

A large, light-colored, stylized signature of the name 'Erasmus' in a cursive script, positioned above the main title.

Erasmus Student Journal of Philosophy

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Editorial

It is good to see that the Erasmus Student Journal of Philosophy becomes increasingly integrated in our faculty. Some professors now use the papers we publish during their courses, many professors mention the journal during their lectures, and our website gets visited more and more frequently. The number of high quality nominations for this eighth issue of the ESJP was again substantial. Also, there were quite a few submissions from areas of philosophy that were not represented in the journal yet. I am glad that we publish work that is part of (or draws extensively on) the Marxist tradition for the first time – two papers no less. This issue also features a paper in legal philosophy, which explores Derrida's famous and unabatedly timely essay *Force de loi: Le 'fondement mystique de l'autorité'* (Force of law: The 'mystical foundation of authority'). Finally, there is a paper in political philosophy that inquires into the asymmetric treatment of desert in theories of distributive and retributive justice. I encourage students to keep on producing such excellent work and professors to nominate it for inclusion in the journal.

Unfortunately for the ESJP, its editors graduate. This has been the last time that the journal benefited from the work of Elina Vessonon and Roel Visser. I found it a pleasure to work with them and am convinced that many authors have learned a great deal from their detailed and sharp commentary. This is also my last issue. It was an honor for me to lead such a talented team of editors over the past year. I would like to extend a sizable 'thank you' to all those who keep on making the ESJP possible. The professors who nominate papers and BA theses, the PhD students and professors who write excellent reviews for us, the editors of the journal who work relentlessly to provide our authors with helpful commentary, the members of the journal's advisory and supervisory board who were always available for giving advice, as well as all the people who help in promoting the journal online and offline.

While some editors go, others come. This issue saw the addition of Willem-Rutger van Dijk and Rui Francisco de Souza Só Maia as guest editors.

I am impressed by their work so far and am confident that the journal will continue to thrive on their editorial endeavors during the next academic year. Dennis Prooi will return as editor-in-chief. One could say that I simply kept his seat warm throughout his one-year exchange at Osaka University. Dennis has proven to be a dedicated, enthusiastic, and hard-working chief editor during the sixth issue. I am sure that he will make the most out of the new developments at our faculty that will have implications for the ESJP next year, which include the start of a Double Degree BA program in English and further internationalization.

I would like to thank a few people in particular. First of all, I am grateful to Dr. Constanze Binder, Prof. Dr. Heleen Pott, Dr. Paul Schuurman, and Prof. Dr. Maureen Sie for their willingness to be part of the jury for the Pierre Bayle Trophy this year. Congratulations to David van Putten for winning the trophy, a well-deserved honor. The jury report can be found on page five of this issue. I would also like to thank Dirk-Jan Laan, former adjunct editor-in-chief of *Twijfel*, for putting an end to the confusion among students and professors about the existence of two Pierre Bayle Trophies at our faculty. The ESJP will keep on awarding the Pierre Bayle Trophy, *Twijfel* will from now on award the Montaigne Mok. Finally, I would like to thank Elina Vessonon, Julien Kloeg, Roel Visser, Stefan Schwarz, and Thijs Heijmeskamp, with whom I discussed many of the major decisions that needed to be taken during the past year.

Huub Brouwer
Editor-in-chief

About the Erasmus Student Journal of Philosophy

The Erasmus Student Journal of Philosophy (ESJP) is a double-blind peer-reviewed student journal that publishes the best philosophical papers written by students from the Faculty of Philosophy, Erasmus University Rotterdam. Its aims are to further enrich the philosophical environment in which philosophy students in Rotterdam develop their thinking and bring their best work to the attention of a wider intellectual audience. A new issue of the ESJP appears on our website every July and December.

To ensure the highest possible quality, the ESJP only accepts papers that (a) have been written for a course that is part of the Faculty of Philosophy's curriculum and (b) nominated for publication in the ESJP by the teacher of that course. Each paper that is published in the ESJP is subjected to a double-blind peer review process in which at least one other teacher and two student editors act as referees.

The ESJP encourages students to keep in mind the possibility of publishing their course papers in our journal, and to write papers that appeal to a wider intellectual audience.

More information about the ESJP can be found on our website:

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Although the editors of the Erasmus Student Journal of Philosophy have taken the utmost care in reviewing the papers in this issue, we cannot exclude the possibility that they contain inaccuracies or violate the proper use of academic referencing or copyright in general. The responsibility for these matters therefore remains with the authors of these papers and third parties that choose to make use of them entirely. In no event can the editorial board of the Erasmus Student Journal of Philosophy or the Faculty of Philosophy of the Erasmus University Rotterdam be held accountable for the contents of these papers.

In this issue

In ‘The late Wittgenstein and Marxian Thought’, Sina Talachian explores the dialectic between Marxian thought and Wittgenstein’s later philosophy, which can be typified by attractions and (vehement) rejections. He argues that the former of the two responses is the more valid one, because of the ontological and epistemological commitments that both strands of thought share.

In ‘Rechtvaardigheid: ook iets voor de jurist?’, Jochem Streefkerk observes that the question ‘when is law just?’ receives little attention both among legal scholars and in the training of jurists. He explores the issue of the justice of law using Jacques Derrida’s essay *Force de loi: Le fondement mystique de l’autorité* (Force of law: The ‘mystical foundation of authority’), interlacing his discussion with examples from Dutch legal practice and theory.

In ‘Socialist Principles of Appropriative Justice: A Reply to Husami’, Victor van der Weerden criticizes the principle of appropriative justice proposed by Ziyad Husami. Moreover, he claims that for a principle of appropriative justice to be faithful to Marx’s philosophical worldview, it should be grounded in the Hegelian theory of self-actualization rather than a Kantian theory of rights or a capability account of human flourishing.

In ‘What Does Desert Cost?’, Huub Brouwer asks why it is that desert is a much more central notion in theories of retributive justice than in theories of distributive justice. Separating the two spheres of justice is, after all, to some extent artificial. He critically discusses Moriarty’s consequentialist rationale for the asymmetric treatment of desert by political philosophers, and argues that it fails.

Jury report Pierre Bayle Trophy 2015

As good philosophers let us start with a question, a grumpy one: what is the value of a student journal and why hand out a price for the best paper in the journal? When the ESJP started out, not all of us welcomed it. First of all, the journal adds to the enormous existing working load. Secondly, the whole circus of submitting, refereeing, being refereed, being rejected, is not something one wants to get acquainted with, let alone too early. Why on earth do students start student conferences, student journals, student essay prizes? Why in heaven's sake imitate that part of the academic circus? Hang around in bars, discuss philosophy, under the influence, in love, but at the very least confused!

In any case, whatever the reason, we must admit it does pay off. We were impressed by the high quality of the articles that we read and had the privilege to discuss with one another. We were also impressed by the spectrum of topics tackled, the resourceful use of the philosophical tradition and the diversity of methods our student apparently master: we read about the morality of markets, ways to determine whether a philosopher stands in a certain tradition, ratification principles to patch up problems with rational choice theory, using Plessner to overcome a deadlock in our thinking about human rights, Aristotle, Nietzsche, Rawls, Wittgenstein, Heidegger, to name but a few. On top we believe that several of the papers we read would be suited for acceptance in a regular journal.

Hence, the ESJP has proven its worth. This very worth considerably burdened our task of determining this year's winner. As you might have guessed from the above remarks, the papers did not really compare well – or better put, not at all. Fortunately, there was one paper that ended on the first place with almost, and in the top two, of all of us. All agreed that this paper was excellently written, in a clear, adequate, and inspiring manner. It starts out with a puzzle: Deleuze was clearly influenced by Heidegger in the themes he addresses and the way he addresses them, but never wrote elaborately on Heidegger. Why is that? It subsequently convinces the reader why she or he

should feel the urgency of this puzzle. It cites enigmatic comments of Deleuze on the question of his relation to Heidegger and proposes how we might find an answer on the basis of these quotes: let us read Deleuze's *Différence et répétition* (Difference and repetition) as a detective. After a considered discussion of the importance of his topic, the author, David van Putten, explains step by step what it is Deleuze wants to do by taking us back to Aristotelian metaphysics and Heidegger's response to it, by explaining how he positions himself in relation to Duns Scotus, Spinoza, Nietzsche, to finally arrive at the crime scene equipped with the insights to answer why Deleuze never wrote extensively about Heidegger. As Van Putten has explained by then, Deleuze clearly builds on Heidegger's work, using his concepts, but he also wants to rise above it, hence, and we conclude with this conclusion of the paper:

Misschien speelt bij Deleuzes zwijgen over Heidegger dezelfde overweging een rol die hem deed zeggen dat we Hegel 'moeten vergeten' en ervoor zorgde dat hij in het ABC-interview weigert te spreken over Wittgenstein. Deze filosofen hebben met elkaar gemeen dat ze pessimistisch zijn over de filosofie en over haar mogelijkheden. De filosofie is uitgeblust geraakt. Dit is juist wat Deleuze als een symptoom van nihilisme verstaat. Het is dus zaak het denken opnieuw op te gang te brengen, met een voortdurend voortbewegend vragen in verschillende contexten. Oftewel: denken zonder oorsprong en zonder bestemming. (2014, p. 17)

We congratulate Van Putten with his excellent, daring, ambitious, careful and inspiring essay, and the ESJP with bringing together these excellent papers in a journal worth reading. With Deleuze we say, philosophy is not dead, cheers to thinking without its origin and with no aim, be it in journals or in bars.

Constanze Binder, Heleen Pott, Paul Schuurman, and Maureen Sie

Jury of the Pierre Bayle Trophy 2015

Table of contents

The Late Wittgenstein and Marxian Thought <i>An analysis and defense of Marxian attractions to and uses of Wittgensteins later work</i> Sina Talachian	7-21	<u>6</u>
Rechtvaardigheid: ook iets voor de jurist? Jochem Streefkerk	22-31	
Socialist Principles of Appropriative Justice <i>A reply to Husami</i> Victor van der Weerden	32-39	
What Does Desert Cost? <i>Evaluating Moriarty's rationale for the asymmetry of desert</i> Huub Brouwer	40-48	

The Late Wittgenstein and Marxian Thought

An analysis and defense of Marxian attractions to and uses of Wittgenstein's later work

Sina Talachian

Austin's contemptuous treatment of the alternatives to the common usage of words, and his defamation of what we 'think up in our armchairs of an afternoon'; Wittgenstein's assurance that philosophy 'leaves everything as it is' – such statements exhibit, to my mind, academic sado-masochism, self-humiliation, and self-denunciation of the intellectual whose labor does not issue in scientific, technical or like achievements.

Herbert Marcuse (2007, pp. 177-178)

Wittgenstein is probably the philosopher who has helped me most at moments of difficulty. He's a kind of saviour for times of great intellectual distress – as when you have to question such evident things as 'obeying a rule'. Or when you have to describe such simple (and, by the same token, practically ineffable) things as putting a practice into practice.

Pierre Bourdieu (1990a, p. 9)

Introduction

Wittgenstein's move from the rigid and restrictive model of language in the *Tractatus logico-philosophicus* (1922) to its dismantling in the *Philosophische untersuchungen* (PU, 1953) was in large part precipitated by lengthy discussions with the Marxian thinker Piero Sraffa, who in turn was profoundly influenced by his close friend and Marxist theoretician Antonio Gramsci.¹ Amartya Sen and others therefore argue that Wittgenstein's late philosophy owed much to Marxian thought, and it is not difficult to identify substantial commonalities between the two (Sen, 2003, pp. 1240-1242).² Yet they also differ in many respects, particularly when it comes

to the import of political and social theory in Marxian thought and its near complete absence in Wittgenstein's work, as well as the obverse lack of attention in Marxian theory to classical philosophical questions and language – around which Wittgenstein's work revolves (Lecerle, 2006, pp. 12-13). These points of contact on the one hand and divergence on the other also come to the fore in the reception history of Wittgenstein's work among Marxian thinkers. Beginning with rejection and harsh criticism as being merely another form of 'bourgeois philosophy' harboring politically and socially conservative ideals (Marcuse, 2007, p. 179), Wittgenstein became appreciated by a new generation of Marxian thinkers who were profoundly attracted to his later philosophy, drawing on various aspects of it in the development of their own thought (Kitching, 2002, p. 17).

All this shows there is an interesting dialectic between Wittgenstein's work and Marxian thought worth exploring in greater detail. For what is the deeper philosophical background that lies behind the shift from rejection to acceptance, and what implications does this have for the varying attitudes Marxian thinkers have taken up in relation to Wittgenstein's work? I aim to provide a novel answer to this question by uncovering the underlying commonalities between Wittgenstein's late thought and that of the new generation of Marxian thinkers who embraced it, focusing on their respective ontological and epistemological commitments, while also putting forth the case that the attractions as opposed to the repulsions are the legitimate response.

In the first section I will analyze the initial critical responses to Wittgenstein by Marxists, arguing that they provide an inadequate appraisal of Wittgenstein's work and that their critique of it is therefore misguided. In the second section I will move to uncovering the motiva-

tions behind the attraction to and positive uses of Wittgenstein's later work by a diverse range of Marxian thinkers, from Left-Heideggerians steeped in the continental tradition of philosophy to those trained in the analytical tradition. This will be done not by examining surface commonalities between various aspects of Marxist theory or Marx's own work and Wittgenstein's thought, as is the case in most current positive assessments of the relationship between the two, but rather by focusing on the deep, underlying structures these favorable sentiments are based on, for only that will provide an adequate account of why an otherwise diverse range of conflicting Marxian thinkers share this common appreciation of Wittgenstein's later thought (Pleasants, 2002, pp. 160-161). I will uncover these underlying commonalities by making use of the concept of language ideology to reveal their nature in Wittgenstein's later philosophy of language, and then showing how they coincide with the underlying commitments of the various Marxian thinkers who developed an appreciation for his later thought (Silverstein, 1979, p. 193). Finally, in the third section it will be shown that it is not by chance that these shared commitments exist given their origins in Wittgenstein's move to his later philosophy in which his contact with Sraffa was instrumental. My aim is not only to adequately explain why otherwise conflicting Marxian thinkers have been attracted to Wittgenstein's later thought and have used it in their own fields of study, but also to show that these positive sentiments are legitimate given their shared underlying commitments. By demonstrating this, I hope to encourage further and more extensive use of Wittgenstein's work by thinkers working in the Marxian tradition.

§1 Rejection and critique

Marxian responses to Wittgenstein's work have been varied, ranging from positive assessments to the outright rejection of it as representing merely another form of reactionary bourgeois ideology. It should be noted, however, that by and large the Marxist tradition has simply ignored Wittgenstein's work, as well as philosophy of language more generally. My analysis concerns solely those who *have* responded to it in various ways (Vinten, 2013, p. 9). In this section I will explicate and assess what the Marxian critique of Wittgenstein consists of. The rejection and critique

of Wittgenstein was most prominently formulated by Herbert Marcuse and Theodor Adorno, who saw in his work an attempt to, in Wittgenstein's (1953/2009) own phrasing, "leave everything as it is" (p. 55) and thereby close off the political space to radical alternatives formulated by critical philosophers such as themselves. In his seminal *One-dimensional man* Marcuse devotes an entire chapter to critiquing Wittgenstein's work, which he sees as representing one-dimensional (i.e. conformist and conservative) thought in the sphere of philosophy in late capitalist society:

Paying respect to the prevailing variety of meanings and usages, to the power and common sense of ordinary speech, while blocking (as extraneous material) analysis of what this speech says about the society that speaks it, linguistic philosophy [referring to J. L. Austin and Wittgenstein's work] suppresses once more what is continually suppressed in this universe of discourse and behavior. The authority of philosophy gives its blessing to the forces which *make* this universe. Linguistic analysis abstracts from what ordinary language reveals in speaking as it does—the mutilation of man and nature. (Marcuse, 2007, p. 179)

Concomitant to this, argues Marcuse, is a lacking critical dimension in Wittgenstein's thought, which particularly in the sphere of political discourse leads him to ignore the conflict-ridden history that lies behind what is now considered the legitimate meaning of words: "Multi-dimensional language is made into one-dimensional language, in which different and conflicting meanings no longer interpenetrate but are kept apart; the explosive historical dimension of meaning is silenced" (p. 202). For example, the term 'freedom' in late capitalist society can only be used legitimately in the political sphere to denote individualistic, liberal notions of freedom such as those inscribed in the rights of property, whereas the whole point of a critical theory is to uncover the purposely suppressed history behind the production of such distorted meanings. By lacking this critical dimension, Wittgenstein's philosophy amounts to a justification of already existing distorted meanings, thereby closing off any possibility of creating novel meanings which stand in opposition to them, which is unacceptable from the standpoint of a Marxian critical theory unsatisfied with the state of the world as it is (pp. 184-186).

Adorno takes issue with Wittgenstein on similar grounds, believing also that his later philosophy was characterized by the fetishizing of ‘ordinary language’, and taking particular offense at his comments in the *Tractatus* that “*die Welt ist alles was der Fall ist*” (The world is all that is the case) (p. 25) and “*wovon man nicht sprechen kann, darüber muss man schweigen*” (whereof one cannot speak, thereof one must be silent) (p. 90). For Adorno it is exactly the extralinguistic, unutterable aspect of being in late capitalism that the philosopher must focus on and explicate so as to enable one to break free from the inhuman oppression that overwhelms us, though he remained notoriously pessimistic about the possibility of doing so successfully (2002, p. 369). In his lecture notes to *Negative Dialectics* (2008) he comments that “[p]hilosophy faces the task of breaking out *despite everything*; without a minimum of confidence in doing so, it can’t be done. Philosophy must say what cannot be said. Against Wittgenstein” (p. 66; italics his). The Marxist thinker Perry Anderson has argued similarly that the intention of Wittgenstein’s philosophy, both the early and the later, “was simply to consecrate the banalities of everyday language” (1968, p. 21), making it the primary task of the philosopher to “ensure the identity and stability of the system, by preventing unorthodox moves within it” (p. 22). Any serious Marxist should know what this means as to the status of such a philosophy: “The social meaning of such a doctrine is obvious enough. Gramsci once wrote that common sense is the practical wisdom of the ruling class. The cult of common sense accurately indicates the role of linguistic philosophy in England” (p. 22). Anderson then goes on to criticize Wittgenstein for being an upper class philistine always loyal to religious and political authority, who barely had any knowledge of the history of philosophy and was compelled by a messianic vision induced by his odd religiosity and mysticism to produce the kind of reactionary bourgeois philosophy he did (pp. 22-25).

The problem with these critical accounts is that they are wholly inadequate in their interpretation of Wittgenstein. For one, they rely on statements taken out of their context, from arguments related to an issue in the realm of the philosophy of language to the realm of political and social theory. This is clearly so with respect to the often repeated “leave everything as it is” statement, which Marcuse and Anderson mention as a primary exemplification of Wittgenstein’s conservatism. It is drawn from §124 of the *PU*. In context, the statement reads as follows: “Philosophy must not

interfere in any way with the actual use of language, so it can in the end only describe it. For it cannot justify it either. It leaves everything as it is” (p. 55). Stanley Cavell and D. Z. Phillips have pointed out that “leaves everything as it is” only refers to the activity of the philosopher in relation to the use of language in a strictly philosophical sense, which Wittgenstein understood as being restricted to the philosophy of language, not a practical, social or political one (Uschanov, 2002, pp. 38-39). In other words, there is nothing that precludes the philosopher from attempting to change *society* as a political and social activist or theorist, as in the cases of Marcuse and Anderson themselves, and thereby effecting a change in the use of language. But when they are doing so they are no longer engaged in *philosophical* activity in the sense Wittgenstein was referring to with the “leaves everything as it is” comment, which as Hans-Johann Glock notes was solely meant to make clear that “(...) it is not philosophy’s business to bring about such reform by introducing an ideal language” (1996, p. 296-297). This leaves out of consideration areas of philosophy like political and social philosophy which generally *are* aimed at effecting change in society. That this is indeed the point Wittgenstein was making in §124 rather than attempting to legitimize existing power structures is further exemplified by the comment that philosophy can also not justify the actual use of language. All of this is conveniently left out in Marcuse’s and Anderson’s rendering of the statement.

This type of selective quoting from Wittgenstein is pervasive, not only in Marcuse’s and Anderson’s accounts but also in Ernest Gellner’s, who in many ways influenced their views concerning Wittgenstein. The line of critique that presents Wittgenstein as some kind of arch-conservative philosopher desperate to defend the powers that be can be traced back to Gellner’s scathing critique of the then dominant Wittgensteinian school of ‘ordinary language philosophy’ at Oxford in his *Words and things* (1959/2005), for which Bertrand Russell wrote a laudatory foreword commending the effort to save philosophy from the clutches of the late Wittgenstein who, as Russell notes elsewhere, sought to reduce it to “at best, a slight help to lexicographers, and at worst, an idle tea-table amusement” (2005, p. 217). Yet in the decades since its publication serious problems have been identified with the text by scholars well-versed in Wittgenstein’s thought. The work was not only full of the aforementioned out of context and tendentious

quoting, but also ignored important biographical information with respect to Wittgenstein's changing views, such as how they were influenced by his interactions with Sraffa.³ It also does not take into account any of Wittgenstein's writings aside from the *Tractatus* and *PU*, and seriously misreads Wittgenstein's concepts of language-games and forms of life as indicating support for radical relativism (Uschanov, 2002, pp. 33-34).

Despite the criticisms of his book, Gellner continued his attacks on Wittgensteinian thought along these lines, arguing in the posthumously published *Language and solitude* (1998) that the *PU* "positively outlaws the very idea of social criticism by making every culture sovereign, self-validating, ultimate" (p. 105). Anderson similarly attempts to make a connection between Wittgenstein and recent postmodernist thinkers on the same basis, referring to Wittgenstein's "incoherent" conception of "incommensurable language-games" (1998, p. 26). It is now commonplace among Wittgenstein scholars to dismiss such a reading of his work, especially in the light of the publication of Wittgenstein's other writings such as *On certainty*. As David G. Stern aptly notes in this respect:

Some readers have taken the practical turn in Wittgenstein's later work to amount to a form of linguistic relativism or idealism that makes the beliefs of a particular group or linguistic community immune to criticism, because they are part of the language-games that the community uses. But the agreement in what we call obeying a rule and going against it Wittgenstein appeals to here is not comparable to agreement over specific doctrines or views. The point of drawing our attention to the role of training and custom and other facts of our natural and social history is not to establish a positive theory of concept formation, but to emphasize what such theories overlook: that language depends on these facts being in place. (Stern, 1995, p. 127)

Marxists who continue to reject and criticize Wittgenstein's thought still do so on the same grounds as Marcuse, Adorno, Anderson and Gellner – often being only superficially acquainted with it via these critiques (Uschanov, 2002, pp. 24-25). The most serious shortcoming of these criticisms is however their overlooking of the significant underlying commonalities between Wittgenstein's later work and the basic assumptions of novel forms of Marxian thought as developed by a new generation of thinkers working in this

tradition. These commonalities explain the attractions of these thinkers to Wittgenstein's later philosophy. It is this underlying core of shared commitments that I will attempt to uncover in the following section.

§2 Family resemblances

The phase of outright rejection of Wittgenstein's work, as represented by the likes of Marcuse and Anderson, began to fade during the 1970s with the advent of the so-called 'linguistic turn' in the social sciences and the move away from structuralism to post-structuralism. This made Wittgenstein's philosophy palatable to a new generation of Marxian thinkers seeking to break free from the archaic modes of thinking induced by a classical Marxism that frequently resulted in crude reductionism and determinism through its fascination with and hyperfocus on structures and socio-economic conditions as the sole or primary explanans of all aspects of reality (Wolff & Resnick, 2006, pp. 11-12). This included the eschewing of the essentializing and foundationalist tendencies of these archaic forms of thought, criticized by the new generation of Marxian thinkers for "confus[ing] the things of logic for the logic of things" (Bourdieu, 2000a, p. 41).⁴ Instead, they focused on a non-foundationalist and non-essentializing conception of linguistic and other practices as being constitutive of reality in their works, and found an ally in the late Wittgenstein for the arguments they wished to advance. Michel Foucault, Pierre Bourdieu, Jacques Derrida and other thinkers belonging to this new generation rooted in the Marxian tradition of critical political and social theory therefore saw his later work in a new light, as offering tools and methods with which to analyze the (for them) newly discovered field of language as a distinct object of study as well as the possibility to apply these tools and methods to the realm of critical political and social analysis (Marchart, 2007, p. 110).⁵ Meanwhile, Marxian thinkers nurtured in the analytic tradition were by virtue of their political and philosophical background already predisposed to prefer Wittgenstein's position in the philosophy of language to others, hence the rise of a 'Marxist-Wittgensteinian' school of thought from the 1970s onward that was heavily dominated by analytical Marxists (Kitching, 2002, pp. 2-4).

The continental and analytical roads to Wittgenstein

There are two distinct paths varying types of Marxian thinkers have traversed to reach Wittgenstein – the continental and analytical – but they share the same motivation for having made the journey. Those taking the first route, like Foucault and Derrida, influenced by Heideggerian phenomenology interpreted from a critical, left-political perspective,⁶ were attracted to the late Wittgenstein for among other reasons his elastic ontological and epistemological commitments. These include the concept of multifarious uses of language in accordance with multifarious language-games and his conception of language as a public rather than a private phenomenon (the exact commonalities that motivated this attraction will be explicated below) (Dreyfus & Rabinow, 1983, pp. 49-50 & p. 57). As for the Marxian thinkers who came to Wittgenstein via the analytical tradition, they were already philosophically predisposed to doing so given the powerful influence he exerted on it. G. A. Cohen, one of the originators of analytical Marxism, exemplifies this attitude aptly in a footnote to his analysis of Marcuse's thought, commenting on his critique of Wittgenstein:

Let me declare an interest which inhibits me from entering an extended commentary on Marcuse's treatment of contemporary Anglo-American philosophy: I teach philosophy in a department which is, broadly speaking, of the 'analytical' persuasion, and I regard the philosophy inspired by the later Wittgenstein as very valuable. It would be unproductive to catalogue all the misperceptions revealed in Marcuse's treatment of the latter. (1969, p. 40)

What remains unexplained in current accounts of Marxian attractions to and uses of Wittgenstein's later work is why these two disparate schools of thought – which moreover differ significantly internally as well – happen to converge on this point. Foucault, Derrida, Cohen and Bourdieu, while all working in the Marxian tradition of critical social and political theory, disagree on many points, some quite fundamental, which is traceable to the analytic-continental divide. Cohen for example has famously referred to non-analytical conceptions of Marxism as constituting “bullshit” (2001, pp. 25-26). Yet both analytical and continental Marxian thinkers have been strongly attracted to Wittgenstein's later work. I believe only a

reference to their shared underlying ontological and epistemological commitments can provide a viable answer as to why this is the case. These shared commitments can best be described as a common opposition to foundational, Cartesian, mentalistic conceptions of reality, including in the sphere of language.

Language ideologies: Augustinian and naturalistic

In order to elucidate the exact nature of the underlying commonalities between the mentioned novel forms of Marxian thought and Wittgenstein's late philosophy, which constitutes the basis of the interactions between the two, it is useful to employ the concept of language ideologies as developed by the anthropologist and linguist Michael Silverstein. Silverstein defines language ideologies as “any sets of beliefs about language articulated by the users as a rationalization or justification of perceived language structure and use” (1979, p. 193). It is therefore not the superficial specificities of otherwise varying philosophies of language that is the focus of analysis, but rather the deeper ontological and epistemological commitments they entail; an analysis of language ideologies is therefore a *meta*-analysis of varying philosophies of language aimed at uncovering the deep structural commonalities with respect to their basic underlying philosophical commitments. Given its very broad nature particularly when extended over various philosophies of language in intellectual history (something Silverstein himself does not do, but thinkers such as Hans Aarsleff, Richard Bauman, and Charles L. Briggs do) – which it has to be by necessity in order to capture all the sometimes widely varying conceptions of language involved – the concept of a language ideology can best be seen as what Wittgenstein describes as a family resemblance concept. It meets the two requisite criteria, namely 1) the concept is *open*, meaning that new additions can be made to it, and 2) the concept is *vague* rather than sharply bounded, meaning that various overlapping terms fall under it so that the meaning of the family resemblance term itself can only be explained by providing exemplifications of paradigm cases of its use (Baker & Hacker, 2009, p. 91 & p. 239). In some cases, the terms that fall under the concept may be either sharply definable such as ‘integers’ or ‘real numbers’ in the family resemblance term ‘number’, or more vaguely as in

the case of ‘football’ and ‘tennis’ in the family resemblance term ‘game’ or ‘Augustine’s picture of language’ and ‘Locke’s philosophy of language’ in the case of language ideology (Baker & Hacker, 2004, pp. 146-147 & pp. 156-157). As mentioned, such a use of the concept is not without precedent. Aarsleff, Bauman, Briggs and others have similarly and extensively employed the concept, providing detailed overviews of how various philosophies of language relate to distinct language ideologies (Aarsleff, 2006; Bauman & Briggs, 2003). On the basis of their work it is possible to distinguish between two types of language ideologies in intellectual history, the explication of which will aid in better understanding why the aforementioned Marxian thinkers were attracted to this rather than that tradition in the philosophy of language by clarifying the conflicting underlying commitments involved.

First there is Cartesian mentalistic language ideology that perceives language as being innate, static and universal (hence *foundational*, based on Platonic essences), whether it takes on the form of universal grammar or logical forms. This language ideology with its underlying foundationalist ontological and epistemological commitments can be found in Augustine, Locke, Frege, Russell, the early Wittgenstein and Chomsky, and fits the late Wittgenstein’s description of what he termed the *Augustinian* picture of language, which will be explicated in more detail below (Hacker, 1996, pp. 105-106; Glock, 1996, p. 41). It is important to note again that language ideology is a family resemblance concept and therefore involves vagueness. So otherwise distinct philosophies of language like Russell’s and Locke’s – which are closer to the side of behaviorism – can still be regarded as belonging to the same category as Chomsky’s – which is much closer to the mentalist side – given that they both share the underlying epistemological and ontological commitments to foundationalism in their respective conceptions of language. *This* key area overlap defines the family resemblance concept of the Augustinian language ideology.

Then there is the late Wittgensteinian conception of language, which perceives language as being social, public (hence intersubjective) and non-foundational. This language ideology, with its underlying non-foundational ontological and epistemological commitments, also comes to the fore in the works of Condillac, Hamann and the Bakhtin Circle, and

can most aptly be described as the *naturalistic*⁷ conception of language.⁸ These language ideologies are diametrically opposed to each other with respect to their underlying commitments, and, as shall be shown in the case of the naturalistic language ideology, these coincide with the commitments of the aforementioned analytical and continental Marxian thinkers.

Why can Wittgenstein’s later work be classified as a naturalistic language ideology and precisely how is it distinct from the Augustinian one? As the prominent interpreter of Wittgenstein’s work Peter Hacker notes, one of the main thrusts of the *PU* is its opposition to foundationalism in the philosophy of language, expressed in a sustained critique of what was defined as the Augustinian language ideology and its underlying foundationalism as propagated by Russell, Frege and himself in the *Tractatus*. In opposition to this Wittgenstein develops a position that is firmly non-foundational. It is worth quoting Hacker’s detailed diagnosis of this at length:

The thought that analysis will reveal the ‘logical structure of the world’ rested on the misconceived idea that the world consists of facts, that facts have a logical structure, and that the substance of the world consists of sempiternal objects with language-independent combinatorial possibilities. Once these metaphysical confusions are swept away, the idea of *the logical forms* of propositions as reflections of reality collapses. What may remain of the notion of logical form is the supposition that the forms of the predicate calculus (with appropriate enrichment) display not the logical structure of the world, but the common depth structure of any possible language. (This conception became the leitmotif of philosophy of language in the 1970s and 1980s, deriving apparent support from the new theoretical linguistics advocated by Chomsky.) But, Wittgenstein argued, the idea that languages have a common essence is misconceived, since the concept of a language is a family resemblance concept. One can imagine a language consisting only of orders and reports in a battle, or only of questions and expressions for answering yes and no (PI §19). One can imagine a language in which all ‘sentences’ are one-word sentences, or a language in which all statements have the form and tone of rhetorical questions, or one in which all commands have the form of questions - e.g. ‘Would you like to ...?’ (PI §21). (...) More important, the very idea that human languages have a hidden, function-theoretic depth structure (first uncovered by Frege,

Russell and Whitehead's discovery (or, more precisely, invention) of the predicate calculus) is misconceived. For the structure that is alleged to characterize a language is a *normative* structure, a structure governed by rule. (1996, pp. 105-106)

The *PU* is peppered with anti-essentialist arguments based on an adherence to a non-foundational view of language, as exemplified by the explication of key concepts like language-games and family resemblances. Wittgenstein begins the *PU*, however, by describing the central features of the Augustinian picture of language, which consist of the following elements:

- (a) every individual word has 'a meaning';
- (b) all words are names, i.e. stand for objects;
- (c) the meaning of a word is the object it stands for;
- (d) the connection between words (names) and their meanings (referents) is established by ostensive definition, which establishes a mental association between word and object;
- (e) sentences are combinations of names. (Glock, 1996, p. 41)

The consequences of this conception of language are then laid out:

- (f) the sole function of language is to represent reality: words refer, sentences describe (PI §21-7);
- (g) the child can establish the association between word and object only through thinking, which means that it must already possess a private language, in order to learn the public one. (PI §32)

A key defining feature of the Augustinian language ideology is therefore its commitment to mentalism and the associated belief in the existence and primacy of private language. In ontological and epistemological terms, it denotes essentialism and foundationalism, for the private language is posited as being universal and as describing reality in a direct sense, as a one-to-one correspondence between (simple) names and objects. For Frege, for example, the *Sinn* (sense) or mode of expression of a name may vary, but its *Bedeutung* (reference) to an object cannot. This is why he believes that sentences, which consist of the combined senses of its constituent terms, denote a *Gedanke* (thought) which refers either to the True or the False, determinable by whether the references of the senses adequately refer to

objects.⁹ Wittgenstein distances himself from Frege and others who put forth such a conception of language, including his younger self, by pointing to the myriad of uses of words in different contexts, which he captures in his concept of language-games: "It is interesting to compare the diversity of the tools of language and of the ways they are used, the diversity of kinds of word and sentence, with what logicians have said about the structure of language. (This includes the author of the *Tractatus Logico-Philosophicus*.)" (2009, p. 15). The rest of the *PU* consists of a thorough demolition of this Augustinian picture of language, which however does not go in the opposite direction of behaviorism but instead tries to find a middle path between the two extremes. This is the only way Wittgenstein can maintain his commitment to the naturalistic picture of language as being something intrinsically social and historical, which in epistemological and ontological terms translates as being anti-essentializing and non-foundational. Examples of this can be seen in §23: "(...) this diversity [of sentences] is not something fixed, given once for all; but new types of language, new language-games, as we may say, come into existence, and others become obsolete and get forgotten" (pp. 14-15). Another example can be found in the statement in §97 against "super-concepts" in ideal language and a necessary refocus to ordinary language: "We are under the illusion that what is peculiar, profound and essential to us in our investigation resides in its trying to grasp the incomparable essence of language (...) Whereas, in fact, if the words 'language', 'experience', 'world' have a use, it must be as humble a one as that of the words 'table', 'lamp', 'door'" (p. 49). This moves into Wittgenstein's condemnation of "crystalline" conceptions of language that postulate a Platonic realm of unreachable perfection and analyze language in relation to it in §107-§108 (p. 51). There is then no doubt that Wittgenstein's later language ideology is indeed a naturalistic one with the concomitant underlying non-foundationalist philosophical commitments.

Having uncovered these commitments, it is now possible to explain why a diverse range of Marxian thinkers have felt an attraction to Wittgenstein's later work. For them, non-foundationalism in political and social theory is a primary concern. All the objects of their analysis, ranging from language and institutions to ideologies, are perceived in a historicizing, diachronic manner; they are intrinsically *social* phenomena and not universal, static, essentialized ones as was all too often the case for

the antiquated Marxist thinkers they criticized (Wolff & Resnick, 2006, pp. 80-81). To exemplify these shared commitments and their origins in more detail with respect to the Left-Heideggerians, it is worth pointing out the similarities between Heidegger's anti-foundationalist philosophy and the commitments underlying Wittgenstein's later work. Hubert Dreyfus has written about this in his analysis of Heidegger's *Being and time*, noting that "Heidegger, like Wittgenstein, holds that the background of *shared* concerns and activities against which the special problem of knowing others arises is constitutive of worldliness and intelligibility" (1995, p. 151). This background is interpreted as being social in nature rather than transcendental or foundational, being composed of our daily practices. Here Heidegger's distinction between knowledge as constituted in the present-at-hand (*vorhanden*) and the ready-to-hand (*zuhanden*) modes comes to the fore. The present-at-hand denotes a foundationalist or ontic conception of being, as is employed by the scientist or philosopher in their abstract analyzing of objects from a distance, whereas the ready-to-hand denotes the practical, immediate, intrinsically social and already-involved conception of being (Dreyfus, 1995, p. 40 & p. 131). Heidegger's project consists of detaching the two modes from each other – which philosophers have failed to do in the past – and refocusing our attention to the ready-to-hand mode of how knowledge is constituted, which is of primary importance in understanding what Being or *Dasein* consists of, the source of all knowledge. Heidegger hereby effects a reorientation of our approach to the intersubjective, social, historical nature of being and knowledge, eschewing foundational and essentializing conceptions of ontology and epistemology (Dreyfus, 1995, pp. 83-84 & p. 310). As shown, Wittgenstein's later work similarly displays a social sensibility and an opposition to foundationalism, eschewing ideal language theory with its search for Platonic forms or atomic facts of any kind. "For both Heidegger and Wittgenstein, then," concludes Dreyfus, "the source of the intelligibility of the world is the average public practices through which alone there can be any understanding at all" (p. 155). It is therefore not surprising that Left-Heideggerians like Foucault and Derrida, sharing Heidegger's epistemological and ontological commitments, were attracted to Wittgenstein's later work as it coincides with them in this respect (Marchart, 2007, p. 110).

A further concrete example of such an overlap in the Wittgensteinian and Marxian approaches along these anti-foundationalist lines can be seen in the discussion of human nature, which also demonstrates the broader implications the adherence to a specific type of language ideology has. Chomsky's conception of language, which belongs to the category of the Augustinian language ideology, leads him to affirm an essentializing conception of human nature, and unashamedly so. For him, such a conception of human nature is necessary not only because it is in line with his linguistic project, but also because it is needed to found a progressive politics on, for without a view of human nature being innately creative and freedom-striving, what is to stop a manipulation of it in whatever direction the powers that be choose? (Chomsky, 1969, pp. 31-32). His well-known debate with Foucault – who was arguing for the Left-Heideggerian position – laid bare the diametrically opposed conceptions of social ontology involved (and, of course, their respective language ideologies reflects this) (Chomsky & Foucault, 2006, pp. 4-5). For Foucault, the concept of human nature is, like all others, an ideological one, normatively implicated from its inception, hence representing a battlefield of opposing interpretations, the dominant ones being determined ultimately by prevailing social norms and conventions. However, this does not imply fatalism, for the construction of meaning, which is a normative endeavor, occurs in social practices and hence can be affected by critical practices such as ideology critique (Chomsky & Foucault, 2006, p. 7 & p. 29; Owen, 2002, pp. 217-219). Compare this view with Hacker's, who has written extensively against essentializing conceptions of human nature, specifically also Chomsky's, on the basis of Wittgenstein's later work, arguing for example that "[o]f course, different cultures may employ distinctly different conceptual schemes to talk and think about human beings and their nature" (2007a, p. 16). While it is true that Hacker does not expand this discussion to the realm of political and social theory as Marxian thinkers have done, their basic positions on the question overlap because they share the same underlying anti-foundationalist commitments.¹⁰

However, it should be clear that an adherence to an Augustinian or naturalistic language ideology does not necessarily imply a specific normative stance in political and social views. Wittgenstein and Derrida need not, and do not, share the same broader normative framework despite the

fact that they adhere to the same underlying ontological and epistemological commitments, and as a self-proclaimed anarcho-syndicalist Chomsky is closer to the Marxian normative position than Hacker is (Chomsky & Foucault, 2006, pp. 38-39). The same is true for many members of the *Wiener Kreis* (Vienna Circle), who were close to Marxian thought in their normative views yet adhered to a foundationalist conception of language and reality as expressed in their logical positivism, though in their case this was not odd because they chronologically preceded the generation of Marxian thinkers who actively eschewed such modes of thinking (even first generation members of the Frankfurt School like Adorno harshly criticized them on these grounds) (LeMahieu, 2013, p. 20). As already said, language ideologies concern only the deeper level underlying the specificities of philosophies of language, i.e., the conceptions of the structure of language and the ontological and epistemological commitments these entail. This does not preclude or impose a certain normative position on the basis of the type of language ideology adhered to. Hence, it cannot be argued that Wittgenstein was himself in fact an avowed Marxian thinker simply by virtue of his adherence to a naturalistic language ideology, just as Heidegger's ontological and epistemological commitments which coincide with the commitments underlying the naturalistic language ideology did not effect a normative commitment to Marxian ideals on his part.¹¹ This brings to light another shortcoming of current accounts of the relationship between Wittgenstein's and Marxian thought. Any point of contact or commonality discovered – strictly limited to the surface level of specific concepts or views and not the deeper ontological and epistemological commitments underlying them – are perceived as indicating a clear normative affinity between the two, evidence of Wittgenstein's supposed Marxian tendencies despite overwhelming evidence to the contrary.¹² Clearly such normative differences are of no relevance to Marxian uses of Wittgenstein's later work, for despite misguided attempts by some to portray them as being normatively aligned, the vast majority of thinkers who have been attracted to it have either rejected or been uninterested in the question of normative alignment. Of course, the same attitude has been taken in relation to Heidegger's work by the Left-Heideggerians (Marchart, 2007, pp. 4-5 & p. 110). This further indicates that the attraction is indeed driven by the deeper ontological and epistemologi-

cal commitments they have in common and not a common adherence to certain normative, political positions. But what are the origins of these shared commitments? The answer to this question yields further evidence to the argument that it is indeed the underlying shared philosophical commitments that motivate Marxian uses of Wittgenstein's later work.

§3 Origins: Gramsci, Sraffa and Wittgenstein

It is not purely accidental that Marxian and Wittgenstein's later thought overlap in terms of their respective epistemological and ontological commitments. Wittgenstein's move from the Augustinian to the naturalistic language ideology was after all precipitated by discussions with Sraffa, who in turn was influenced by Gramsci. They already possessed the requisite anti-essentializing, historicizing and dialectical commitments in social and political theory given their eclectic philosophical background, which included a highly original and lucid reading of Marxism, and upon closer analysis it becomes clear that these commitments were imparted to Wittgenstein via his discussions with Sraffa (Sen, 2003, p. 1245).¹³ A wonderful illustration of this is provided in the famous story about an argument they were having concerning Wittgenstein's Augustinian view of language as laid down in the *Tractatus*, specifically the idea that propositions and that which they describe must have the same logical form or grammar, the so-called "picture theory of meaning" which "sees a sentence as representing a state of affairs by being a kind of a picture of it, mirroring the structure of the state of affairs it portrays" (Sen, 2003, p. 1242). During this discussion, Sraffa made a gesture with his hand, brushing under his chin, which indicates rudeness in Neapolitan culture, and asked Wittgenstein: "What is the logical form of *that*?" (p. 1242). Sen, who knew Sraffa personally, asked him about this story, in response to which Sraffa "insisted that this account, if not entirely apocryphal ('I can't remember such a specific occasion'), was more of a tale with a moral than an actual event ('I argued with Wittgenstein so often and so much that my fingertips did not need to do much talking')" (p. 1242). He goes on to say: "But the story does illustrate graphically the nature of Sraffa's skepticism of the philosophy outlined in the *Tractatus*, and in particular how social conventions could contribute to the meaning of our utterances and gestures" (p. 1242).

However, as Ray Monk rightly notes, this does not mean that his move away from the picture theory of meaning and the Augustinian language ideology more generally was caused directly and solely by his interactions with Sraffa and thus indirectly by Gramsci. In the *Tractatus*, before he had even met Sraffa, Wittgenstein had already made steps toward the naturalistic conception of language by eschewing the connection between language and logic and describing ordinary or colloquial language as being organic.¹⁴ With respect to mathematics, Wittgenstein had sided with L. E. J. Brouwer and Hermann Weyl against Russell and Frank Ramsey, arguing that the latter's attempt to build mathematics on the foundation of logic was misguided whereas he was sympathetic to the former's argument that the two are not intrinsically connected but rather distinct, hinting at a non-foundationalist conception of mathematics. Very interesting is Wittgenstein's use of the term 'bourgeois thinker' to describe Ramsey's attempt to save Russell's work in mathematics by drawing on his theory of propositions as outlined in the *Tractatus* (which he believed to be ill-conceived), and the term 'Bolshevik' to describe Brouwer and Weyl's views (Monk, 1991, pp. 245-246). Wittgenstein's move away from the Augustinian picture of language must therefore be seen as a process of development wherein Sraffa's ability to make Wittgenstein see things from a different perspective, thereby deeply problematizing foundationalist conceptions of language, played the instrumental role he himself acknowledges in the foreword of the *PU* – but the move is not reducible to this alone (pp. 260-261; Wittgenstein, 2009, p. 4).

Sen goes on to add that the novel perspective Sraffa introduced to Wittgenstein was influenced by Gramsci, and revolved around key assumptions of a naturalistic language ideology. In his *Prison notebooks*, which Sraffa was familiar with, Gramsci interestingly discusses language in very much the same terms as the later Wittgenstein would. For Gramsci, philosophy is an activity bound by rules and conventions, and must be perceived in such an "anthropological" way, for, as he argues, "it is essential to destroy the widespread prejudice that philosophy is a strange and difficult thing just because it is the specific intellectual activity of a particular category of specialists or of professional and systematic philosophers" (Sen, 2003, p. 1245). Instead, "it must first be shown that all men are 'philosophers,' by defining the limits and characteristics of

the 'spontaneous philosophy' which is proper to everybody" (p. 1245). The "spontaneous philosophy" was to be concerned with "language itself, which is a totality of determined notions and concepts and not just of words grammatically devoid of content" (p. 1245). Here Sen sees a striking resemblance with Wittgenstein's refocusing from ideal language in the *Tractatus* to ordinary language in the *PU*. Elsewhere, Gramsci criticizes Russell's Augustinian view of language, contrasting it with his own non-foundationalist view, which is very reminiscent of Wittgenstein's arguments concerning meaning arising out of convention and custom in the *PU*:

One can also recall the example contained in a little book by Bertrand Russell [*The problems of philosophy*]. Russell says approximately this: "We cannot, without the existence of man on the earth, think of the existence of London or Edinburgh, but we can think of the existence of two points in space, one to the North and one to the South, where London and Edinburgh now are." ... East and West are arbitrary and conventional, that is, historical constructions, since outside of real history every point on the earth is East and West at the same time. (p. 1245)

Wittgenstein said of his conversations with Sraffa that they "made him feel like a tree from which all branches had been cut", to which Monk adds: "The metaphor is carefully chosen: cutting dead branches away allows new, more vigorous ones to grow (whereas Ramsey's objections left the dead wood in place, forcing the tree to distort itself around it)" (1991, p. 261). The following anecdote mentioned by Monk is also important in clarifying the influence of Gramsci and Sraffa on Wittgenstein with respect to the 'anthropological' or naturalistic conception of philosophy and language:

Wittgenstein once remarked to Rush Rhees that the most important thing he gained from talking to Sraffa was an 'anthropological' way of looking at philosophical problems. This remark goes some way to explain why Sraffa is credited as having had such an important influence. One of the most striking ways in which Wittgenstein's later work differs from the *Tractatus* is in its 'anthropological' approach. That is, whereas the *Tractatus* deals with language in isolation from the circumstances in

which it is used, the *Investigations* repeatedly emphasizes the importance of the ‘stream of life’ which gives linguistic utterances their meaning: a ‘language-game’ cannot be described without mentioning their activities and the way of life of the ‘tribe’ that plays it. If this change of perspective derives from Sraffa, then his influence on the later work is indeed of the most fundamental importance. (1991, p. 261)

Given all this, John B. Davies persuasively argues that the central area of influence from Gramsci and Sraffa to Wittgenstein is to be located in the former’s adherence to the Hegelian conception of critique, grounded on an anti-foundationalist social ontology expressed in an adherence to a historicizing, dialectical conception of reality, which in those respects overlap with the underlying ontological and epistemological commitments of the naturalistic language ideology Wittgenstein moved towards in his later work (2002, pp. 131-132). While Sen notes that further research is required to uncover the exact points of contact between Gramsci, Sraffa and Wittgenstein, he argues the same, saying that on the basis of what is already known about these contacts there was certainly an important degree of influence exerted by Sraffa on Wittgenstein (2003, pp. 1242-1243 & p. 1245).¹⁵

Going back to the rejections and critique of Wittgenstein for a moment, they not only ignore the importance of Wittgenstein’s move toward a naturalistic language ideology, either by not even mentioning it as indicating any significant change in position (Marcuse) or by contentiously reading into it an adherence to radical postmodernist relativism (Anderson), but they also ignore the role played in this move by Sraffa and Gramsci.¹⁶ I believe the reason for this is pretty straightforward. Those Marxists who still reject and criticize Wittgenstein’s late work also reject those Marxian thinkers who have been attracted to it, and for the same reasons. They believe these thinkers have betrayed ‘the cause’ by abandoning and criticizing the archaic categories of classical Marxism with its functionalist and determinist underpinnings, i.e., a naïve foundationalist conception of Marxism and social and political theory more generally. Hence why Anderson lumps Foucault, Derrida and others belonging to the Left-Heideggerian camp in with the late Wittgenstein (and by implication, Marxian thinkers attracted to his late work coming

from the analytical tradition), seeing in both a pernicious radical relativism (Anderson, 1984, pp. 38-39; 1998, pp. 25-26). In reality, these thinkers have merely moved away from archaic foundationalist conceptions of reality whilst retaining a commitment to the Marxian conception of critical theory, thereby making significant progress by enhancing the explanatory power and critical potential of their work. Developments in the philosophy of science and sociology of knowledge, as exemplified in the works of Thomas Kuhn and W. V. O. Quine and the Wittgenstein-inspired social scientists of the Edinburgh school of strong sociology, as well as the works of Bourdieu and Left-Heideggerians like Foucault and Derrida in the field of political and social philosophy, have made clear that clinging to a naïve conception of foundationalism as these Marxist critics attempt to do is highly problematic, leading among other things to the scholastic fallacy of “taking the things of logic for the logic of things” (Bourdieu, 1990b, p. 49; 2000b, pp. 54-60).¹⁷ On these grounds alone their attempts to criticize the late Wittgenstein from a foundationalist perspective can be seen as thoroughly misguided, not only being out of touch with broader developments in philosophy and the social sciences over the past decades but also with developments within Marxian social and political theory itself. Somewhat ironically *they* are the conservatives in this respect.

Conclusion

Thinkers in the Marxian tradition have responded to Wittgenstein’s work in a variety of ways, ranging from the positive to the negative. Those belonging to the latter category rely on misguided interpretations of Wittgenstein’s thought, perceiving it as putting forth a defense of conservatism or radical relativism. Yet both positions do not stand up to scrutiny, for among other reasons that they are based on inadequate readings of statements taken out of context and ignore important biographical information and Wittgenstein’s many other writings (Uschanov, 2002, pp. 38-39). Most importantly, the criticisms disregard the relevance of Wittgenstein’s move to his later philosophy, the relation the underlying ontological and epistemological commitments of his later philosophy has to the basic commitments underlying newly developed forms of Marxian thought by a new generation of thinkers working in this tradition, and the origins of these shared commit-

ments in Wittgenstein's discussions with Sraffa. Current positive accounts of the relationship between Wittgenstein's and Marxian thought similarly ignore this dimension, instead focusing on superficial commonalities between Marx's and Wittgenstein's work, thereby not being able to explain why a diverse range of otherwise conflicting thinkers in the Marxian tradition have been attracted to and made use of Wittgenstein's later thought. In order to remedy these shortcomings and provide an explanation for this, I made use of the concept of language ideologies, which uncovers the commonalities in the underlying structures of varying philosophies of language. It is possible to distinguish two types of language ideologies with distinct underlying ontological and epistemological commitments, the Augustinian and naturalistic (Silverstein, 1979, p. 193).

Wittgenstein's later work fits the definition of a naturalistic language ideology, meaning that in terms of its underlying epistemological and ontological commitments it is characterized by an opposition to foundationalism, and hence essentializing conceptions of language. Instead it adheres to a conception of the structure of language as being public and social. With these commitments uncovered, it becomes clear why Marxian thinkers have been positively disposed toward Wittgenstein's later work given that they share the same underlying commitments. Moreover, the origin of these shared commitments further explains why this is so, for Wittgenstein's discussions with the Marxian thinker Sraffa, who himself was influenced in this direction by Gramsci, played an instrumental role in his move toward a naturalistic language ideology in his later work, with the concomitant non-foundationalist commitments. This indicates that the shared commitments between the naturalistic language ideology of the late Wittgenstein and the concerns of Marxian thinkers have their origins in this close intellectual relationship. By having thus clarified what lies at the basis of the attractions to and uses of Wittgenstein's later thought by a diverse range of Marxian thinkers, I hope to have not only demonstrated that they are legitimate, but also to thereby encourage further and more extensive uses of Wittgenstein's later work by those working in the Marxian tradition.

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Notes

1. I use the terms 'Marxian' to denote those thinkers whose work is influenced by Marxism but are not necessarily Marxist in their overall outlook, and 'Marxist' to denote those whose work is firmly within the Marxist tradition and generally adhere to its classical conception. Recent thinkers belonging to the latter tend to be dogmatic in their outlook, whereas those belonging to the former are open to other forms of thought and perspectives. While this distinction contains a normative dimension it is also reliant on an analysis of the specific thinkers involved.
2. Wittgenstein expresses his intellectual indebtedness to Sraffa in the introduction of the *PU* as such: "Even more than to this – always powerful and assured a criticism – I am indebted to that which a teacher of this university, Mr. P. Sraffa, for many years unceasingly applied to my thoughts. It is to this stimulus that I owe the most fruitful ideas of this book" (2009, p. 4).
3. The importance of this will be explicated in detail in the third section.
4. See for example Bourdieu's criticisms of the classical Marxist conception of social space which reorients it to a focus on a non-essentialized conception of practices (including a linguistic one): "Constructing a theory of the social space presupposes a series of breaks with Marxist theory. First, a break with the tendency to privilege substances – here, the real groups, whose number, limits, members, etc., one claims to define at the expense of

relationships; and with the intellectualist illusion that leads one to consider the theoretical class, constructed by the sociologist, as a real class, an effectively mobilized group. Secondly, there has to be a break with the economism that leads one to reduce the social field, a multi-dimensional space, solely to the economic field, to the relations of economic production, which are thus constituted as co-ordinates of social position. Finally, there has to be a break with the objectivism that goes hand-in-hand with intellectualism, and that leads one to ignore the symbolic struggles of which the different fields are the site, where what is at stake is the very representation of the social world and, in particular, the hierarchy within each of the fields and among the different fields” (1985, p. 723).

5. See Schatzki et al. (2001) for an extensive overview of the ‘practice turn’ in contemporary social and political theory drawing heavily on Wittgenstein’s later work.

6. Hence their description as Left-Heideggerians (Marchart, 2007, pp. 4-5 & p. 110).

7. This term was suggested to me by drs. Frans Schaeffer.

8. See Schatzki (2002) for an analysis of the shared aspects of such a conception, termed materialist by him, in Marx and Wittgenstein.

9. Not all terms have a reference to the True or the False, in some cases there is neutrality of thought, such as when fictional characters like Odysseus are part of a sentence. Such ambiguities, which arise out of the commitment to foundationalism, only serve to further complicate Frege’s model and the Augustinian picture of language more generally. Wittgenstein’s concept of language-games resolves these issues (Frege, 1960, p. 58 & pp. 62-63; Hacker, 1996, pp. 105-106).

10. For a more detailed overview of this, see Hacker (2007a, pp. 101-102; 2007b, pp. 21-22).

11. Heidegger’s association with Nazism is well-known, see Bourdieu (1991, pp. 3-4).

12. As Ray Monk notes in his acclaimed biography of Wittgenstein, he at no time identified himself as a Marxist and greatly distrusted key normative aspects of its theory such as its scientism, expressed in the belief that social ills could only be alleviated by the progressive development of science (Monk, 1991, p. 348 & p. 486).

13. This also explains why Gramsci is one of the few thinkers coming out of the classical Marxist tradition who has remained popular among the new generation of Marxian thinkers.

14. See Wittgenstein (1922, §4.002, p. 39).

15. The relations between the two ended abruptly, an episode Monk recounts, further demonstrating the great influence Sraffa had on Wittgenstein: “In May 1946 Piero Sraffa decided he no longer wished to have conversations with Wittgenstein, saying that he could no longer give his time and attention to the matters Wittgenstein wished to discuss. This came as a great blow to Wittgenstein. He pleaded with Sraffa to continue their weekly conversations, even if it meant staying away from philosophical subjects. ‘I’ll talk about anything’, he told him. ‘Yes’, Sraffa replied, ‘but in *your way*’” (1991, p. 487).

16. There is no mention of it whatsoever in Marcuse, Adorno, Anderson or any other critical Marxist account of Wittgenstein’s thought I have read. Given that many of them hold Gramsci in very high regard, it should not be surprising that the connection is kept quiet.

17. An interesting movement in philosophy has sprung up in the past decade or so embracing and combining these developments and attempting to go beyond the traditional analytical-continental divide. This is not only true for theoretical philosophers but also for those working in the fields of social and political philosophy. The broadly post-foundationalist approach that defines this movement, which coincides with what has been referred to as ‘neo-pragmatism’, is in my view the direction Marxian thinkers should move toward if they have not already. David Owen (2002), Titus Stahl (2013) and Oliver Marchart (2007) are some examples of Marxian thinkers who have done interesting work as part of this movement. Naturally, those taking on this post-foundationalist approach are sympathetic to Wittgenstein’s later work by virtue of this.

References

- Aarsleff, H. (2006). Philosophy of language. In K. Haakonssen (Ed.), *The Cambridge history of eighteenth-century philosophy. Volume 1* (pp. 451-495). Cambridge, UK: Cambridge University Press.
- Adorno, T. (2002 [1970]). *Aesthetic theory*. New York: Continuum.
- (2008). *Lectures on negative dialectics. Fragments of a lecture course 1965/1966*. Cambridge, UK: Polity Press.
- Anderson, P. (1968). Components of the national culture. *New Left Review*, 50 (1968), pp. 3-57.
- (1984). *In the tracks of historical materialism*. Chicago: University of Chicago Press.
- (1998). *The origins of postmodernity*. New York: Verso.
- Baker, G. P., & Hacker, P. M. S. (2004). *Wittgenstein. Understanding and meaning. Volume 1 of an analytical commentary on the Philosophical investigations. Part I, essays, 2nd edition*. Singapore: Wiley-Blackwell.
- Baker, G. P., & Hacker, P. M. S. (2009). *Wittgenstein. Rules, grammar and necessity. Volume 2 of an analytical commentary on the Philosophical investigations, essays and exegesis §§185-242, 2nd edition*. Singapore: Wiley-Blackwell.
- Bauman, R., & Briggs, C. L. (2003). *Voices of modernity. Language ideologies and the politics of inequality*. Cambridge, UK: Cambridge University Press.

- Bourdieu, P. (1985). The social space and the genesis of groups. *Theory and Society*, 14, 723-744.
- (1990a). Fieldwork in philosophy. In P. Bourdieu (Ed.) *In other words. Essays toward a reflexive sociology* (pp. 3-33). Stanford: Stanford University Press.
- (1990b). *The logic of practice*. Stanford: Stanford University Press.
- (1991). *The political ontology of Martin Heidegger*. Stanford: Stanford University Press.
- (2000a). For a scholarship with commitment. *Profession*, 40-45.
- (2000b). *Pascalian meditations*. Stanford: Stanford University Press.
- Chomsky, N. (1969). Linguistics and politics. An interview. *New Left Review*, 57, 21-34.
- Chomsky, N. & Foucault, M. (2006). *The Chomsky-Foucault debate on human nature*. New York: New Press.
- Cohen, G. A. (1969). Critical theory. The philosophy of Marcuse. *New Left Review*, 57, 35-51.
- (2001). *Karl Marx's theory of history. A defense*. Princeton: Princeton University Press.
- Davies, J. B. (2002). A Marxist influence on Wittgenstein via Sraffa. In G. Kitching & N. Pleasants (Eds.), *Marx and Wittgenstein. Knowledge, morality and politics* (pp. 131-143). New York: Routledge.
- Dreyfus, H. (1995). *Being-in-the-world. A commentary on Heidegger's Being and time, Division I*. Cambridge, Mass.: MIT Press.
- Dreyfus, H. L. & Rabinow, P. (1983). *Michel Foucault. Beyond structuralism and hermeneutics*. Chicago: University of Chicago Press.
- Frege, G. (1960). On sense and reference. In P. Geach and M. Black (Eds.), *Translations from the philosophical writings of Gottlob Frege* (pp. 56-85). Oxford: Blackwell.
- Gellner, E. (2005 [1959]). *Words and things. A critical account of linguistic philosophy and a study in ideology*. New York: Psychology Press.
- (1998). *Language and solitude. Wittgenstein, Malinowski and the Habsburg dilemma*. Cambridge, UK: Cambridge University Press.
- Glock, H. (1996). *A Wittgenstein dictionary*. Cornwall: Wiley-Blackwell.
- Hacker, P. M. S. (1996). *Wittgenstein's place in twentieth-century analytic philosophy*. Oxford: Wiley-Blackwell.
- (2007a). *Human nature. The categorical framework*. Oxford: Wiley-Blackwell.
- (2007b). *The relevance of Wittgenstein's philosophy of psychology to the psychological sciences* (pp. 1-23). Retrieved 19.4.2015 from <http://info.sj.ox.ac.uk/scr/hacker/docs/Relevance%20of%20W%27s%20phil.%20of%20psychol.%20to%20science.pdf>
- Kitching, G. (2002). Introduction. In G. Kitching & N. Pleasants (Eds.), *Marx and Wittgenstein. Knowledge, morality and politics* (pp. 1-19). New York: Routledge.
- Lecercle, J. (2006). *A Marxist philosophy of language*. Leiden: Brill.
- LeMahieu, M. (2013). *Fictions of fact and value. The erasure of logical positivism in American literature, 1945-1975*. Oxford: Oxford University Press.
- Marchart, O. (2007). *Post-foundational political thought. Political difference in Nancy, Lefort, Badiou and Laclau*. Edinburgh: Edinburgh University Press.
- Marcuse, H. (2007 [1964]). *One-dimensional man. Studies in the ideology of advanced industrial society*. New York: Routledge.
- Monk, R. (1991). *Ludwig Wittgenstein. The duty of genius*. New York: Penguin Books.
- Owen, D. (2002). Criticism and captivity. On genealogy and critical theory. *European Journal of Philosophy*, 10(2), 216-230.
- Pleasants, N. (2002). Towards a critical use of Marx and Wittgenstein. In G. Kitching & N. Pleasants (Eds.), *Marx and Wittgenstein. Knowledge, morality and politics* (pp. 160-181). New York: Routledge.
- Russell, B. (1959). *My philosophical development*. New York: Simon & Schuster.
- Schatzki, T. (2002). Marx and Wittgenstein as natural historians. In G. Kitching & N. Pleasants (Eds.), *Marx and Wittgenstein. Knowledge, morality and politics* (pp. 49-62). New York: Routledge.
- Schatzki, T., Cetina, K. K., & Savigny, E. von (Eds.). (2001). *The practice turn in contemporary theory*. New York: Routledge.
- Sen, A. (2003). Sraffa, Wittgenstein, and Gramsci. *Journal of Economic Literature*, 41, 1240-1255.
- Silverstein, M. (1979). Language structure and linguistic ideology. In Paul R.

- Clyne et al. (Eds.), *The elements. A parasession on linguistic units and levels* (pp. 193-247). Chicago: Chicago Linguistic Society.
- Stahl, T. (2013, November 21). *What is immanent critique?* (pp. 1-20). Retrieved 19.4.2015 from <http://ssrn.com/abstract=2357957>
- Stern, D. G. (1995). *Wittgenstein on mind and language*. Oxford: Oxford University Press.
- Uschanov, T. P. (2002). Ernest Gellner's criticisms of Wittgenstein and ordinary language philosophy. In G. Kitching & N. Pleasants (Eds.), *Marx and Wittgenstein. Knowledge, morality and politics* (pp. 23-46). New York: Routledge.
- Vinten, R. (2013). Leave everything as it is. A critique of Marxist interpretations of Wittgenstein. *Critique: Journal of Socialist Theory*, 41, 9-22.
- Wittgenstein, L. (1922). *Tractatus logico-philosophicus*. London: Kegan Paul, Trench, Trübner & Company.
- (2009 [1953]). *Philosophical investigations (revised fourth edition)*. Singapore: Wiley-Blackwell.
- Wolff, R. D. & Resnick, S. A. (2006). *New departures in Marxian theory*. New York: Routledge.



Rechtvaardigheid: ook iets voor de jurist?

Jochem Streefkerk

1. Ter inleiding

“*Remota iustitia, quid sunt regna nisi magna latrocinia?*”¹ Woorden van Augustinus die het verdienen om bij de aanvang van elk werk over staatsrecht te worden geciteerd, aldus één van de klassieke handboeken op het gebied van Nederlands staatsrecht (Elzinga & De Lange, 2006, p. 5). Het citaat brengt onder woorden waar het recht op neerkomt: de ordening van een groep mensen met behulp van regels. Zonder het recht is er volgens Augustinus geen sprake van een staat, maar een wanordelijke bende ‘rovers’. Bovendien is *iustitia* (ook) als ‘rechtvaardigheid’ te vertalen. Augustinus en met hem alle klassieke rechtsfilosofen funderen het recht en de staat op een gedachte van rechtvaardigheid.

Maar de vraag naar rechtvaardiging (of rechtvaardigheid) van het recht lijkt onder juristen en in de huidige juridische handboeken en opleidingen niet op veel aandacht te kunnen rekenen. Wanneer is het recht eigenlijk rechtvaardig? Dit essay gaat aan de hand van Jacques Derrida’s *Kracht van wet* in op de oude filosofische kwestie van de rechtvaardiging van het recht in morele termen: welk recht is rechtvaardig?

Paragraaf 2 schetst de ontwikkeling in het denken over de rechtvaardiging van recht. Verschillende argumenten van Derrida zijn terug te voeren op historische ideeën over recht en samenleving. Vervolgens worden in paragraaf 3 de meer theoretische delen van *Kracht van wet* door middel van parafrase en met verwijzing naar het historische kader behandeld. Dwang speelt een cruciale, constitutieve rol in het recht en maakt – in verschillende combinaties van zijn verschijningsvormen – het verschil tussen rechtvaardig en onrechtvaardig recht. In paragraaf 3 komt ook Derrida’s onderscheid tussen fictieve en natuurlijke rechtvaardigheid aan de orde. Dit onderscheid wordt aan de hand van stellingen van Derrida en voor-

beelden uit het Nederlandse (staats)recht verder verkend (paragraaf 4). Ten slotte wordt met Derrida antwoord gegeven op de hoofdvraag en wordt dit antwoord in verband gebracht met het historisch kader dat eerder is geschetst (paragraaf 5).

2. Een kleine geschiedenis van het staatsrecht

Alhoewel het staatsrecht – als rechtsgebied waarin de fundamentele grondslagen van de samenleving aan de orde komen – bij uitstek een rechtsgebied lijkt te zijn waarin rechtvaardigheid een rol dient te spelen, komt het woord niet voor in de indices van verschillende handboeken.² Het begrip wordt blijkbaar slechts gebruikt door rechtsfilosofen. Maar waar ligt de grens tussen filosofie en (rechts)theorie? In deze paragraaf komen in vogelvlucht enkele (staats)rechttheorieën aan de orde.

2.1. Rechtvaardiging van het recht tot 1850

Het denken over de staat begint bij klassieke schrijvers als Plato en Aristoteles: de staat (d.w.z. de ordelijke samenleving) is een natuurlijk gegeven (Elzinga & De Lange, 2006, p. 4). Een bijzondere rechtvaardiging van het bestaan van een staat is niet aan de orde, want een staat is onderdeel van de teleologische orde waar de mens in leeft. Het doel verklaart de aanwezigheid van de eigenschap³ en een onderscheid tussen de ordening zelf en de rechtvaardiging van die ordening is daarom niet te maken.

Dat wordt anders wanneer het christendom een rol van betekenis in Europa gaat spelen.⁴ De staat en het recht worden meer begrepen als een instrument, in plaats van als een vanzelfsprekende menselijke eigenschap

(pp. 4-10; Haddock, 2011, pp. 59-60 & pp. 63-9). Er is een scheiding tussen de instrumentele, technische kant van recht – die slechts secundair is – en de ethische kant – die in deze periode wordt herleid tot het goddelijke.

De ethische kant verandert op zijn beurt met de opkomst van theorieën die een sociaal contract als fundering van de staat en het (staats-) recht postuleren. De ideeën van Hobbes, Locke en Rousseau kennen een nieuwe positie toe aan de mens, namelijk als de betekenisgevende factor van het recht. De staat wordt beschreven “vanuit de mens” (Elzinga & De Lange, 2006, pp. 19-23) en er is niet langer sprake van een goddelijke rechtvaardiging van recht. De fundering wordt gevonden in een menselijke behoefte.

De nadruk die wordt gelegd op de mens als maatstaf van het (staats-) recht, wordt door Burke terzijde geschoven. Een samenleving is volgens hem te complex om te kunnen doorgronden met rechtlijnige principes als dat van een sociaal contract. De maatschappij heeft “een zekere redelijkheid in zich, die het gearticuleerde denken wel kan nadenken, maar niet kan creëren” (p. 40). Hij loopt daarmee vooruit op een historisch-organische opvatting van Von Savigny (Van den Bergh & Jansen, 2007, p. 119-22). Von Savigny vindt in het bestaan van het recht (en de historische ontwikkeling en vorming daarvan) de rechtvaardigende factor van het recht.

De ideeën van recht als rationele inventie en van recht als historisch orgaan komen aan het begin van de negentiende eeuw bij elkaar in de rechtstheorie van Hegel (Elzinga & De Lange, 2006, p. 43). Ook volgens Hegel is het geldend recht tot stand gekomen door een historisch proces, maar dan wel onder invloed van rationele inbreng. Sterker nog: het geldend recht is een weergave van de historische ontwikkeling van het rationele (Kolakowski, 2008, pp. 48-59). De historische ontwikkeling van het recht bij Burke en Von Savigny impliceert een toevalligheid, die bij Hegel wordt vervangen door een doelgerichtheid.⁵ De twee zijn als twee zijden van de medaille van de wereldontwikkeling. Hegels techniek verschilt van die van Burke en Von Savigny, terwijl een gedeelde ethische rechtvaardiging is te vinden in de vorm van de (zich ontwikkelende) maatschappij.

2.2. Filosofische impasse?

Tot zover een grove schets van de ontwikkeling van de theorieën tot omstreeks 1850. Sindsdien – aldus het *Handboek van het Nederlandse staatsrecht* – is het denken over het recht niet meer op fundamentele punten (filosofisch) beïnvloed (Elzinga & De Lange, 2006, pp. 49-50). De analyse van recht en gezag binnen hun eigen, bestaande systeem is belangrijker geworden dan de vraag naar de rechtvaardiging van recht en gezag (p. 53). Met andere woorden: de vraag naar de morele rechtvaardiging van recht wordt niet meer gesteld.

Die verandering van insteek lijkt samen te hangen met de verzwakte positie van het ongecodeerde Romeins recht en gewoonterecht in de tweede helft van de negentiende eeuw (Van den Bergh & Jansen, 2007, p. 139). Door de invoering van nationale wetboeken werd de positie van het positief recht (het gecodificeerd recht) versterkt (pp. 128-129). Die versterking gold niet alleen binnen het recht, maar ook binnen de staat: stromingen van legisme (recht bestaat uit de letterlijk toegepaste wet) beletten de rechter een te vrije interpretatie van de wet. Daarmee werd ook een teleologische interpretatie, doorgaans gebruikt om geschreven recht met ongeschreven recht in overeenstemming te brengen, onmogelijk danwel onwenselijk gemaakt (pp. 130-132).

Zo stelde Kelsen dat recht als autonoom fenomeen moet worden gezien. Recht is volgens Kelsen het enige middel om recht te creëren, het enige middel om autoriteit en bevoegdheid te funderen. Daardoor kan per definitie slechts *binnen* het rechtssysteem van recht gesproken worden (Elzinga & De Lange, 2006, pp. 53-54).⁶ Het recht fundeert daarmee dus zichzelf – en niet op een manier die hierboven met Von Savigny is aangekaart, maar op een meer vicieuze, doch empirisch controleerbare manier. Recht is simpelweg dat wat geldt, te beoordelen aan het (proces)recht zelf. De theorie van Kelsen laat herkenbare sporen achter in Derrida's werk.

Alhoewel gecodificeerd recht nog steeds van groot belang is, is het legisme wel op de achtergrond geraakt: recht is niet slechts dat wat in technische zin geldt, maar ook datgene dat in morele zin rechtvaardig wordt gevonden.⁷ Dit ligt in lijn met gangbare opvattingen over (internationale) mensenrechten (Van den Bergh & Jansen, 2007, p. 146; Venter, 2010, pp.

23-9). Deze zijn – al dan niet gecodificeerd – gestoeld op de gedachte dat er bij mensen, respectievelijk landen, een gemene deler te vinden is in de vorm van een (morele) opvatting over wat rechtvaardig is.

Kunnen we dan met het *Handboek* meegaan en constateren dat er sprake is van een filosofische impasse, of ligt de vraag van rechtvaardiging van het recht als zodanig toch weer op tafel? Dat laatste lijkt het geval en dat roept de vraag op waar Derrida in de hier geschetste ontwikkeling is te plaatsen en of hij uit deze filosofische impasse kan breken.

3. Rechtvaardigheid in *Kracht van wet*

Het is Derrida te doen om een analyse van fundamenteën van het rechtssysteem, op basis van het poneren en onderzoeken van verschillen (2013, pp. 49-53). In het geval van het rechtssysteem gaat het dan om verschillen tussen conventie en natuur (p. 51) en tussen het algemene en particuliere. Bovendien lijkt Derrida er waarde aan te hechten dat deconstructie ook effect heeft op hetgeen gedeconstrueerd wordt.⁸

3.1. Recht in termen van dwang

Alvorens in te gaan op rechtvaardigheid bespreekt Derrida verschillende vormen van dwang of “moeten” (p. 46). Dat helpt bij het maken van onderscheid tussen de begrippen recht en rechtvaardigheid, die juist in het staatsrecht zo snel door elkaar lopen.

De eerste vorm van dwang die Derrida onderscheidt, vertoont overeenkomsten met het eerder genoemde sociaal contract: Derrida spreekt van een “symbolische macht”, die onafhankelijk van expliciete instemming van de rechtssubjecten geldt, doch tegelijk op instemming kan rekenen wanneer men eraan toegeeft (p. 46). Om in een maatschappij te functioneren moet ik mij aan de heersende norm (de bestaande rechtsregels) conformeren. Het is mogelijk om daar tegenin te gaan, maar dan plaats ik me ook buiten de maatschappij. De tweede vorm van dwang is een vorm die zich soortgelijk oplegt, maar die Derrida specifiek in het licht van begrip stelt – om begrepen te worden dienen de begripsvoorwaarden aan beide kanten van een medium hetzelfde te zijn.⁹ Er is hier sprake van

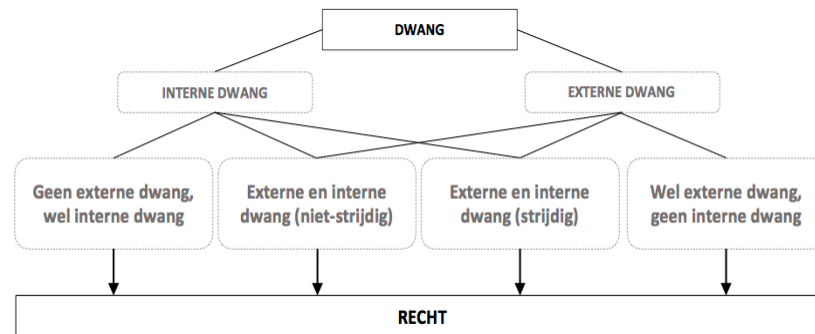
een macht van de meerderheid. Iets moet begrepen worden, op de wijze waarop de meerderheid dat begrijpt. De derde vorm van dwang bestaat uit een juridisch-politiek-ethisch ‘moeten’: een morele opvatting over wat in een bepaalde situatie het goede zou zijn, dwingt tot een bepaalde handlingswijze.

Hoe dient recht, als een vorm van dwang, te worden opgevat? Essentieel in de beantwoording van die vraag is dat Derrida lijkt aan te sluiten bij het rechtsbegrip van Kelsen. Kelsen bracht de rechtvaardiging van recht tot uitdrukking met de frase ‘recht is dat wat geldt’. Er wordt niet verwezen naar een ‘hogere’ rechtvaardiging, buiten het rechtssysteem zelf. Door Derrida wordt dit idee evenwel nader ingevuld met de stelling dat er pas sprake is van recht wanneer degenen tot wie het recht zich richt door een vorm van dwang of krachtsvertoon tot naleving van dat recht worden bewogen (p. 47). Met andere woorden: niet ‘recht is dat wat geldt’, maar ‘recht is dat wat tot gelding wordt gebracht’.

Alhoewel de mogelijkheid van een buiten het rechtssysteem gelegen rechtvaardiging van het recht direct met zoveel woorden door Derrida wordt voorbehouden, gaat deze dwang van het recht volgens hem in beginsel uit van een geïnternaliseerde opvatting van het rechtssubject¹⁰ over wat hoort (p. 47). De herkomst van de geïnternaliseerde opvatting zal ik in paragraaf 3.4 bespreken. Deze opvatting heeft mijns inziens twee eigenschappen. Enerzijds vormt zij een ‘interne facilitator’ van het recht: een middel dat een rechtssubject van binnenuit – op basis van eigen (morele) opvattingen – beweegt tot naleving van het recht. Anderzijds vormt zij het middel waarmee dwang van buitenaf herkend kan worden en aan de hand waarvan die externe dwang gewaardeerd kan worden.¹¹ Opmerkelijk aan het idee van de geïnternaliseerde opvatting is dat recht in dat opzicht bij uitstek subjectief is: het bestaat wegens dwang (een opvatting) van het rechtssubject zelf. Dit is in Derrida’s theorie een mogelijkheidsvoorwaarde van rechtvaardigheid.

Het is volgens Derrida echter ook mogelijk dat hetzelfde recht door rechtssubjecten met een andere opvatting als onrecht wordt beoordeeld. Is dat mogelijk? En zo ja, hoe dan? Kan er nog wel gesproken worden van recht, laat staan van toepassing van dat recht, wanneer dat niet kan rekenen op de dwang van de interne facilitator? De toepassing van het

recht wordt weliswaar vergemakkelijkt door de interne facilitator, maar is daarvan blijkbaar niet afhankelijk. In dit geval speelt de eerste vorm van moeten een rol: het recht wordt door een ‘externe facilitator’ geldig gemaakt. Dwang krijgt in deze situatie wellicht zijn meest alledaagse betekenis, nu de externe facilitator in het uiterste geval de inzet van de klassieke ‘sterke arm’ vereist. Minder extreem is de dreiging van een boete, die mensen ervan weerhoudt om bijvoorbeeld door rood te rijden wanneer de interne opvatting is dat het rode licht geen betekenis hoeft te hebben op een leeg kruispunt. De interne en externe dwang zijn in dit voorbeeld strijdig. Schematisch zijn nu vier mogelijke combinaties van dwang weer te geven die tot recht leiden:



3.2. Oorspronkelijk geweld als fundament

De rechtstoepassing zoals die volgens externe dwang mogelijk is, vraagt om een verklaring voor het bestaan van zulk extern (rechtssubject-vreemd) krachtsvertoon. In lijn met de gedachte van een sociaal contract komt Derrida tot de stelling dat er ooit sprake is geweest van ‘oorspronkelijk geweld’. Dat geweld was noch rechtvaardig noch onrechtvaardig, maar het middel om voor het eerst gezag in te stellen (p. 49). De instelling van gezag bestaat in wezen uit de instelling van een machtsbasis om externe dwang uit te oefenen en om eventueel geïnternaliseerde opvattingen te beïnvloeden. Het element van krachtsvertoon is volgens Derrida onvervreemdbaar van het idee van recht (p. 48). Er bestaat geen recht, zonder dat het ook in

praktijk kan worden gebracht. Zonder interne facilitator moet er in elk geval een externe facilitator bestaan om over recht te kunnen spreken.

In het verlengde daarvan stelt Derrida dat er geen wetten zonder uitvoerbaarheid bestaan – een zeer opmerkelijke constatering. Weliswaar lijkt het, dat in het verlengde van de eerdere argumentatie gezegd kan worden dat er geen sprake kan zijn van *recht* zonder dat het ook tot gelding gebracht kan worden. Echter, een *wet* is wat dat betreft een contingent, arbitrair iets. Het rookverbod in de horeca en het verbod op godslastering illustreren dit. Het eerste verbod¹² kent van begin af aan al uitvoeringsproblemen (een gebrekkige externe dwang) – om maar niet te spreken van het gebrek aan interne dwang.¹³ Het verbod op godslastering is onlangs afgeschaft,¹⁴ nadat het jaren ongebruikt is gebleven. Het is veilig om te zeggen dat dit verbod (recentelijk, althans) niet uitvoerbaar was: zij het praktisch gezien (mankracht), zij het door het uiteenlopen van externe dwang en interne dwang. Wet en uitvoerbaarheid stemmen dus niet altijd overeen – behalve als de definitie zo wordt geformuleerd dat datgene wet is wat uitvoerbaar is. Maar dan komen we met ‘onuitvoerbare wetten’ niet verder dan een *contradictio in terminis* en blijven er (voormalige wets)regels over die niet onder de definitie van wet vallen. De in dit verband meest vergaande uitspraak over wetten kan zijn dat zij slechts de mogelijkheid bieden om recht in taal te vatten, voor zolang hun inhoud uitvoerbaar is. Zonder uitvoerbaarheid – zonder dwang – is er immers geen recht.

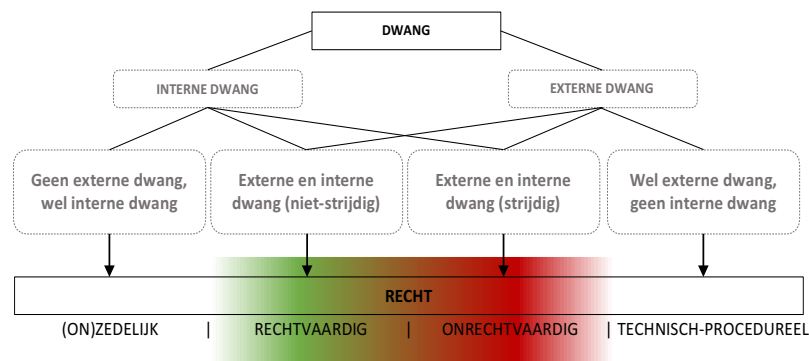
3.3. Rechtvaardigheid

Wanneer eenmaal sprake is van gezag, is er een verschil te maken tussen een rechtvaardig en onrechtvaardig krachtsvertoon. Dit verschil is de functie van de variabele manieren waarop recht zijn werking kan hebben. Derrida herdefinieert de vraag naar het verschil tussen rechtvaardig en onrechtvaardig krachtsvertoon tot de vraag naar het verschil tussen legaliteit en illegaliteit. De legale handeling is wel gewettigd en de illegale niet (pp. 48-49). Vervolgens stelt Derrida dat rechtvaardigheid en recht overeenstemmen wanneer rechtvaardigheid “kracht in handen heeft” (p. 54).

Rechtvaardig is dan de situatie waarin externe dwang kan steunen op (cq. gewettigd wordt door) de interne rechtsopvatting en samenvalt met de

interne dwang. Binnen het subjectieve domein van de interne dwang is daarom een rechtvaardig deel van het recht te identificeren, namelijk waar het samenvalt en overeenkomt met externe dwang. Dit in tegenstelling tot het moment waarin recht door een externe facilitator van toepassing is op een rechtssubject dat dit recht niet onderschrijft. In dat moment vallen de noodzakelijkheid door dwang van een externe facilitator en de geïnternaliseerde opvatting niet samen (p. 55). Het recht kan dan niet steunen op (cq. wordt niet gewettigd door) de interne opvatting van het rechtssubject en is er sprake van een onrechtvaardige situatie.

Daarnaast lijkt nog een onderdeel van het recht te onderscheiden dat in het geheel niet door externe dwang respectievelijk interne dwang geldt. Het gebied waarin weliswaar sprake is van interne opvattingen, maar dat niet door externe regels gereguleerd wordt, zou dan kunnen worden aange-merkt als het gebied van de zeden – de normen en waarden. Er bestaan mogelijk externe *verwachtingen*, maar er is geen sprake van externe dwang. Een spiegelbeeldig onderscheid lijkt ook mogelijk op het terrein waar weliswaar externe dwang wordt uitgeoefend, maar waar geen sprake is van interne opvattingen. In het recht kan gedacht worden aan niet-principiële voorschriften, zoals de kleur van kentekens. Schematisch kan deze analyse als volgt worden ingetekend:



3.4. De(con)structie van het fundament

Derrida gaat verder in op de eigenschappen van recht en haakt aan bij De Montaigne, wiens idee het is dat het de consequente aanvaarding van recht en de gewoonte is, wat recht tot recht maakt (p. 56). Die gewoonte – ‘*het mystieke fundament van het gezag*’ – lijkt simpelweg een nieuwe verwoording van het adagium ‘recht is wat geldt’. Derrida drukt er tegelijk echter een nieuw oordeel mee uit, namelijk dat recht fundamenteel onwaardeerbaar is in termen van rechtvaardigheid (p. 57).¹⁵ Het werkelijke fundament is mystiek en het gezag of de gelding van het recht is slechts *af te leiden* van de *werking* van facilitatoren. Omdat men echter altijd naar fundering (rechtvaardiging of legitimering) lijkt te zoeken, is er sprake van ‘legitieme ficties’ (pp. 57-58).

Legitieme ficties hebben tot gevolg dat recht kan worden gewaardeerd in termen van een arbitraire conceptie van rechtvaardigheid en teruggrijpen naar de maatstaf van natuurlijke rechtvaardigheid niet noodzakelijk is. Vergelijk in dit verband de concepten van interne opvattingen en externe dwang. De constructie van een rechtvaardigheidsbegrip dat afhankelijk is van de interne rechtsopvatting gaat immers nog voorbij aan de essentie en het ontstaan van de interne rechtsopvatting. Het ontstaansmoment van rechtvaardigheid kan gevonden worden in het moment van instelling van gezag – de mogelijkheid van krachtsvertoon – door het oorspronkelijk geweld. De mogelijkheid van externe dwang articuleert de interne maatstaf. Rechtvaardig is de toevallige situatie waarin het recht strookt met interne opvattingen, terwijl het ook enkel op basis van externe dwang zou kunnen gelden. Slechts door de mogelijkheid van dwang tot iets oneigen, een onrechtvaardigheid, is begrip mogelijk van het eigene en van de situatie waarin externe dwang wel strookt met de geïnternaliseerde opvatting van het rechtssubject – de subjectieve maatstaf voor externe dwang. Het gaat in die situaties telkens om toevallige rechtvaardigheid, afhankelijk van een persoonlijke interne opvatting (zie ook de schema’s hiervoor).

Het concept van een sociaal contract en temeer dat van een grondwet lijken helemaal tegemoet te komen aan dit idee van legitieme ficties. Beiden pretenderen tegelijk een fundament (door bevoegdheidstoedeling) en een maatstaf (door normstelling) te zijn – fictieve rechtvaardigheid, zonder inhoud aan de natuurlijke rechtvaardigheid te geven.¹⁶ De fictie

van deze rechtvaardigheid komt onder meer bloot te liggen in de gevallen waarin fundamentele rechten botsen: wanneer bijvoorbeeld het recht op gelijke behandeling botst met het recht op eerbiediging van religie.¹⁷

3.5. Rechtswetenschap als funderingswetenschap

Het concept van een legitieme fictie wordt door Derrida aangegrepen om nader te kijken naar de werking van recht. De toepassing en vestiging van nieuwe rechtsregels is geen natuurlijk proces en is afhankelijk van dwang (p. 59). Nu er in een *fictieve* fundering is voorzien, wordt de vraag naar het *mystieke* fundament verder weggeduwd. Praktisch gezien is die vraag de vraag naar de fundering van een grondwet, of de vraag naar de interpretatie van de regels van het fictieve fundament (pp. 60-61). Dit ‘wegduwen’ van de vraag naar het mystieke fundament is de mogelijksvoorwaarde van een deconstructieve benadering van het recht: de fundering van recht is niet te vinden en recht kan niet zonder interpretatie. Recht en natuurlijke rechtvaardigheid bewegen zich op verschillende vlakken: de eerste is gebaseerd op de werking van interne en externe facilitatoren, de tweede vormt het mystieke fundament (p. 63).

Door een interpretatieve beslissing betreffende het geldende recht kan een moment van recht én fictieve rechtvaardigheid bereikt worden (pp. 65-66). We hebben gezien dat er sprake is van een fictieve legitimatie, als ware het een weergave van wat af te leiden is uit de werking van interne en externe facilitatoren. De fundering van het staatsrecht is echter niet gecodificeerd,¹⁸ waardoor er voor interpretatie toch gegrepen moet worden naar het mystieke fundament: de natuurlijke rechtvaardigheid die zich door de gewoonte heeft bewezen (p. 68). Door deze interpretatie, of het teruggrijpen op een ander fundament, wordt de kracht van het recht in geschreven vorm (het fictieve fundament) tijdelijk ontkend: “een moment van opschorting” (p. 69). Er wordt immers gezocht naar een meer fundamentele waarde. Het samenvallen van recht en natuurlijke rechtvaardigheid zou dan theoretisch mogelijk zijn in de interpretatieve beslissing, die past binnen het recht en (unaniem) wordt geaccepteerd door rechtssubjecten. Het is echter ook mogelijk een beslissing te hebben die niet samenvalt met het recht. Een overweging uit de hiervoor

genoemde uitspraak over de betekenis van een onrechtmatige daad kan dat illustreren.

Onder “onrechtmatige daad” werd in de 19e eeuw verstaan het onrechtmatig doen of nalaten. Dit werd heel letterlijk uitgelegd als een handelen of niet-handelen dat in strijd was met een wettelijk verbod of gebod. Onrechtmatig was dus eigenlijk onwettmatig.¹⁹ De Hoge Raad verwerpt deze uitleg evenwel in 1919. In een zaak betreffende bedrijfsspionage oordeelde het Gerechtshof dat er geen sprake was van een onrechtmatige daad, omdat er kortgezegd geen wet bestond die bedrijfsspionage verbood. De Hoge Raad overweegt als volgt:

- (1) dat ‘s-Hofs beslissing aan de uitdrukking ‘onrechtmatige daad’ eene beteekenis toekent dermate beperkt, dat daaronder alleen kunnen begrepen worden die handelingen waarvan het geoorloofde uit eenig wets-voorschrift rechtstreeks is af te leiden, terwijl daarbuiten vallen alle handelingen van welke dit niet kan worden aangetoond, *ook al mogen deze strijdig zijn met maatschappelijke betamelijkeid en zedelijkeid;*
- (2) dat echter tot zoodanig beperkte uitlegging het artikel geen grond geeft.²⁰

Deze beslissing werkte tegelijk onbevestigend voor het voorafgaande recht (de Hoge Raad ‘ging om’), maar ook bevestigend voor het recht ná de uitspraak en het recht dat formuleert hoe recht wordt vastgesteld.²¹ Een beslissing kan grote gevolgen hebben; niet voor niets spreekt Derrida van een ruimte waarin revoluties plaats kunnen vinden (p. 69).

Het opstellen van grondwetten en (nog hoger) internationale verdragen is in dit opzicht op te vatten als slechts de invoeging van tussentappen, die leiden tot uitstel van teruggrijpen op de niet-geformuleerde natuurlijke rechtvaardigheid. Er ontstaat een probleem wanneer zich premissen voordoen (of premissen worden opgesteld) waarover niet meer getwijfeld mag worden en die niet veranderd kunnen worden (pp. 70-1). De mogelijkheid de premisse (het recht) te verwerpen is een voorwaarde voor rechtvaardigheid (fictief en natuurlijk), omdat volgens Derrida niet kenbaar is of een premisse inderdaad in alle tijden en omstandigheden

voldoet aan het rechtvaardigheidsbegrip. De zogenaamde “eewigheidsclausule” van de Duitse grondwet is in dit opzicht problematisch, nu het waarden als gelijke behandeling onveranderlijk verklaart.²²

4. Rechtvaardigheid: vaardigheid van de rechter?

Na het formuleren van de eigenschappen en het kader van rechtvaardigheid, neemt Derrida enkele stellingen in over rechterlijke uitspraken, om zijn theorie nader toe te lichten. Ik illustreer deze stellingen met voorbeelden uit het Nederlandse recht.

4.1. Bevestiging van de fictie

Interessant is de stelling dat een rechterlijke beslissing niet alleen een rechtsregel moet volgen, maar – indien hij deze volgt – deze ook dient te bevestigen (p. 73). Dit ligt in lijn met de constatering dat de mogelijkheid om een premisse te verwerpen, de (overeenstemming van) fictieve en natuurlijke rechtvaardigheid mogelijk maakt. Om een acceptabele uitspraak te doen, moet de rechter zich altijd aan het reeds bestaande fictieve fundament conformeren. Daaraan ontleent zijn uitspraak legitimiteit. Tegelijk moet de uitspraak meer kunnen zijn dan een simpele toepassing van de fictie, daar het die fictie ook kan uitbreiden, aanpassen of verwerpen.

In het Nederlandse (burgerlijke) recht lijkt deze verhouding tussen recht en rechtvaardigheid te zijn gecodificeerd in de eis van redelijkheid en billijkheid.²³ Deze eis brengt tot uitdrukking dat er in bepaalde omstandigheden²⁴ kan worden afgeweken van recht. Dit vormt een mooie uitwerking van Derrida’s opvatting dat een definitie van rechtvaardigheid niet gegeven kan worden, daar het zijn wezen ontleent aan een constellatie van spelende belangen en factoren (pp. 53-54 & p. 73). De fictie laat in dit geval zelf al ruimte voor natuurlijke rechtvaardigheid.

Enige tijd geleden is op een veel gelezen forum de vraag naar motivering van de rechter weer aan de orde gesteld (Steenhuis, 2013).²⁵ Stelling: de rechter dient alleen te motiveren wanneer er uitleg nodig is. De gedachte die ten grondslag ligt aan deze stelling is blijkbaar dat uitleg slechts nodig

is, wanneer er sprake is van onduidelijke (lees: onverwachte, niet-gangbare) uitspraken. De simpele herbevestiging van een gewoonte behoeft geen motivering. Deze opvatting strookt evident niet met Derrida’s weergave van de verhouding tussen recht en rechtvaardigheid. Er dient juist geen sprake te zijn van dergelijke vanzelfsprekendheden in het recht.

De eisen van billijkheid en motivering komen eveneens terug in de eis tot beslissing die Derrida poneert. In de afweging die komt kijken bij een beslissing over randgevallen – waar dus fictieve en natuurlijke rechtvaardigheid grenzen – moet op een gegeven moment de knoop worden doorgehakt. Een rechter kan blijven hangen in de vergaring van relevante feiten en omstandigheden, maar Derrida herpakt zijn stelling dat natuurlijke rechtvaardigheid niet te definiëren is (Derrida, 2013, pp. 75-6). Het is derhalve onmogelijk een beslissing te nemen die alles in zich tot recht laat komen. Deze onmogelijkheid is precies hetgeen de wens ingeeft om telkens een rechtvaardige(re) beslissing te nemen en geen enkel recht onveranderlijk of onveranderbaar te laten zijn.

Het equivalent van deze stelling kan voor het burgerlijk recht worden gevonden in het verbod op rechtsweigering – elke rechter moet uitspraak doen in een voorgelegde zaak.²⁶ Natuurlijk is hier ook sprake van samenloop van pragmatische overwegingen met de rechtsfilosofische argumenten om een veranderlijk (veranderbaar) rechtssysteem in te richten. Zo is het op een gegeven moment ook om sociale of economische redenen nodig om in een juridisch geschil een knoop door te hakken.

4.2. Verhouding tot (natuurlijke) rechtvaardigheid

Een beslissing is dus tegelijk interpretatief en bevestigend met betrekking tot recht en vormt een noodzakelijke, maar ook belemmerende voorwaarde voor rechtvaardigheid. Hoe dan ook maken beslissingen een (nieuw) onderdeel uit van positief recht, waarmee direct het mystieke fundament verder wordt verdrongen door de fictie van de beslissing (pp. 79-81). De continue dynamiek tussen natuur en fictie is essentieel in de mogelijkheid van rechtvaardigheid. Een stelling die in verband kan worden gebracht met het debat omtrent de invoering van een toetsingsmogelijkheid van wetten aan de Grondwet.

Vooralsnog is in Nederland een rechterlijke toetsing van wetten aan de Grondwet niet mogelijk:²⁷ wanneer het parlement een wet aanneemt, kan een rechter niet over de grondwettigheid van die wet oordelen (zoals dat in bijvoorbeeld de Verenigde Staten wel mogelijk is). Alhoewel wetten daarnaast wel degelijk aan internationale verdragen getoetst kunnen worden, lijkt er toch een wezenlijk deel van de mogelijkheid tot rechtvaardiging van wetten te missen. Immers is het, aldus Derrida, van wezenlijk belang om regels te kunnen verwerpen, wil men kunnen spreken van rechtvaardigheid. Toetsing aan internationale verdragen kan evenwel slechts het ‘buiten toepassing laten’ van wetten tot gevolg hebben.²⁸ Dat wil zeggen dat een wet wel als zodanig blijft bestaan, maar alleen voor de betreffende situatie (waarin strijd met een verdrag wordt geconstateerd) geen werking heeft. Waar het de wens om uitspraken mogelijk te maken betreft, zou hier dus verandering in moeten worden aangebracht. Daarmee zou overigens wel ‘slechts’ sprake van toetsing aan een hogere fictie (namelijk de Grondwet) – nog niet aan het mystieke fundament zelf.

Het argument van Derrida zou ook de weg openzetten naar een vorm van rechterlijk activisme, die moeilijk te rijmen valt met het begrip van een rechtsstaat (dat door Derrida als zodanig niet wordt aangevallen). Immers, wanneer een beslissing noodzakelijk is voor het samenvallen van recht en rechtvaardigheid, is het ook het enige moment waarop sturing kan plaatsvinden (vergelijk het ‘moment van opschorting’ in paragraaf 3.5). De rol van het parlement wordt daarmee beperkt tot de hoofdlijnen van één factor van rechtvaardigheid: het recht. Het is de vraag of Derrida dat wenselijk zou vinden.

Een slotopmerking hier verdient nog de recent in gang gezette procedure om een algemene bepaling in de Grondwet op te nemen.²⁹ Deze algemene bepaling voegt het volgende doel toe: “De Grondwet waarborgt de democratie, de rechtsstaat en de grondrechten.” In het kader van Derrida’s onderscheid tussen fictieve en natuurlijke rechtvaardigheid kan deze ‘preamble’ wellicht het beste getypeerd worden als een extra laagje ‘natuurlijk’ vernis op (de zelffundering van) de legitieme fictie.

5. De bijdrage van Derrida

De verhouding tussen recht en rechtvaardigheid is in de loop der tijd veranderd. Van belang is dat de discussie over deze verhouding zich na een periode van een ruime honderd jaar (van grofweg 1850 tot na de Tweede Wereldoorlog) weer naar een meta-niveau lijkt te verplaatsen. Er wordt weer gekeken naar de rechtvaardiging van recht, buiten het eigen rechtssysteem.

Derrida vormt een exponent van deze ontwikkeling en geeft een theorie waarin in twee instanties – binnen én buiten het systeem – sprake is van rechtvaardigheid. Binnen het systeem is rechtvaardig de situatie waarin de interne opvatting van een rechtssubject strookt met de op hem uitgeoefende externe dwang. Onrechtvaardig is de situatie waarin de interne opvatting wordt overstemd door de externe dwang. Die (on)rechtvaardigheid is evenwel fictief, omdat deze voorbij gaat aan het ontstaan van de interne opvatting van het rechtssubject. Voor de (consequenties van) fictieve rechtvaardigheid is dus een plaats binnen het systeem en binnen de rechtswetenschap te vinden.

Het begrip van natuurlijke rechtvaardigheid, zoals door Derrida gehanteerd, lijkt evenwel moeilijker in te passen. Het idee is dat er sprake is van een fundamentele onherleidbaarheid van recht tot natuurlijke rechtvaardigheid: recht heeft de rechtvaardigheid niet in pacht. Wanneer het recht (als wetenschap) deze onherleidbaarheid zou omarmen, dan ontkent het tegelijk de pretentie die niet zelden door wetten en verdragen zelf wordt vastgelegd: om een rechtvaardige basis voor een samenleving te vormen, door de hoogste en fundamentele waarden vast te leggen.

Waar laat dit nu de jurist? Derrida dicht de rechter de nobele taak toe om de fictieve rechtvaardigheid af en toe met de natuurlijke rechtvaardigheid in overeenstemming te brengen. En alhoewel Derrida daar niet over spreekt: ook de wetgever (i.e. politici) zou hier een rol in kunnen hebben. Dat geeft al voldoende reden om juristen in ieder geval ook buiten het kader van de fictie op te leiden: te beginnen met een verplicht vak wijsbegeerte!

Dankbetuigingen

Graag dank ik hier Henri Krop en Christian van der Veeke, voor hun verhelderende vragen en aanmoediging om niet te stoppen na het inleveren van een essay. Dankzij de opmerkingen van de redactie is de lijn van dit artikel verbeterd, waarvoor eveneens veel dank.

Jochem Streefkerk (1991) studeerde Staats- en bestuursrecht aan de Erasmus Universiteit Rotterdam en studeert Wijsbegeerte van gedrags- en maatschappijwetenschappen aan dezelfde universiteit. Naast zijn werk als onderwijsjurist bij Van Doorne N.V. werkt hij aan een juridisch promotieonderzoek naar samenwerking tussen hoger onderwijsinstellingen. Zijn wetenschappelijke interesse gaat uit naar politieke en maatschappelijke vraagstukken.

'Rechtvaardigheid: ook iets voor de jurist' is de bewerking van een essay dat oorspronkelijk werd geschreven voor 'De bijdrage van de filosofie aan de menswetenschappen. Actuele thema's in alfa- en gammawetenschappen', begeleid door dr. H. Krop en dr. C. van der Veeke.

Noten

1. "Als recht[vaardigheid] verdwijnt, wat zijn staten dan anders dan roversbenden in het groot?" (Augustinus, *De civitate Dei*). Zie ook paragrafen 2 en 5.
2. De staatsrechtelijke handboeken van Elzinga & De Lange (2009) en Venter (2010). Maar ook de algemene handboeken van Cassese (2005) en Van den Bergh & Jansen (2007) maken geen melding van 'rechtvaardigheid' (dan wel 'justice').
3. Er is een ordening, omdat de mens die nodig heeft om te leven, net zoals vissen kieuwen hebben om in het water te kunnen leven.
4. Het moge reeds duidelijk zijn dat dit essay zich uitsluitend richt op Westerse begrippen.
5. Ik ga hier verder niet in op Hegels dialectiek en verschijningsvormen van deze rationaliteit en verwijs de geïnteresseerde lezer naar Kolakowski (2008). De doelgerichtheid is in dit artikel van belang.
6. Recht en soevereiniteit (van een staat) vallen hierdoor ook per definitie samen. Dit geeft aanleiding tot een interessante vergelijking tussen de teleologische benadering van de staat van de oude Griekse denkers en de legistische benadering van Kelsen. Dit essay richt zich daar verder niet op.
7. In de Nederlandse rechtspraktijk zichtbaar in het arrest Lindenbaum-Cohen, dat in

paragraaf 3.5 verder aan de orde komt. Ook de rol van de Tweede Wereldoorlog kan niet onvermeld blijven: de verwording van het Duitse recht onder het naziregime is doorgaans een sterk voorbeeld tegen het legisme.

8. Vergelijk dit met Marx' elfde stelling over Feuerbach: "De filosofen hebben de wereld slechts verschillend *geïnterpreteerd*; het komt erop aan haar te *veranderen*."

9. Een simpel voorbeeld in dit kader is de begripsvoorwaarde van taal: om elkaar te kunnen begrijpen moet je ten minste elkaars taal spreken. Die taal kan bestaan uit handen- en voetengebaren, maar pas wanneer de gesprekspartners dezelfde betekenis aan een gebaar toekennen, kan men elkaar via die taal begrijpen.

10. Een natuurlijke persoon (een mens) of een rechtspersoon (bijvoorbeeld een besloten vennootschap of stichting) met rechten en verplichtingen. Ik richt mij alleen op natuurlijke personen.

11. Vergelijk in dit kader Kants categorisch imperatief.

12. Besluit uitvoering rookvrije werkplek, horeca en andere ruimten (Stb. 2008, 122).

13. Getuige de wijziging van het Besluit uitvoering rookvrije werkplek, horeca en andere ruimten bij Besluit van 14 juni 2011 (Stb. 2011, 337) en de procedure daaromtrent, recent resulterend in een uitspraak van de Hoge Raad van 10 oktober 2014 (ECLI:NL:HR:2014:2928).

14. *Handelingen II* 2012/13, 32 203, nr. 75, item 18.

15. Merk op dat het nu dus gaat om natuurlijke rechtvaardigheid.

16. Natuurlijk proberen sommige staatscodices dat wel, middels uitgebreide preambules waarin de oorsprong of het doel van de mens of maatschappij worden uiteengezet.

17. Of er in termen van natuurlijke rechtvaardigheid geen botsingen mogelijk zijn, is iets waarover binnen de terminologie van Derrida niets is te zeggen. Recht is immers fundamenteel onwaardeerbaar in termen van rechtvaardigheid.

18. De hoogste wet (het hoogste recht) is immers per definitie niet zelf ook gefundeerd, anders dan (in eerste instantie) op procedures of (in laatste instantie) op een handeling die bij conventie wordt geaccepteerd. Vóór invoering van de Grondwet, was er immers nog geen procedure die grondwetwijziging regelde. Interpretatie van de verschillende vrijheidsrechten in de Nederlandse Grondwet (betreffende meningsuiting, vereniging, godsdienst, onderwijs) vraagt dan ook om meer dan teruggrijpen naar een hogere wet of verdragstekst: op een gegeven moment gaat het nog slechts om een politiek debat. Met het verstrijken van de tijd – en het aannemen van opeenvolgende Grondwetten – wordt dit probleem natuurlijk verder verhuld door onder meer de verslaglegging van parlementaire debatten.

19. Illustratief is het laatste arrest waarin de Hoge Raad dit principe heeft gehanteerd (Hoge Raad 10 juni 1910, W 9038). Er was in deze zaak sprake van een gesprongen waterleiding in een kledingloods. De vrouw die boven de loods woonde weigerde – zonder bijzondere redenen – de in haar woning geplaatste hoofdkraan dicht te draaien. De eigenaar van de loods

liep veel schade op en eiste een schadevergoeding van de vrouw. De rechtbank kende de schadevergoeding toe, maar de Hoge Raad ging daar niet in mee: de vrouw had geen wettelijke regel geschonden en de schade kon haar (dus) ook niet worden aangerekend.

20. Hoge Raad 31 januari 1919 (NJ 1919, 161), nummering en nadruk door auteur.

21. Ter zijde: wat hier met het burgerlijk recht ook gebeurt is dat de “maatschappelijke betamelijkheid en zedelijkheid” het domein van de externe dwang wordt ingetrokken.

22. Artikel 79 Grundgesetz für die Bundesrepublik Deutschland.

23. Zie artikel 6:248 lid 2 Burgerlijk Wetboek: “Een (...) krachtens wet, gewoonte of rechtshandeling geldende regel is niet van toepassing, voor zover dit in de gegeven omstandigheden naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn”.

24. Te oordelen aan de hand van de redelijkheid en billijkheid – niet nader gespecificeerd.

25. Vergelijk tevens “Project Motiveringsverbetering in Strafvonnissen (PROMIS)” op www.rechtspraak.nl.

26. Artikel 26 Burgerlijke Rechtsvordering: “De rechter mag niet weigeren te beslissen.”

27. Artikel 120 Grondwet: “De rechter treedt niet in de beoordeling van de grondwettigheid van wetten en verdragen.”

28. Artikel 94 Grondwet: “Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties.” Zie over dit onderwerp uitgebreid De Wit (2012).

29. Wetsvoorstel algemene bepaling Grondwet, 22 augustus 2014, www.internetconsultatie.nl.

Literatuur

Cassese, A. (2005). *International law*. New York: Oxford University Press Inc.

Curtis, M. (1962). *The great political theories II*. New York: Avon Books.

Derrida, J. (1990). *Force de loi: Le fondement mystique de l'autorité*. *Cardozo Law Review*, 11, 920-1046.

Derrida, J. (2013). *Kracht van wet*. Het ‘mystieke fundament van het gezag’. (R. Sneller, vert.). Antwerpen/Apeldoorn: Garant.

Elzinga, D.J. & De Lange, R. (2006). *Van der Pot, Handboek van het Nederlandse staatsrecht*. Deventer: Kluwer.

Haddock, B. (2011). *A history of political thought*. Cambridge: Polity Press.

Hobbes, T. (1990). *The citizen*. In Gert, B. (red.), *Man and Citizen*. Cambridge: Hackett Publishing Company.

Kolakowski, L. (2008). *Main currents of Marxism*. (P.S. Falla, vert.). New York: Norton.

Locke, J. (2005). *Second treatise on government*. Verkregen op 9 juli, 2013, via <http://www.gutenberg.org/ebooks/7370>.

Nieuwenhuis, A.J. & Hins, A.W. (2011). *Hoofdstukken grondrechten*. Nijmegen: Ars Aequi Libri.

Rousseau, J.-J. (1973). *Du contrat social*. Évreux: Imprimerie Hérissé.

Steenhuis, D. (2013, 25 juni). *Motiveren*. Verkregen op 9 juli, 2013 via <http://www.publiekrechtropolitiek.nl/motiveren/>.

Venter, F. (2010). *Global features of constitutional law*. Nijmegen: WLP.

De Wit, J.C. (2012). *Artikel 94 Grondwet toegepast: een onderzoek naar de betekenis, de bedoeling en de toepassing van de woorden ‘vinden geen toepassing’* in Artikel 94 van de Grondwet. Den Haag: Boom Uitgevers.



Socialist Principles of Appropriative Justice

A reply to Husami

Victor van der Weerden

The relationship between Marxism and justice has always been contentious. Interpretations range from Marx as an amoralist who believed that moral norms were always a product of a specific historical mode of social organization, to Marx as a fervent moral opponent of capitalism who believed that capitalist exploitation was inherently unjust. During the 1970s and 1980s this debate reached its fullest development within the movement of Analytical Marxism. Analytical Marxism sought to apply the tools of analytical philosophy to Marxist political philosophy in an attempt to divorce Marxism from the obscurantism of Hegelian philosophy. The obscurantism of Hegelian philosophy was associated with its use of the dialectical method that seemed to violate the formal logic principle of non-contradiction and a highly abstract vocabulary which seemed to obfuscate the concepts being explained. The principle participants in the debate were Allen Wood, Ziyad Husami and Gerald Cohen. Wood took the view that transhistorical moral condemnations of capitalism were inconsistent with Marx's historical conception of morality. Cohen, on the other hand, argued that Marx thought capitalism was unjust but that Marx was not aware that he believed capitalism to be unjust. Finally, Husami defended the view that Marx regarded capitalism as morally condemnable from principles of socialist justice.

In this paper I will focus on the interpretation of Marxian justice by Ziyad Husami. In the well-known paper *Marx on distributive justice* (1978), Ziyad Husami argues, in opposition to Allen Wood and Richard Tucker, that Marx regarded the exploitation of workers by capitalists as unjust. Wood and Tucker read Marx as only condemning economic systems internally, that is to say, according to standards set by the

superstructure and ideology which arise from those economic systems and never from a transepochal point of view. Husami's contention is that capitalist exploitation is unjust because it violates what he interprets as Marx's socialist principle of justice, 'from each according to his ability, to each according to their contribution'. Husami argues that in order to end capitalist exploitation, the private ownership of the means of production must be abolished in favor of state ownership. In this paper I wish to advance three claims against Husami's specific interpretation of Marxian justice. Following and refining Burczak (2003), Ellerman (1992), and Resnik and Wolff (1987), I want to argue that Husami's conception of what DeMartino (2003) calls *appropriative justice* does not fully capture what is unjust about capitalist exploitation. Secondly, I argue that Husami's proposed solution to socialize the means of production will not in fact eliminate exploitation. Lastly, I wish to argue that an alternative socialist project of worker control and *private* (in the sense that capital is owned by individuals and not a collective authority such as the state) ownership of the means of production is desirable not only because it upholds appropriative justice but because it allows for the achievement of what Wood (1979) calls the 'non-moral good' of self-actualization, an idea Marx inherited from Hegel. Wood calls goods such as freedom, self-actualization, and community 'non-moral goods' because they are regarded as good in virtue of their ability to satisfy the "potentialities, needs, and interests of human beings" rather than good because they conform to the precepts of a moral theory (1979, p. 289). Self-actualization, like happiness, is regarded as a non-moral good because it is seen as desirable, in accordance with a certain conception of human nature, even though no moral credit is attached to its pursuit alone.

1. Husami's 'socialist principle of justice'

Husami defends Marx against the charge of amoralism by Wood and Tucker, that is to say the view that nothing is *intrinsically* right or wrong. Husami does so by clarifying that in the Marxian sociology of morals the fact that a norm arises or pertains to one historical mode of production does not rule out its use in the evaluation of other historical modes of production (1978, p. 34). Specifically, Husami contends that Marxist principles of justice can be derived from the critical, revolutionary standpoint of proletariat consciousness, which develops its own standards of justice contrary to those of the dominant mode of production, capitalism, and the dominant class in that mode of production, the bourgeoisie. Whether or not Husami is correct in interpreting Marx as being committed to a standard of justice in criticizing capitalism will not be the topic of this paper. I will assume for the purposes of this paper that Husami is correct in deriving his socialist principles of justice from Marx himself. I aim instead to provide an internal critique of Husami. My argument is that given Husami's own principle of socialist justice as derived from Marx, his account of *appropriative justice* fails to locate what is unjust about capitalist exploitation according to that very same principle.

Husami defines exploitation as the "extraction of surplus labor or surplus value from the worker and its appropriation by the capitalist without compensation" (1978, p. 47). I understand appropriation here in the traditional Marxian sense of the word as 'receiving directly into his or her hands' or 'becoming the first title holder of', that is to say claiming a property right on the product (Wolff & Resnik, 2012, p. 155). Husami's definition of exploitation follows, of course, from Marx's well known labor theory of value, whereby the value of a commodity is defined by the amount of labor-time that went into its production. For Marx the amount of labor-time which is needed to reproduce the worker's labor-power in a given day is what determines the wage that the capitalist pays the worker. Specifically, the wage is determined by the labor-time needed to produce the bundle of consumption goods necessary to maintain the worker's labor-power or 'capacity to work' according to the socio-cultural standards of a given historical epoch. Hence it is a subsistence wage, in that the labor-value of the wage is equal

to the labor-values of the commodities needed to ensure the physical and social survival of the worker. For Marx, exploitation follows from the fact that the amount of labor-time which goes into making the product the worker produces is greater than the amount of labor-time which goes into reproducing the worker's labor-power in a given day. The worker is thus robbed of the extra or surplus value created by the surplus labor, which the capitalist appropriates in the form of profit.

Husami proceeds to show how the exploitation occurring in the capitalist system can be viewed as unjust as it violates two fundamental Marxist principles of distributive justice found in Marx's *Critique of the Gotha programme* (1875): the socialist principle 'from each according to his ability to each according to his contribution' and the communist principle 'from each according to his ability to each according to his need'. The crucial point Husami wants to make is that in the just socialist society, workers would receive "consumption goods embodying an amount of labor equal to the amount of labor [they] contributed" (1978, p. 41). That is to say, in a socialist society workers would appropriate the surplus value originally appropriated by the private owners of capital since they no longer receive merely the product of the "necessary labor-time", the exchange-values of the worker's means of labor-power reproduction, but also the product of the labor they expend after producing their means of subsistence (Marx, 1976, p. 325). Crucially, Husami believes that the socialist principle of justice requires the abolition of private property, with the means of production either becoming state property or social property. If exploitation, the appropriation of surplus value by the capitalist who did not share in the process of surplus labor, is a necessary consequence of some individuals having ownership rights to the means of production to the exclusion of others then, for Husami, it follows that ending capitalist exploitation requires the abolition of private property rights in regards to society's capital assets. Husami believes that by abolishing the private ownership of the means of production, socialism represents a marked advance over capitalism for two principal reasons. Most importantly, by socializing the means of production no person can receive an income stream in virtue of the ownership of capital; all people are regarded as workers who receive a share of the total social product (after necessary deductions) equivalent

to the amount of labor-time embodied in the commodities they produce. Secondly, Husami regards the socialization of the means of production as a way in which society can establish rational and collective control over its total social product, by allowing for deductions of the social product on the basis of shared collective needs rather than the private interests of individual capital owners as under capitalism (1978, p. 43).

2. The notion of appropriative justice

DeMartino (2003) distinguishes between three different elements of justice in relation to the social processes of class in his conceptualization of what he terms ‘class justice’: productive justice, appropriative justice, and distributive justice. Following DeMartino, productive justice refers to “the fairness in allocation of the work of producing social surplus”, appropriative justice refers to “fairness in the processes by which some individuals and/or groups in society *receive* the social surplus produced by themselves or others”, and distributive justice to “fairness in the processes by which the social surplus is *distributed* among society’s members for their personal use and in the distributive patterns that emerge from these processes” (2003, pp. 8-9). The three dimensions are clearly overlapping since patterns of justice in appropriation will affect patterns of justice in distribution and vice versa. Nonetheless, the three processes of class justice are conceptually distinct for the reception and the distribution of the product are two different concepts. The distribution of the product occurs *after* the product is received, therefore the two processes are not necessarily linked. In reality, however, the process of receipt usually bears on the process of distribution as well, especially if the appropriators will also serve as the distributors of the product. For the purposes of this current critique I will focus exclusively on the notion of appropriative justice, specifically to show why Husami’s notion of appropriative justice does not fully capture what is unjust about capitalist exploitation.

Following Burczak, I interpret Husami as regarding exploitation to be unjust because “surplus labor and *only* surplus labor is appropriated by someone who did not participate in the production of that surplus” (Burczak, 2006, p. 104). This principle of appropriative justice

can be contrasted with those of Marxists like John Roemer who view exploitation as occurring in the sphere of exchange rather than production. Roemer defines exploitation as “the unequal exchange of labor for goods [whereby] the exchange is unequal when the amount of labor embodied in the goods which the worker can purchase with his income is less than the amount of labor he expended to earn that income” (1985, p. 30). Roemer, for example, would argue that independent commodity producers can be exploited because even though they appropriate the full product of their labor they cannot retain the full value they produce since they have to make payments to land, capital, and credit providers in order to gain access to privately owned means of production (Burczak, 2006, p. 106). Both Husami and Roemer identify the private ownership of the means of production as the locus of capitalist exploitation. In contrast to both of these views, Burczak regards the important question to ask as: “Who is the legitimate appropriator of the whole product, not just the surplus product?” (p. 111). That is to say, who should appropriate all the new assets created in the production processes, as well as the liability (costs) for the used-up productive factors? Whereas Husami’s principle of appropriative justice emphasizes the right of those who produce the surplus product to appropriate it, Burczak and Ellerman emphasize the right of those who produce the *entire product* to appropriate it. Both Husami and Burczak, however, still espouse the idea that the producers of the product (whether surplus or total product) have the appropriating rights. As DeMartino reminds us, however, in addition to the onsite productive and nonproductive workers, numerous other workers beyond the specific enterprise can be said to contribute to the production of the total or surplus product; in essence, production can never be isolated from the constellation of social relations and processes which provide the conditions for its existence. I follow DeMartino then in reconceptualizing Burczak’s principle of appropriative justice in the weaker form whereby “those who directly produce [the total product] *are not excluded* from fair and meaningful participation in appropriation” (DeMartino, 2006, p. 18).

3. Ellerman's conception of appropriative justice

The difference in Husami's principle of appropriative justice stems from the fact that Husami is still committed to the traditional Marxian theory of value whereas Burczak follows Ellerman in replacing the labor theory of value with the 'labor theory of property'. Ellerman defines the 'labor theory of property' as the normative principle that "people should appropriate the positive and negative fruits of their labor" (Ellerman, 1992, p. 25). Positive fruits here refers to the assets created during production and negative fruits to the costs during the same production process. Ellerman eschews talk of surplus value as the source of exploitation since, as he concludes, there is nothing unique about labor as a measure of surplus value which cannot be reformulated in terms of another productive factor, such as a 'spinning-machine theory of value' where "more 'spinning-time'" is extracted than is equivalent to "the day's 'spinning-power'" (Ellerman, 1992, p. 40). 'Spinning-time' here refers to the amount of 'spinning-hours' contained in the textile commodity that is produced. 'The day's spinning-power' refers to the amount of 'spinning-hours' needed to maintain the operation of the spinning-machine for a day. Spinning-hours are thus analogous to labor-values in this example. The injustice of exploitation in Ellerman's labor theory of property arises from the fact that the agents who are responsible for the production of labor's product (the sum of the newly created commodities and the labor services expended to produce them) are not the agents who have the appropriating rights in the capitalist firm. Ellerman employs a specific conception of appropriation in his elaboration of the labor theory of property. In regards to "newly manufactured commodities", appropriation is simply defined as "becoming the first title holder to an asset" while regarding the liabilities employed in the production of commodities, specifically the consumption of labor-power in the capitalist process, appropriation is defined as being the last owner of a property right (Burczak, 2006, p. 104). To give a specific example, an automobile that emerges from a production line has no preexisting property right attached to it; someone must become the first owner of the newly created automobile or it will lie to waste like unpicked apples in an orchard. Likewise, the input liabilities employed in producing an automobile, such as electric power or the worker's labor-power, are extinguished once used in the production process. Therefore the owner of these liabilities is the last owner as electric power and labor-power no longer exist once consumed.

4. Ellerman's Kantian grounding for appropriative justice

The labor theory of property is made into a normative theory by invoking the 'juridical principle of imputation', the principle whereby "people should have the legal responsibility for the positive and negative results of their intentional actions" (Ellerman, 1992, p. 25). Applied to the realm of production, the juridical principle of imputation is transposed into the labor theory of property. For Ellerman responsibility is a property that follows from intentionality and since intentionality can only be assigned to mental states, it follows that only labor, which is the only factor of production that can be assigned mental properties, can be said to be *responsible* for the production of the total output and equally responsible for the labor-power consumed in the production process. Labor is thus responsible both for its positive product, the total output, and the negative product, the labor-power consumed. In Ellerman's perspective, to sell one's labor-power as a commodity, as is the case under capitalism, would be to transfer both responsibility and hence ownership of the positive product (the firm's total product) of one's actions and responsibility and ownership of the negative product of one's actions (the costs incurred in production) to an external agent, the capitalist. It is important to note that when I use the terms 'positive' and 'negative' here I am not making a normative claim that the newly created product is the beneficial aspect of the production while the costs incurred are the non-beneficial aspect of production. I am merely using the words positive and negative to refer to the process of creation and destruction. That is to say, when an asset is created it can be termed a 'positive' act; in contrast, when an input-liability is destroyed or consumed it can be termed a 'negative' act. Through alienating himself from the ownership of his labor-time and from the ownership of his labor-time's product, the worker has been exploited by the capitalist and this exploitation is regarded as unjust because it treats the worker solely as a means and not as an end-in-itself, violating the central Kantian categorical imperative (Ellerman, 1988, p. 1110). The key point to be made here is that the removal of the laborer's legal responsibility (he is no longer legally responsible for the assets or liabilities of his actions) in his employment contract is what renders him a mere thing or tool.

One might object that the Kantian imperative states that people should not be treated *merely* as a means, and that in the production process, although workers are treated as a means, they are also treated as ends-in-themselves. Ellerman states that he is himself not interested in remaining completely faithful to the Kantian imperative so he does not really respond to this charge and instead is satisfied with emphasizing the aspect in which workers are treated as a means. I would argue, however, that the very fact that labor is to be regarded by definition as an input, whose presence or participation is *necessary* for the fulfillment of the ends of the firm, means that all relations with the workers must ultimately be instrumental to the extraction of his labor or at least not interfere with this process. For example, if the owners and managers of a firm are said to treat their workers well or with respect, they only do so insofar as either this treatment advances the role of the worker as a means or at least does not interfere with the process by which the role *qua* tool produces the firm's output. Another possible objection which can readily be claimed by libertarians is that in denying the worker's the ostensibly voluntary act of selling his labor-power he is in fact being treated *merely* as a means. The objection then is that even if the worker is treated as a means *inside* the production process, if we deny him the possibility to let himself be treated as a means inside the production we are consequently treating him as a mere means outside the production process!

Two replies to this objection are possible. First, one can accept that in banning the 'voluntary slavery' that is the wage contract, one is treating the worker as a means to an end of social justice but not *merely* as a means. He is not treated *merely* as a means in the sense that the humanity in the worker is still treated as an end given that after being denied the possibility to sell himself into wage slavery, his capacity to act as a self-directed rational agent is not violated. Secondly, and this follows from the first reason, the Nozick case of voluntary slavery necessarily treats a human being *merely* as a means because in entering the contract he no longer allows the possibility that his humanity is treated as an end. For Kant, our humanity is the collection of features that make us distinctively human, which include the capacities to engage in self-directed rational behavior and to adopt and pursue our own ends. The case of entering into voluntary slavery would violate the Kantian imperative to treat 'the humanity' in human beings as an end itself. A human being who enters into such a contract, even if it was voluntary, is entering

into a position that no *rational* agent can consent to, for a human being who agrees to be treated as a means, or thing, in the production process is agreeing to treat himself in such a way that he cannot exercise his rational capacity to be self-directed and to adopt and pursue his own ends. Furthermore, consenting to become a wage slave would clearly violate what Kant regarded as the primacy of the moral law over self-love for in such a case the rational nature of humanity (which is an end in itself) in the employee is being treated as a mere means to the conditional good of wealth which satisfies the self-love of the employer (Wood, 1999, p. 143).

To summarize, Ellerman's conception of appropriative justice locates the phenomenon of exploitation in the simple fact that under capitalism the person who is causally responsible for the output and input-liabilities of his actions, namely the laborer, is not held to be legally responsible for those same products of his actions. I now turn to Husami's crucial claim that in order to end exploitation it is necessary to abolish the private ownership of the means of production. Although Marx himself believed that only the social ownership of the means of production could bring about the fullest development of society's productive forces and the fullest development of man's *Gattungswesen* (species-being), it is important to note that Marx himself made the distinction between private property *per se* and capitalist private property. Marx contrasts "private property which is personally earned, i.e. which is based as it were on the fusing together of the isolated, independent working individual with the conditions of labor" with capitalist private property characterized by "the exploitation of alien, but formally free labor" (Marx, 1976, p. 928). Nonetheless, Marx believed that private ownership of the means of production would ultimately have to give way to social or state ownership since the productive forces of capitalism were too far developed and the social relations too complex to permit going back to a small-scale economy of independent commodity producers.

The mistake that Husami, following Marx, makes is assuming that the contractual roles constituting the firm come in a bundle so to speak, or as Ellerman puts it "the fundamental myth of capitalist property rights" (1992, p. 6). To put it in more specific terms, the fundamental myth assumes that the rights of residual claimancy, the rights of bearing the costs of the inputs used in the production process and the rights of owning the firm's

outputs, follow necessarily from the ownership rights of the means of production, the capital assets such as the machinery and the plant used in the production process (Ellerman, 1992, p. 12). Ellerman stresses that property rights are a category which include many specific rights which do not necessarily follow from each other. Ownerships rights, residual claimancy rights, and control rights all fall under the category of property rights. However, rights to own the means of production do not imply a right to residual claimancy or what is equivalent, the right to *appropriate* the firm's total product. As it so happens, in reality the holders of ownership rights also tend to be the holders of residual claimancy rights. However, this need not be the case. For example, a labor-managed firm may have residual claimancy, or appropriating rights, to capital even though they only rent out the capital equipment from private individuals and thus do not have ownership rights on the capital assets. To give a further historical example, during the Communist¹ regime in the Soviet Union all the means of production were nationalized and placed under state ownership, with the assumption that the state was the representative of the working class. As Wolff and Resnik make clear, however, even though the Soviet state nationalized property ownership, the workers themselves did not collectively appropriate the surpluses they produced inside the firms in which they worked. The rights of appropriation instead went to the Soviet state officials (Wolff & Resnik, 2012, p. 338). A more promising route advocated by 'market socialists' such as Ellerman (1992), Burczak (2006), and Bowles and Gintis (1993, 1994) is to make workers residual claimants of the firm while allowing workers to rent or lease the capital assets, such as the machinery needed in the production process. Gregory Dow (2003) presents one such modest proposal to achieve this goal through workers creating a workers' trust which gradually buys back the shares of the firm from its shareholders, while leasing the capital equipment needed for production; workers ultimately receive a 'wage' construed as a payment of dividends on the equity capital shares they own in the firm. By making workers residual claimants of the firm, while the means of production are leased, appropriative justice in Ellerman's sense is upheld as "workers are jointly the first owners of the manufactured output and the final owners of the input liabilities, specifically their collectively owned labor time" (Burczak, 2006, p. 110).

5. Hegel's ethical theory of self-actualization²

I have established that the principle of appropriative justice as interpreted by Ellerman and Burczak does not require abolishing private ownership of the means of production, only that workers are made residual claimants. I now would like to give the principle of appropriative justice a more authentically Marxian interpretation by grounding it in the Hegelian ethical theory of self-actualization. For Hegel self-actualization is acting in accordance with the human good as given by a historically determined human nature which is socially and culturally contextualized. In the literature on appropriative justice, normative force is given to the principle of appropriative justice by either grounding it in a Kantian conception of treating people as ends-in-themselves (Ellerman, 1992) or on any of the several capability theories advanced by Sen and Nussbaum, for example (Burczak, 2006). I have already explored the Kantian justification for upholding appropriative justice *vis-à-vis* Ellerman's labor theory of property. The capability justification for upholding appropriative justice is grounded on the idea that all members of society should have equal capabilities to function as appropriators of the social product entailing meaningful participation in decisions regarding the use of the firm's total (or surplus) product (DeMartino, 2003, p. 21). The capability framework, as I interpret it, is silent regarding what is to be regarded as a valued functioning and therefore I do not find it to be very informative regarding what is normatively appealing about appropriative justice. However, to be fair, I have only mentioned one specific conceptualization of the capability approach and given that many alternative conceptions exist it may well be that an alternate conception of the capability approach can just as effectively ground a principle of appropriative justice as a Kantian framework. As appealing as I find the Kantian justification for upholding appropriative justice, in the final part of this paper I will try to find a normative grounding for appropriative justice that is more faithful to Marxian philosophical thought. Given that Marx took Hegel and not Kant as his point of philosophical departure, naturally, we will have to find normative justification for appropriative justice in Hegel if we wish to stick more closely to Marx's philosophical language.

For Hegel self-actualization is a dialectical process whereby a person, mediated by the collective consciousness of historical cultural forms, seeks to understand both who he is and who he ought to be and to actualize this self through the pursuing of principles and ends which are seen as consistent with the kind of self he is and ought to be. In Hegel's conception of self-actualization the distinction between theoretical reason, and practical reason disappears as the two sides of reason (or spirit) are seen to be mutually interconnected. Following Kant, Hegel defines theoretical reason as knowledge of what is, while practical reason is defined as knowledge of how things ought to be. In the process of self-actualization practical reason and theoretical reason are dialectically conjoined, as each form of reason presupposes the existence of the other form of reason. Theoretical reason presupposes a concern with what I am and what I ought to do, thus presupposing practical reason. Likewise, in actualizing practical reason the will reveals what I am, thus presupposing theoretical reason. For Hegel, what *I am* is a being whose vocation is to know itself and actualize its knowledge of the self, or what he calls Freedom (Wood, 1990, p. 32). By using the word vocation, Hegel is making the teleological claim that knowledge of self, and the actualization of this knowledge, is the end, or purpose, of human nature. As Wood explains further, both Hegel and Marx regard the self that is to be discovered and actualized as a historical product, mediated through the specific social processes of a historical time period (p. 33). The connection between self-actualization and appropriative justice can now be drawn. The historical process reveals that an element of man's self-knowledge is his conception of his nature as a productive animal. Through his nature as a productive animal he seeks to actualize himself through laboring on the inorganic and organic matter of nature and in so doing sees himself in the objects he produces. This leads him to further redefine his self-conception as productive being. The productive activity of man becomes itself an object of his will and consciousness and through this process of self-consciousness man makes not only his own nature his object but his nature as man, as a member of a species, and hence in so doing he defines what it means to be human (Marx, 1964). In a society where workers are alienated from their own product in that they are denied the ability to appropriate the product of their labors, not only does

the commodity they produce confront them as alien, but their very productive life-activity and hence their own self appear as not their own. In denying the worker the capacity to define himself through his productive activity, he is being denied the ability to actualize himself and know his self through actualization. He is being denied the Freedom, as a being whose vocation it is to know himself and actualize this knowledge, which makes him human (Wood, 1990, p. 17). For Hegel self-actualization is what makes human beings human *beings*. It is essential to what we are. Human beings are beings that are constantly self-actualizing themselves. Appropriative injustice, thus, dehumanizes mankind.

6. Conclusion

The relationship between Marxian social theory and theories of justice has always been an uneasy and complicated one, since Marx actively sought to avoid the normative language which many read into his critique of capitalist exploitation. In this paper I have examined one particular theory of socialist justice, Husami's principle of appropriative justice, in which laborers should have the right to appropriate the surplus product they produce. Since the workers are the ones contributing to the production of surplus value, they should be given the right of appropriation to this surplus product. I have then criticized Husami's notion of appropriative justice on two crucial aspects. First I followed Ellerman and Burczak in identifying the injustice of exploitation as stemming from the fact that workers do not appropriate the total product rather than the surplus product. Second I criticized Husami's contention that ending capitalist exploitation requires the socialization of the means of production by exposing his commitment to what Ellerman terms the 'fundamental myth of capitalist property rights'. Lastly I argued that grounding a principle of appropriative justice in the Hegelian theory of self-actualization, rather than a Kantian theory of rights or a capability approach of human flourishing, is far more faithful to Marx's condemnation of capitalism for its denial of fundamental non-moral goods.

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Notes

1. Communist in name only, given that it's economic structure was in essence a form of state socialism.
2. I follow Wood (1990, p. 17) in defining an *ethical*, as opposed to a *moral* theory, as a theory that is "grounded in a knowledge of human beings that enables us to say that some modes of life are suited to our Nature, whereas others are not. In that sense, ethical theories generally may be regarded as theories of human self-actualization."

Bibliography

- Bowles, S., & Gintis H. (1993). Agency, incentives, and democratic accountability. In S. Bowles, H. Gintis, & B. Gustafsson (Eds.), *Markets and democracy: Participation, accountability, and efficiency*. Cambridge: Cambridge University Press.
- (1998). Efficient Redistribution: New rules for markets, states, and communities. In E.O. Wright (Ed.), *Recasting egalitarianism: New rules for communities, states, and markets*. New York: Verso.
- Burczak, T. (2006). *Socialism after Hayek*. Ann Arbor: University of Michigan Press.
- DeMartino, G. (2003). Realizing class justice. *Rethinking Marxism*, 15(January), 1-31.
- Dow, G. K. (2003). *Governing the firm: Worker's control in theory and practice*. Cambridge: Cambridge University Press.

- Ellerman, D. (1988). The kantian person/thing principle in political economy. *Journal of Economic Issues*, 22(4), 1109–1122.
- (1992). *Property and Contract in Economics*. Cambridge Mass.: Blackwell.
- Husami, Z. I. (1978). Marx on distributive justice. *Philosophy & Public Affairs*, 8(1), 27-64.
- Marx, K. (1964). *Economic and philosophic manuscripts of 1844*. New York: International Publishers.
- (1976). *Capital* (B. Fowkes, Trans.). New York: Vintage.
- Resnick, S. A. & Wolff, R. D. (1987). *Knowledge and class: A marxian critique of political economy*. Chicago: University of Chicago Press.
- Roemer, J. (1986). Should marxists be interested in exploitation?. In J. Roemer (Ed.), *Analytical marxism* (pp. 260-262). Cambridge: Cambridge University Press.
- Wood, A. W. (1979). Marx on right and justice: A Reply to Husami. *Philosophy & Public Affairs*, 8(3), 267-295.
- (1990). *Hegel's ethical thought*. Cambridge: Cambridge University Press.
- (1999). *Kant's ethical thought*. Cambridge: Cambridge University Press.
- Wolff, R. D., & Resnick, S. A. (2012). *Contending economic theories: Neoclassical, Keynesian, and Marxian*. Cambridge, Mass.: MIT Press.



What Does Desert Cost?

Evaluating Moriarty's rationale for the asymmetry of desert

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Desert at work. The feast of St. Nicholas, Jan Havicksz. Steen, 1665-1668.

1. Introduction

Many paintings of Jan Steen have a message. This depiction of a Dutch St. Nicolas celebration is no exception. Already since the thirteenth century, legend has it that the name-giver of the feast delivers a present in the shoe of Dutch children some time in December. St. Nicholas must have made an exception to his standard delivery method for the girl at the center of the painting. She can scarcely carry the presents she has received: a doll and a bucket full of candy. Her crying brother just behind her has been less fortunate: his shoe only contains a rod,¹ which one of his sisters is holding up while laughing at him. Jan Steen's message seems simple enough: those who are good become deserving of rewards, those who are bad become deserving of punishment. Or is it? It appears there is a twist to the story. Look at the grandmother at the back. She winks the crying boy, while seeming to reach for something behind the curtain. Is she taking out a present to cheer him up?

The scene in the painting is just one illustration of the central role of desert in our everyday lives. Many of us have the intuition, ingrained from a very early age onwards, that it is a good thing if people get what they deserve and a bad thing if they do not. We are – in the words of Shelly Kagan – “friends of desert” (2012, p. 3). This centrality of desert in our thinking would seem to make it a good candidate for a principle of distribution of social benefits, social burdens, and punishment: to each according to what they deserve. Aristotle certainly seemed to favor something of the sort when he remarked that “all men agree that what is just in distribution must be according to desert in some sense” (quoted in Olsaretti, 2003, p. 3). Similarly, John Stuart Mill wrote that “it is universally considered just that each person should obtain that (whether good or evil) which he deserves” (1863/1998, p. 98).

Many contemporary political philosophers think rather differently. They appear to be a bit like the winking grandmother in the back of the painting, resisting the operation of desert as a principle of *distributive justice* – a principle that decides how social benefits and burdens are distributed. As Scheffler puts it (1992, p. 301): “none of the most prominent contemporary versions of philosophical liberalism assign a significant role to desert at the level of fundamental principle”.² It appears only luck egalitarian theories are an exception.³ The absence of desert in prominent theories of distributive justice is puzzling. How is it possible that a notion that is so ingrained in our thinking about what is just in distribution plays a rather limited role in philosophical reflection on that topic?

Matters get even more puzzling when one takes a look at contemporary theories of *retributive justice* – theories about the distribution of punishment. In such theories, desert frequently plays a central role.⁴ It seems that our intuitions about desert are reflected much more in discussions of retributive justice than in discussions of distributive justice. This has been called *the asymmetry of desert* thesis.⁵ Moriarty (2003, p. 512) has claimed that we would expect similar principles of justice to operate in both spheres of justice, because separating them is to some extent “artificial”.⁶ A justification of the asymmetry would show why the arguments for assigning desert a certain role in one realm of justice do not apply to the other realm. In case no such justification can be found, a re-evaluation of the role of desert in distributive and retributive justice may be required, so that desert is assigned a similar role in both. So far, Scheffler (2000), Smilansky (2006), and Moriarty (2013) have put forth justifications of the asymmetry.

Moriarty’s (2013) account is the only one that remains uncontested.⁷ However, in this paper I argue that it is unconvincing. To make my case, I will first flesh out the conception of desert that is at stake in the asymmetry of desert literature (section 2) and discuss Moriarty’s rationale for the asymmetry in greater detail (section 3). In section 4.1-4.3, I will argue that the cost asymmetry on which Moriarty bases his rationale⁸ is not as large as he suggests: rewarding retributive desert is more expensive⁹ and rewarding distributive desert less expensive. Additionally, I will claim in

section 4.4 that for Moriarty’s rationale to be successful, he needs to specify when systems of desert-based distribution and retribution are fair enough. Currently, he does not do so. These two claims together lead to the conclusion (section 5) that Moriarty’s rationale for the asymmetry fails.

2. What is desert?

There is some agreement amongst philosophers about what the concept¹⁰ of desert is, but much disagreement about how the concept should be fleshed out (McLeod, 2004; Olsaretti, 2004). Let’s start with the agreement. Desert is generally conceived of as a three-place relation among a subject (S), object (O) and desert base (D). An example would be: Rosemary (S) deserves to win the Rotterdam weightlifting contest (O), because she has the strongest muscles of all contestants (D). Also, it is typically assumed that the base of desert claims must be something about the subject, such as an attribute of hers or an act she performed (Feinberg, 1970).¹¹ Most of us would, for instance, strongly disagree if someone claimed that Rosemary deserves to win the Rotterdam weightlifting contest because her father has stronger muscles than all contestants. Finally, desert claims have normative or moral force (Olsaretti, 2004, p. 15). To claim that someone deserves something is to say that it is a morally good thing if she would get what she deserves.¹²

2.1. The conception of desert in the asymmetry debate

Philosophers seem to stop agreeing with each other on the topic of desert from this point onwards. There is much discussion on what *can* and *should be* the subjects, objects and especially bases of desert claims (see McLeod, 2004). Such dissent is mostly absent from the asymmetry of desert literature.¹³ All contributors assume that the *subjects* of desert claims are human beings. They take *objects* to be punishment in the retributive sphere, and social benefits and burdens in the distributive sphere – although some¹⁴ narrow down the latter to income and wealth. The *base* of desert, however, is often left unspecified. A possible desert base in the retributive sphere could be wrongdoing, while possible bases of distributive desert include effort and achievement.¹⁵

All contributors to the debate specify that they talk about prejusticial desert. To see what that means, it is helpful to distinguish prejusticial desert from institutional and preinstitutional desert. According to an institutional theory of desert, desert claims are based on the rules and purposes of the institutions of society (McLeod, 2004; Olsaretti, 2004, p. 17; Scheffler, 2000). To borrow an example from Rawls (1999): the team that scored the most goals while abiding by the rules of soccer deserves to win the game. This is a relatively simple conception to use in practice. To know what a person deserves, it suffices to apply the rules. However, simplicity may come at a cost here, as rules and institutions of society are not always just. We all know the feeling that the winning soccer team actually deserved to lose.

By basing desert on a principle of justice, preinstitutional desert allows for a discrepancy between desert and the rules and purposes of society's institutions. This conception of desert would make it possible to say: the rules of soccer are unjust, because they allow more able teams to lose matches. Note that preinstitutional desert is "parasitic" on another principle of justice – such as the principle that more able teams should get prizes (Olsaretti, 2004, p. 15). It derives its normative force from that other principle. Prejusticial desert, on the other hand, is grounded in itself. What people deserve is not a function of the rules and purposes of institutions, nor of another principle of justice. To ask what is just amounts to asking what is deserved.

2.2. The asymmetry of desert

With this conception of desert in mind, it is time to move on to the asymmetry itself. Although Moriarty (2003) coined the term *asymmetry of desert*, Scheffler (2000) was the first to write about it. He argues that Rawls (1999) assigns desert a different role in the distributive and retributive spheres of justice. Rawls insists that desert only has a derivative role to play in distributive justice,¹⁶ but he simultaneously argues that it should play a more pronounced role in retributive justice. One can see the opposition by comparing the following two passages from *A theory of justice* (1999).

In the first, Rawls considers the possibility of rewarding desert in the distributive realm:

[I]t is incorrect that individuals with greater natural endowments and the superior character that has made their development possible have a right to a cooperative scheme that enables them to obtain even further benefits in ways that do not contribute to the advantages of others. We do not deserve our place in the distribution of native endowments, any more than we deserve our initial starting place in society. That we deserve the superior character that enables us to make the effort to cultivate our abilities is also problematic; for such character depends in good part upon fortunate family and social circumstances in early life for which we can claim no credit. (p. 89)

In the second, he writes about rewarding desert in the retributive realm:

A propensity to commit such [criminal acts] is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults. (p. 277)

The question these passages raise is this: how can Rawls simultaneously claim that individuals do not deserve the fruits of their character and endowments when it comes to the distribution of primary social goods, but should be punished for their bad character? He does not provide an answer to this question. Rawls is one of the few philosophers in whose work the asymmetry¹⁷ can be found, which can be explained by the fact that he is one of few philosophers who wrote about both distributive and retributive justice. However, Moriarty (2003) and Smilanksy (2006) note that the asymmetry is quite a general phenomenon in contemporary theories of retributive and distributive justice. Desert frequently plays a fundamental role in the former, but not in the latter. This means that even if one does not agree with Scheffler's (2000) reading of Rawls, the asymmetry is worthy of attention.

3. Moriarty's consequentialist rationale: an asymmetry to defend the asymmetry

Moriarty is one of the most active contributors to the asymmetry of desert literature. Although he previously confessed to having serious doubts about whether the asymmetry can be justified (2003, p. 533), he has come up with a consequentialist rationale for it in a recent (2013) paper. The rationale is based on a difference in the costs of rewarding desert in the two spheres of justice. It is consequentialist, because Moriarty assumes that a practical consideration – the cost of rewarding desert – can outweigh the importance of giving people what they justly deserve. I think one could summarize his argument as follows:

- M1. A case can be made for requiring desert as a matter of justice,
- M2. Requiring desert in the distributive sphere would be very costly,
- M3. Requiring desert in the retributive sphere is not as costly,
- M4. Cost considerations can outweigh the importance of giving people what they justly deserve,
- M5. Therefore, an asymmetry in the costs of requiring desert between the two spheres of justice could provide a (partial) rationale for the asymmetry of desert.

To make his case, Moriarty refers to a paper by Arneson (2007) that argues that a free market does not reward people according to any plausible conception of distributive desert. He then claims that in order to implement desert-based distribution, a planned economy would be required. However, history has shown that planned economies are terribly inefficient. Requiring desert in the distributive sphere would therefore be expensive. This cost argument does not apply in the retributive sphere because much fewer people break criminal law than make productive contributions.

The upshot is that requiring desert is more costly in the distributive sphere than in the retributive sphere. Such cost considerations can be a reason to refrain from allocating all social benefits and burdens

according to desert. Cost considerations do not *justify* the asymmetry, however, as they do not undermine the case for requiring desert that Moriarty assumes (M1). Therefore, one should still try to reward distributive desert whenever this can be done at a reasonable cost. This seems quite possible for the distribution of a substantial number of goods: think of scholarships, welfare benefits, transplant organs, and work visas. What remains is a *residual asymmetry*: the whole of people's just share of punishment would be awarded according to desert, whereas only part of social benefits and burdens would be distributed in accordance with desert.

4. Bringing some symmetry to Moriarty's cost asymmetry

It is my contention that the cost asymmetry that Moriarty postulates does not succeed at vindicating the asymmetry of desert. To establish this claim, I will defend the following argument:

- B1. Distributing punishment according to what people deserve is more expensive than Moriarty suggests,
- B2. Distributing social benefits and burdens according to what people deserve is less expensive than he suggests,
- B3. Estimating the cost of rewarding desert requires the specification of a fairness threshold,
- B4. Moriarty does not specify such a threshold,
- B5. Therefore, Moriarty's rationale for the asymmetry of desert fails.

4.1. The cost of rewarding retributive desert

Moriarty (2013) does not ponder how well the criminal justice system is doing at rewarding desert. This is remarkable given that he (i) does ask this question for the market, (ii) answers that it is doing badly, and (iii) then argues that an inefficient planned economy would need to be implemented to properly reward distributive desert. Could a similar story be told for retributive desert?

To arrive at a tentative answer to this question, let's try to assess how well the criminal justice system in the United States is doing at rewarding desert. I restrict my attention to the United States here, because that is the country Moriarty focuses on. Now, to make the assessment, we need to know what it means to punish people according to their desert. In essence, it seems to entail giving people (S) punishment (O) grounded on a desert base (B). Moriarty does not specify what he takes the base for retributive desert to be. Suppose that it were 'wrongdoing by breaking criminal law'.¹⁸ Furthermore, assume for now that all the punishments for violations of criminal law in the United States are in fact in accordance with desert: no innocent people are arrested and convicted, and the punishments that guilty people get are perfectly in accordance with the law.

Even under such unrealistic assumptions, it seems that the U.S. criminal justice system is doing a poor job at giving wrongdoers the punishments they deserve. The Federal Bureau of Investigation (FBI) publishes yearly reports on crime clearance rates for the whole of the United States. In these statistics, a crime is marked as 'cleared' whenever the offender has been arrested or when she/he has been identified but cannot be arrested due to factors outside of the control of the relevant law enforcement agency (FBI, 2014). These are the main clearance rates for violent crimes and property crimes of all U.S. law enforcement agencies in 2013: murder and negligent manslaughter, 64,1%; forcible rape, 40,6%; robbery, 29,4%; aggravated assault, 57,7%; burglary, 13,1%; larceny-theft, 22,4%; and motor vehicle theft, 14,2%.

The clearance rate for all of these offenses is well below 100%. Note that the reported clearance rates include cases in which the known offender cannot be arrested and punished. What is more, it is well established in criminology that crime is underreported by victims and underrecorded by the police (MacDonald, 2002). In other words, a substantial number of the crimes committed are not met with any form of legal punishment. The perpetrator walks free. I think that these statistics are enough to cast serious doubts on the ability of the U.S. criminal justice system to currently punish wrongdoers in accordance with what they legally deserve. Achieving increases in the clearance rate of crimes is likely to come at

considerable costs: more police on the streets, more surveillance, more cases to be tried, more people in prison, and so on.

If such a costly rise in clearance would need to be realized before it can be assumed that wrongdoers are sufficiently punished in accordance with their deserts, it seems that the cost asymmetry on which Moriarty bases his rationale decreases. This implies that a smaller part of the asymmetry of desert can be rationalized by cost considerations.

4.2. The cost of rewarding distributive desert

The cost asymmetry decreases further if one considers that desert-based distribution may be less expensive than Moriarty claims. He argues that the (free) market does not reward people according to any reasonable conception of individual desert. The only way in which one could reward distributive desert is by implementing a planned economy. As history has shown time and again, however, planned economies are inefficient, which makes rewarding distributive desert an expensive option. What Moriarty seems to ignore here though, is that a number of proposals have been put forth for combining the efficiency of the market with rewarding distributive desert. One example is the 'belasting op bekwaamheid' (talent tax) proposed by the Dutch Nobel prize-winning¹⁹ economist Jan Tinbergen (1970). His idea is to have people pay a fixed amount of tax each year that increases with their capacity to earn. Such a system approaches a desert-based system of distribution by making people's incomes less dependent on factors outside their control, such as genes and upbringing.

Plug, Van Praag and Hartog (1998) work out Tinbergen's suggestion.²⁰ They claim (p. 186) that capacity to earn can be approximated by (i) physical health, (ii) cognitive intelligence, (iii) social and emotional intelligence, and (iv) gender (men live shorter than women and do not bear children). In countries with mandatory education, such information could initially be acquired at schools and updated when required. Everyone would pay a fixed amount (lump sum) of tax, regardless of how many hours he or she works. The height of the tax increases with capacity to earn. A system of income taxation based on capacity to earn is likely to be more efficient than the current tax system in the United States. There,

the marginal tax rate²¹ increases with income – which creates a disincentive to work harder (p. 207). Also, a talent tax would significantly reduce the costs of assessing each year how much income tax people need to pay. People's capacity to earn is unlikely to unpredictably change significantly over time.

Talent-based taxation comes with worries too. People may have a strong incentive to understate their capacity to earn. However, tax administrators could reduce this incentive by making higher education admission and job selection for the government (as they already are to some extent) dependent upon factors as (ii) cognitive intelligence, and (iii) social and emotional intelligence. Additionally, one may worry that people's privacy is infringed upon too much if the government tests people for their capacity to earn. I would retort that the current tax system in the United States also infringes upon people's privacy quite a bit. When parents apply for financial help (Temporary Assistance for Needy Families) in the state of Georgia, for instance, they need report whether their children (i) have satisfactory attendance at school, (ii) have been immunized, (iii) have experienced domestic violence, (iv) suffer from physical or mental incapacities, and so on (Georgia Department of Human Services, 2015).

The upshot is that if a talent tax could ensure distribution in accordance with desert, it appears that it is less costly to reward distributive desert than Moriarty claims. Hence, the cost asymmetry on which he bases his rationale would decrease further.

4.3. The inefficiency of planned economies

There is one more point that is worth mentioning here. Moriarty claims that history has shown that planned economies are inefficient and lead to a low standard of living. By implication, a planned economy that rewards distributive desert will lead to a low standard of living as well. I disagree with this inference, because it seems that planned economies that aimed to reward individual desert have not really been tried yet. The lion-share of the planned economies of at least recent economic history consists of the economies that made up the Union of Socialist Soviet Republics

(USSR). These economies were notorious for the lack of individual incentives to work harder (Murrell, 1991).

What factory managers were paid depended on whether they met production targets. Such targets were frequently defined just in terms of quantity, which meant that managers had no incentive to (i) produce more than the target, and (ii) produce goods of higher quality. Such an incentive problem might be less prevalent in planned economies that aim at rewarding individual desert. After all, such a system could provide people with an incentive to become more deserving, whereas such incentives were largely absent in the USSR economies. The upshot of this is, again, that rewarding distributive desert might not be as expensive as Moriarty claims it to be, even if it would require implementing a planned economy.

4.4. A fairness threshold

Moriarty might respond to my argument by claiming (i) that the U.S. criminal justice system is actually doing sufficiently well in giving people the punishments they deserve, and that (ii) in proposals like that of Tinbergen, people's distributive desert is not rewarded in a precise enough manner. This brings me to a problem that underlies Moriarty's rationale for the asymmetry. To be able to assess to what extent it is successful, one needs to be clear on when a desert-based system of distribution and retribution is fair enough. It appears that the lower one sets the fairness threshold for rewarding desert, the cheaper it will become to implement desert-based systems of distribution and retribution.

Wolff (2013) claims precisely this when he argues that for any such system, there is a tradeoff between feasibility and fairness. 'Feasibility' refers to the idea that the information required for requiting an individual's desert can be approximated at reasonable costs. The lower these costs are, the more feasible a system for requiting desert is. 'Fairness' considerations typically pull in the opposite direction. They refer to the extent in which a measure of desert really captures an individual's desert. The cheaper one's measure of desert is, the less likely this is to be the case. To see this more clearly, it is helpful to think of requiting distributive desert in accordance with effort.

If we were to aim at rewarding effort *corrected for* differences in genetic endowment and upbringing, we would naturally need to gather information about these two factors. Approximating this information by education level would be quite cheap, but might be unfair. After all, the education level that people obtain is likely to be determined both by their effort-making ability, but also the ability-corrected effort they exerted. We only aim to correct for the former, but not the latter. A fairer measure would be to establish people's effort-making ability by submitting them to a full day of testing. Doing so for the whole population of a country, however, would be expensive. This, in a nutshell, is the tradeoff between the feasibility and fairness of rewarding desert.

The success of Moriarty's rationale for the asymmetry of desert stands or falls with what tradeoff between fairness and feasibility he deems acceptable. I have claimed that little would be left of his rationale if he would deem desert-rewarding systems as the talent tax fair enough, and the current criminal justice system in the United States unfair. Whether Moriarty would do so, is guesswork: he does not explicitly consider the tradeoff. Therefore, I claim that (B5) his rationale for the asymmetry of desert fails.

5. Conclusion

The asymmetry of desert is a fascinating puzzle. It can be solved either by providing a justification for the asymmetry, or by assigning desert a similar role in distributive and retributive justice. This paper critically evaluated Moriarty's consequentialist rationale for the asymmetry. He claims that an asymmetry in the costs of rewarding desert between the distributive and retributive sphere can (partially) vindicate the asymmetry of desert. I claimed that (B1) rewarding desert in the retributive sphere might be more expensive than Moriarty seems to think. At the same time, (B2) rewarding desert in the distributive sphere may not be as expensive as he suggests. Combining these two claims, it turns out that the cost asymmetry that underlies Moriarty's consequentialist rationale is not as large as he makes it out to be. In addition, I argued that the success of Moriarty's defense of the asymmetry hinges on the (B3) specification of a fairness threshold

for desert-based systems of distribution and retribution. As Moriarty does (B4) not specify such a threshold, it appears that (B5) his rationale fails.

Should political theorists become more or less like the desert-upsetting grandmother in Jan Steen's painting? The disappointing but simultaneously hopeful answer is: I do not know, *yet*. This paper criticized the last defense of the asymmetry of desert that remained uncontested. However, new justifications could be found. In my view, the way forward is further conceptual reflection upon distributive and retributive desert – in the line of recent work by Olsaretti (2004), Kagan (2012), and Walen (2014). So far, the assumption in the asymmetry of desert debate has been that similar conceptions of desert are at stake in both spheres of justice. I highly doubt this assumption. This raises a new question: if there are different conceptions of desert at stake in theories of distributive and retributive justice, to what extent can one still speak of an asymmetry of desert that is in need of justification? This is a question for a different paper.

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Editorial note

Since this essay was written by a member of the editorial board of the Erasmus Student Journal of Philosophy, it was subject to a more extensive review procedure. For more information, see

<http://www.eur.nl/fw/english/esjp/submissions>

Notes

1. Symbolizing an instrument with which bad children would be whipped.
2. The term 'fundamental principle' here refers to a preinstitutional and prejusticial notion of desert. I will explain what such a notion of desert is in the next section.
3. Luck egalitarians such as Cohen and Dworkin argue that unequal distribution only is morally permissible if it is the result of deliberate, calculated gambles by people. Concomitantly, inequalities are impermissible if they are the result of 'brute luck' factors such as genetic endowment and upbringing. Lippert-Rasmussen (2014) provides an overview of the many variants of luck egalitarian theories.
4. See, for instance, Olsaretti (2003), Smilansky (2006), and Walen (2014).
5. See Moriarty (2003, 2013), and Smilansky (2006).
 6. See Moriarty (2003) for a more elaborate argument on why the asymmetry of desert is in need of justification. I will not repeat it here, but simply assume that the asymmetry is indeed in need of justification.
 7. Scheffler's (2000) justification has been challenged by, amongst others, Moriarty (2003) and Miller (2003). Smilansky's was challenged by Moriarty (2013). Note that Scheffler (2003) published a more refined version of his justification to accommodate some of the criticisms he received. This 'updated' justification has not received critical scrutiny yet.
 8. When talking about his *rationale* for the asymmetry of desert, Moriarty (2013) occasionally uses the word 'justification'. I think this is confusing, because he actually argues that the asymmetry could be unjust, but we might leave it intact because it would be costly to eliminate it. Consequently, I will consistently talk about Moriarty's rationale in this paper from now on.
 9. Note that Moriarty does not specify what he takes 'expensive' and 'costly' to mean. I took these terms to denote not only monetary costs, but also feasibility concerns.
 10. I am here using the word 'concept' as defined by Rawls (1999, p. 5). It refers to the structure of the term 'desert': a three-place relation between subject, object and desert base. A conception of desert would be a concept of desert in which the subject, object and desert base are specified.

11. Desert claims are typically backward-looking (i.e. based on past and/or current attributes or acts), although David Schmitz (2011) has recently published a plea for forward-looking desert.

12. There is disagreement, however, about whether desert claims can or should be able to ground obligations.

13. This is claimed, *inter alia*, by Moriarty (2003, p. 519).

14. Smilansky (2006) does that, for instance.

15. Note, however, that there are many other possibilities. See, for instance, Wolff (2003, pp. 220-221).

16. Note that this interpretation is contested. Scanlon (1986) and Sandel (1982) interpret Rawls as assigning the same role to desert in both the distributive and the retributive sphere.

17. Scheffler (2000) and Moriarty (2003) claim this.

18. Of course, the notion of desert being discussed in the literature on the desert asymmetry is prejusticial, so might not coincide with criminal law at all times. This, among other reasons, is why I call my answer to the question how well the U.S. criminal justice system is doing at rewarding retributive desert 'tentative'. I decided to focus on criminal law here for two reasons. First, it is the best proxy for a prejusticial notion of retributive desert that I can think of *for which data are available*. Second, Moriarty cites statistics of the United States criminal justice system as well, and I am responding to his argument.

19. I am well aware that it is actually the Sveriges Riksbank Prize in Economic Sciences in memory of Alfred Nobel, and that Alfred Nobel did not include this award in his testament. All this is besides the point of the paper.

20. An elaboration on Tinbergen's suggestion was needed; the article in which Tinbergen calls for the talent tax is only three pages long.

21. The tax paid on an additional dollar earned.

Bibliography

- Arneson, R. (2007). Desert and equality. In: N. Holtug & K. Lippert-Rasmussen (Eds.), *Egalitarianism: new essays on the value and nature of equality* (pp. 262-293). New York: Oxford University Press.
- FBI (2014). Crime in the United States 2013. Retrieved from http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/clearances/clearancetopic_final.
- Feldman, F. (1970). *Doing and deserving*. Princeton: Princeton University Press.

- Georgia Department of Human Services (2015). TANF eligibility requirements. Retrieved from <https://dfcs.dhs.georgia.gov/tanf-eligibility-requirements>.
- Kagan, S. (2012). *The geometry of desert*. New York: Oxford University Press.
- Lippert-Rasmussen, K. (2014). Justice and bad luck. In E.N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2014 edition). Retrieved from <http://plato.stanford.edu/archives/sum2014/entries/justice-bad-luck/>.
- McDonald, Z. (2002). Official crime statistics: their use and interpretation. *The Economic Journal*, 112(477), F85-F106.
- McLeod, O. (2002). Desert. In E.N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2013 edition). Retrieved from <http://plato.stanford.edu/archives/win2013/entries/desert/>.
- Mill, J. S. (1998/1863). *Utilitarianism*. R. Crisp (Ed.). New York: Oxford University Press.
- Miller, D. (2003). Comparative and noncomparative desert. In S. Olsaretti (Ed.), *Desert and justice* (pp. 25-44). Oxford: Oxford University Press.
- Mills, E. (2004). Scheffler on Rawls, justice, and desert. *Law and Philosophy*, 23, 261-272.
- Moriarty, J. (2003). The asymmetry of desert. *Nous*, 3(7/3), 518-536.
- (2005). The epistemological argument against desert. *Utilitas*, 17(02), 205-221.
- (2013). Smilansky, Arneson, and the asymmetry of desert. *Philosophical studies*, 162, 537-545.
- Murrell, P. (1991). Can neoclassical economics underpin the reform of centrally planned economies? *Journal of Economic Perspectives*, 5(4), 59-76.
- Nozick, R. (1974). *Anarchy, state and utopia*. Oxford: Basil Blackwell.
- Olsaretti, S. (2003). *Desert and justice*. Oxford: Oxford University Press.
- (2004). *Liberty, desert, and the market*. Oxford: Oxford University Press.
- Plug, E.J.S., Van Praag, B.M.S., Hartog, J. (1999). If we knew ability, how would we tax individuals? *Journal of Public Economics*, 72, 183-211.
- Rawls, J. (1999). *A theory of justice* (Revised Edition). Cambridge, Mass.: Harvard University Press.
- Sandel, M. (1982). *Liberalism and the limits of justice*. Cambridge: Cambridge University Press.
- Scanlon, T.M. (1986). The significance of choice. *The Tanner lectures on human values*. Retrieved from: http://tannerlectures.utah.edu/_documents/a-to-z/s/scanlon88.pdf.
- Scheffler, S. (1992) Responsibility, reactive attitudes, and liberalism in philosophy and politics. *Philosophy & Public Affairs*, 21(4), 299-323.
- (2000). Justice and desert in liberal theory. *California Law Review*, 88(3), 965-990.
- (2003). Distributive justice and economic desert. In S. Olsaretti (Ed.), *Desert and justice* (pp. 69-93). Oxford: Oxford University Press.
- Schmidtz, D. (2002). How to deserve. *Political Theory*, 30(6), 774-799.
- Smilansky, S. (2006). Control, desert and the difference between distributive and retributive justice. *Philosophical Studies*, 131, 511-524.
- Steen, J. (1665-1668). Het St. Nicolaasfeest [The feast of St. Nicholas, painting]. Amsterdam: Rijksmuseum.
- Tinbergen, J. (1970). Belasting op bekwaamheid [talent tax], *Intermediair*, 30, 1-3.
- Walen, A. (2014). Retributive justice. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2015 edition). Retrieved from <http://plato.stanford.edu/archives/sum2015/entries/justice-retributive/>.
- Wolff (2003). The dilemma of desert. In S. Olsaretti (Ed.), *Desert and justice* (pp. 219-232). Oxford: Oxford University Press.

