this is a bad thing. And so there we have it: indisputable truth.

However, we must follow our analysis to its inevitable conclusion. How is the human fear of death itself unlike Bartley's fear of unwashed grapes? How is it any less arbitrary? Is it not only because these value determinations are so deeply embedded into our psyche, so necessitated by our physical state, and so pervasive and commonly held, that they seem beyond question—that they appear to us to possess categorical objectivity? These are value assumptions so entrenched into the nature of being alive, that it is inconceivable that, at the end of the day, they are not rooted in the real. And yet, they are not. If we could step beyond these patterns of belief that bind us to the blind acceptance that our values are self-evident truths, we would see clearly that, in the final analysis, our value system is wholly relative and no less arbitrary than Bartley's. But to put it mildly, this is a difficult thing to do. In fact, it is a virtually impossible thing to do, and our very inability to grasp this reality, speaks to how deeply rooted and powerful these perceptions really are. There is no difference between any of us and Bartley. All value is constructed, not intrinsic. Indeed the entire edifice of value itself—of any sense of value—is just the equivalent of unwashed grapes.

B. Bartley And Death By Vehicular Idiocy

Let us take another example involving Bartley, again illustrating the same point. In an effort to alleviate some of the anxiety brought about by his debilitating condition, Bartley's therapist recommends he take a vacation. Putting aside his paralysing fear of unwashed grapes, Bartley takes his trusted doctor's advice and takes a trip to London, England. He rents a car and plans a route through the English countryside, careful to avoid the few wineries that operate in the UK. As Bartley winds his way over the empty country roads of rural England, finally free of the oppressive terror of unhygienic grapes, he notices a tractor-trailer heading directly towards him. The massive truck is driving on the same side of the road as Bartley and refusing to change lanes. Bartley is bewildered. As Bartley frantically sounds his horn, the horn of the truck blares back at him, and the truck continues to barrel towards poor Bartley. Bartley panics yet again wishing he had never left home. And just at the point of impact, as Bartley's small car is about to be utterly crushed by the tractor trailer, we still the frame and notice (of course) that Bartley is driving on the right side of the road.

Clearly, if you will, we have here two conflicting value systems: a value system that deems driving on the right side of the road as correct and one that posits the left side of the road as correct. This highlights the postmodern dilemma in distinct terms. Driving on the right side of road is no more inherently valid than driving on the left. Certainly, this practice of driving on one side of the road or the other is no more than a mere cultural phenomenon, having no objective claim to being any truer than any other. What we have here are rules completely unrelated to any moral framework—a set of norms that show themselves as utterly subjective social constructions. That is fine enough, but what are we to tell Bartley who is about to be killed by oncoming traffic? Does it make a whit of difference? The rules do not have any objective reality to them in the sense that they are not grounded on any universal truth; however, the result (his impending

death) is very real. That is to say, is there any question that traffic rules are arbitrary? But of what use is this insight when you are hit by a truck? If a man takes it upon himself (unlike Bartley) to intentionally drive on the right side of the road in a place where the rules dictate that traffic must drive on the left, is it not then a moral issue? People are going to get hurt; it does not matter that the rules are not founded upon objective truth. In a very real sense, they have become objective truths.

C. Pain And Moral Clarity

Let us now return to poor Bartley in the first example. How could subjecting this man to unwashed grapes be morally wrong? Let us get to the heart of the matter. It is wrong because in doing so we would cause Bartley to suffer, and it is precisely human suffering that is the yardstick with which to gauge right from wrong—the core underpinning to justice. Indeed, it is, and always has been, the only process through which “good” is defined; the whole of morality is grounded upon the extent to which an act creates suffering and the extent to which the act reduces suffering. This is all morality ever is. Although it may flower into systems of ethical complexity, it remains nothing more than just this. All sense of value is ultimately contingent upon this experience, and evolves from it. The experience of suffering physical or mental, is the very definition of “negative.” *Negative has no meaning beyond this.*²³ “Negative” is the experience of suffering, and its inverse, “positive,” is the cessation of this very same sense of suffering. It is a self-defining process that in no uncertain terms “reifies” itself. Once it is ushered into existence, it is “real.” The experience of suffering is the root of good and bad. It

²³ Some might argue that human suffering is useful and has a function in life, in that it is conducive to great art, or human progress, but this is just semantics. What these advocates of suffering are really saying is that great art or human progress is worth the suffering. However, something can only be “worth it” if, in some way, it is a short-term sacrifice for a greater good. And what is “good” but ultimately reducing suffering? There is no way around this.

is its very core. Put simply, it is not the basis of right and wrong, it is the progenitor of right and wrong. Value is never anything more than the sum total of suffering and the lack of it. Human suffering is not the defining factor of value; it is not a mechanism through which to measure value—it *is* value.

An act in itself has no implicit moral character. It is the occurrence of suffering that provides a moral context through which an act becomes either right or wrong. To illustrate this point, let us return then to the question raised above regarding slavery. Imagine a situation in which the institution of slavery did not in any way create even a trace of human suffering—a situation where the slave did not experience pain (physical or emotional) as a result of his bondage. Even the master was not morally corrupted by this exploitive relationship, and does not mentally suffer as a result of his cruelty. Certainly, this kind of situation is not possible, but for argument’s sake, let us suppose this is the case—absolutely no suffering is created for any parties, directly or otherwise. How could we then say that this situation is morally wrong? We could not. Once the element of suffering is taken out of the equation, the physical act of slavery ceases to possess any moral significance.²⁴ This does not seem to gel with our fundamental notions of right and wrong. It is, however, only because we intuitively recognize that this situation could never truly arise, that it appears so patently wrong. It is because we are aware that slavery as an institution is the cause of such misery that it is morally repugnant to us. However, let us not confuse the issue; it is not the act of slavery itself, it is the suffering it creates. The element of pain once introduced upon our emotional landscape imbues the world with a measure of moral reality. We construct entire value systems within which we then live, but the moment we react to these

²⁴ Kant though, and many other philosophers who view conforms to a Deontological ethics, would adamantly disagree. Kant for one places emphasis on the act itself, and not merely the consequences of the act, famously arguing that it would be even wrong to lie to a murderer asking the whereabouts of a potential victim. See C. Korsgaard, “Kant on Dealing With Evil” in James P. Sterba, *Ethics: The Big Questions* (1998).

constructions, all subjectivity ends. Our reactions are real. There is good and bad, right and wrong.

It is important to understand that what is being denied here is not that our belief systems and sense of value are largely determined by culture, economics etc., but rather that these subjective constructions preclude any possibility of clear moral guidance—just because they are subjective does not make them any less “real.” Entire value systems are, as postmodernism contends, subjective creations. It is the very perception of value that creates value. Beyond the bonds of experience, value does not, nor ever has existed; when we speak of value and we speak of an individual’s perception, we are speaking of one and the same thing. However, once it is created, it is very real. In that they ultimately create the experience of suffering or the lack of it, morality is thus reified. That is, the parameters are created through a wholly subjective process, but once created, we live and die within these very parameters. The postmodern argument fails to recognize this truth, and it is precisely this truth that no amount of postmodern relativism can undermine.

D. How This Is, And Is Not, Utilitarianism

This might be understood as Utilitarianism, or perhaps even a refined version of hedonism. To a certain extent this is true. The basic goal of utilitarianism is to offer a means with which to arrive at somehow valid normative propositions regarding what is “just” by positing the principle of maximizing individual’s experience of happiness as a way to gauge what is right.²⁵ Similarly, we are here

²⁵ See Walter Sinnott-Armstrong, “Consequentialism,” *Stanford Encyclopedia Of Philosophy*, (2003), <http://plato.stanford.edu/entries/consequentialism/> (“The paradigm case of consequentialism is utilitarianism, whose classic proponents were Jeremy Bentham (1789), John Stuart Mill (1861), and Henry Sidgwick (1907). . . . Classic Utilitarians held hedonistic act consequentialism. *Act consequentialism* is the claim that an act is morally right if and only if that act maximizes the good, that is, if and only if the total amount of good for all minus the total amount of bad for all is greater than this net amount for any incompatible act available to the

positing “happiness” as having intrinsic value. However, although similar, there is a slight difference: the emphasis here is *not on maximizing utility, but on finding a stable underfooting of value on which to stand at all*. We can be said to be taking from utilitarianism only what is necessary to establish firm ground upon which to plant our footing upon the shifting sands of postmodern relativism. Issues of maximizing utility for the greatest good are purposively not brought into the discussion. The difference is: subjective reaction is not a tool with which to gauge the moral nature of an act, rather, *it is the moral nature of an act*—it is value. The point being made here is that subjective reaction is the very creation, or “reification” of value. There is simply no value outside of this phenomenon, regardless of whatever convoluted expression it assumes. Value does not exist in a vacuum; it is an interpretive process.

Bentham once famously decried the notion of natural law as “nonsense upon stilts.”²⁶ Let us now carry it further: the notion of objective value at all is nonsense upon even higher stilts. Value is no more than an individual’s subjective interpretation of events; an interpretation that can be enlarged to subsume entire cultures that have formed consensus around it. Thus, subjective reaction is not so much a mechanism through which we may quantify the moral nature of an act, rather, it is the very creation of value; value does not, nor ever has existed outside of this subjective process—as postmodernism suggests, it is solely a human construction. But, nevertheless, it is here in the core of this process of construction, that we can discover a degree of constancy.

agent on that occasion. *Hedonism* then claims that pleasure is the only intrinsic good and that pain is the only intrinsic bad. Together these claims imply that an act is morally right if and only if that act causes “the greatest happiness for the greatest number,” as the common slogan says.”) (footnotes omitted).

²⁶ Jeremy Bentham, “Anarchical Fallacies; Being An Examination of the Declarations of Rights Issued During the French Revolution” in John Bowring, *The Works of Jeremy Bentham* 501 (1843).

CONCLUSION

Our reasoning here accepts full throttle the inevitable conclusions to which postmodern thought leads us: value is the machinations of culture and subjective reaction. But at the end of the day, the measure of certainty implicit in these very reactions provides stability within this moral turmoil. Bartley's reaction to unwashed grapes constructs the possibility of value, and brings it into existence where otherwise it simply would not be present. As Bartley's reaction is what allows the possibility of value, we can turn to the very reaction for moral guidance. To bemoan the fact that value constructs are subjective is rather odd, if not irrelevant; it does not matter. We eventually come full circle. The reaction *is* value. Thus, once created, it is as real as anything, and is a point of stability that postmodern moral relativism cannot undercut. It does not matter what course we follow to stimulate those reactions. Subjective concoctions or not, they are real. And they are foundational principles.

The postmodern argument is a powerful one precisely because it reveals in unapologetic clarity the true magnitude of our ignorance. The subjective nature of our conceptions of the world is exposed for what they are. Nevertheless, this does not disenfranchise morality. On the contrary, in that the process of deconstruction sets our value systems in proper relief, the moral superstructure on which they are based becomes that much clearer, and thus reinvigorated. Our value systems are stripped of all claims to objective authority, but yet the end result remains the same—it makes no difference. There is right and wrong. Ultimately, all postmodernism does is force us to set aside the exterior expressions of “justice,” and instead root our legal conceptions at this more fundamental level.

Value structures as reflected in the law may shift and change over time. As with all value systems, codified systems of law, and the principles they establish such as nuisance, trespass, and negligence, are highly determined by the particular cultural context from which they arise. However, it is in the intrinsically negative quality of suffering

that we find firm footing on which to distinguish right from wrong—here we have a piece of “reality” on to which we can firmly clutch. It is here that the laws we formulate cease to be arbitrary fabrications and become rooted in fixed moral truth. It is a simple and familiar formula: the generation of suffering is inherently bad; conversely, the cessation of human suffering is good. It is logistically difficult to quantify, but is endowed with a quality of reality, of universal truth, more than capable of withstanding the nihilistic blows of moral relativism engendered by postmodern thought. The basis of law has credence only in so far as it conforms to this principle, and no more.