

Paradox and Origin: On the Structure of Legal Communication

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Abstract

This paper seeks to analyze the nature of legal communication. It does so by examining the nature of paradox and its centrality to legal discourse. Is the paradox something that legal theory must escape? In this paper, we will argue that paradox is a central and defining feature of legal conceptuality; it simply pushes the boundaries of traditional rationality and makes a deeper a more probing analysis possible. Contemporary legal theory, from Legal Realism to Critical Legal Studies, is slowly coming to recognize the importance of this notion. This paper seeks to trace the route of legal paradox, as a figure of text and experience, through the writings of key figures such as Vico, Derrida, and Luhmann. By doing so, it will be shown how paradox forms a lynchpin for all legal communication and structures what we understand as law both in theory and practice.

Paradox and Legal Theory

One of the most salient and pervasive features of modern legal thought has been the generalized *recognition* of the paradoxical formation and basis of legal knowledge and institutions. The pristine world of legal verities, if any such world ever existed, has evaporated like so many illusions unmasked by contemporary skepticism. Some have described this contemporary and virulent form of skepticism as ‘postmodernism.’ Its principal features involve the unveiling of legal fictions and, most importantly, authority structures. It will be the argument of this paper that these modern skepticisms, or, this ‘postmodernism’ is not a novel feature of current legal institutions only. These skepticisms are rooted in a vastly integrated, centuries-long questioning of the *foundations* of law. The purpose of the present chapter will be to situate these questions within a broader discourse of paradox. Paradox is, in its ancient sense, something im-passable, a conundrum that makes movement forward or conclusiveness difficult if not impossible. In order to engage the paradox, however, one must engage the argument. Therefore, one is caught in an im-passable argument and bound to the dictates of a language that we cannot often control (Sorensen 2003: 6-7). Now the paradox was a distinctive feature of Greek philosophy from Anaximander to Aristotle. In this often hidden history of paradox within the otherwise coherent account of truth and its findings within the West, the figure of Zeno becomes important as the codifier of the *un-codifiable*; in other words, he is able to set the tone and to speculate on the linear dynamics of paradox. The eighteenth century Neapolitan philosopher Giambattista Vico put himself into the very vortex of paradox and self-consciously constructs his philosophy in the manner of inter-related and over-determined binaries. All this talk of paradox and philosophy might seem far away from the concerns of ‘real world’ legalities but, in truth, they linger within the very body of law.

Law is paradoxically formed because it cannot happen otherwise. Primary divisions and differences within the body of law create strange structurations that do not resolve themselves with the aid of reason or technique. Vico's lasting insight was to understand paradoxicality as a crucial impetus or, we might say, *architectonic* of legal knowledge and history. In fact, it is the *antinomical communication of paradox* in its interiority that over-determines law. Law is indeterminate because it is structured through differences that are at once mythically and conceptually tied. This is the *death waltz* of the law, of its circularity, iterability and repetition. It is never, therefore, a simple matter of choice between one side and the other but an intricate bi-implication within a multiplicity of points of view. As our analysis develops we will delve deeper into the nature of legal paradox and its ultimate irresolvability. Paradox leads us to the im-passable yet it also brings us to the edge of possibility. Is this possibility a pure form? No, rather a possibility of immanence and of interiors designed to *punch through* the techniques of legal determination in which we are both inside and outside rationality.

Many important legal thinkers of the late nineteenth century began to ask questions about the prevailing orthodoxies of legal knowledge. The formalistic techniques developed at Harvard influenced Anglo-American legal history in an important way. What became known as *Langdellianism* advocated pure methods of stating a case and finding the source and point of law (Duxbury 1995). This process was taught as a technique that could be applied in a universal sense. The argument was that the particular case might have been different but the method of significant extraction, of finding what was important in the matter at hand, was formal and universal. One could, in other words, find the universality within the particularity. It must be clear that this discovery of legal principle was not seen as an intuitive exercise but as a mode of exculpation modeled on the successful discovery of raw data or facts within the natural sciences. Cases were codified and organized, as reading material for law schools, and students were called upon to recite and indicate the principle involved. Reduction and abstraction *not interpretation* were the guideposts of this understanding of legal knowledge. Students, it was believed, could be trained in this technique without much strain and enter the practical legal world with tools of extraction, reduction, and abstraction that would allow them to *cut to the chase* within the context of any particular case. In the late nineteenth century, especially in the United States, questions arose, as we mentioned earlier, as to the validity and applicability of this model. Great jurists and legal theorists such as Holmes and Cardozo pointed out the inherent unpredictability of the juridical decision (Holmes 1992). Could Langdellian formalism explain the nature of judicial review? Judges and lawyers trained in the formalism of legal certainty and technique were spread all over North America and its methods were even being applied across the Atlantic in Britain yet different judges still were deciding different cases in different ways. They grounded their claims, it is true, in points of law, precedent or statute but they also looked to morality to base their decisions. And even if some of them, such as Holmes, looked to science as their model their variant interpretations of evolutionary theory or animal behaviour resulted in diverse outcomes. As a result, legal certainty had reached something of a dead end both within the academy and without. No doubt this type of legal formalism survives even to this day both in theory and in practice. However it cannot be grasped outside the context of its questioning. The questioning of pure form and technique has largely been bequeathed to contemporary legal thought through the important Legal Realist movement. These thinkers sought to use the methods of the emerging social sciences to jolt law away from its over-reliance on insular modes of reasoning towards an openness to alternate forms of explanation (Duxbury 1995). This was conceived essentially as a strategy to wipe away the cobwebs inhabiting the legal mind and replace them with incisive social theory. Much of this movement culminated, one could argue, in the work of Jerome Frank. Frank combined psychoanalysis, psychology, and sociology into a sustained critique of legal mythologies which he saw to be a product of an infantile mind. By doing so, he went to the heart of the problematic that I have identified.

Frank's language often cuts like a knife. He is able to draw clear demarcations and delineate issues with an enviable precision. Frank describes the current decrepit state of legal self-deception in the following manner

The lawyer's pretenses are not *consciously* deceptive. The lawyers, themselves, like the laymen, fail to recognize fully the essentially plastic and mutable character of law. Although it is the chiefest function of lawyers to make the legal rules viable and pliable, a large part of the profession believes, and therefore encourages the laity to believe, that those rules either are or can be made essentially immutable. (Frank 1931: 9)

He further goes on to ridicule those legal professionals who speak of finding a rule as a process akin to geometry or mathematics. To see law as a rigid code of applicable rules is both untrue and practically misleading

Now the true art of the lawyer is the art of legal modification, an art highly useful to the layman. For the layman's interests, although he does not realize it, would be poorly served by an immobile system of law. Especially is this so in the twentieth century. The emphasis of our era is on change. The present trend in law is, accordingly, away from static security—the preservation of old established rights—and towards dynamic security—the protection of men engaged in new enterprises. Which means that the layman's ordinary practical needs would be seriously thwarted by an inelastic legal arrangement. A body of undeviating legal principles he would find unbearably procrustean. Yet paradoxically he and his lawyers, when they express their notions of a desirable legal system, usually state that they want the law to be everlastingly settled. (Frank 1931: 10)

This collection of misperceptions and misunderstandings are the groundwork of what Frank call the "basic myth." This myth is most clearly expressed in the longing for certainty and in the desire to eliminate the capriciousness of particularity with the stability of rules and unchangeability. For Frank this myth arises because of the ingrained infantilism of a culture that, since ancient times, has relied on unknowable certainties fixed in the sky or in the mind. To understand the mind of the child and its imaginative construction of the world is to understand the very nature of legal formalism and its fetishism of rules. Order is psychologically preferable to chaos. Yet this preference can easily slide into destructive modes of legal formation that are completely out of touch with the modern world.

Why this text? I have embarked on a partial reading of one of Legal Realism's greatest thinkers to prove the point that a growing recognition of paradox in law and of the limits of certainty, at least of a scientific type, in the legal system. This text is also important because of its gifts of posterity, to a legal theory that would come after the final days of Legal Realism. The re-constituted program of legal positivism recognized this dilemma as well as Natural Law theory. Most importantly when 'critical theory', per se, is brought to law the question of the legal paradox is re-framed and cast in terms of the antinomies or contradictions indicative of a liberal model of law. Exponents of Critical Legal Studies begin from the Marxist insight of inherent contradiction that expands outward from the central locales of politics and economics. Unger, for example, speaks at length of the antinomies of liberal thought, such as fact and theory, self and collectivity, and individualism and altruism (Unger 1975). The problem that we, as well as others, identify with the CLS School is its over reliance on simple inversions as solutions. In other words, altruism is to *replace* individualism as a pertinent example. However, such solutions beg the question and seek a new form of rigidity in which the rule of individualism is replaced with the rule of collectivity. In fact, paradox in law cannot be overcome in such a facile and banal manner. Paradox is disseminated throughout the body of law and it will re-emerge whenever we believe that we have eliminated only one ugly side of the riddle.

Nature/Culture and Legal Communication

If Vico's understanding of law is premised around certain dualisms that over-determine legal institutions, what are its forms? And, further, how does it express itself in content. These are questions that are at the very center of Vico's metaphysical ruminations and lay the necessary groundwork for a new concept of historico-social science. As I will show throughout this study, the true nature of this founding moment of social science can only be understood by taking Vico's idea of *conatus* as an interpretive nexus. All conditions and determinations as well as freedoms and expressions must pass through the hermeneutic hinge of *conatus*. In one sense *conatus* is simply understood and expressed as the 'will to will'; more specifically, it becomes an ontological category that tries to deal with the contradictions of motion and rest. In his early metaphysical writings, as they are summarized in *The Ancient Wisdom of the Italians*, Vico meditates on the intricate structural and physical nature of motion. To move from motion to rest is a simple paradox that is shown through a reading of Zeno of Elea. We clearly have abstract and mundane concepts that can account for motion and rest; however, how do we explain, in similar terms, the process that brings us from rest to motion? After the publication of *The Ancient Wisdom*, Vico drops the idea of a metaphysics coordinated in a systematic fashion and turns towards the contemplation of things historical. He is brought to the historical world by his academic interest in law. Yet, I will argue, he does not leave behind his metaphysical conclusions exemplified in the problematic of *conatus*. In his historical analyses *conatus* will re-emerge at crucial points as a hinge between past and present, rest and motion; it marks a transition point, a demarcation; in sum, a difference ontologically drawn. In social and historical terms, *conatus* is an idea that Vico uses to express this differentiating process. There is no greater differentiation than that drawn by humans as they escape the confines of nature. Nature, on one side, and culture, on the other, are inextricably bound in a dualism that is self-produced. This dualistic understanding of Vico's thought is acknowledged by Enzo Paci in *Ingens Sylvae* as the cornerstone for any understanding of Vico that seeks to go beyond its proclamations and redactions at the hands of interpreters to its profound interior (Paci 1994). Much of what we will argue will be premised on this Pacian insight. In fact, we believe that a thorough and open reading of Vico's text make it necessary.

What is the significance of the divide between nature and culture? I could begin with some simple clichés about the movement from a natural context to one created by and for humans. However, the difference that we are discussing is literally the *difference that makes a difference*. Humans are at first *bestial*. In itself this claims nothing unusual. But if humans are at first 'animalistic' in their proclivities and habits then that means that culture is the work of taming. Culture tames, first and foremost, the *passions*. Therefore, *conatus* is the work of culture; it embodies the attempt to overcome bestiality and to forge human institutions. The ultimate significance of *conatus* lies in its ability of conversion. It is able to draw the necessary demarcations that make civilization, at any level, possible. Passions must be tamed in order to form families and states and these passions are not abstract or detached from the existentiality of our lives. They are embedded deep within our psyche. As a result, humanity's taming and the laying of the various earthworks required for culture are a simultaneous and enduring task that requires interior self-mastery. Self-mastery is in conjunction with any type of social formation; self and society are mutually implicated in a continuous process of civilization. Humans must gain self-mastery in order to stave off the destructive tendencies of their fallen nature. God, in turning humans away from the Garden of Eden, has reduced humanity to a state of constant agitation. These agitations are expressed as internal movements in which force or power is pitted against contrary forces and powers. This is where we can detect the Spinozist influence working its way into Vico's corpus. No doubt the idea, found in Spinoza's *Ethics*, that passions must be controlled and that the human soul needs to acquire an internal balance is related to the basic dialogue of Vico's *conatus*. The language and structure are largely altered but the ethico-ontological insight gained by the discourse of self-mastery is retained in large measure. For Vico, it expresses the

deep linkages between mind and social structure. Further, the Spinozist discourse of ethical self-mastery means, for Vico, that culture and civilization are products of self-creation. Humans make their societies by taming their own selfish desires and destructive appetites; self-mastery is equivalent to social formation. This ability to create culture at both ends of the conceptual spectrum means that any discussion of one end presupposes or 'calls out' the necessity of an explanation that can account for the other as well. From an ethico-political perspective this idea is most important in its implications for our understanding of "freedom." For Vico, as for Spinoza before him, freedom will not become simply a negative or liberal notion, a form without content. It is understood as the act of self-creation imbued and co-implicated along with social formation. These understandings clearly give a new significance to law and expand the range of human activity that it covers. Law is not only, or even primarily, the ability to forge and form coercive social structures and obedient populations. It is also an interior process of social and psychic construction.

Roberto Unger in his magisterial work called *Politics* describes the rise of modern social theory as a reaction to naturalistic accounts of the cultural world. It lays the groundwork for a modern type of social theory and it is with Vico that, according to Unger, this anti-naturalistic claim is staked

Much in our modern ideas about society represents the relentless development of the principle contained in Vico's statement than man can understand the social world because he made it. (Unger 2004:84)

As I have demonstrated, this anti-naturalism is not premised on the claim that nature has no influence on human conduct or that we live in an ideal solipsism of our own making. Nature is humanity's constant companion and, as such, lies beyond moral evaluation. However, the paradox emerges in recognizing this while simultaneously imposing a moral or ethical context that calls into question the activities and lifestyles that emerge from nature. As humans we must constantly check our desires and we must learn to channel them into socially acceptable avenues. Societies must also learn this art of self-mastery. In Luhmannian terms, society draws its boundary through the difference between the social system and its environment. This difference survives, systematically and psychically, through the activities and communications of institutions and individuals. For Luhmann and modern systems theory, communications are the basis for social formation. In abstract terms this occurs through various processes of self-observation; it is, in other words, about the system observing itself. By doing so, the system is able to differentiate itself and obtain independence or autopoiesis (Luhmann 1984: 137-175). The ability of systems to do this means that consciousness is able to draw the distinction of ego and alter. Therefore, although social systems and psychic systems are separated and independent, they are *structurally coupled*; in other words, they translate meanings between levels. Reflexivity and self-mastery are connected and given life through the actions and/or communications of autonomous systems. What makes all this interpenetrating of communication and consciousness possible is the work and task of language: "Only language secures reflexivity" (Luhmann 1984: 153); language, in other words, is able to meaningfully form the difference between nature and culture. In Vichian terms, I will be describing this as the process of *ingenium*. *Ingenium* is the ability to move our passions via the vehicle of language. Here we are not talking of conceptual or scientific language that might describe our world as a plane of objects but of the poetic word. Poetry is able to do two essential things for Vico. First, it orders and makes sense of the world. It explains, for example, why the thunder bellows, why lightning strikes, what the meaning of death is, as well as all other things. It connects humanity to the world around. Second, it tames through its models and examples. It does so by giving us concrete examples of heroic or godly behavior as well as explicating the wishes of the gods. These gods seek to be appropriated and it is the task of poetic divination to discover divine desire. The body as a communicative site of meaning plays a major part in this process (O'Neill

1989). Upon the body are inscriptions of poetic ordering that once again speak to the connection I have made between Vico's levels of analysis. This insight is largely based on recognizing the role of human nature in the formation of language. Humanity does not have an abstract point of view from which to judge nature and so must rely on what can be learned from resemblance. Resemblance becomes the source of metaphor because it is a property of the human mind "that whenever men can form no idea of distant and unknown things, they judge them by what is familiar and at hand" (1994:60). Therefore, the body becomes a central repository of meaning since: "words are carried over from bodies and from the properties of bodies to signify the institutions of mind and spirit" (1994: 78). Passions are controlled along the contours of bodies themselves by speaking, in a metaphoric sense, the *language of corporeality*. Languages were formed through song and became a major source for the control of passions and the formation of culture; "men vent great passions by breaking into song" (1994: 77).

Poetry is the first source of law. This is something that Vico repeats incessantly. The basis for his argument is found in the idea that culture must be understood through its origins

The nature of institutions is nothing but their coming into being (*nascimento*) at certain times and in certain guises. Whenever the time and guise are thus and so, such and not otherwise are the institutions that come into being. (1994:64)

I have chosen to describe this principle as Vico's *hermeneutics of beginnings*. It is an interpretive idea that seeks to bind beginnings to posterity. For Vico, this is not expressive of an antiquarian eroticism. In truth, it reflects the importance of original formation to the life of society because: "The inseparable properties of institutions must be due to the modification or guise with which they are born" (1994: 64). A society's origin, as well as all the institutions such as the law that we chose to observe, leave indelible traces on all present and future formations. Poetry, in its dual function as conceptual and institutional, is this indelible trace at the origin of society. Poetic language is described as the great witness to the "customs of the early days of the world" (1994:65). It is here in the beginnings of poetic language, which is after all the first language, that we can seek to understand the nature of law as a social institution. Poetic language is an archive of authoritative social formation; it is, in other words, a redactor of archaic law. The poems of Homer become significant historical repositories of legal theorizing; it is the first place where law develops as an active form of self-observation. Vico saw Homer as a historical archive of great worth long before modern attempts to prove his cultural veracity: "the poems of Homer are civil histories of ancient Greek customs" as well as "two great treasure houses of the natural law of the *gentes* of Greece" (1994:65). Homer is the exemplar of a historical process in which poetry, language, and law are intertwined in a delicate mix of social formation. Homer and the other poets describe things sensually with the body as the prime site of metaphor. Metaphor, for Vico, expresses this insensate sensuality by talking of things and experiences beyond or outside the body within terms understood through the same body. This becomes a type of *body thinking*. Therefore, if the poets say that "the fields are thirsty" (1994:129) we understand the connection or linkage because of our existential and corporeal experience; it is, in reality, a metaphor that all, especially those who remain close to the land, can understand. These body-metaphors resonate with an "eternal property" which is described as a "credible impossibility" (1994:120). In other words, they make connections of difference within the sameness of perception; the human mind takes the impossible for reality at least at the level of belief because she can point to her embodiment. Eventually, in the progression of language from its feral origins, fables or *fabula* develop. *Fabula* is equivalent to the Greek idea of *mythos* and represents a collection or re-collection of significant metaphors organized as narratives. Various extensions of metaphor such as metonymy and synecdoche are invoked in the fable as extensions of language. The end result of the process is a narrative which constructs enduring *poetic characters* that always represent more than their name. In fact, their name becomes synonymous with certain ideas. These poetic characters lay the basis

for humankind's first form of abstract thinking which Vico describes as *vulgar metaphysics*. Orpheus, for example, is a tamer of men's passions; he tames with his lyre and soothes the bestiality of humans. This type of figure is not an individual; she or he is an active representation of a series of interconnected ideas and values. Orpheus, along with Hercules, Solon, Romulus, Numa Pompilius, and Cadmus, was a *nomothetoi* or law-giver. They are exemplars of civility and tame internal passions and limit unrest through language, in the case of Orpheus, or power and strength, in the case of Hercules. The *strongman* and the poet become conspirators in the creation of culture.

In sum, I am claiming, with Vico, that the law can be read off of the historical contours laid down for us by history. The above descriptions of the earliest forms of metaphor rely on understandings of language development. The age of gods is one of hieroglyphic communication. Here the gods speak to human through the artifice of a written language which is, in a strong sense, ideographic. This is what Vico is referring to when he says that: "all nations began to speak by writing" since the "first nations thought in poetic characters, spoke in fables, and wrote in hieroglyphics" (1994: 138). Writing precedes speech because of the inscription of bodily forms on a misunderstood universe; the universe is the body writ large and ideograms become bodies of expression. Symbolic or heroic language turns to the deeds of men who are born or generated from the gods. Their language is therefore edifying yet now tied to a certain humanity in its presence; it shows us more of the actions of men while the gods become ultimate arbiters slightly removed from the game. The heroes of culture, mentioned above, fit this category and role best. Lastly, epistolary language is a fully humanized type which is based on distant communication and factual justification. Because "law is born from language" (1994: 159) it will certainly be borne out that it follows similar strains of development. Law is at first theocratic-theological or *themis*. Divine design and cosmic balance are the basis of law. Law is then heroic or aristocratic and is grounded on power, authority, and wisdom of the ruling classes. Lastly, law is grounded in popular forms of sovereignty and philosophical analysis. These languages all have their own forms of differentiation. The theocratic moment is grounded in a difference of human from her universe and God; the heroic is based in an inimical relationship of classes; and the popular form of government is justified as a difference of all amongst all or *aequitas*. Further, all of these developments assume, along with Luhmann, that law entails a growing awareness of itself; in other words, self-reference or reflexivity increases in epochs bound by epistolary language. Irony, for example, requires an awareness of inside and outside as well as truth and falsity: "Irony...is fashioned of falsehood by dint of a reflection which wears the mask of truth" (1994:130). The full explication of the significance of my argument will require patience on the part of the reader. In fact, most of my work in this study will be grounded on trying to elaborate some of the simple premises that I have put forward here. Once an author pulls on a particular strand in the work of a great thinker, many more issues appear and the complexity grows.

The Mysterious Origins of Legal Authority

The paradox of legal self-reference points indeed at the larger and bothersome problem of legal authority. From a legal internal perspective, law is a closed self-referring system. Nevertheless, from an external point of view, the justification for obeying the authority of the legal order must emanate, in the last resort, from a transcendent—extra legal—source. The rule of law is always the rule of man. Law does not amend or justify itself; it is people who amend or justify their laws. From an extra-legal perspective, the authority of law stems from a prelegal origin that antecedes the legal authority and is not bound by it. Yet, the one thing which the law can never justify by itself is its prelegal (and therefore, non-legal) origins. The legal order cannot justify the prelegal roots of its authority. (Kedar 2006: 102)

This quote from a recent text that deals with the whole issue of paradox and inconsistency in law reveals much of the problematic of authority. Its origins remain *mysterious* in the sense that we cannot grasp its founding moment nor, as a result, can we hope to justify its conservation. Kedar talks of “prelegal” justifications of law that recede into the darkness as we seek to approach. I agree with the general sentiment of paradox imminent to this whole question of authority. Further, the more elaborate arguments for the centrality of paradox to legal knowledge is premised on the idea that this is an im-passable nexus; it is one that both impedes our progress and calls us to continual re-evaluation. Why is this question important to legal knowledge? Why should we be concerned with its implications? In sum, I would say that this area of analysis opens up the chasm of law to the questions that are most important in the existential practice of law. It raises the question of the important role of violence and its reduction in legal formation; violence, after all, is “prelegal” because it can impose rules without justification. But is violence an albatross forever bound the neck of law? Does physical or bodily violence become conceptual or abstract violence? This brings us to some of the arguments I raised above in reference to the centrality of *conatus* for Vico. One may also ask about the significance of theological-theocratic formation to law. In other words, can law be founded (and conserved) without the reference to a wholly other (God)? I will answer these questions not in the form of schema but through an interpretive encounter with Derrida. In two crucial texts, written years apart but imbued with the same spirit, Derrida raises these very same questions. His analysis will be useful to my analysis because of its *radicality*. In other words, Derrida pushes these questions to their philosophical, logical, and social extremes. Without such a strategy, one that exposes us to the risk of skepticism, indeterminacy, and possibly nihilism, I do not believe that we can come to an adequate understanding of law.

The text known as *Violence and Metaphysics* was written sometime in 1967 and lays out an in-depth encounter with the work of Emanuel Levinas. Levinas became known in France for his ‘thinking of the other.’ This involved a suspension of traditional philosophical categories grounded in regions such as epistemology and ontology for the sake of ‘ethics as first philosophy.’ What is at stake for Derrida is the radicality of Levinas’ thought. Did the thought of the ‘other’ make possible a non-violence bound within the very origins of the world’s opening? *La trace de l’autre* lies beyond any horizon, in a phenomenological sense (Derrida 1978: 95). The other is both the human face and its ethical call as well as the wholly Other (God). Ethics can be grounded in an epistemological analysis and self-awareness of the critical variety as one would find in Kant’s categorical imperative. Nor can fundamental ontology, as in Heidegger, seek primordial grounds. Ethics is the first relation of human to her world and cannot be superseded

the only possible ethical imperative, the only incarnated nonviolence in that it is respect for the other. An immediate respect for the other himself...because it does not pass through the neutral element of the universal, and through respect—in the Kantian sense—for the law. (Derrida 1978: 96)

This indicates the interconnection, especially in the eyes of Levinas, between the task of nonviolent foundation and the law. It seems that the law is stained with the negativity of violence because it conceptualizes a universal or abstract element. Yet by doing so the immediacy as well transcendent value of the other disappears. There are many intricacies to Derrida’s text that I cannot elaborate on here. But the main point that I am seeking to make is that there is a separation drawn between violence, its forms and what makes it possible, and nonviolence. Nonviolence is non-form, non-conceptuality; it is religion, in its purest expression, versus philosophy and politics; it is, in sum, the Jew versus the Greek. The question that Derrida is left with by the end of this lengthy analysis is: “Are we Jews? Are we Greeks?” (Derrida 1978: 153). In other words, can violence be attributed to a particular tradition such as Greek politics and metaphysics? Can we incise one from the other? And, most importantly, can our surgery remove nonviolence from the active and vibrant body of violence? In the case of Levinas, he would ask whether the Jew could

be removed from the Greek in order to found a pure religiosity. Derrida's answer to this is both simple and revealing: "We live in the difference between the Jew and the Greek, which is perhaps the unity of what is called history. We live in and of difference, that is, in *hypocrisy*..." (Derrida 1978: 153). This concern with violence and its paradoxical origins will carry over into Derrida's explicit analysis of law and the problem of authority that he will embark upon years after this Levinas piece. However, the two texts of *Violence and Metaphysics* and the *Force of Law* represent something of an arch. They will both ask the same essential questions of violence, authority and law and they will also employ the same paradoxes to rattle the foundations of legal rule.

The aporias of legal rule are laid out in terms of a problematic of violence. This is not a new interpretive invention but a radicalization of traditional dilemmas about the role of force in legal justification. Vico, like Derrida, connects violence with the very core of law and his theory of *conatus* is like a historical process of conversion. Violence, and the coercive force of law, are implicated as progenitors of justice; force and violence can be separated from what they are contrasted with, namely, ethics and justice

Force or coercion are necessary components of law, its establishment as well as its subsequent enforceability, but they are also obvious threats to justice. The establishment of a system of justice itself presupposes a moment of violence that could not have been sanctioned by arrangements agreed on by those over whom the violence is exercised. (McCormick 2001: 398)

As McCormick points out, this analysis is made up of putting the purified foundations of law into question. Just as Frank, in our earlier discussion, talked about the inconsistencies and illusions found within the body of law, Derrida and Vico unveil the fanciful delusion that law is founded in justice. McCormick rightly describes this type of analysis as a "persistent provisionality and a continual prologue to enlightenment and the establishment of justice" (McCormick 2001: 399). We have called this type of meditation a *hermeneutics of origins/beginnings*. Vico, like Derrida, operates through the provisionality of law's logic and justifiability. Justice exists within the body of a law built upon the foundation of violence; it exists as a 'deconstruction' of the presumptions of violence but never a denial or repression.

Derrida, through his reading of Benjamin's *Critique of Violence*, distinguishes between two forms of violence. Mythic violence is a product of the Greek tradition. This type of violence will become the main feature of Vico's analysis of legal development and, as a result, is important to my overall analysis. This violence is one of chaos reduction and it does this "by establishing the political" (McCormick 2001: 405). This is a violence that bifurcates into two subtypes: "the founding violence, the one that institutes and positions law...and the violence that conserves, the one that maintains, confirms, insures the permanence and enforceability of law" (Derrida 1992: 31). These distinctions can simply be phrased in terms of a *law-making violence* versus a *law-conserving violence*. Mythic violence relies on a re-telling and re-appropriation of its origins; in other words, it recalls its beginnings in blood. This coercive feature binds members of a legal community together in fear. Vico does not hide from the implications of this idea. In fact, long before deconstruction, Vico's thought is caught in the conundrum of originary violence and its relation to law. Law is, essentially, a *conversion of violence* yet it retains the features of its *primordial force*. Representative language, in the case of Benjamin, or, something that lies in the realm of *writing*, means that law is fallen and compromised. This definitely fits into the Derridean schema of the privilege of speech over writing yet it also signifies a hostility to mythology as the basis of un-truth, deception, and, in the end, violence. For Vico, however, violence is reduced through the representative capacities of language. Myth reduces the *natural* inclination of humans towards force because it intercedes with metaphoric representation; Vico calls these essential features *imitations of violence*. The Greek concept of *mimesis* plays a major role in the formation

of legal consciousness since it makes possible non-violence. Albeit this is not a pure non-violence; it is one based on a historic compromise. In theatrical terms, is a stage performance that mimics a murder or violent death something that reduces aggressive reaction from the audience, or, does it encourage such behavior? Aristotle in his poetics argued that such theatrical scenes could provide the audience with a sufficient release from its inherently violent tendencies; it could remove bad emotions and replace them with positive ones. This expunging was called *catharsis* and Vico thinks that such an *imitative performance* is at the heart of law's founding and conserving power

During that period of adolescence of mankind—which is the age when fantasy is powerful in human beings and, for that reason, was the poet's century...the first founders of commonwealths transformed the right of the Greater Gentes in certain imitations of violence. (2000:92)

Derrida argues that Benjamin is seeking a “finality, a justice of ends that is no longer tied to the possibility of *droit*...” (Derrida 1992: 51). It is the task of mystical or divine violence, which stands on the Judaic side of the contrast with mythic violence, to deny or negate the proclivities of Greek law. That means that it must stand beyond universality and representation and appear in its simple and uncomplicated purity. Benjamin speaks of this, as Derrida recounts, in positive theological terms

To this violence of the Greek *mythos*, Benjamin opposes feature for feature the violence of God. From all points of view, he says, it is its opposite. Instead of founding *droit*, it destroys it; instead of setting limits and boundaries, it annihilates them; instead of leading to error and expiation, it causes to expiate; instead of threatening, it strikes; and above all, this is the essential point, instead of killing with blood, it kills and annihilates *without bloodshed*. Blood makes all the difference. (Derrida 1992: 52)

Blood is the symbol of life and God does not spill it out of His deep connection to this force. Yet God does punish in and through violence; a violence that is somehow pure and un-touched because its source is un-known and un-precedented. The general strike that develops into a larger proletarian attack on the state is the clearest example that Benjamin has in mind. It is a violence that creates the *purely new*; it is, in other words, the eschatological-messianic hope of God's intervention in history. Revolutionary zeal combines with theological insight to create this vision. Something that Derrida argues is never too far from the core of Hegelianism or Marxism. Derrida claims that these obsessions are founded in a deep concern over the status of the decision. Here, once again, the distinctions drawn are his point of departure

All undecidability...is situated, blocked in, accumulated on the side of *droit*, of mythological violence, that is to say the violence that founds and conserves *droit*. But on the other hand all decidability stands on the side of divine violence that destroys *le droit*, we could even venture to say deconstructs it. (Derrida 1992: 54)

Here the arch of theology coincides that of revolution. The law of God is in favour of the violence that destroys a conserving-conservative power. This conservative and founding violence is self-destructive because it breeds counter-violences that it must engage with in *polemos*. This decidability, however, is “a decision not accessible to man” (Derrida, 1992: 55). Here we come to the conundrum or paradox at the heart of a revolutionary logic that relies on a reformed negative theology. As Derrida rightfully points out, this decision is inaccessible and therefore beyond the pale of human knowledge

It is never known in itself, “as such”, but only in its “effects” and its effects are “incomparable”, they do not lend themselves to any conceptual generalization. There is

no certainty or determinant knowledge except in the realm of mythic violence, that is, of *droit*, that is, of the undecidable we have been talking about. (Derrida 1992: 56)

Derrida's point is that the dichotomies laid out by revolutionary thought or theological speculation do not offer viable solutions. The decision cannot lie only on one side of the difference because the undecidable inhabits the majority of the space between these two types. In other words, we can only recognize and understand divine violence through our negative work in deconstructing mythic violence. And most importantly, we can only understand the practical tasks of law through the certainty provided for by our various mythologies. Vico clearly sees the nature of this problematic because he analyzes the certainty created by law. His theology begins from *human's fallenness* and the artifice of coercive law is meant to return us to our spiritual source. Vico's providential-eschatology sees this as the vindication of violence and authority through human striving; there is no pure violence but only the concrete struggle of epochs. In the end, it is the spirit that drives humans to convert and overcome violence with the means available. Instead of overturning all means for the sake of unknowable end(s), we must convert the symbolic implications brought out by history's varied means and convert them towards providential ends.

This is part of a process that we will describe as a *second-order observational reduction of violence*. This is self-observation that begins with myth, language, and representation and ends, as we will show, with conceptuality. The *nexus* was originally a physical constraint used on the neck of the slave or client; it was eventually replaced with a "fictional knot" (2000:92). Likewise, many other legal forms developed out of these fictions created through the aid of language and representation. Of the legal tradition of *usucapion*, Vico says

The *usucapion* no longer required the constant physical adhesion and the possession that was obtained, at the beginning, with a true physical act but was, thereafter, preserved only by the spirit's intention...the obligation no longer needed chains for the body but imposed a certain ligament consisting in a formula of words (*certo verborum ligamine*). (2000: 92)

These are all examples of how second-order observation or systems, like the law, observing themselves, can lead to linguistic devices that replace physical acts. Many of these acts were initially the violent and aggressive acts of a strongman. With the intercession of words, however, law is *spiritualized*; it is, in other words, brought to the brink of conceptuality both as a salvation and as a condemnation.

The Autonomy of Law and the Emergence of Legal Conceptuality

My purpose in this last section is to analyze how this process of second-order observation creates the very context in which Vico's theory of law is to be understood. Niklas Luhmann has artfully described this process as the 'differentiation of the legal realm' and the development of autonomy. Luhmann draws out the implications of this process and links its conceptualization to the interpretive tasks of deconstruction. As in deconstruction the foundation of the analysis must begin with the assumption of the aporia: "all knowledge and all action has to be founded on paradoxes and not on principles; on the self-referential unity of the positive and the negative—that is, on an ontologically unquantifiable world" (Luhmann 1993: 770). The aporia or the im-passable is the "visible indicator of invisibility" because it hides the operations of its own creation (Luhmann 1993: 770). The autonomy of the legal system means that its own self-observations become integral parts of its reproduction

Autopoietic systems are the products of their own operations. They have properties such as dynamic stability and operational closure. They are not goal-oriented systems. They

maintain their autopoietic organization of self-reproduction as long as it is possible to do so. Their problem is to find operations that can be connected to the present state of the system...They use self-referential operations to refer to their present state to decide what to do next. (Luhmann 1993: 771)

Autopoiesis occurs through the differences that are continually drawn between system and environment. In other words, “the identity of law is not given by any stable ideal but exclusively by those operations that produce and reproduce a specific legal meaning” (Luhmann 2004: 78). Law is bound in and through its distinctions. Yet these distinctions must be made operative and understandable by the legal system itself; one cannot impose extra-legal categories to understand the social function of law because all outside references must be put into a language that is juridically coordinated. Law stabilizes normative and cognitive expectations while employing the *code* of legal/illegal (Luhmann 2004: 147). As a result, we can no longer meaningfully speak of the facticity or validity of law and can only rely on the reference to a legal system. Therefore, we cannot begin with an ideal sense of law since this would take us beyond the appropriate context of the system; the law must, in turn, be grasped as a process that engenders the “certainty of expectations” (Luhmann 2004: 148). This means that the law, in its function, will be observed as a system that “makes it possible to know which expectations will meet with social approval and which not” (Luhmann 2004: 148). The law is practically and conceptually actualized through its code and its various programmes. The code, as I mentioned earlier, is a simple reduction of complexity that can pose all questions in the binarism of legal/illegal. Decisions can only be vindicated in this way since, as I have pointed out, there is no extra-legal reference for legal decidability. This coding is not self-sufficient, according to Luhmann who uses a self-consciously Derridean phrase, because it is always in need of further *supplements*. This occurs because: “there must be further points of view which indicate whether or not and how the values of the code are to be allocated *rightly* or *wrongly*. We shall call these additional semantic elements (in law and in other coded systems) *programmes*. Programmes allow for critical discussion and, therefore, contribute to the increase of second-order observation. This distinction is intra-systemic and “the autopoietic self-determination of the system comes about only because of the *difference* between coding and programming” (Luhmann 2004: 193). The programme essentially reduces the severity of the either/or found in the code and makes possible elaborate forms of self-referentiality. But what is a programme? First, Luhmann argues, programmes found in the legal system are always *conditional* which “provide reasons for the generation of difference (an amplification of deviation) on the condition that the effects produced can be secured through the differentiation of corresponding systems” (Luhmann 2004: 197). The conditional programme spells out the conditions on which it depends, “whether something is legal or illegal.” It is, most succinctly, a way for dealing with legal justification with an eye to the future; *modo futuri exacti*. Juristic decisions, for example, are made “exclusively on the basis of what they see as the future at the moment of their decision, that is, on the basis of what appears to them...to be the present future” (Luhmann 2004: 200). The conditional programme is, therefore, not bound to the strictures of tradition in an overly rigid way because the conditionality of its existence means that it changes when both judge and case are at hand. Hard cases that raise the uncertainty of legal formulation must rely on conditional programmes because they have an eye to future expectations. Contingency, in a related sense, must also be dealt with by the system. Here, for example, Luhmann can describe justice not as a transcendent value beyond the legal system but as a *formula for contingency* that must visibly speak of values while invisibly covering over this very contingency. The law cannot, however, except justice as a natural condition of possibility but must find ways to operationalize it within a system context

Justice as a formula for contingency in its most general form has traditionally, and still today, been identified with *equality*. Equality is seen as a general, formal element, which

contains all concepts of justice but which means only something akin to regularity or consistency. Equality is seen, and this applies to all formulae for contingency, as a 'principle' which legitimizes itself...The formula for contingency is a scheme for the search for reasons or values, which can become legally valid only in the form of programmes. Every answer to whatever issue is addressed would then have to be found in the legal system by mobilizing its recursivity. (Luhmann 2004: 217-18)

The legal system progressively engenders its own forms of self-critique and value. Justice is an unknowable point of view but equality can find certain formulae within the legal system. As a result, *some justice* resides within the legal system through its own recursive values. These values are, at first, justified through extra-legal reference to nature or God, as I showed in my analysis of Derrida, something which, in truth, can never be metaphysically surpassed. However, they eventually come to reside in internal legal norms referred to as *eigenvalues*. Luhmann describes the function of these eigenvalues as "recursively stabilized functional mechanisms, which remain stable even when their genesis and their mode of functioning have been revealed" (Luhmann 1996: 1). We will argue that these *eigenvalues* as self-referential and interior forms legal value can be read into Vico's theory of law. In fact, there is a stark similarity between Luhmann's assumptions about how a system such as the law develops autonomy and comes to found formulae for contingency and Vico's analysis of the movement from *certum* to *verum*. In sum, it means that legal systems develop self-observational values that are often described as 'principles' but that have difficulty escaping their own contingency. This is the paradox of ascertaining the meaning and standing of different legal moral-principles as they operate within the system.

We have described the nature of Luhmann's systems theory and its relation to law to elucidate the *structure of legal communication*. Communication, as we mentioned earlier, is a reflexive activity and form of knowledge production in which the point of reference has become internal. By exploring the implications of systems theory as well as Derrida's deconstruction, we have been able to emphasize this growing self-referentiality. Vico's theory of law is able to make significant and positive contributions towards a *reflexive theory of law* because of its ability to fold its own manifestations back on itself and to proceed historically. In sum, Vico, in my interpretation, moves from a sense of law that is bound to a cosmic order as a self-evident reality of force and nature to a self-observation of *law as law*. Law in its functions and meanings is linked to a self-observation, at the system level, of its own groundings. That is why I have emphasized the aporias of foundation and violence at the heart of the historicity of law. These self-referential questions and inquiries are by a prolonged and divergent tradition of judicial review. Roman jurisprudence, as it is developed through the *Edictum Perpetuum* and juristic elaboration, becomes a fully articulated *legal metaphysics* on which is based a series of structural and communicative linkages. *Aequitas* and *iustitia*; *auctoritas* and *libertas*; formal procedure and practical context; all become, in Luhmann's terms, *eigenvalues*. Vico, in the opinion of this study, is the first to conceive and lay out the consequences of a history of law based on differentiation; of its own second-order observation; and, as a result, of its own possibilities for deconstruction. These *eigenvalues* are not eternal verities for Vico but historical conquests of a legal metaphysics. As such, this metaphysics does not hold onto a truth that is necessary according to ideal premises but that speaks of the implications of the historical development of law. It draws out the consequences of the paradoxes that law must live with. This is the key to my argument and the source for the general relevance of Vico's unique understanding of legal institutions. He emerges from this analysis not as an antiquarian oddity but as an insightful commentator on the recursive nature of law; something that, as I have shown, is an extremely relevant question to modern legal theory.

The final piece of the puzzle comes in understanding how this second-order observation is constructed from within the history of law. What are its dynamics? Are there clear indicators of its features? In general Vico's work operates with a constant self-referentiality but we can examine the specifics of legal development through the key terms of *certum* and *verum*. *Certum* must be

understood as what is ‘made in law’. In modern terms, one could draw connections with the *positive theory of law*. It is expressed as a “conscience secure from doubting”; in other words, it makes reality through the human mind (2000:11). The *certum* is unable to pierce the true nature of reality and therefore must rely on such things as probability or versimilarity. One can observe connections to the mythico-poetic foundations that I spoke of earlier. However, the *certum* is not fanciful; it constructs real human relations. These relations, as well as the knowledge that emerges as a result, become ossified through repetition and become what many might call *custom* or *tradition*. Law based on custom operates on the basis of the *certum*; things are made certain, dependable or predictable. Here both our senses and the massed opinion of others culminate to create legal tradition (2000:11). This tradition is not an arbitrary collection of maxims and rules imposed from a distant elite but something that ties into the context of people’s lives through the art of persuasion. The contingency of this legal development is emphasized by Vico as one side of the relation between *certum* and *verum*. The *certum* is grounded in authority. The ‘correctness’ of traditional interpretation is what is being emphasized here. Correctness emerges not from a firm grasp of ultimate reality but from the expulsion of doubt in quasi-Cartesian move. Authority is the expulsion of doubt because it expunges questioning and takes for granted certain social verities. In other words, legal communication is recursively structured in and through the order that abides in a particular society. As I showed through the mythic origins of law, this means that law begins through an act of persuasive contingency that becomes authoritative through the recursive construction of structures that are veiled. In other words, law is socially self-created but does not appear so. Religion, myth, and poetry cover over this illusion of legal certainty yet Vico is able to show us its roots. One can clearly see this Vichian interpretation at work when he discusses the origin and significance of legal formulae:

When the Optimates became the best only by name without the reality of the thing, then the civil order succeeded to the natural order and the *verum* succeeded the *certum* that is the conformation to the order not of things but of words, from which the conscience safe from publicly doubting proceeds (*conscientia publice dubitandi secura*). (2000: 125)

And so, legal history develops along the lines of the self-production of legal certainty. Nature and civil order come together in a self-creation initiated by language. Formulae contain words and gestures of archaic origin but they are also very succinct in expressing mimetic forms of violence and rendering social cohesion more likely. The *certum*, in sum, is the very constitution of the civil (2000:125). As a result, one can read the poems of Homer and Virgil as legal texts and draw a line from there to the beginnings of pragmatic forms of law. The *certum* binds the law to its extra-legal origins through the continuity of authority; mythico-poetic traditions spill into the *serious poem of the law* through the desire to reduce doubt about the cosmic-existential.

On the other side of the Vichian dichotomy stands the *verum*. However, as soon as one examines the contexts of use for this word one notices the tenacious deconstruction of the whole idea of standing, irredeemable binaries. Vico rarely mentions one side of the binary without immediately bringing in its relation to the other side; one presupposes the other; and one side cannot be understood without the context of the other. I believe this nascent deconstructive logic is particularly apparent when Vico discusses the *verum*. The *verum* is most simply defined as the “proper and perpetual attribute of necessary right” (2000:63). It has a sense of constancy that is always somehow present within the body of law. The *verum* is not something that can be grasped outside the context of a culture that is able to *abstract* ideas out of history; *reason*, for Vico, enters history as the ability to observe the self-production of law and society. As a result of *reflexive reflection*, brought about largely through the emergence of philosophy and its growing influence on jurisprudence, Vico is able to identify reason within the process of legal formation. This reflexive reflection is what allows us, according to Vico, to step out of the taken-for-granted assumptions of tradition and dominant opinion by *making the invisible visible*. This self-observational premise

and, I would say, the formula through which one can grasp Vico's theory of law is expressed through the simple dictum of *Certum est pars veri*—the certain is part of the truth (2000: 62). Here the intertwining of binaries gives life and movement to the law. Instead of conceiving these binaries as self-sufficient they repeatedly bleed into each other; they never remain completely isolated on their own side of the breach. In Chapter 83 of *Universal Right* entitled 'The Certain is From Authority, the True from Reason' Vico says: "the *certum*, the certain, is from authority, as *verum*, the true, is from reason, and that authority cannot completely oppose reason because otherwise there would be no laws, but monsters of law (*monstra legume*)" (2000: 62). Authority is, therefore, *pars rationis*, part of reason. All of these ideas culminate in the self-observational notion that the Roman law, as Vico's case in point, is imbued with notions that work from both sides, as well as in-between, these two bedrocks of interpretation. How does this occur? Vico answers this question by tying the *certum* and the *verum* to the actions, thoughts, and interests of particular groups: "Those who hold fast on *certum*, the certain of the laws, are the pragmatics of law, whilst those who hold fast on *verum*, the true of the laws, are philosophers of the law" (2000: 64). However, Vico is not comfortable with a hard and fast distinction here either because if one examines legal history one sees the intertwining of philosophical and pragmatic perspectives. One can see it in the seemingly philosophical influences of Stoicism and the Academy on the Roman jurists. Concepts such as *aequitas* invoke abstract forms of universalism brought to fruition not through an imposition of philosophy on legal training but through a self-constructed movement towards greater conceptual universality. Therefore, one can look at the history of Roman law and see the *verum* of *aequitas*, as a properly philosophical concept, at work in the long time of the *certum*. Further, one can see the influence of legal ideas all the way from the earliest notions of *dike* in pre-Socratic philosophy to the centrality of law in Plato, Aristotle, and others. All philosophers seem to have been taken with the idea that a society must rely on the *rule of law* to create harmony. Legal metaphors were also widely used to talk of the governance of the soul and self-mastery. Vico, in the end, is able to mediate im-passable paradoxes not by eliminating or resolving but by involving them in inescapable co-implication. All of this is a result of growing second-order observation being, in itself, observed.

In conclusion, the question will be asked: 'Does such a typology of law, in all its paradoxicality, produce the contours of an ethical account of law?' If one is looking for a clear and demarcated ethical delineation of law's meaning, one will come up, once again, against the walls of self-referential paradox that ties divergent values together

All the virtues are one virtue, and each one of the three is always together with the other two; the two-fold particular justice, directing and equalizing, is one universal justice, and each of them is always accompanied by the other two; virtue and justice are one, one is the power of truth, and one is the human reason; thus, dominion, liberty, and tutelage, so far as they are conforming with upright reason, are invested with this same character of divine origin. (2000: 65)

The values embodied in law are self-producing paradoxes of indexicality; they each refer to the one another and from a collection of interest and accommodation that binds dominion, liberty, and tutelage into a hermeneutic circle

All three from a unity, and each one of them is always connected with the other two: in the dominion, liberty and tutelage are contained; in the liberty, dominion and tutelage; in tutelage, dominion and liberty. Therefore, the person who is the owner, is also the moderator and the arbiter of its own property; this person may, whenever wishing, protect its property against injury and violence. The human being who is free, is owner of at least its own freedom and, by right, may defend it from violence and injury, whenever so wishing. The human being who, by right, defends its possessions and "way of being", should be free and master (*Qui rem iure tuetur, liber et dominus sit oportet*). (2000:65)

The power of defense and the will to carry it through are co-implicated with the freedom and right to do so. Natural freedom is of the type described above and is bound to solitary forms of strength that make a space for human habitation. Civil freedom is made, via reason, the self-observational grasping of this verity and culminates in the idea of *aequitas*. In sum, by following the history of authority, as made by the *certum*, I will illuminate the work of freedom as it comes to fruition in certain *eigenvalues*. In order to do so, I will focus on the self-productive as well as self-observational capacities of the law to produce values that show their own creation. Freedom, as one of my major examples, can only be grasped as a reflexive self-mastery and attunement to power. This revelation does not, however, reduce the internal veracity of these values because it consistently argues that they can only be understood within the autonomy of a developing legal system. The understanding of the legal system can only be revealed through continuous and recursive analyses of the way communication occurs. Communication is the avenue through which paradoxicality is tamed and used for constructive purposes. In order to grasp the essence of this idea of communication one must rigorously examine the self-mastery of complexity and contingency. To place Vico within the context of this understanding of law is to do justice to his brilliant and provocative insights. Further, I believe that his manner and method can bring new insight to the aporias of contemporary legal debate which has not adequately encountered the issue of self-referentiality and historical development.

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