social, moral, and political issues.\textsuperscript{20}

Philosophical pragmatism has directly influenced contemporary legal theory. Today, some traces of pragmatist thought may be found in nearly all jurisprudential writing, and legal pragmatism as a distinct attitude—if not a discrete theory—may well dominate the legal academy.

Modern legal pragmatism accommodates a wide spectrum of political and social beliefs.\textsuperscript{21} The materials that follow are designed to illustrate three interrelated features that unite this otherwise extraordinarily diverse body of thought: first, the normative belief in the value of community; second, the search for interpretive practices to supplant foundationalist conceptions of rules; and finally, the enduring commitment to some notion of social progress.

**A. PRAGMATISM, FROM LEGAL REALISM TO POSTMODERNISM.**

**Thomas C. Grey**

**HOLMES AND LEGAL PRAGMATISM**


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My suggestion is that we can understand the distinctively pragmatist cast to Holmes' legal thought if we take account of the recent revival and reinterpretation of pragmatism within Anglo-American philosophy. The "neo-pragmatists" reject the long-standing treatment of pragmatism as simply a minor element in the triumphant advance of scientific positivism. In this traditional view, the pragmatists were merely thinkers who anticipated and stated in a confused way some of the ideas later worked out more rigorously by the logical positivists and their successors in the philosophy of science. A parallel view of pragmatism in legal theory would see Holmes, Roscoe Pound, and its other exponents as relatively primitive and confused precursors of the more rigorous and sophisticated form of scientific instrumentalist jurisprudence represented by contemporary law and economics, cost-benefit analysis, and public choice theory.

\textsuperscript{20} Discourse is "the practice of solving problems against the background of consensus about what counts as a good explanation of the phenomena and about what it would take for a problem to be solved." RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 320 (1979). Joseph William Singer suggests that for Rorty, "All objectivity means is agreement among people... . [O]bjective principles are principles... people accept." Joseph William Singer, The Player and the Cards: Nihilism in Legal Theory, 94 YALE L.J. 1, 25 (1984).

\textsuperscript{21} See J. M. Balkin, The Top Ten Reasons To Be a Legal Pragmatist, 8 CONST. COMMENTARY 351 (1991) (If one is a pragmatist, one "can also be (a) a civic republican, (b) a feminist, (c) a deconstructionist, (d) a case-cruncher, (e) a crit, (f) a law and economics type, or (g) anything else.")
By contrast, the new philosophical interpretation of pragmatism stresses certain ways in which it departs from and indeed undermines orthodox scientific empiricism, particularly in its focus on human inquiry as a culturally situated form of activity. Much as William James' original formulation of pragmatism sought to mediate between "tough-minded" devotees of science and "tender-minded" religious believers, the neo-pragmatists seek a bridge across the divide that has separated Anglo-American from European philosophy in this century. On one side of this divide, English speakers (and some Austrian helpers) have tended to conceive of philosophy as an enterprise dedicated to exploring the foundations of knowledge through a rigorous account of natural scientific method, with the ultimate aim of extending that method to all areas of human inquiry. On the other side, European philosophy has long stood in an adversary relation to natural science and technology, pursuing the (often quasi-religious) search for meaning, sometimes culminating in a discovery of meaninglessness, through the exploration of culture and lived experience.

The schism matters to legal scholars because it extends beyond philosophy to divide students and theorists of social phenomena more generally, including those who focus upon law. The positivist project of developing "social sciences" modeled on physics, chemistry, and biology has dominated Anglo-American social theory, while the European tendency has been to study society and culture interpretively, as text-analogues to be understood rather than as natural phenomena to be explained. The extension of the European style of theorizing into American intellectual life in recent years has produced sharp divisions between the traditionally dominant positivist approach, and a newer movement toward "hermeneutic" and "post-modernist" modes of thought. This division is evident within legal thought as well, where jurisprudential approaches based upon the economic paradigm of rational choice remain dominant, but are increasingly subject to challenge from approaches that stress the centrality of culture, history, language, ideology, and rhetoric.

The neo-pragmatists' pluralistic conception of inquiry challenges the dominance of natural science in the intellectual life of the English-speaking world, and some traditional positivists see their work as a nihilistic challenge to reason itself. But when compared with other post-modernist thinkers, the new pragmatists can be seen as still working within the scientific empiricist tradition broadly conceived. They tend to reject both the pervasive relativism and the oppositional stance toward natural science that many European philosophers and social thinkers have adopted, and they accept the spirit of scientific inquiry, in which theory is tested against experience by a reflective and critical community of inquirers. Pragmatists see even natural scientific inquiry as having unavoidably interpretive and culturally conditioned aspects; at the same time they believe that humanistic and explicitly evaluative inquiry can be pursued rationally and with the reasonable hope of progress. In social theory generally, and legal theory more particularly, the pragmatist tendency is to promote trade rather than warfare between normative and descriptive theorists, storytellers and model-builders, interpreters and causal explainers.
Finally, in interpreting the history of pragmatism, the neopragmatists have departed from their predecessors by emphasizing Dewey over Peirce and James as the central figure in the movement. Dewey's own focus was not so much on the methods of the natural sciences (as with Peirce) or on the life-situation of the individual (as with James), but more on issues of social theory, politics, and law. It was Dewey who particularly developed the pragmatist critique of the traditional philosophical "quest for certainty," Dewey who particularly undermined the positivist dualisms of subject and object, mind and matter, fact and value, and Dewey who particularly stressed the shaping effect of cultural and historical context on human inquiry. And these are the aspects of pragmatism that have dominated the recent revival.

* * *

The pragmatists' account of the mind and inquiry was . . . thoroughly practical, in two related senses. First, on the side that derived from historicist social thought, they treated thinking as contextual and situated; it came always embodied in practices—habits and patterns of perceiving and conceiving that had developed out of and served to guide activity. Some of these habits and patterns were instinctive, some were learned individually, but those most distinctively human resulted from the capacity for language; they were products of culture, collectively developed and transmitted. Second, on the side that derived from Darwinism, the pragmatists regarded thinking as an adaptive function of an organism, practical in the sense that it was instrumental. It had evolved as a problem-solving capacity, oriented toward survival. In its most developed form, thinking functioned to help resolve, by means of conscious reflection and experimental revision, the real problems and live doubts that arose in the course of acting on reflective and habitual practices. Holmes himself provided a characteristically compact summary of these two tenets: "all thought," he said, is at once "social" and "on its way to action."

Whereas older accounts of pragmatism emphasized its instrumentalism, the distinctive feature of recent reinterpretations of pragmatism is to give equal significance to its contextualist thesis—the idea that thought is essentially embedded in a context of social practice. Not only is contextualism no less fundamental to the pragmatists' thought than instrumentalism; it is what most sharply distinguishes them from orthodox scientific positivists. Indeed, development of the contextualist thesis led the pragmatists to their most profound philosophical innovation: the rejection of philosophical "foundationalism."

* * *

Practices are not only habitual and largely unconscious; they are mainly collective in origin. The pragmatists emphasized the social origins of the great mass of settled belief from which inquiry proceeds. We see that practices are collective, when we consider that they are mediated by language, the conventional, collectively constituted, spontaneously evolved, complex communicative structure of meaningful signs that underlies all reflective or conscious thought. Language supplies not only the forms in which thought is
represented and conveyed, but much of the stuff of thought itself. Thus, Peirce argued that thought was essentially carried on by means of signs, of which the most important were the conventional signs that constitute language. In fact, in emphasizing the role of language and the collective notion of inquiry, Peirce went so far as to hold that reality itself is simply the object on which the representations of a community of inquirers are destined in the long run to converge.

* * *

From a certain philosophical perspective, Holmes' pragmatist theory of law is, like much pragmatist theory, essentially banal. At its most abstract level it concludes in truisms: Law is more a matter of experience than of logic, and experience is tradition interpreted with one eye on coherence and another on policy. Similarly, Peirce's critique of foundational epistemology did away with the exciting theories that had engaged great minds from Descartes to Kant and, if accepted, left nothing interesting to say at the most general level about how human beings acquire knowledge. In the same vein, almost all of Dewey's best work involved the critique of elegantly structured dualistic theories and their replacement with one version or another of his standard monistic (and monotonous) truisms: that generalizations tend to be situated instrumentally marking temporary distinctions of degree, not absolute truths delineating sharp boundaries, and that some of them are good for some purposes in some contexts, others for other purposes in other contexts. After a pragmatist critique, the theory of the effect of separation on human relationships might come down to: sometimes "out of sight, out of mind," and sometimes "absence makes the heart grow fonder."

The payoff of pragmatist philosophy is thus often more in the critique than in the construction. This is why Dewey called philosophy "criticism" and metaphysics the "ground-map of the province of criticism." Pragmatism rejects the maxim that you can only beat a theory with a better theory, when this carries with it such essentially aesthetic criteria of theory choice as elegance, rigor, and originality. No rational God guarantees in advance that important areas of practical activity will be governed by elegant theories. Certain useful theories, such as those concerning the motions of the heavenly bodies, do indeed turn out to be simple, rigorous, and altogether pleasing to the intellectual taste. On the other hand, the theories most helpful for understanding the weather are messy, complex, and unlovely, and they may always remain so.

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In fact Holmes did not believe that "theory and philosophy" necessarily supplied the practical knowledge and understanding that made a good judicial legislator. As a pragmatist, and hence a believer in the situated and tacit character of belief, he thought that "successful men of affairs" operated on "premises" that though "inarticulate" were often "profound." Applying the point to the judiciary, Holmes defended the appointment of politicians as judges, which had produced Marshall, Story, Taney, and Chase, along with his contemporaries Taft and White. He feared that "men . . . of the abstract type
only exceptionally prove wise in practical affairs," adding wryly that coming from him this was obviously a "disinterested judgment." Though no one could ever have mistaken Holmes for a modest man, he was able to admit his own deficiencies in practical wisdom and common understanding (at least to a fervent admirer). Thus he wrote to Laski: "[N]ot being a man of affairs and affairs being half at least of life I look up to those who have profound insights and foresights and successfully act on them." And when Brandeis scolded him for ruling on labor legislation without understanding the facts of industrial life, he accepted the criticism as fair, and even read a few legislative studies of factory conditions before begging off on account of age and going back to Aristotle, Hegel, and French novels for his vacation reading.

* * *

Holmes' predicament... was to be an instrumentalist without an adequate system of ends. While he conceived of law as a tool for the achievement of the good, on the question of what the good was, he thought that apart from "the de facto will of the community for the time... as yet no one has much to say." Nor, in the absence of formal legislative guidance, did he even have much of a sense for the temporary de facto collective will; he had chosen to serve a community with whose values he was out of sympathy, whose opinions he did not know, whose very newspapers he did not read.

As an "internal" man who thought that "ideas are more interesting than things," Holmes was by nature a spectator or "witness," yet he chose to work within the law as an "actor." He was reconciled to being a lawyer by a faith that law could "furnish philosophical food to philosophical minds." But he had to struggle to square this faith, which drove him to see every case as an illustration of the "theory and philosophy of the law," with his instrumental conception of law as essentially legislative, to be judged by its "justice and reasonableness." This struggle gave him a curious half-out-of-body vision, an ability to look in on the law from the outside at the same time as he operated upon it from within.

* * *

At the center of both Dewey's account of human action and his theory of value is the concept of the continuum of ends and means. This is one of his most important ideas, and it sharply differentiates him from other "instrumentalist" thinkers such as Bentham and Hobbes, who understand that human action is always directed toward certain fixed ends, whether the avoidance of death or the attainment of pleasure. For Dewey, the second pragmatist tenet, the culturally situated and contextual aspect of all human inquiry and deliberation, undercuts any idea that all human activity is aimed at some limited set of fixed ends, just as it undercuts the concept that the moral life should be directed by fixed rules or principles formulated and applied without regard to context and consequence. The dualism of ends and means is, for Dewey, no more tenable than any other, when it is taken to divide experience into mutually exclusive categories.
As Dewey understands human conduct, individuals make plans, setting provisional goals at varying levels of abstraction, and selecting among the alternative courses of conduct that might lead to the goals. But the goals that give structure to human plans are never "final"; they are at best momentary resting points whose attainment has further foreseeable consequences desirable or undesirable; hence they must themselves be evaluated as means relative to those consequences. Nor can alternative plans of action be evaluated only on the basis of their efficacy in achieving their (provisional) ends; activities, however instrumentally conceived, are to be evaluated by their intrinsic satisfactions or frustrations as well as by their consequences.

* * *

Holmes' account of "the transformation of means into ends" responds to the most common objection to pragmatism—that it is the soulless philosophy of Mr. Gradgrind, promoting a mean and reductive approach both to life and to law. On this score, it is instructive to compare Holmes' version of the ideal the lawyer should pursue with that stated by Roscoe Pound, who was probably the first significant American legal thinker to label himself a "pragmatist." Expounding his conception of "sociological jurisprudence," Pound wrote that legal scholarship should dedicate itself to a "great task . . . of social engineering," aimed at the creation of a system of law rationally designed with an eye to "precluding friction and eliminating waste." Pound's "social engineer" would study the law scientifically, accumulating information so as to assess the machinery of the law in terms of the efficient production and distribution of material goods. This purely instrumental conception of law was not all there was to Pound's jurisprudence, but it was certainly its most prominent strand. It was a view entirely consistent with Bentham's conception of law as an instrument for the satisfaction of certain fixed human desires and the assuagement of certain fixed fears.

There is much of value in Pound's engineering conception of law, especially by way of compensation for the spectatorial defects in Holmes' statement of the professional ideal. Pound rightly emphasizes the social consequences of legal practice and thus properly reinforces the sense that professional privileges carry with them social obligations. But for all this, his model of the lawyer as social engineer has defects that have become more evident over the years. For one thing, the engineering metaphor creates false hopes for the technical solution of social problems by experts, wrongly suggesting that injustice is always better redescribed as "friction" and "waste." Further, it presupposes that so important an element in social life as law can remain simply a dependent variable, a means for achieving external ends. Holmes' and Dewey's concept of the ends-means continuum reminds us that law, even if it begins as an instrument for the attainment of basic ends like "food and raiment," can generate its own intrinsic values, both positive (due process, legality, the Rule of Law) and negative (legalism). Dewey well understood this; he wrote that a good system of law was partly constitutive of, not merely instrumental to, a good society. Legal pragmatism thus understood is receptive to the classical republican conception
both of law as a constitutive element in political life, and of politics itself as an activity of intrinsic as well as instrumental value. Together, these ideas suggest a model of lawyer as republican civil servant rather than as social engineer.

Notes

1. Foundationalist philosophy generally presupposes the existence of both moral and empirical truths, truths that are essential, universal, absolute, and largely realizable. In what ways does pragmatism challenge these understandings; i.e., in what ways is pragmatism non- or anti-fundationalist? Is pragmatism a theory? Is it anti-theory? Is legal pragmatism anti-jurisprudential?

2. Professor Grey describes both an "instrumentalist" and a "contextualist" aspect to pragmatist thought. Can you see how the former aspect—dominant in the early understanding of pragmatism—remains quite evident in some current legal scholarship? As for the contextualist aspect, Professor Grey indicates that it is the dominant strain of neo-pragmatist thinking. As you might predict, the neo-pragmatists are frequently criticized by "positivist" or "fundationalist" thinkers for this contextualism; interestingly, neo-pragmatists are also criticized by some post-modern thinkers, who believe that the pragmatist understanding of context is too limited or too timid. Can you see how the pragmatist conception of context might be objectionable both to positivists and to postmodernists? See Chapter Nine: Postmodernism.

3. In some senses, as Professor Grey notes, pragmatism bridges the gap between positivism and postmodernism, both in social theory and in jurisprudence. But does this saddle pragmatism with an inherent tension? In attempting to steer a middle ground between the fundationalism of modern thought and the relentless critique of postmodern thinking, does pragmatism necessarily embody a central philosophical dilemma? Is the dilemma debilitating? Does it render pragmatism "essentially banal"?

4. Justice Holmes' dilemma, Professor Grey notes, was to be an "instrumentalist without ends." Is this also an inherent pragmatist's dilemma? Is it certain to be the dilemma of the pragmatist judge? Consider, in this regard, Professor Grey's suggestion that Justice Holmes was a "good judicial legislator." Is this oxymoronic? To a pragmatist?

5. According to Professor Grey, Justice Holmes went beyond the conventional instrumentalism of pragmatist thought, and incorporated its more radical revisions of jurisprudence. Among these are the view of law as experience or social practices, and a vision of law on a "means-ends continuum" with the broader culture. Can you use these concepts to articulate a coherent philosophy of law?

6. Consider two of Justice Holmes' most famous opinions. Dissenting in *Lochner v. New York*, 198 U.S. 45 (1905), Holmes urged deference to the legislature in assessing the constitutionality of a state law regulating the hours of workers in a bakery. Holmes suggested that in invalidating the statute on due process grounds, the Court was improperly constitutionalizing the economic doctrine of *laissez faire*. Writing for an eight-Justice majority in *Buck v. Bell*, 274 U.S. 200 (1927), Holmes sustained the compulsory sterilization of a young woman institutionalized in a state "colony for the feeble-minded." Noting that the woman, her mother, and her daughter were all "feeble minded"—assertions that, even given the conventions of the day, were certainly contestable and quite likely demonstrably false—Holmes concluded that "[t]hree generations of imbeciles are enough." *Id.* at 207; but see Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985).

What strands of pragmatist thought are evident in these opinions? Using pragmatic
criteria, are these decisions "right"?

7. In what sense does pragmatism re-conceptualize the lawyer "as republican civil servant rather than as social engineer"?

**B. PRAGMATISM AND COMMUNITY: THE SEARCH FOR CONSENSUS.**

As Thomas Grey suggests, one vital element of pragmatist legal thought is the central importance of community. There is both a positive and normative dimension to this notion: positively, community and law are conceived of as mutually reconstitutive; normatively, the communitarian ideal is of a public consensus generated by vigorous, non-hierarchical dialogue, i.e., what philosopher Jürgen Habermas has described as "the ideal speech situation" obtaining in an "ideally free community." The centrality of community is—in both aspects—somewhat at odds with the dominant conceptions: the positive vision threatens to undermine the conceptions of both the law and the individual as essentially autonomous, while the normative vision challenges the liberal belief in the primacy of individual rights. The pragmatic embrace of community is thus more radical and subversive than its altogether innocuous phraseology might suggest.

But if it is radical, it is not necessarily new. The debate over the relative significance of the individual and community is at least as old as the American republic. Indeed, one way of understanding the constitutional ratification debates is as a struggle between competing political ethos: between, on the one hand, the liberal individualism of the federalists, and, on the other hand, the civic republican communitarianism of the anti-federalists. Not coincidentally, the recent ascension of legal pragmatism has been accompanied by a renewed interest in the ideals of civic republicanism: at times, this renewal is evident in interpretive revisions which locate in the Constitution a variety of republican ideals; at other times, the renewal is evident in an almost nostalgic lament for "the road not taken." See, e.g., Symposium—The Road Not Taken: Anti-Federalist/Federalist Dialogue and Its Implications for Constitutional Understanding, 84 Nw. U. L. Rev. 1 (1990).

The materials in this section explore the pragmatic conception of the role of community. The focus is on the construction—and reconstruction—of norms through social dialogue. The readings describe four dialogical encounters: the framing of the Constitution; the debate over judicial appointments; judicial decision-making; and the interaction between the judiciary and the "political" branches of government.

**Suzanna Sherry**

THE FOUNDERS' UNWRITTEN CONSTITUTION


* * *

By 1787, then, Americans had a clear vision of the nature of a constitution as a species of fundamental law. Like natural law and laws or traditions that had existed since time immemorial, it could be used to invalidate positive law, but again like natural law and those long-established laws and traditions, a constitution was not itself seen as positive, enacted law but rather as a
declaration of first principles. Moreover, because of the constitution’s character as largely a declaration of indubitable truths and time-tested customs, its fundamentality did not depend on popular origin or approbation. The only exception to the non-positive nature of the constitution lay in its function as a charter of government or allocation of powers among parts of the government. As this section will suggest, even that exception was hazy in the minds of those in Philadelphia in the summer of 1787.

The first drafts and early debates in the Convention suggest that most delegates still held these views of the character of a constitution. The Constitution they were drafting was, at the beginning, neither positive law nor popularly grounded. As the summer progressed, the delegates began to formulate and understand two concepts crucial to understanding the Constitution as a sui generis form of positive law: self-referential enforceability and extra-legislative origin. By self-referential enforceability I mean the notion that the Constitution declared itself to be fundamental law, thus suggesting that positive enactment rather than inherent nature made a written constitution fundamental. By extra-legislative origin, I mean the notion that legislatures lacked power to enact fundamental law. Both of these concepts were in direct conflict with the English version of a constitution as inherently fundamental and accretionally derived from natural law and unchallenged legislative acts.

* * *

In creating the notion of the Constitution as popularly enacted positive law, the framers had invented an idea that perfectly suited their liberal needs. As one scholar has noted, the difference between prior constitutions and the framers’ new invention was the difference between government by consensus and government by command. The Constitution, although derived originally from the people, thus became a source of law to be imposed from above rather than dependent on the continuing support of the population. This transition, in turn, coincides with the transition from a unified "regime," where law and morality are intertwined and formulated by the community, to a more limited "government," which separates law (imposed on the community) from morality. This difference is the classic identifier of the transition from a classical republican outlook to a modern liberal one.

Had the framers intended their new Constitution to displace prior fundamental law, the transition would have been complete. This section will suggest, however, that the notion of the Constitution as popularly enacted positive law did not serve to replace the earlier idea of fundamental law as inherent and declared rather than enacted, but instead merely complemented the older tradition. The architects of our constitutional system assumed that appeals to natural law would continue despite the existence of a written Constitution. This hypothesis can be established by juxtaposing the evidence . . . of the framers’ dawning recognition that fundamental law could be enacted if the enacting authority were the people, against contemporaneous or subsequent discussions of the status of natural rights.

* * *
Under a natural reading—even disregarding its natural law heritage—the ninth amendment lends itself to a traditional inherent rights interpretation. It might, therefore, have been used by judges interested in protecting inherent rights as a textual anchor for their decisions. In fact, in Supreme Court decisions during the first three decades after the adoption of the Constitution, most justices found some legislative enactments invalid by relying on natural law and related principles expressly, without resort to the mediating language of the ninth amendment. Although other scholars have noticed what they often describe as isolated references to natural law, the "orthodox legal view" is that "there is no case in which the courts have held an act invalid or refused to enforce a law because regarded as contrary to natural law, except when such a law was in conflict with an express constitutional provision. This section will suggest that it might be more appropriate to turn this conventional wisdom on its head: there is no case during this period in which the courts have upheld an act contrary to natural law on the ground that the law was not in conflict with any constitutional provision.

A careful examination of the first three decades of Supreme Court constitutional jurisprudence suggests that the deeper pattern is consistent with the pattern observed in pre-1787 cases of judicial review. While individual Justices differed in the frequency with which they cited principles of natural law, most of the Justices tended to rely on the written Constitution primarily in deciding allocation of power questions and on unwritten law in deciding the rights of individuals.

* * *

From 1789 until almost 1820, then, the Supreme Court continued the traditions of Bolingbroke and the early state courts: looking to natural justice as well as to written constitutions. All of the influential or significant Supreme Court Justices, except Iredell, wrote opinions that contained at least some references to extra-textual principles, not merely as a method of interpreting the written constitution itself, but in order to judge the legality of the challenged statute or other governmental action. As in the pre-1787 state cases, references to principles of natural law are more frequently found in cases involving individual rights, and a careful examination of the written constitution is more often found in cases involving allocation of powers.

By approximately 1820, however, the reliance on natural law was waning, disappearing entirely within a few years. It is this nineteenth century rejection of the notions of natural rights that has most influenced modern constitutional law. After two brief flirtations with decisionmaking on the basis of natural law, the Supreme Court since 1937 has made a consistent and at least partially successful attempt to link all of its decisions to specific clauses of the Constitution, even when doing so stretches the language to the limits of credibility.

* * *

Notes
1. According to Professor Sherry, in what ways does the Constitution—"originally" and in its early constructions—reject both the conventional positivist conception of law and the natural law theories of constitutional government? Is the conception that emerged—of a fundamental charter that is "popularly enacted positive law"—consistent with your understanding of the Constitution? With contemporary constitutional jurisprudence?

2. Professor Sherry suggests that the Constitution originated in "consensus" rather than "command." Is this a statement of fact, or of theory? Is it at all inconsistent with the observation that the body politic of 1787 was conceived of in very narrow terms, excluding, among others, women, Africans and African-Americans, the native people, and white men without property?

3. As Professor Sherry notes, the classical republican conception of government imagines "a unified 'regime,' where law and morality are intertwined and formulated by the community." In what ways did the framers of the Constitution ultimately reject this model? Was the rejection complete? If not immediately, then inevitably?

4. How does the persistence of natural law theory throughout the generation following ratification suggest that the transition from republicanism to liberalism was not quite complete? Does the temporary abeyance of the purely positivist conception of constitutional law mean that there was once room for a pragmatic vision of constitutional meaning? Is there still such room? To what extent is this possibility mitigated by the suggestion that the dominant alternative to positivism—natural law—is itself foundationalist? Could a pragmatist accept natural law? What if natural law was not foundationalist, but is understood instead as a function of the ongoing social dialogue on the proper role of government? Could the same be said of positive law?

5. There is in the Constitution no textually explicit "right of privacy," and yet it is now axiomatic that the Constitution recognizes such a right, perhaps in the Fifth and Fourteenth Amendments' guarantee of "liberty" against deprivation without due process, perhaps in the Ninth Amendment's reservation of rights, perhaps in the "penumbra" of the Bill of Rights. See, e.g., \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965). Is the "right of privacy" a "natural law" right? Or is it an example of a dynamic rendering of positive law, i.e., a recognition that the meaning of positive law is organic and, hence, contextual?

6. In 1987, Justice Lewis Powell announced his retirement from the Court. Partly on the urging of Attorney General Edwin Meese, President Ronald Reagan nominated as Powell's replacement U.S. Court of Appeals Judge Robert Bork. Opposition to Bork was intense, and focused principally on the judge's conservative views. Among the more controversial of his positions was his critique of the right of privacy, a critique that led the judge to denounce as unprincipled the Supreme Court decision in \textit{Griswold v. Connecticut}. Judge Bork may have retreated from these views during his confirmation hearings, but not sufficiently to satisfy either the Senate or the American public. The former ultimately rejected his nomination by a vote of 58 to 42; the latter consistently recorded their opposition to his nomination in opinion polls. Almost invariably, public opposition to the nomination was rooted in the judge's perceived unwillingness to fully protect individual rights. See generally \textit{Ethan Bronner}, \textit{Battle for Justice: How the Bork Nomination Shook America} (1989).
Morton J. Horwitz

THE BORK NOMINATION AND AMERICAN CONSTITUTIONAL HISTORY


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It is important to understand the power of originalism in American culture, which is the reason why constitutional doctrine was never really subjected to Darwinian evolutionist thinking in the same way as the rest of law. I would go so far as to say that law, especially constitutional law, is the successor to religion and religious categories in an increasingly secularized society. Originalism in constitutional doctrine shares the same psychological yearnings for certainty that religious fundamentalism does. The idea of there being a starting point that is true beyond criticism is deep both in religious and legal thought. If you look at the relationship between law and religion in American society, you will see the tremendous connection between the two and the ways in which law came in the late nineteenth century to replace religion as one of the dominant forms of certainty and legitimacy in social life.

So it would appear that originalism had a lot of things going for it. The living constitution was too relativist and too varying to accommodate those deeply felt needs for certainty that the idea of a living constitution, however realistic, seemed to suggest. The Bork nomination, however, did not turn on this issue. It turned on a completely different strand in the debate over constitutional interpretation. It turned on the question of rights.

* * *

I think it is accurate to say the bulk of Americans could not imagine a constitution without a right to privacy, nor could they imagine that their Constitution did not provide for such rights. The Bork nomination, therefore, seemed to be quite clearly in the first instance, a referendum on this question. The referendum decisively and overwhelmingly established that Griswold was good law. I mean good law not according to the Supreme Court, but good law according to deeper cultural understandings in the society.

Nevertheless, there is a lot of irony in all of this. The idea that the nomination would turn on the issue of rights was surprising to most of us. One expected that the issue that was being joined was the question of whether a changing constitution was the only way to understand the Constitution. And I think it is also clear that those who chose to strategize on this question realized that it would be too difficult to persuade a country with a deep history of religious fundamentalism to accept a non-originalist idea of the Constitution. Nevertheless, one wonders whether the referendum on rights and on Griswold was not the functional equivalent of that. Did people believe that the right to privacy had always existed? Or did they in their own way understand the content of rights was always changing, and that the vision of what needs to be protected depended on the times and the circumstances. Was the referendum
on Griswold a sub-silentio recognition of a living constitution. Or was it, as Senator Biden wished us to believe, a reaffirmation of the "self-evident" truths of the Declaration of Independence? Do we hold those truths to be self-evident because we are endowed by our creator with certain inalienable rights? Did the country decide on inalienable rights, or did the country decide that the rights themselves were historically contingent and created?

As one looks at the rhetoric, as one looks at what Senator Biden said (and deeply believed), it was a reaffirmation of the Newtonian view of the Declaration of Independence. It was a reaffirmation of the eternal character of rights. The question is therefore whether any sophisticated person in the twentieth century could really believe that. So one of the deep ironies and paradoxes of the Bork decision, is that though one assumed that it would be a referendum of the idea of a living constitution, it came instead, perhaps, to be a referendum of the Newtonian constitution. And the cultural fundamentalism of Americans geared to a Newtonian conception of originalism, simply surprised us.

The referendum in the Bork case clearly was not a determination that our Constitution is living and changing and can accommodate itself to different times and different circumstances. While it is possible that such a view of evolving rights was implicitly adopted, it is more likely that originalism and a fundamentalist view of rights triumphed, though not in a way that Attorney General Meese ever anticipated.

* * *

Notes

1. In what sense might the defeat of Robert Bork be viewed as a vindication of the pragmatist conception of law? In what sense might it be viewed as a rejection of that conception?

2. Many modern legal pragmatists "emphasize a conception of law as a dialogic activity. Progress is achieved through an ongoing conversation informed by an inquisitive receptivity to critique and revision tempered by respect for traditional values (as embodied in legislation and the common law) and stability in legal expectations." David Millon, Objectivity and Democracy, 67 N.Y.U. L. REV. 1 (1992). According to Professor Horwitz, was this part of the pragmatic conception apparently the victor or the vanquished in the Bork debates?

3. In assessing the fortunes of pragmatism in the wake of the Bork controversy, consider whether it might be of some significance that a). the confirmation hearings were televised; b). pro-Bork and, more aggressively, anti-Bork forces engineered significant public relations campaigns; c). public opinion polls were regularly conducted and reported; and d). public opposition—and the absence of public support—might have directly influenced the outcome in the Senate. Is this the kind of dialogic activity envisioned by eighteenth century civic republicans? Is it the kind imagined by modern legal pragmatists?

4. Is there a necessary—or likely—connection between pragmatism and "progressive" political beliefs? Is there a necessary—or likely—connection between pragmatism and "conservative" political beliefs?
Frank I. Michelman,
SUPER LIBERAL: ROMANCE, COMMUNITY, AND
TRADITION IN WILLIAM J. BRENNAN, JR.'S
CONSTITUTIONAL THOUGHT

* * *

This Article examines the political thought of William Joseph Brennan, Jr., as conveyed by his writings over a thirty-four year career as an Associate Justice of the United States Supreme Court. Probing that thought prompts reflection on some uses of political language in contemporary academic and popular debates. Justice Brennan’s work pushes one to sort out some relations between liberal and communitarian political ideas. It also draws one into a certain project of terminological rescue, namely, that of the political honorific "liberal" from certain straitened usages—doctrinaire free-marketeer or catechistic Kantian—to which it has recently, unhistorically and undenifyingly been appropriated by both right and left.

* * *

Justice Brennan’s way of parsing the relations among individuals, society at large, groups within society, and the state, follows paths well-trodden in liberal country. In summary: individuals are supreme in value. Individuals are also, however, as a matter of fact, socially constituted, enmeshed in various relations, communities, institutions, and practices. Out of these sundry contexts and their intersections, individuality forms itself. Individuals depend on their relations and affiliations for identity and self-definition, just as they depend on public institutions of law and government for justice and other conditions of thriving.

Society, perhaps, devolves toward stratification. Without the state’s active, continuing attention to distributions of wealth, status, and power (in which social-groupness is always a factor), many individuals suffer constriction of access to the contestations and rewards of social life, and the ones who do are not randomly distributed among social groups with which identities connect. Missing from the scene, then, are their sensibilities, perspectives, articulations of need and value—what Richard Rorty calls their vocabularies and self-descriptions. That absence is itself an insult to justice and a deprivation to individuality everywhere. But if absence from the scene of repressed or off-center articulations is one kind of setback to liberal individuality (call it monotony), another is an ascendent articulation’s fullness of presence (call it hegemony or totality). The good state, therefore, devotes some of its unique powers of legislation to establishing, maintaining, and reproducing social-structural conditions of fair and open cultural and visionary contention, at the same time refusing use of those powers for the consolidation of any cultural or ideological party’s local or momentary advantage.

Gotten up as constitutional-legal doctrine, this particular (egalitarian-multiculturalist) conception of political liberalism surely contains stresses and
fissures. It rests on a distinction, elusive and ever-contestable, between (i) proper governmental defense of a particular conception of liberal social structure and (ii) illicit governmental imposition of one or another partisan ideology; the conception is paradoxically committed to commandeer the state for its own partisan cause. Such difficulties are endemic in all variants of liberalism—as distinguished, say, from anarchism. Political liberals are by definition constitutionalists. Because liberal doctrine requires both a state and a public/private distinction to bound the state’s authority, political liberals must engage in some constitutional practice, and of course the practice is inevitably to enact their liberalism as constitutional law. (What else could they do?)

* * *

[Justice Brennan strove] to retrieve both the rule of law and the role of the judge from conventionally authoritarian connotations. One fruit of this striving is Justice Brennan’s bold conception of the high court as a political institution, whose members stand always ready, without closure, to train their own dialogic exchanges on re-collecting the Court’s “own” tradition. Another is his still more remarkable insistence that a courtroom, even an appellate courtroom, is a site of passionate encounter between judges and litigants (as between “one human being and another”), and judicial judgment is, accordingly, “human judgment” informed by the judge’s passionate reach for an empathic grasp of the parties’ experiences of the case. These are unconventional and problematic ideas, whose difficulties and prospects deserve further exploration. Should the ideas prove viable and generative, they may eventually rank among Justice Brennan’s most memorable contributions to constitutionalism. Nothing, however, will change the fact that while Justice Brennan himself held judicial office, the dominant understanding of that office was far more authoritarian than the one he has recently tried to adumbrate. Whatever his second thoughts about the office, it is fair to say that in practice he generally took it as he found it. As Justice Brennan, his word (when he spoke for the Court) was law; his word bespoke closure. He was hesitant to lay down the law, when he was able, in accord with the particular political doctrine he favors and believes to be contained in the Constitution.

Those who find in that doctrine much that is good and right have reason to be thankful that he did so. It is not that we are greatly in the Justice’s debt for invention or exposition of a political theory; the political ideas we extract from Justice Brennan’s writings can be read elsewhere, more searchingly and systematically presented. Nor can we confidently thank him for an irreversible legacy of rules of constitutional law, because “his” rules are not irreversible. Yet, however much the rules laid down by the “Warren Court,” or any court, may be undone and reversed, historic transformations in the terms of debate are never completely reversible. It is not only by its rulings that the Court affects American life and history. The Justices have in fact held a goodly portion of the power to set the terms of political debate in this country, and it may matter incalculably which ideas get respect there and which do not.

Among judicial visionary statements, there are some that posterity comes to
value as prophecy. Nothing limits that category to maverick views first uttered as dissents. It may extend as well to syntheses that hold the field before they suffer eclipse by overruling and other forms of discreditation. They, too, remain available for re-collection. Even so, to praise Justice Brennan as dissenter and as prophet is to trivialize his contribution to American constitutional history, past and future. His status is altogether different. He is a Framer.

Notes

1. Professor Michelman describes Justice Brennan’s embrace of liberalism as a simultaneous rejection of monotony and totality. But in extolling the virtues of liberal individualism, is Justice Brennan also necessarily rejecting the communitarian commitments of pragmatism? Professor Michelman also suggests that Justice Brennan’s commitment to liberalism includes a devotion to passionate and empathetic dialogue. Is this simultaneously an embrace of pragmatism?

2. Perhaps the pragmatist dilemma is most evident in Professor Michelman’s observation that Justice Brennan embraced dialogue, but dialogue with closure. For Justice Brennan, then, is law both “consensus” and “command”? Is this possible?

3. What does Professor Michelman mean when he concludes that Justice Brennan “is a framer”? Would Professor Sherry agree? Professor Horwitz? Justice Brennan?

4. Professor Daniel C.K. Chow has suggested that modern legal pragmatists include both “critical pragmatists” and “prudential pragmatists”; the former deconstruct law with a radical critique of its foundationalist bases, while the latter attempt to reconstruct law with a “cautious, conservative respect for tradition and inherited culture.” Daniel C.K. Chow, A Pragmatic Model of Law, 67 Wash. L. Rev. 755, 758 (1992). Both groups, he notes, reject the epistemological requirement of correspondence between a contested belief and its underlying essential reality; their epistemology is instead coherentist, focusing on the coherence of a contested belief with other established beliefs, with a necessary appreciation of the pluralistic and relativistic nature of knowledge. Id. at 777-80. Normatively, the groups divide: critical pragmatists favor natural law as the basis for legal norms, while prudential pragmatists favor positive law, id. at 814-15. Both bases, Professor Chow indicates, can be conceived of in non-foundationalist terms by emphasizing the significance of cultural construction and contingency. Finally, Professor Chow includes critical race theorists and feminists among the critical pragmatists; among the prudential pragmatists he includes Justice Antonin Scalia. Id.

What does it say about pragmatism as a distinct jurisprudential theory—or even attitude—if its sweep is broad enough to include both Justice Brennan and Justice Scalia? Do you suppose that Professor Michelman would conclude that Justice Scalia, like Justice Brennan, is “a framer”?

Daniel A. Farber & Phillip P. Frickey


It is a commonplace that we live in a statutory era. A century ago, statutes were considered intrusions into the pristine order of the common law. Today,
legislatures are the primary source of law, and the statute books grow exponentially. Nevertheless, the common law has shown great vitality. In the past thirty years, for example, the law of products liability has undergone explosive growth. The common law has also retained its ability to respond to changes in social values. In contracts, old common law doctrines like "employment at will" are under increasing attack. In property, long-established rules are being challenged in the name of new social values.

There is nothing new about change in the common law. But in an era of statutes, the role of the common law in formulating social policy has become problematic. Arguments for innovation in the common law are almost always challenged on the ground that the legislature, not the court, is the proper forum in which to argue for reform.

* * *

At one time we had a clear idea of what legislatures did and how it differed from what courts did. Legislatures made ex ante rules to achieve public policies; courts administered ex post justice in disputes between private parties. Each body had the specialized abilities necessary to perform its functions properly. None of this is clear anymore. Since the time of the legal realists, the policymaking role of the courts has become undeniable, and that policymaking has taken an increasingly conscious ex ante perspective. Republicanism has helped illuminate the role of the courts in articulating public values. On the other hand, because of public choice, today we question the ability of the legislature to make good (or even coherent) public policy. So it is increasingly hard to find the appropriate boundary between judicial and legislative policymaking.

Of course, a full understanding of the limits of judicial policymaking would require not only a more comprehensive consideration of the common law, but also of the judicial role in statutory and constitutional interpretation. With the help of the New Public Law, we seek here only to illuminate a part—though an important part—of the general problem of defining the appropriate boundaries of judicial policymaking in an increasingly statutory world.

* * *

There are undoubtedly different ways to characterize the public law scholarship of the past decade or so. One of its most distinctive attributes (and the one on which we will focus) is the much more careful and explicit attention granted to political theory. Unlike the pluralist theories of the 1950's, currently influential theories reject the view that the public interest will automatically emerge from the conflicting efforts of interest groups. In particular, two new movements in the study of political institutions, republicanism and public choice theory, have had a major impact on legal scholarship in public law.

* * *

One strand of the New Public Law derives from a communitarian strain in modern political thought that has become known as republicanism. "Republicanism" was hardly a household word even for public law scholars until
the 1980's. The term is unfortunately misleading: the political philosophy called "republicanism" has no particular connection with the Republican party. The general obscurity of the term is itself quite meaningful, for the neo-republicans claim to have rediscovered a forgotten yet fundamental strand of American political thought. For the uninitiated, a brief, ruthless oversimplified introduction will suffice for our purposes.

The dominant strand of American political philosophy has been liberalism—another misleading term, since philosophical liberalism is at least as much embraced by political conservatives as liberals. Philosophical liberalism begins with the individual rather than the community and posits that individuals have basic human rights that exist independent of any particular political system. Political conservatives may view these rights as involving property; political liberals may stress rights of individual self-expression or equality; but both agree that these rights are constraints on government rather than creations of government.

Liberalism also assumes that individuals have interests that they seek to advance, both in private life and in politics. The government's role is defined in terms of these individual interests while respecting individual rights. One important function of government, therefore, is to provide fair procedures for determining who prevails when individuals or groups conflict.

Philosophical liberalism is the dominant strain in current American thought. In the eighteenth century, however, another political tradition—republicanism—was also highly influential. During the Revolutionary era, many prominent Americans were strongly influenced by the teachings of the seventeenth-century Opposition party in England. The Opposition thinkers had decried the destruction of the old order, the rise of corruption, and the loss of civic virtue. The fate of the nation, they believed, rested on the willingness of individuals to sacrifice private interests to the common good.

Modern reconstructions of republicanism are based on the allure of civic virtue. Political life is not, as liberalism posits, merely an effort to use the machinery of government to further the ends of private life. Rather, politics is a distinct and in some respects superior sphere in which citizens rise above their merely private concerns to join in a public dialogue to define the common good. Indeed, one of the most important tasks of government is to make the citizenry more virtuous by modifying existing individual preferences to further the common good.

According to republicans, courts can play an important role in this process. As forums for public deliberation, courts can identify and promote the acceptance of public values. Courts can also ensure that the decisions of other agencies of the government reflect republican deliberation rather than an equilibrium of private interests.

On the surface, at least, public choice theory stands in stark contrast to republican theory. Public choice usually claims to be positive while republicanism is explicitly normative, and the implications of public choice seem
as dismal as those of republicanism seem optimistic. Again, because of its recent prominence, we will present only a brief, simplified overview of public choice for the uninitiated.

As we see it, public choice theory is a hybrid: it applies the economist’s methods to the political scientist’s subject. Public choice is largely concerned with abstract, axiomatic modeling of political processes. These models often view the legislative process as a microeconomic system in which "actual political choices are determined by the efforts of individuals and groups to further their own interests," efforts that have been labeled "rent seeking." Thus, "[t]he basic assumption . . . is that taxes, subsidies, regulations, and other political instruments are used to raise the welfare of more influential pressure groups."

Further, collective action problems make it difficult to organize large groups of individuals to seek broadly dispersed public goods. Public choice suggests that political activity will instead be dominated by small groups of individuals seeking to benefit themselves. The most easily organized groups presumably consist of a few individuals or firms seeking government benefits for themselves, benefits which will be financed by the general public. Accordingly, under this view "rent-seeking" special interest groups dominate politics.

The vision of politics is disturbing precisely because it suggests that there is an underlying, coherent pattern to political outcomes, but one that most people find normatively unattractive. The implications of another branch of public choice theory are, if anything, even more dismal. Some public choice theorists have suggested that, far from systematic rent-seeking, political processes necessarily lead to entirely arbitrary or incoherent outcomes.

* * *

In an earlier age, the distinction between public and private law had deep jurisprudential roots. In nineteenth-century legal thought, the public/private distinction was founded on the idea of an autonomous private order. Private law was designed to protect these pre-political rights. Property law arbitrated disputes about ownership; tort law protected owners from unconsented intrusions; and contract law allowed owners to exchange property. Private law, then, was that part of the legal system protecting the private ordering; public law consisted of government compulsions restricting private freedom.

This vision of a prelegal private ordering was a major target of the legal realists, and today has been attacked by critical legal scholars and neo-republicans. They have argued cogently that the common law itself is based on choices of public policy. Today, in considering issues of contract, tort, or property law, it is almost second-nature to refer to considerations of public policy. Despite the realist critique, it may be possible to salvage something of the distinction between rules that uphold private ordering versus those that override private ordering. Elaborating this distinction would be no easy matter, however, since most fields of law contain some rules of both types. Moreover, the distinction between facilitative and intervening legal rules may itself be
problematic. Private law does not endorse all private activity. It attempts to distinguish between "coercive" and "voluntary" transactions, to identify those actions that do further private preferences. These distinctions, however, are themselves often controversial.

If the private law/public law distinction retains any vitality after the realist critique, the line between the two is at best elusive. Fortunately, we need not resolve the issue here. So far as we can see, whether republicanism and public choice are useful analytic tools does not depend on whether a legal rule is ultimately facilitative or supervening.

We suggested earlier that the distinctive attribute of the New Public Law is its explicit reliance on postpluralist political theory. Whether the New Public Law is useful in a particular instance depends, consequently, on whether such political theory helps to solve the problem at hand. Thus, what determines the relevance of the New Public Law is not the substance of the legal issue, but whether an understanding of political institutions seems necessary. Not surprisingly, this most often occurs when the legal issue is formulated from the outset as relating to the proper role of government, or when the interpretation of a governmental act is at stake. But even in other kinds of cases, the perspective of political theory may be important.

In the "market" for legal ordering, the legislature is always a "potential entrant." When a court is asked to make rules to govern a private transaction, it is often relevant that the legislature or its administrative agent are possible alternate decisionmakers. Indeed, today, some legislative act such as the Uniform Commercial Code is often implicated in even the most "private law" case. Once either legislation or the potential of legislation enters the case, the same political theories that have helped shape the New Public Law may become important sources of insights regardless of whether the issue is considered public or private law.

In short, we believe that the "New Public Law" is a misnomer. Although it has its origins in fields that were traditionally considered "public law," the applicability of this body of theory is only contingently related to whatever remains of the public law/private law distinction. The New Public Law is potentially useful in analyzing wide variety of legal problems outside the domain of public law, as classically understood.

* * *

Notes

1. Please briefly explain how Professors Farber and Frickey see possible reconstructions of republicanism in each of the following phenomena:
   a). the increased acceptance of the policymaking role of the courts;
   b). the gradual disintegration of the public/private dichotomy; and
   c). the advent of "postpluralist political theory."

2. Professors Farber and Frickey suggest that the "New Public Law" may be useful not only in cases raising obvious issues of governmental authority, but also in "private" disputes where the "political" branches of government may be alternate problem-solvers.
Consider then the argument for a "new" common law tort of "wrongful discharge" from employment. As a judge confronted with such a claim, how would you seek to facilitate a comprehensive public dialogue? Who are the appropriate participants in that dialogue? What are the appropriate points of discussion? How will you secure closure?

3. At least one commentator has suggested that the union of practical reason and public choice theory creates an intolerable philosophical tension: the latter is precisely the sort of grand theory—replete with a priori premises like the self-interested actor—that the former rejects. See Edward L. Rubin, Public Choice in Practice and Theory, 81 CALIF. L. REV. 1657, 1665 (1993). Can this tension be resolved?

C. PRAGMATISM AND THE RULE OF LAW: THE SEARCH FOR MEANING.

The rejection of foundationalist epistemology and the normative commitment to community both seem to necessitate a reconceptualization of the meaning of law. As to the first, the rejection of absolute truths or first principles that are either empirically verifiable or metaphysically ordered would appear to rob law of the legitimacy gained from appeals to the certainty of "plain meaning," underlying "policy," "fundamental fairness," or any of the other conventional guarantors of legal determinacy. As to the second, the consensus model of justice entails a pluralism and deepened appreciation for subjectivity, perspective, and context that would seem to deny the possibility of a determinate rule with a single meaning. But the pragmatists' paradox is that the possibility of consensus depends on some closure to the public dialogue; the legal pragmatists' paradox is compounded by the recognition that the rule of law requires rules of law. Thus the pragmatist must confront the need to secure a resolution to legal problems without yielding to the conceit that the resolution is realizable. What ensues is a pragmatic search for meaning.

In the first article to follow, Professor Margaret Jane Radin explores the connection between formalism and the traditional conception of the Rule of Law. She begins by reviewing the senses of "formalism" in law.

Margaret Jane Radin

RECONSIDERING THE RULE OF LAW


* * *

The ideal of "the rule of law, not of men" calls upon us to strive to ensure that our law itself will rule (govern) us, not the wishes of powerful individuals. According to this traditional ideal, government must be by "settled, standing Laws," not by "Absolute Arbitrary Power." Although the Rule of Law ideal is central to our legal tradition, it is deeply contested. Among those who affirm the traditional ideal there is no canonical formulation of its meaning, and critical theorists argue that the Rule of Law is mere ideology that should be jettisoned. In this essay I suggest that it is too soon to throw out the Rule of Law
wholesale, but that at minimum the concept should be reinterpreted.

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1. Formal connection between rule and particulars

Traditionally, legal "formalism" is the position that a unique answer in a particular case can be "deduced" from a rule, or that application of a rule to a particular is "analytical." (The scare quotes indicate that philosophical arguments about language have made the traditional understanding of these concepts just as problematic as "rule" itself. I shall return to this issue in the next section.) The connection between the rule and its application is, in other words, formal. Pejoratively, this is mechanical jurisprudence, or the computer model of judging. In this model, judges do not judge; they are only black boxes, who function to juxtapose the rule and the particular so the formal connection can be declared.

2. Formal connection between foundations and rules

There is another way that the term "formalism" traditionally has been used. This "formalism" is the view that there exists a mind-independent reality consisting of certain first principles either of fact or value. These first principles form a logical, analytical, "foundation" for the law. A natural law theory would be formalist in this sense if it claimed that legal and moral rules are real and are there for us to discover, for example, or if it claimed that legal rules are deducible from a foundational set of real values. In this foundationalist kind of formalism, the crucial formal connection is between the structure of the universe and rules of law. It is thus different from the mechanical jurisprudence kind of formalism, where the crucial formal link is between rules and the application of those rules to particulars.

3. Formal connection between words and things

In a famous metaphor, H.L.A. Hart suggested that legal rules have a "core" of certainty and a "penumbra" of uncertainty. Hart declared that in the penumbra, judges must "legislate." A common understanding of the core/penumbra distinction—although probably not Hart's own understanding of it—is that in the core, formal deductive application of rules to particulars is possible. If we do assume that formal application to particulars is possible within the core of a rule, then we can characterize a third sense of traditional formalism: formalism in semantics. If there is a set of particulars, comprising the core meaning, to which a rule is applicable analytically or through deduction, it must be true that the words in the rule have an analytic connection with at least a subset of the particulars falling within these words' extensions. For example, if a rule contains the word "vehicle," then for the rule ever to be formally applicable there must be some subset of cases involving objects that are seen to be vehicles through deduction or some sort of analytic connection alone.

The notion of an analytic connection between a word and its extension raises thorny problems in the theory of reference. Yet some logical positivists may have thought word-meaning could be analytic in this way. Formalism in semantics may assume that the extension of a word can be logically determined
by connection with a list of necessary and sufficient criteria, and thus that there is a formal connection between a word and the things to which it applies once the criteria are known. The necessary and sufficient criteria could be conventional artifacts of language. For a thorough reductionist, however, the criteria would be deducible from foundational sense-data, and formalism in semantics would lead back to formalism in metaphysics.

4. Formal realizability and the formalist conception of rules

In the traditional conception of the nature of rules, a rule is self-applying to the set of particulars said to fall under it; its application is thought to be analytic. It is often said that rules are logically prior to the particular cases that fall under them. Another way of putting this is to think that somehow the applications to particulars are already present in the rule itself. For example, if a rule says that no one under 21 is allowed in a saloon, then the application of the rule to Sally, who is in Joe's Saloon on her sixteenth birthday, is analytic or formal. The result that Sally must be excluded follows immediately from the rule itself and Sally’s specific circumstances, and is unaffected by any other previous applications of the rule or other circumstances.

Under the traditional conception of rules, the property of analytic self-application, thought to inhere in rules, is sometimes called "formal realizability." When a directive or command is formally realizable, its application is deductive or analytic. In other words, it deserves to be called a "rule." To the extent that legal directives are formally realizable they are to be implemented by mechanical jurisprudence. In my view, rules would be formally realizable to the extent that the words in them are formally realizable. Thus, traditional formalism in the conception of rules leads back to traditional formalism in semantics. Formal realizability is an asserted characteristic primarily of words, and only secondarily of rules.

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A Wittgensteinian view of words, and of the rules containing them, suggests that there is no such thing as traditional formal realizability, or in other words, that the traditional formalist conception of rules is wrong. The Wittgensteinian view of rules may be characterized as both a social and a practice conception. It is a social conception because in this view rules depend essentially on social context, and it is a practice conception because rules also depend essentially on reiterated human activity.

* * *

One might say, "So what?" Under the Wittgensteinian view there are still obvious cases of rules and rule-following; whether we hold the traditional view of rules or the Wittgensteinian view makes no difference for our conceptions of the model of rules and the Rule of Law. The "So what?" response is particularly appealing to those who read Wittgenstein more narrowly than I do. I take a view that aligns him with modern pragmatism. His insistence that meaning cannot be separated from "use"—from reiterated human activity, practices, embedded in and helping to constitute a "form of life"—seems, when
given the central weight I believe it deserves, to make clear his intellectual affinity with pragmatism. Yet those who read Wittgenstein more narrowly understand him merely to have been making an analytic point about language, and rules couched in language, to the effect that no rule can determine the scope of its own application. They deny that Wittgenstein means that there is something essentially social or "communitarian" about rules.

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The philosophical consequences we must accept if we accept the pragmatic Wittgensteinian view of rules are, I think, these: the tendency of "applying" rules to coalesce with "making" rules; the tendency of the "rule" to coalesce with the "particulars falling under it"; the idea that rules are contingent upon whole forms of life and not just specific acts of a legislature; and the essential mutability of rules.

From a Wittgensteinian perspective, making rules and applying rules cannot be radically separate activities. A rule would cease to exist if we (the relevant community) stopped apprehending it as a rule and stopped recognizing ourselves and others as acting under it. This view of legal rules would contrast with one aspect of the positivist view formulated by H.L.A. Hart. Hart drew a sharp distinction between primary rules of obligation, which can be valid whether or not people obey them, and the rule of recognition, whose existence depends upon the observed actions and public commitments of the legal community. For a Wittgensteinian it seems the distinction cannot be quite so sharp. The rule of recognition itself certainly depends upon community agreement in practice, but so too (even if in a less direct sense) must the notion of validity. If a primary rule were never followed, at some point it would become questionable whether we were justified in thinking it to be a rule.

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If we accept the Wittgensteinian view of rules, there can also be no radical distinction between a rule and the particulars falling under it. This seems to deny the generality (in Fuller's sense) of rules. In a Wittgensteinian view, rules depend upon the practice of decisions that the relevant community accepts as rule-like. Rules do not wholly pre-exist the particular applications of them in practice, because people must actually follow rules before we can say rules exist.

More broadly, a switch to the Wittgensteinian view of rules must profoundly affect our views about law and the Rule of Law because the Wittgensteinian view makes the existence of legal rules contingent not just upon the acts of legislatures or other authoritative entities, but also upon the surrounding social context, the content of an entire form of life. Of course, rules can come into being partly because we have specific practices (legislation, judging, agency promulgation) that formulate them. In order to find out what rules exist by virtue of these practices, we must "look and see" what the practice is. But that which makes any directive rule-like relates not only to its promulgation according to an essentially social existing practice, but also to the content of
surrounding social activities and understandings. Rules are created and continue to exist not only because a legislature says so, but also by virtue of their being embedded in our *nomos*. A judge's decision in response to a rule responds necessarily to the community as a whole and not just to what the legislature has said.

Finally, if we accept the Wittgensteinian view we must recognize that rules are not immutable. Whether an activity is seen as rule-like is contingent upon material social context and agreement. Over time the "same" action in response to the "same" directive can go from being compelled by a rule to not being compelled by a rule, or vice versa. The traditional notion of law as rules cannot readily accommodate the idea that the contours of the law may shift through no legislative or official act but merely through social change. At what point in the process of coming-to-be-rule-like do we treat something as law?

The point of "the Rule of Law, not of individuals" is that the rules are supposed to *rule*. The easiest (most "natural") way to achieve that in our historical and philosophical context is to assume that rules apply to particular cases in an analytical or self-applying way. "Individuals"—judges, police, administrators—are needed to make sure these self-evident applications are carried out, but these individuals are not supposed to *rule*. They are to be rule-bound, merely instrumental functionaries.

* * *

Suppose we drop both the notion that law is mediated through formal rules in the traditional sense (accepting Wittgensteinian reinterpretation of formalism), and the broader idea that law consists essentially of verbal directives like rules and standards, apart from the practice in which they are embedded (accepting a more far-reaching reinterpretation). We will still find it deeply normatively appealing to conceive of ourselves as a people governed by its law rather than by arbitrary individual power, because conceiving of ourselves this way I take to be constitutive of ourselves as a political community. The enduring normative appeal of the Rule of Law is the reason I pursue reinterpretation. The reinterpretation I want to pursue (barely beginning in this essay) turns toward a view of law that emphasizes practice as well as words. It is a view that turns toward pragmatism, seeking to view law as a pragmatic normative activity. In this view, hermeneutics—the view of interpretation and meaning as holistic and practice-based—forms the epistemology of law.

The work of Robert Cover is suggestive for the reinterpretation I seek. Cover is perhaps the quintessential modern anti-positivist. He claims that the role of judges is rightly law-creating ("jurisgenerative"). Thus, he stands on its head the traditional slogan that judges should apply rather than make law. When judges slip into the old rhetoric and claim to act not as people but as functionaries whose hands are tied, they "substitute[e] the hermeneutic of jurisdiction for the hermeneutic of the text." In other words, they refuse to take responsibility for their actions by taking refuge in their role as rule-followers. "Judges are people of violence"; one way of being violent is to disavow responsibility for the consequences of their functionary behavior.
In Cover's view, judges are not functionaries but rather constitute an interpretive community. Law-creation is not unique to them; it inheres in all interpretive communities. In interpretive communities, "applying" and "making" law coalesce. As a community applies its law, it continuously [re-] makes it. Law is not the creature of the state but the mark of an interpretive community. Law is not made by legislatures (or judges) alone. Under the sway of the positivist model of law as rules, the role of the state has been to crush all law contrary to that of the state. This Cover deplores. For Cover, to act rightly as a judge is to refuse to use the violence of one's office to enforce the law of the state against the law of various dissenting communities, while at the same time recognizing and taking responsibility for the fact that the law of the community of judges can come into conflict with, and is not intrinsically privileged over, the law of other interpretive communities.

Like Cover's theory of law, hermeneutic social theories have rejected foundationalism, formalism, and the idea that a rule could be applied by one person, only once, apart from a group in whose interpretive practice the rule is embedded. Hermeneutic theories have also rejected the notion that there can be application without interpretation, or interpretation without politics and value, or politics and value without commitment. These theories view interpretation as holistic, pragmatic, and historically situated. Because of these features, hermeneutic theory bears an affinity with the turn toward coherence theories and pragmatism in ethics and metaphysics. Hermeneutic theory thus seems more promising than the new non-foundationalist "natural law" for legal theorists who seek to exorcise formalism.

A pragmatic reinterpretation of the Rule of Law would at least deny that law consists of formally realizable rules in the traditional sense. More controversially, perhaps, I believe such a reinterpretation would deny that law consists quintessentially of rules at all, as well as the notion that rules are separate from cases and logically pre-exist their application. Such a reinterpretation would also deny the strict division of people into rule-givers and rule-followers, and the conception of judges as rule-followers, and the conception of judges as rule-appliers rather than rule-makers.

How would these broad theoretical features play out into a substantive conception of the Rule of Law that can supersede the traditional one? One task in answering this question is the one I left aside in this essay: the remaking of the supporting theories of the person and of politics. In the meantime, we can set out to "look and see," readjusting our theory and thus the reinterpretation of our practice at each step along the way. Thus I suggest that we explore how each precept of the Rule of Law might be reinterpreted. If we can retain the entire complex, or most of it, but with new philosophical underpinnings, we shall retain the Rule of Law as a central normative commitment of our legal system. For those who accept the new interpretation, however, its meaning and import for the form of life we call law may be very different.

**Notes**

1. Professor Radin identifies several distinct strands of formalism. Which of these
were substantially undermined by the legal realists? How does Professor Radin’s conception of pragmatism complete their dissolution? Law, she suggests, is perhaps best understood as social practice: “social” because it depends on “social context” and a “practice” because it depends on “reiterated human activity.” How does this compare with the formalist conception of law? With the realist conception? With other contemporary conceptions?

2. Professor Radin identifies four consequences of a pragmatic Wittgensteinian conception of rules: the distinction between rule-making and rule-application tends to dissolve; rules are denied their “generality” because they are largely indistinguishable from the particulars of their application; rules are contingent not only upon the specific institutional practices that generate them but also upon the surrounding cultural context; and rules are not immutable. Thus understood, can rules really rule?

3. Hermeneutics, Professor Radin suggests, will form the epistemology of the pragmatic re-conception of law. Is this sufficient grounding for an effective conception of law? Conversely, is it too foundational to be considered pragmatic?

4. Professor Radin draws upon the work of the late Professor Robert Cover to suggest that judges must respect “the law of various dissenting communities.” See Robert Cover, Violence and the Word, in Chapter Ten: Reconstructions. Interpretive practice, she suggests, must be holistic, pragmatic, and historically situated, and should strive to achieve coherence within and among interpretive communities. Does this burden judges with too much responsibility? Can judges, in theory or practice, assume this responsibility? Can they avoid it?

5. Professor Radin uses the word “vehicle” to briefly illustrate one aspect of formalism. Recall one of the most popular of all interpretive exercises, the attempt to discern the meaning of the proscription “No Vehicles in the Park.” See H.L.A. Hart, Positivism and the Separation of Law and Morals, excerpted in Chapter One: Legal Realism. Assessing the reach of the ban is a fairly low-stress intellectual exercise: it might arguably extend to bicycles, to an ambulance, to skateboards, to wheelchairs, to a commemorative armored tank, and so on. More stress-inducing is the assessment of the methodology for these determinations: how does one decide? What would Professor Radin identify as the relevant considerations?

Richard A. Posner

THE JURISPRUDENCE OF SKEPTICISM

* * *

The skeptical vein in American thinking about law runs from Holmes to the legal realists to the critical legal studies movement, while behind Holmes stretches a European skeptical legal tradition that runs from Thrasymachus (in Plato’s Republic) to Hobbes and Bentham and beyond. Against the skeptics can be arrayed a vast number of natural lawyers, legal conventionalists, and formalists, including Cicero, Coke, Blackstone, and Langdell, not to mention the majority of contemporary lawyers, judges, and law professors. This article will set forth and defend a moderately skeptical approach to law and judging, one not so far-reaching as that of the critical legal studies movement or even of
Holmes but distinct from orthodox legal thought or at least its pietistic expressions.

A summary of my own judicial credo may help orient the reader to the type and degree of skepticism that the article will defend. Many—though certainly not most, and perhaps only a tiny fraction—of the legal questions in our system, and I suspect in most others as well, are not merely difficult, but impossible, to answer by the methods of legal reasoning. As a result, the answers—the fourteenth amendment guarantees certain rights to fathers of illegitimate children, the right of sexual privacy does not include sodomy, a social host owes a duty of care to persons injured by a drunken guest, laws against selling babies make contracts of surrogate motherhood unenforceable, and so on ad infinitum—depend on the policy judgments, political preferences, and ethical values of the judges, or (what is not clearly distinct) on dominant public opinion acting through the judges, rather than on legal reasoning regarded as something different from policy, or politics, or values, or public opinion. Sometimes these sources of belief will enable a judge to come to a demonstrably correct result, but often not; and, when not, the judge's decision will be indeterminate in the sense that a decision the other way would be equally likely to be pronounced correct by an informed, impartial observer.

The skepticism that gives rise to this conclusion is an epistemological skepticism, but it is often and will in this article be conjoined with a skepticism (again partial rather than complete) about the existence of invisible entities, such as "justice" and "legislative intent," to which appeal is sometimes made for answers to legal questions. (These forms of skepticism are distinct: one could believe that there are moral entities such as justice, but that they are unknowable). Ontological skepticism has significance for legal factfinding as well as for legal reasoning. Doubts about the existence of such mysterious mental entities as legislative intent can incite doubts about the existence of the mind itself and thus make problematic the requirement of proving a mental element in criminal, tort, discrimination, and other cases.

* * *

There is more to this article than an exposition and defense of a particular judicial philosophy. I argue that a skeptical perspective can cast light on a variety of jurisprudential questions—not only the nature of legal reasoning, but also criminal intent, civil disobedience, judicial ethics, the issue of specialized courts, the unit of Holmes's thought, the validity of behaviorist approaches to law, and even the law of deodands. I sketch the decisionmaking process of the skeptical judge, emphasizing the importance of what I call social vision. I try, in short, to show that a skeptical perspective can be a stimulant to inquiry and understanding rather than just a slogan, provocation, or wet blanket.

Perspective—not theory. Even if skepticism as dogma is not a contradiction in terms (as well it may be), my own skepticism is a mood or attitude—a disposition to scoff at pretensions to certainty, to question claims (even my own) to the possession of powerful methodologies founded on professional expertise, and to disbelieve in absolutes and unobservable entities—rather than a theory.
The skeptical mood can be a by-product of realism or anti-realism; of reverence for science or hostility to science; of cultural and other forms of relativism; of positivism, pragmatism, anti-essentialism, materialism, or agnosticism; of Romanticism or of the rejection of Romanticism. But despite its confused lineage and affinities, the skeptical mood has, as I hope to demonstrate, not only a distinctive and bracing tone—astringent, irreverent, unsentimental, no-nonsense—but many fruitful applications to law.

There are, of course, degrees of skepticism. Since mine is of intermediate degree, this article perforce faces in two directions: I am as intent on distinguishing my position from that of the radical skeptics in the critical legal studies movement as on challenging the position of Dworkin, Fried, and others that there is a right answer to every legal question. I believe I can do this without having to indicate precisely which, or precisely how many, decisions I regard either as indeterminate, period, or as indeterminate by the methods of legal reasoning.

The distinction in the last sentence deserves emphasis. Mingled throughout the article, but important to hold separate in one's mind, are two different though overlapping forms of legal skepticism (this is a different axis of distinction from that suggested earlier between epistemological and ontological skepticism). One form, skepticism about the determinacy of legal outcomes in difficult cases, denies Dworkin's "right answer" thesis . . . as well as the older legal formalism. The other form, skepticism about the existence of a distinctive legal-analytic methodology ("legal reasoning"), denies Coke's and Fried's "artificial reason" thesis, but is consistent with the possibility that some legal outcomes can be made determinate by methods of analysis that owe little or nothing to legal training or experience. The "right answer" thesis may be said to reflect nostalgia for lost certitudes; the "artificial reason" thesis, nostalgia for a lost sense of the law's autonomy.

* * *

Practical reason in this sense is not a single analytical method or even a set of related methods but a grab bag of methods, both of investigation and of persuasion. It includes anecdote, introspection, imagination, common sense, intuition (due apparently to how the brain structures perceptions, so that, for example, we ascribe causal significance to acts without being able to observe—we never do observe—causality), empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent; custom, memory, "induction" (the expectation of regularities, related both to intuition and to analogy), "experience." There is duplication in this list; and some of the methods listed can be viewed as crude approximations to exact inquiry—for many of the inferences we draw with the aid of practical reason, whether in everyday life, literary criticism, or legal analysis, reflect a form of hypothesis-testing and thus are parallel to scientific inquiry.

Miscellaneous and unrigorous it may be, but practical reason is our principal
set of tools for answering questions large and small. And often it yields as high a degree of certainty as logical demonstrations do; an example is the proposition, neither analytic nor verifiable (and hence, to a strict logical positivist, a pseudo-proposition), that no human being has ever eaten an adult elephant in one sitting.

* * *

Coming closer to the use of practical reason in law, I note (here breaking very sharply with logical positivism) that practical reason can answer some ethical questions with a high degree of certainty. It is almost as certain that the Nazi racial policies were evil as that no person has ever eaten an adult elephant in one sitting. Of course, a thousand years from now, perhaps a hundred years from now, the consensus that pronounces those policies evil may dissolve, but at the moment it is so strong that a person who challenges it is likely to be thought crazy (at least by educated persons in Western societies), like a person who thinks the earth is flat, or was created five minutes ago complete with its history, or is going to disappear on the stroke of midnight December 31, 1999.

Thus I do not believe that merely because the methods of exact inquiry are rarely usable by judges in deciding cases, most judicial decisions must be political or random. Practical reason can answer most of the legal questions that logic cannot answer (and logic can answer some, as we saw).

* * *

I can illustrate my conception of judicial decisionmaking with the example of antitrust law. The first step in deciding a tough antitrust case, a case not controlled by precedent, is to extract (not—it goes without saying—by a deductive process), from the relevant legislative texts and history, from the institutional characteristics of courts and legislatures, and, lacking definitive guidance from these sources, from a social vision as well, an overall concept of antitrust law to guide decision. A popular candidate for such a concept today is the economic concept of wealth maximization, but it is, needless to say, a contestable choice. Having made this choice (the current Supreme Court has almost, but not quite, made the choice for him), the judge will then want to canvas the relevant precedents, and other sources, for information that might help in deciding the case at hand. This is step two. Step three is a policy judgment (in some cases it might approximate a logical deduction) resolving the case in accordance with the principles of wealth maximization. Step four returns on the precedents, but now viewed as authorities rather than merely as data; the judge will want to make sure that the policy judgment made in step three is not ruled out by authoritative precedent. Actually this is the third rather than the second time that the judge will have consulted precedents, since they must be consulted at the outset to determine whether the case is indeed in the open area; if not, the four-step analysis that I have described is predetermined.

The suggested approach describes, I believe, the actual (though often implicit) reasoning process that good judges use in the tough cases.

* * *
Because legal rules frequently, perhaps characteristically, do not make a perfect fit with the facts that lawyers and judges subsume under them—either the facts were not foreseen when the rule was adopted or the rulemakers were not able to agree (or just would not agree) on how to deal with those particular facts—the judge has to decide whether to extend or modify or "interpret" the preexisting rule. In such a case the rule does not rule, yet the case is decided somehow. So law must be more than rules, unless we want to say that judges are lawless whenever they exercise the kind of discretion I have just illustrated.

We can save Holmes' account and reconcile it with his skepticism by noting that if the law is just a prediction of what the judges will do, it is meaningless to ask how the judges can use prediction to discover the law. The law is not a thing they discover; it is the name of their activity. They do not act in accordance with something called "law," they just act; and the law is the bar's attempt to discern the regularities in their action. If this is right, the question whether "the law" is just the rules, or also includes the consideration that judges take into account when the rules "ran out" or when a brand-new rule is being created, is a pseudo-question, whose significance is political and ideological rather than analytical. Because the word "lawless" is a pejorative and because aggressive judges want to minimize the appearance of judicial discretion in order to give their (discretionary) decisions a more "objective," less political, and therefore more authoritative ring, commentators such as Ronald Dworkin who approve of an aggressive judiciary define "the law" as broadly as possible, while those desiring greater restraint define it more narrowly. It is just a semantic game (the game of "persuasive definition"), and it seems unworthy of the academic attention that it has received. The question whether judicial decisionmaking should be more or less freewheeling is interesting and important, but it is not a question about the nature of law. The law is not a thing, and it has no nature. Like "literature," "time," "fascism," "democracy," and "beauty," the word "law" is not referential, that is, does not denote some set of objects, physical or mental, real or fictitious, as the word "chair," or "rabbit," or "unicorn," or "ice cream," or "electron," or "fear" does, though often with much ambiguity at the edges (and some of my examples are controversial). The word can be used, but not defined; "definitions" of law are political statements or jurisprudential claims.

* * *

Law relies very heavily on practical reason, often to good effect. But sometimes a legal question will not yield to methods of practical reason. There is thus an area of indeterminacy, which, of necessity, judges fill with contestable judgments of ethics or policy. The more heterogeneous the judiciary, the larger the area of indeterminacy; and the modern American judiciary, like the society it mirrors, is extremely heterogeneous.

All this can be summed up in the proposition that the goal of the careful judge is nothing more pretentious than a reasonable decision. If only one of the possible outcomes would be reasonable, it can fairly be described as the correct outcome—the "right answer" to the legal question posed by the case. But often
two or more outcomes will be reasonable, and the choice among reasonable outcomes is an open one, though not, I argued, precisely a legislative one.

* * *

Notes

1. Judge Posner is critical of the positivist conceptions of law he associates with Professors Ronald Dworkin and Charles Fried. As to the "one-right-answer" thesis of the former, see Chapter Five: Law and Literature, supra; as to the latter’s view of law as an autonomous discipline, consider the following:

If the law is to do its work, which I want to insist is modest work, it must once more be viewed as a local, rather than a grand and global discipline... Now an important reason for resisting this notion of law as really rather technical and consisting of uninteresting picky little rules, is that it is a conception that seems to freeze out the layman and make laymen feel quite puzzled about the areas they wander into. I am not sure that is such a bad thing, but it is exaggerated as a result. ... I do think that it is by this return to law as a rather technical subject, somewhat cut off from its ethical, philosophical, and other heady roots, that we can once more have a measure of order, predictability, discipline, and limitation put into the law, because it is the lack of these which is the great illness from which the law suffers. And what I am talking about therefore is a return to rules.

Charles Fried, Jurisprudential Responses to Legal Realism, 73 CORNELL L. REV. 331, 332-33 (1988). How does Professor (at the time, Solicitor General) Fried’s conception of law differ from Judge Posner’s? In what ways is it the antithesis of the pragmatic conception? In what ways—if any—might it be consistent with pragmatic thought?

2. Is Professor Fried right, that a "return to rules" will bring a return to "order, predictability, discipline, and limitation"? Is Judge Posner’s "grab-bag" of problem-solving techniques reasonably calculated to serve the same values?

3. Judge Posner suggests that the skeptical perspective does not preclude certainty. He notes that it is certain, for example, that no human being has ever eaten an adult elephant in a single sitting, and "almost as certain" that the Nazi racial policies were evil. But by what methods and criteria can he declare these beliefs "certain"? How might their certainty be placed in doubt? Does the existence of a dissenting perspective dissolve the certainty? Can Judge Posner, in other words, achieve certainty without consensus? Or do some forms of dissensus not count? In both epistemological and metaphysical terms, can skepticism avoid the problem of infinite regress without imposing some random closure on the inquiry? Consider Wittgenstein’s suggestion, first, that "[i]f you tried to doubt everything you would not get as far as doubting anything"; and, second, that there are, at times, "hinge propositions": "the questions that we raise and our doubts depend on the fact that some propositions are exempt from doubt, are, as it were, like hinges on which those turn." LUDWIG WITTGENSTEIN, ON CERTAINTY §§ 115, 341 (Oxford ed. 1969).

4. Judge Posner suggests that the indeterminacy of law will be in proportion to the heterogeneity of the judiciary, which, he asserts, "is extremely heterogeneous." Is he correct that the judiciary is "extremely heterogeneous"? Can you see why Professor Radin— and Professor Cover, whom she cites— might object to this portion of Judge Posner’s thesis? Consider Judge Posner’s reliance on, inter alia, "common sense":

Common sense reasoning is one of the intellectually weakest methods of
analysis. Common sense is dependent on cultural fabric, on social, ethnic, and geographic variations, and on historical traditions. While common sense thought is deeply influenced by culture, common sense does not promote reflective thinking about cultural conditions. Indeed, the unquestioning acceptance of certain "common sense" beliefs is necessary to their perpetuation. Because common sense is concerned with cultural transmission and replication, it is conservative in orientation and method . . .


5. "[T]he goal of the careful judge," Judge Posner concludes, "is nothing more than a reasonable decision." Is this sufficiently constraining? Is it too constraining?

Steven D. Smith

THE PURSUIT OF PRAGMATISM


* * *

Dworkin’s criticism of legal pragmatism can be presented in the form of two claims, one descriptive and the other normative. His descriptive claim is that pragmatism as a theory of law holds that legal officials—in particular judges—"do and should make whatever decisions seem to them best for the community’s future, not counting any form of consistency with the past as valuable for its own sake." Dworkin’s normative claim is that judges should maintain continuity with the past, at least to some extent. Taken together, the descriptive and normative claims can form the premises of a loose syllogism. If pragmatism values only future good but not continuity with the past, and if continuity with the past is valuable, then pragmatism offers an inadequate or undesirable theory of law.

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Let us begin with two propositions that, if they do not quite qualify for the lofty status of "self-evident truths," at least come awfully close. First, a person ought to choose and act so as to produce more rather than less good. Second, any given choice or action can affect what happens in the future but cannot alter what, at the time of the action or decision, has already happened in the past.

* * *

The two propositions have an obvious plausibility and an ability to deflect or withstand apparent objections. And if the two propositions are accepted, the logical conclusion with respect to law is—legal pragmatism. Legal officials should choose and act to promote the greatest good. And since the only good that they have any power to affect lies in the future, it follows that they should act to promote good in the future. If it does not serve that purpose, then continuity with the past is not valuable.

This analysis suggests that legal pragmatism, as Dworkin defines it, is, or at least is close to being, a kind of irresistible truth. Of course, that truth leaves
a great deal of room for various kinds of disagreements. All the standard disputes about what things are good and how society should realize goods remain intact; pragmatism does nothing to disturb those disputes. Whether judges can better promote the future good by following rules, by employing "situation sense," or by recognizing and enforcing "rights," remains a viable controversy. Diverse views about how to use the past will also continue to flourish; both the Burkean who regards history as a distillation of human wisdom and the cynic who follows Voltaire in believing that history is largely a record of human depravity can claim the label of pragmatist. But pragmatism does expose one kind of debate as frivolous. That debate asks whether the law is obligated to count continuity with the past as "valuable for its own sake." It is in other words, the debate about pragmatism itself.

The present analysis thus suggests that everyone is virtually compelled to be, at some level, a pragmatist. Legal pragmatists like to claim that their movement is antifoundational, but pragmatism itself is in one sense a kind of foundation for political and legal discussion. Or, to paraphrase Dworkin, every conscientious judge and scholar (including Dworkin) in any of the supposed camps, is a pragmatist in the broadest sense. The great debates are debates within pragmatism, not about its relevance.

The conclusion that legal pragmatism is irresistible might seem, at least for self-proclaimed pragmatists, too good to be true. In fact, the conclusion is too true to be good. Pragmatism in the sense discussed above is irresistible because it is platitudinous. If the truths offered in the name of pragmatism can be uniformly accepted without disturbing any existing debates (except for the misconceived debate about pragmatism itself), then it would seem that pragmatism is not useful in resolving legal problems. Ironically, a position that has insisted that an idea is true only to the extent that it is useful would be convicted under its own standard. Indeed, if everyone is necessarily a pragmatist, then it seems that pragmatism is not a distinct legal theory at all. Rather than accept this unhappy conclusion, we ought to consider a different interpretation of legal pragmatism.

* * *

The previous section considered a view that focuses on legal pragmatism's attitude toward the past. But scholars also commonly describe pragmatism in terms of its attitude toward theory.

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The predicament that confronts aspiring pragmatists such as Posner can be described simply: Pragmatists dislike and distrust theory. Pragmatists also like and need theory. Consequently, pragmatists will always inveigh against theory, and then they will go back to theorizing. Even worse, pragmatists cannot offer any method or criterion for theorizing different from the methods and criteria already employed by nonpragmatists.

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This dilemma confounds in law as in other areas of life. Legal theory can
mislead and distort. But legal theory is also necessary and valuable. For example, pragmatists surely do not believe that judges should simply decide each case on the basis of an unguided gestalt; like everyone else, they believe that some kinds of factors are relevant to the judicial decision and that other factors are irrelevant, or that some ways of deciding cases should be encouraged while other ways of deciding cases should be discouraged. Similarly, the pragmatist does not favor leaving common law or constitutional decisions as a mass of particular, unprocessed controversies and results; he wants "as much system as possible" and hence will try to make connections, offer explanations, and identify valuable categories for understanding and using the raw material. And as soon as the pragmatist begins to talk about how judges should decide cases or about how common law or constitutional decisions should be understood, he will have embarked on a new project of theory-building.

Thus far, the search for a distinct and potentially valuable pragmatic position has proven disappointing. There may well be a pragmatic temperament or attitude, but this attitude does not issue in useful propositions or criticisms, indeed, it undermines the pragmatist criticism of "grand theory." Pragmatists also provide recurring themes: forward-looking instrumentalism, the priority of experience, contextualism, and perspectivism. But these themes turn out upon inspection to be either empty or innocuous. At best, it seems, pragmatists are telling us what we already take for granted; at worst, insofar as pragmatists think they are saying something distinctive and useful, legal pragmatism is a project in self-deception.

Before dismissing pragmatism on these grounds, however, we should ask what is so bad about being platitudinous? If a theorist or scholar purports to offer some new revelation or novel insight but then proceeds to recite pious generalities that everyone already acknowledges, we will naturally be disappointed. Similarly, insofar as legal pragmatism claims to be a distinctive, valuable position or theory about law, but in fact offers only platitudes, then it has failed to deliver on its promises. On the other hand, platitudes are eminently suited to perform certain functions such as exhortation.

Recognizing the function of exhortation suggests that the criticisms of legal pragmatist themes offered earlier in this article may be misdirected. Such criticisms assert that many of the things that legal pragmatists typically say are propositions which everyone already takes for granted. Insofar as pragmatists are trying to offer criteria or principles for evaluating legal theories, that conclusion suggests that pragmatism offers little of value. But imagine a different function for pragmatism; perhaps the purpose of pragmatist writing is to exhort scholars and judges to avoid intellectual vices that they already acknowledge as such but are nonetheless prone to commit.

For example, everyone may agree that theories should be firmly grounded in experience. Theorists generally start with experience, not only because they
believe they should but because that is the only place they can start. Once conceived, however, a theory may acquire a vitality of its own. Rather than helping the scholar to understand or deal with experiential reality, the theory becomes the scholar's reality. This sort of theorizing resembles the religious vice of idolatry. The worshipper creates an image to help focus her thoughts and feelings on a more ultimate reality; but she concludes by worshipping the image itself. In the same way, a legal scholar may come to regard his theory as, like Dworkin's past, "valuable for its own sake"; he thereby succumbs to "a piece of perverse abstraction worship." And pragmatism operates as a kind of exhortation, reminding the scholar of proper priorities, calling him back to experiential reality.

One can easily misperceive the exhortatory function of legal pragmatism because the vices against which it admonishes—excessive abstraction, unwarranted generalization, formalistic rigidity, insensitivity to context—occur in theorizing (or, more loosely, in thinking). If theories remedy intellectual or theoretical problems and exhortation remedies problems of practice, then it might seem that pragmatism, which addresses intellectual problems, must be a kind of theory rather than a form of exhortation. In this instance, however the distinction between theoretical problems and problems of practice is likely to confuse. Pragmatism is concerned with problems that occur in the practice of theorizing. It does not supply distinctive standards for constructing or evaluating theories, but instead admonishes thinkers to adhere to standards that they already accept. And it is precisely the oft-noted platitudinous character of the pragmatists' counsels that reveals the essentially exhortatory function of legal pragmatism.

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The resurgence of pragmatism in legal thought reflects a widespread perception that in recent years legal thinking has been unduly theoretical and abstract. One familiar explanation—albeit only a partial one—for this tendency suggests that Brown v. Board of Education and later Roe v. Wade prompted a crisis of constitutional legitimacy and provoked constitutional scholars to ever loftier flights of theoretical abstraction in their efforts to defend those decisions. A whole generation of theorists was born out of the struggle over what Alexander Bickel called "the countermajoritarian difficulty." The ambitious theories of scholars such as Ely, Dworkin, Rawls, Ackerman, and Perry stand as the landmark achievements of that generation.

In the long run, however, this project of theory-building has proven unsatisfying. Each of the landmarks mentioned above has been severely eroded, if not entirely overthrown. The movement toward "grand theory," it may now seem, represented a wrong turn; and it is time for retrenchment to the more solid ground of experience, practice, and common sense. This diagnosis, which views legal thought as emerging from (or perhaps still entangled in) a period of "grand theory," helps to account for the revival of legal pragmatism. It suggests that the pragmatists' message is not only timeless, but also timely.

A counter diagnosis, however, deserves to be considered. Note first the
insecure status of theories of Ely, Dworkin, Rawls, and Ackerman within the realm of "grand theory." Such theories were indeed elaborate, lengthy, and sweeping in scope; by those criteria they would qualify as "grand theory." In a different sense, however, such theorizing does not appear "grand" at all, but rather peculiarly and deliberately modest. John Ely's position, emphasizing a "concern with process in a broader sense," attempted to spare the judge, and the theorist, the difficult task of addressing questions of substantive justice or morality. The theories of Rawls, Ackerman, and Dworkin, while seemingly more "substantive," studiously avoided addressing the perennial ethical, existential, or theological issues such as "the nature of man," or of "the good," or the meaning or purpose of life. On the contrary, at their core, the theories suggested that government and law (and hence legal theory) must not take positions on questions such as these. Such theories did not merely decline to address such questions, but devoted themselves to insulating the law from moral and theological thinking that might arise in other disciplines or in the culture generally. Hence, by contrast with the true "grand theories" in the classical sense—i.e., to philosophies such as those of Plato, Aristotle, and Aquinas—recent legal thought has been decidedly timid; it may plausibly be viewed not as "grand theory," but rather as a kind of anti-"grand theory."

This alternative characterization of recent theorizing suggests several conclusions that clash with those of pragmatist diagnosis. First, the theorizing of Ely, Rawls, Dworkin, and Ackerman arguably has proven unsatisfying not because it was too ambitious, but rather because it was so aggressively unambitious. Such theorizing was precluded in advance from providing satisfying answers to legal and political questions precisely because it refused to confront essential issues such as the nature of the good life, hiding instead behind an illusory "neutrality." Second, legal pragmatism may plausibly be viewed not as challenging or replacing this theoretical quest for "neutrality," but rather as carrying on that quest in a lightly altered guise. The underlying instinct—one that avoids making difficult and controversial substantive judgments upon fundamental human questions—seems very much the same. After all, what could be safer and less likely to give offense than a legal philosophy that principally offers innocuous advice such as "Respect human experience," "Listen to all sides," and "Be sensitive to context"?

Finally, if this analysis is accurate, then the pragmatist diagnosis and prescription are misconceived. The remedy, if there is one, for the failures of recent theorizing lies not in a pragmatic flight from theory, but rather in better and more courageous theorizing. And the more promising recent development in legal thought lies not in the revival of legal pragmatism, but rather in the renewal of interest in what is awkwardly called "natural law."

Notes

1. Professor Smith notes that the current ascendancy of pragmatism may rest largely in its commitment to mere platitudes. Is he correct? If so, is he also correct, that pragmatism must be convicted under its own standards of utility?

2. The resurgence of pragmatism, Professor Smith observes, was a response to the
perceived failures of grand theory. In his view, however, grand theory may have failed not because it was too ambitious, but because it was too timid. Is he correct?

3. In what sense is the renewal of interest in "natural law" more promising than the renewal of pragmatism? Are the two incompatible? As the readings have suggested, some pragmatists contend that natural law may provide a normative basis for legal problem-solving within a pragmatic framework. Would Professor Smith concur? Could natural law at least be understood in a way consistent with pragmatism's "platitudes"?

4. Professor Smith suggests that pragmatism's platitudes may serve some purpose as exhortation. But this exhortation, he notes, is directed largely at theorizing and theorists. Is there something ultimately futile about this form of exhortation? Is the pragmatic vision realizable in any meaningful way?

5. Professor Smith's suggestion that pragmatism may serve an exhortatory function is substantially consistent with the pragmatic commitment to consensus and with its conception of law as social (or dialogic) practice. All of these notions are premised on a critical assumption: that beyond foundationalism there is the possibility of persuasion and hope for a revitalized community.

D. PRAGMATISM AND SOCIAL PROGRESS: THE SEARCH FOR PROPHECY.

"Prophetic pragmatism," writes Professor Cornel West, "gives courageous resistance and relentless critique a self-critical character and democratic content; that is, it analyzes the social causes of unnecessary forms of social misery, promotes moral outrage against them, organizes different constituencies to alleviate them, yet does so with an openness to its own blind spots and shortcomings." The Limits of Neo-pragmatism, 63 S. CAL. L. REV. 1747, 1750 (1990). "Prophetic pragmatism," Professor West concludes, "is pragmatism at its best ..." Id.

Lynn A. Baker
"JUST DO IT"

PRAGMATISM AND PROGRESSIVE SOCIAL CHANGE

What use is pragmatism for achieving progressive social change? This question has been central to the recent renaissance of pragmatism within the legal academy. Not surprisingly, the scholars who have examined this question have shared a core concern: the persistent marginalization and disempowerment of certain groups in our society. More striking, however, is the substantial agreement of these scholars that pragmatism is useful for alleviating oppression in modern America.

In this Essay I suggest, despite the popularity of claims to the contrary, that pragmatism is of scant use for achieving progressive social change. My analysis focuses on the writings of Richard Rorty for two reasons. First, he is the acknowledged philosophical leader of the recent revival of interest in
pragmatism. Second, an examination of Rorty's work uncovers important, and previously undiscussed, inconsistencies in his own assessment of pragmatism's usefulness for progressive social change.

I begin by analyzing two distinct, but previously unseparated strands in Rorty's discussion of progressive social change, which I term the "prophetic" and the "processual."

* * *

The central element of Rorty's prophetic strand is his definition of progressive social change. Although he frequently eschews the notion of progress, Rorty is willing to employ it in the context of social change. According to Rorty, progressive social change is that which moves a society closer to realizing his three interrelated aspirations: that suffering and cruelty will be diminished, that freedom will be maximized; and that "chances for fulfillment of idiosyncratic fantasies will be equalized." Rorty derives these hopes from his premise that "the aim of a just and free society [is] letting its citizens be as privatistic, 'irrationalist,' and aestheticist as they please so long as they do it on their own time—causing no harm to others and using no resources needed by those less advantaged."

* * *

Rorty's prophetic strand also encompasses his suggestions concerning the vehicles we might use to move to the better world he envisions. Rorty repeatedly asserts: "There is no method or procedure to be followed except courageous and imaginative experimentation." Nonetheless, he suggests two vehicles by which social progress has occurred in the past and might occur in the future: narratives and separatist groups. Rorty does not mean to imply, however, that these are the only two vehicles by which social change has occurred or could someday occur; they are simply the two that he thus far has chosen to examine at greatest length.

Thus, Rorty's prophetic strand consists of his three hopes and the premise from which they are derived, as well as his suggestion of narratives and separatists groups as the vehicles for realizing these hopes. Rorty's processual strand, in contrast, consists of his account of the processes or mechanisms by which the vehicles of narratives and separatist groups would transport us to his better world.

* * *

To summarize Rorty's processual strand: Separatist groups move society toward Rorty's utopian vision through their creation of new linguistic practices; narratives do so through an expansion of individual empathy. This distinction is not intended, however, to obscure the obvious interrelatedness of the two mechanisms: The creation of new linguistic practices can occur simultaneously with, cause, or result from an expansion of individual empathy. Thus, Rorty also describes narratives as "aimed at working out a new public final vocabulary ..., a vocabulary deployed to answer the question 'What sorts of things about what sorts of people do I need to notice.'" Similarly, he portrays separatist
groups as "trying to get people to feel indifference or satisfaction where they once recoiled, and revulsion and rage where they once felt indifference or resignation."

* * *

Given the above analysis of the prophetic and processual strands in his work, what unique contribution does Rorty's pragmatism make to his views on progressive social change? This issue can be examined without confronting the vastly larger and less tractable challenge of defining pragmatism by focusing on pragmatism's anti-foundationalist core: the claim that "metaphysical entities" such as "reality," "truth," and "nature" are not "warrants for certitude." In the context of social change, this anti-foundationalism more specifically entails: (1) recognizing the pervasiveness of contingency; (2) rejecting metaphysical notions when conceptualizing or evaluating processes of social change; and (3) avoiding metaphysical notions when constructing or evaluating arguments for (or against) social change.

* * *

The only anti-foundationalist aspect of Rorty's prophetic strand is the way he "justifies" its various aspects. Rorty's claim that his premise simply embodies "ungroundable desires" for which there is "no noncircular theoretical backup" is an example of pragmatism's anti-foundationalist distrust of metaphysical entities as warrants for certitude. Another example of this distrust is Rorty's suggestion that "[w]e should learn to brush aside questions like 'How do you know that freedom is the chief goal of social organization?'" and instead "should see allegiance to social institutions as no more matters for justification by reference to familiar, commonly accepted premises—but also as no more arbitrary—than choices of friends or heroes."

* * *

Rorty's processual strand, in contrast, is anti-foundationalist through and through. In his account of the mechanisms by which separatist groups and narratives effect progressive social change, Rorty portrays neither vehicle as reaching toward a metaphysical truth or an objective reality. Separatist groups and narratives both strive toward "increasingly useful metaphors rather than ... increasing understanding of how things really are."

* * *

Scholars who laud Rorty's concern for marginalized people praise his prophecy, not his pragmatism. In contrast, scholars who find fault with Rorty's defense of existing American political institutions disapprove of part of his prophecy, and/or disagree with his assessment of the constraints anti-foundationalism imposes on the current pursuit of his better world.

* * *

In their haste to criticize Rorty for complacently defending the status quo, legal scholars have failed to raise a potentially much more devastating issue. They have never undertaken to evaluate, by Rorty's own pragmatist terms, his claims for a postmetaphysical culture in the context of progressive social
change. What use is anti-foundationalism for achieving progressive social change, and the anti-foundationalism that he advocates? Despite the centrality of this issue, Rorty, like his critics, never directly confronts it.

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In the end, Rorty persuades one only of that for which no persuasion was necessary: An anti-foundationalist culture by definition will be different from a foundationalist one. Notwithstanding his general claim that a postmetaphysical culture would be preferable to our metaphysical one, Rorty does not convincingly establish that a cultural shift to anti-foundationalism would be advantageous for realizing even his own utopian vision.

* * *

If our culture does not move from foundationalism to anti-foundationalism, would subscribing to the latter nonetheless be of greater use to prophets than a belief in metaphysics? Throughout his writings, Rorty’s answer to this question seems to waiver between "no" and "yes, quite a bit."

At one extreme, Rorty states that pragmatism has nothing to offer those with a vision of a better world: "[I]t seems to me that if you had the prophecy, you could skip the pragmatism." In addition, Rorty has described pragmatism in the context of progressive social change as "something comparatively small and unimportant, a set of answers to philosophical questions—questions which arise only for people who find philosophical topics intriguing rather than silly." Thus, Rorty notes that "pragmatism bites other philosophies, but not social problems as such—and so is as useful to fascists like Mussolini and conservatives like Oakeshott as it is to liberals like Dewey."

At the other extreme, however, is the bulk of Rorty’s recent Tanner Lecture, "Feminism and Pragmatism." There he states that feminist prophets with a vision of a better world, such as Catherine MacKinnon and Marilyn Frye, might profit from "thinking with the pragmatists."

Both of Rorty’s rather extreme positions cannot be correct. Indeed, close examination of Rorty’s three more ambitious claims for anti-foundationalism finds them unpersuasive.

First, Rorty states that pragmatist philosophy might aid feminist politics because of the way the former conceptualizes and redescribes social progress.

* * *

[But] an anti-foundationalist conception of social change as evolution may dilute both the prophet’s belief in her own vision and her motivation to effect social change. It is one thing to believe, as a prophet by definition does, that the status quo is neither necessary nor the best possible state of affairs; but it is quite another to believe that the better world one envisions and would work toward achieving is also a contingency, a mere resting point in a larger evolution.

* * *

Rorty’s second claim is that anti-foundationalism offers feminist prophets
useful rules of rhetoric. He suggests that feminists quit invoking "an ahistoricist realism" through the use of phrases like "in truth" and "in reality," and instead see themselves as creating a new language through which they would simultaneously be fashioning what they did not before have: "a moral identity as women." Rorty promises that with new, anti-foundationalist linguistic practices come new social constructs.

* * *

There are two problems with Rorty's suggestions. As Rorty himself acknowledges, anti-foundationalism cannot provide prophets (or anyone else) with a method for selling their visions (or doing anything else): "There is no method or procedure to be followed except courageous and imaginative experimentation." And, as Rorty also notes, the extent to which metaphysics holds sway in our world means that "Practical politics will doubtless often require feminists to speak with the universalist vulgar . . ." Indeed, anti-foundationalist rhetoric and arguments would seem to be of questionable use to prophets who are selling their vision to a foundationalist society.

Third, Rorty would have feminist prophets who are feeling discouraged look to anti-foundationalism for a kind of moral support.

* * *

Rorty urges feminists to have faith in their vision of a better world: "Prophecy, as we [pragmatists] see it, is all that non-violent political movements can fall back on when arguments fails." To be sure, some (rather intellectual) feminist prophets may be bolstered by Rorty's exhortation. But then will not anti-foundationalism have become for the prophet what Rorty has claimed, with some disdain, that metaphysical entities are for the realist and universalist: "something large and powerful" that is on one's side and enables one to keep trying?

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Thus, despite Rorty's broader claims, he persuades one ultimately that anti-foundationalism might be useful only to especially intellectual prophets, and only when they need to extricate themselves from philosophical or theoretical hassles. Rorty convinces one only that if highly intellectual feminists redescribe themselves and their project in anti-foundationalist terms, they might free themselves from the "philosophical" demand for a "general theory of oppression."

* * *

Notwithstanding the claims of many legal scholars, and sometimes Richard Rorty, pragmatism is of scant use for alleviating oppression in American society. Rorty's own discussion of progressive social change is deceptive on this score because it contains both a prophetic and a processual strand. And pragmatic anti-foundationalism entails the substance of only the latter strand. Thus, Rorty's exhortation to look out for marginalized people is best understood as dictated by his prophecy, not his pragmatism. In contrast, Rorty's defense of existing American political institutions indicates neither conservatism nor the
absence of a utopian vision; rather, it is the result of his pragmatist historicism and acknowledgment of contingency in contemplating the vehicles for realizing his prophecy.

* * *

As I have shown, Rorty does not support his more hopeful claims for an anti-foundationalist culture with convincing explanations of how or why that culture will be more useful than our current metaphysical one for achieving progressive social change. Nor has he provided persuasive evidence that subscribing to anti-foundationalism will be of greater use to prophets than a belief in metaphysics. As a good pragmatist, Rorty cannot therefore be sure that anti-foundationalism is preferable to metaphysics for realizing his—or any other—utopian vision.

In the end, pragmatism appears to be useful in achieving progressive social change to the extent that one profits from statements such as, "There is no method or procedure to be followed except courageous and imaginative experimentation." Or, as the Nike people say, "Just do it."

Richard Rorty

WHAT CAN YOU EXPECT FROM ANTI-FOUNDATIONALIST PHILOSOPHERS?: A REPLY TO LYNN BAKER


Professor Lynn Baker says that "an anti-foundationalist conception of social change as evolution may dilute both the prophet's belief in her own vision and her motivation to effect social change." It might, but if it does then the prophet is the wrong kind of prophet, the kind who thinks herself the voice of something bigger and more authoritative than the possible consequences of the application of her ideas.

The good kind of prophet thinks of herself as just someone who has a better idea, on an epistemological par with the people who claim to have a new gimmick for retreading tires, or programming computers, or redrawing the company's table of organization. Good prophets say that if we all got together and did such and such, we would probably like the results. They paint pictures of what this brighter future would look like, and write scenarios about how it might be brought about. When they've finished doing that, they have nothing more to offer, except to say "let's try it!" (a phrase I prefer to Baker's "Just do it").

This kind of prophet does not think that her views have "legitimacy" or "authority." The other, worse, type of prophet thinks of herself as a messenger from somebody (God) or something (Truth, Reason, History, Human Nature, Science, Philosophy, the Spirit of the Laws, The Working Class, the Blood and Soil of Germany, The Consciousness of the Oppressed, Woman's Experience, Negritude, the Overman who is to come, the New Socialist Man who is to come)—somebody in whose name, or something in the name of which, they
speak. Such prophets think of themselves as not just one more voice in the conversation, but as the representative of something that is somehow more than another such voice. They defend their proposals not solely in terms of how much we would like the consequences of the change they propose—how glad we, or at least our descendants will be that we made that change—but also by reference to the authority of that for which they speak.

* * *

I do not see the contradiction Baker sees between saying that pragmatism is "something comparatively small and unimportant" and saying that prophets might profit from thinking of themselves in pragmatist terms. But they will, to be sure, profit only if somebody distracts their attention from last things by asking them about first things—asking them to turn philosophical. In the thoroughly antifoundationalist culture of my dreams, the culture in which philosophy is one more literary genre rather than an expression of the need for authoritative reassurance, this request would not be made. In our culture, it frequently is made, and prophets sometimes need philosophical advice about what to say in reply. To say that they should conceptualize their own vision as part of a larger, evolutionary process is just to say that they should be able, when necessary, to articulate their own preference for looking toward last things. The force of the analogy with biological evolution, like that of most other things pragmatists have to say, is primarily negative and renunciatory: it is a way of saying "You can no more be sure of your own usefulness to future generations than could the first fish who crawled up on land; but you just might, in time, deserve the same gratitude."

I can’t, Baker rightly says, "be sure that anti-foundationalism is preferable to metaphysics for realizing [my] . . . utopian vision." But . . . I won’t be able to be sure of my view until I see what a culture looks like in which questions about authority and legitimacy no longer have the resonance they have in ours. I should live so long.

Still, while waiting, I can recite the same optimistic "up from principles" story that Dewey recited. I can point to the steady decline in requests for legitimation and for citation of authority over the last few hundred years, the steady increase in willingness to experiment. I can give examples of how the citizens of the constitutional democracies have been getting less fanatical, more willing to listen to novel prophecies, more imaginative, since the churches were disestablished, the franchise opened up, a liberal education was made available to the masses, avant-garde art made a paying proposition, and so on. This is the only sort of case I can make to show that, in Baker’s words, "this recognition of contingency makes the prophet more effective." It is hardly a conclusive case, but it is not, as Baker claims, "no case."

* * *

By suggesting that "we" are ready and willing to listen to proposals for radical social change, I seem to many of my critics to suggest that we in the United States, or in the rich democracies generally, are already capable of
Habermasian "undistorted communication." I seem to suggest that it is enough, nowadays, for prophets to say "Try it; you'll like it" rather than "You won't like it much, because you will lose the ability to oppress you presently enjoy, but you should do it anyway." My critics on the left remind me that, despite all the progress made in opening up people's imagination, it is still very hard for radical proposals to get a hearing, and that this is because "truth is an effect of power." I am constantly told that I seem unaware of the existence of power.

I think it is quite true that truth and power are linked, and always will be; I also think the pragmatist philosophers, by naturalizing the notion of "truth," were among the first to make clear why this linkage is indissoluble. The linkage in question comes down to the following two facts: (1) which statements count as truth-candidates, as reasonable matter for discussion, is determined by the vocabulary of moral and political deliberation currently being used; (2) this vocabulary is in use because, in the past, some people won power-struggles (military, political, academic, etc.) over other people.

* * *

Given this connection between truth and power, however, I still do not see that we need what a lot of the left seems to think we need—a lot of deep philosophical thought about what James calls "first things." The left finds pragmatism disappointing and wants philosophical thought that is more "radical" than that of James or Dewey, because less "complacent"—as if a really powerful philosophy could break down all the resistance to radical social change by dissolving all the old fears and prejudices.

I think of philosophical thought . . . as having relatively little to do with the reach of the political imagination. It seems to me a sign of despair, and therefore of failing imagination, when a left becomes as philosophized, as preoccupied with theory, as the academic left in the United States presently is. The fantasy that a new set of philosophical ideas—a new contribution to the Aristotle-Wittgenstein sequence—can do quickly and wholesale what union organizers, journalistic exposés, activist lawyers, charismatic leftist candidates, and the like can do, at best very slowly and at retail, seems to me a failure of nerve.

* * *

Still, what about this "we" to whom I imagine the good sort of prophet appealing when she says "If we try it (treating all men and women as brothers and sisters, abolishing slavery, banning pornography) we'll like the consequences?" Isn't there an ambiguity between "we, the people with power to change things" and "we—all of us—the powerless as well as the powerful?" Doesn't my cheerful, up-beat, "liberal" use of "we" obscure this difference?

It does, but then the difference has become more obscure—or at least more usefully obscured—as what Nietzsche was pleased to call "slave-morality" has caught on, as the franchise has been extended, as education has become more nearly universal, etc. The rhetoric of the relatively powerful has had to change to take account of the need to use persuasion rather than force on the relatively
powerless. Lately, the operations of constitutional democracy—the pressures brought by what President George Bush is pleased to call "interest groups"—have forced people to stop naked appeals to sexism and racism, and forced them to make cloaked appeals instead. A lot of things that some of the powerful believe in their hearts—e.g., that men have the right to beat up on women whenever they need to bolster their own self-confidence—are things they can no longer say in public, and can barely admit to themselves. We have a long way to go in this direction, obviously, but I see no better political rhetoric available than the kind that pretends that "we" have a virtue even when we do not have it yet. That sort of pretense and rhetoric is just how new and better "we's" get constructed. For what people cannot say in public becomes, eventually, what they cannot say even in private, and then still later, what they cannot even believe in their hearts.

* * *

Foundationalists think that this better self is something that is always already deep down there—down at a level at which, somehow, Truth does its thing without interference from Power. Anti-foundationalists think that it's the sort of self that gets created by pretending that it is already there.

* * *

If we pragmatists are good for anything in the present cultural situation, it is because we supply a bit of informed irony about the ever-renewed hope for authority. That may not seem all you have a right to expect from us anti-foundationalist philosophy professors, but it is the only useful thing you are going to get. As long as you think of "Philosophy" as the name of something having intrinsic redemptive power—or even as something which might provide a quick fix—you are going to find pragmatism disappointing.

Robert Justin Lipkin

PRAGMATISM—THE UNFINISHED REVOLUTION:
DOCTRINAIRE AND REFLECTIVE PRAGMATISM IN
RORTY'S SOCIAL THOUGHT


* * *

[Richard Rorty's pragmatic] revolution founders because it fails to distinguish between two distinct types of pragmatism: doctrinaire pragmatism and reflective pragmatism. Distinguishing between these two types of pragmatism casts the entire controversy over knowledge, truth, justice, reason, and the moral law in a different light. In Rorty's hands, doctrinaire pragmatism beckons the end of philosophy. For Rorty, philosophical questions are pointless mumbo jumbo and should be abandoned. Reflective pragmatism avoids committing us to such a precipitous result.

Unlike doctrinaire pragmatism, reflective pragmatism tells us that traditional philosophical questions are best understood as questions about the basic terms
of our culture. Reflective pragmatism, in taking seriously such questions as "What is truth?" and "Does reason compel our theoretical and practical judgments?" seeks to identify those cultural and rhetorical devices that explain and validate our beliefs and values. Philosophical investigations should then be understood as a particularly deep form of cultural criticism. Foundational doctrines concerning truth, knowledge, and morality are interpretations of the deepest, most general, structural features of our cultural framework. They are interpretations that faithfully attempt to characterize our culture in normatively attractive terms.

Interpretations of our cultural legacy should have pragmatic utility. They must illuminate and explain the basic features of this legacy. Rorty’s objections to foundationalism are best understood as condemning foundationalism as a pragmatically failed attempt to provide illuminating interpretations of our culture. Remember, if foundationalism is pragmatically impossible, and pragmatism is the only effective form of intellectual inquiry, then attempts to provide foundations can be nothing other than failed pragmatic attempts. If pragmatism is the only game in town, foundationalism can only be a particular form of pragmatism, if it is anything at all.

Reflective pragmatism enables us to take nonpragmatic vocabularies more seriously than does doctrinaire pragmatism. Instead of abandoning whole systems of descriptions, we can be more selective, picking and choosing particular descriptions and phrases for particular purposes on different occasions. Only doctrinaire pragmatism compels us to abandon traditional epistemological and metaphysical descriptions of our experience sans phrase. Reflective pragmatism regards these descriptions as being on par with any other type of description, and, therefore, they must be evaluated in terms of their pragmatic benefit, not by some a priori conception of the essence of language.

Reflective pragmatism recognizes a more expansive conception of the term "pragmatic benefit" than does doctrinaire pragmatism. Reflective pragmatism urges us to find both direct and indirect or collateral pragmatic benefits. A metaphor or description, for instance, has direct benefits when used as a tool to achieve a particular purpose. It derives indirect or collateral benefits from its connection with other vocabularies that exist throughout culture and common experience. Indirect benefits, in general, are tied to how the vocabulary connects with past and future vocabularies and with what these vocabularies permit us to say in alien contexts.

Rorty’s approach focuses exclusively on a vocabulary’s direct use as a tool, ignoring its interpenetration with other vocabularies. Rorty gives traditional philosophical discourse such short shrift because his pragmatism is monolithic; it takes a foundationalist conception of language too seriously. Rorty appears to embrace the dichotomy between foundationalism and antifoundationalism. A vocabulary must either be one or the other. But in fact, vocabularies have both foundationalist and nonfoundationalist functions.

* * *


The reflective pragmatist sees an ambiguity throughout Rorty's pragmatism. Should we understand Rorty as saying that foundationalism is bad, so don't do it? Or is he telling us, as does Stanley Fish, that foundationalism is impossible, so don't worry? If Rorty is telling us that foundationalism is possible but bad, he should indicate why foundationalist descriptions have failed. He should, in other words, show why foundationalist descriptions have no collateral pragmatic benefits. In particular, he must show how we can maintain the same degree of cultural cohesion without foundationalist discourse. If Rorty is telling us, on the contrary, that foundationalism is impossible, then no one was ever a pragmatist. In that case, all philosophical positions, including foundationalism, realism, and transcendentalism, are simply different versions of pragmatism.

* * *

Foundationalist prophecy treats prophecy in almost mystical terms. A moral prophet's insight reveals truths of ultimate moral reality. This reality legitimizes prophecy and authorizes conduct necessary to achieve the truth. Foundationalist prophecy pervades the spirit of the great American liberation movements: abolitionism, civil rights, and sexual liberation. For instance, we are told that abolitionism was morally required by God, truth, and reason. The authority to abolish slavery was not a function of human deliberation, for if human deliberation authorizes social institutions, then why was slavery not justified? As with any well-entrenched institution, slavery was authorized by years of human deliberation.

* * *

Rorty's conception of the language of prophecy does not correspond to the language of actual prophets. In short, the kinds of prophets we admire use very different descriptions than the ones that seem to follow from Rorty's conception of antifoundationalist, prophetic language. If doctrinaire pragmatism cannot accommodate the actual language of prophecy, then arguably it cannot be used for reflective social change even in the way Rorty endorses. Rorty's conception of good prophecy distorts moral language and moral psychology, the same language and psychology that have permitted Western intellectuals to seek to eradicate suffering and render society free and just. Unlike doctrinaire pragmatism, reflective pragmatism can support and extend the language of prophecy as the only nonviolent means of reform and revolution.

All prophets, good and bad, must, pace Rorty, "think of themselves as not just one more voice in the conversation, but as the representative of something that is somehow more than another such voice." Prophets must believe that something warrants their insight into the solution they propose. It may not be God, truth, or reason, but it must be something. For an abolitionist to insist that her conviction is just one more voice alongside the slaveowner's would be absurd. Indeed, the abolitionist prophet says that her voice is the correct voice; something warrants it and condemns the voice of the slaveowner. But what provides this justification if no external justifications are possible? The obvious answer is an internal justification, one that is better supported by the collective natural and cultural history of humanity than are the alternatives.
Reflective pragmatists and prophets implicitly appeal to historically situated moments for reflection and reconsideration. After trying middle-sized theoretical devices like the reversibility argument—"How would you like to be a slave?"—the abolitionist exhorts the slaveowner to "trust me, and soon we will agree that slavery is unjust." Such agreement may not be immediate, but it usually occurs before either Peirce's or Habermas's "end of inquiry." During these moments of social reflection, people assess the consequences of social revolution and change. The prophet's presupposition is that these periods of reflection will vindicate her convictions.

Once we abandon foundationalism, no difference remains between philosophy and, to wax oxymoronic, inspired collective humdrum. Indeed, philosophy will survive in one form or another just as long as there exist deep humdrum explanations and justifications of human experience. Deep humdrum explanations and justifications are illuminating interpretations of our collective natural and cultural history, interpretations prompted by our hunger to understand those creatures who bequeathed us our cultural legacy. This collective natural and cultural history is the alternative both to foundationalism's dogmatism and to Rorty's doctrinaire pragmatism. It is this alternative that reflective pragmatism embraces.

Based on everything we know, reflective pragmatism permits universal moral truths. Its antifoundationalism remains intact. These truths are historically derived and do not pretend to represent any reality save our historical heritage. The reflective pragmatist does not believe for a minute that these truths are anything more than deep, contingent generalizations.

For the reflective pragmatist, permitting universal judgments saves us from the straightjacket of doctrinaire pragmatism. The language of universality permits us to say more of what we want to say about good and evil, our understanding of the moral past, and our utopian aspirations for the future. So, despite the contingent imperfection associated with universal moral judgments, adopting a judicious use of such judgments is better than abandoning them entirely. Reflective pragmatism, unlike its doctrinaire counterpart, contends that more pragmatic benefits accrue by permitting some universal judgments than by proscribing their use entirely.

Reflective pragmatism promises to continue the pragmatic revolution, a revolution that should always remain unfinished. The unfinished pragmatic revolution indicates that pragmatism is a process that can exploit any other type of discourse when that discourse has pragmatic benefits. As long as we recognize this, a pragmatist can adopt foundationalist, realist, objectivist, or universalist discourses shorn of their epistemological and metaphysical commitments when the pragmatic price is right. Reflective pragmatism frees the
pragmatist from both foundationalism and doctrinaire pragmatism. Reflective pragmatism, in short, renders the pragmatist free from foundationalism as well as free to adopt foundationalist discourse, thereby expanding the pragmatic conversation. Given reflective pragmatism's superiority over doctrinaire pragmatism, nothing should prevent us from viewing the transition to reflective pragmatism as pragmatism's next revolutionary moment.

Notes

1. Professor Baker contends that Professor Rorty's prophetic strand is essentially foundationalist, while only his processual strand is anti-foundationalist. She then notes that "[s]cholars who laud Rorty's concern for marginalized people praise his prophecy not his pragmatism." But are the two strands so easily distinguished? Is it possible that the prophecy and the pragmatism co-exist on the Deweyan "means-ends continuum"? Consider, in this regard, Professor Rorty's suggestion that there are two kinds of prophets, and that what distinguishes the good kind of prophet from the wrong kind of prophet is the refusal of the former to make foundationalist claims for her vision. Does this mean that Rorty's prophecy is not foundationalist at all?

2. Professor Baker is highly skeptical of Rorty's claim that anti-foundationalist philosophy can produce progressive social change. Rorty demurs to the skepticism, but contends that there are grounds for optimism to be found in the events that have accompanied the demise of foundationalism. Is it significant that Professor Baker's critique is essentially abstract and Professor Rorty's response largely experiential? Could Professor Baker support her claim experientially, i.e., with counter-examples?

3. Professor Lipkin sees an irony in Rorty's relentless anti-foundationalism: his refusal to permit the prophet to make foundationalist appeals may, as Professor Baker suggested, be a barrier to social progress. This, Professor Lipkin suggests, produces something of an oxymoron: the "doctrinaire pragmatist." There are times, in contrast, when the "reflexive pragmatist" might be willing to use foundationalist rhetoric to achieve the prophecy; foundationalism is, Professor Lipkin observes, the language that prophets actually speak. But in distinguishing these two kinds of pragmatists, does Professor Lipkin rely on the artificial distinction between means and ends? Is the pragmatist who appeals to authority really a "pragmatist" at all? What, after all, would distinguish this pragmatist prophet from the foundationalist prophet, save the possibility that the former was disingenuous and the latter simply naive? Does this make the former "a good prophet"?

4. Implicit in the above is the broader pragmatist's dilemma: pragmatism is an anti-philosophical philosophy. Does Professor Rorty respond adequately to this dilemma when he suggests that pragmatism is only a philosophy proper to the extent that the pragmatist may be asked to speak in the language of philosophers? Does Professor Lipkin respond adequately when he suggests that pragmatist philosophy is not meta-theory, but "a particularly deep form of cultural criticism"?

5. Is the pre-occupation with meta-theory, as Professor Rorty suggests, a manifestation of a "failure of nerve"? Or is it simply that, as Professor Baker and Professor Lipkin suggest, foundationalist claims have capital in contemporary discourse, while non-foundationalist claims do not.

gets created not through appeals to authority or through revelation, but "by pretending that it is already there." Do any risks inhere in these strategies? Will they work?

7. In Albert Camus' *The Plague*, Rambert abandons his plans to escape the quarantined, plague-ridden town of Oran and join his lover. He confides in Dr. Rieux, whose wife had left Oran for a sanatorium just prior to the outbreak of plague.

"Doctor," Rambert said, "I'm not going. I want to stay with you."

Tarrou made no movement; he went on driving. Rieux seemed unable to shake off his fatigue.

"And what about her?" His voice was hardly audible.

Rambert said he'd thought it over very carefully, and his views hadn't changed, but if he went away, he would feel ashamed of himself, and that would embarrass his relations with the woman he loved.

* * *

"But you know that as well as I do . . . Or else what are you up to in that hospital of yours? Have you made a definite choice and turned down happiness?"

Rieux and Tarrou still said nothing, and the silence lasted until they were at the doctor's home. Then Rambert repeated his last question in a yet more emphatic tone.

Only then Rieux turned toward him, raising himself with an effort from the cushion.

"Forgive me, Rambert, only—well, I simply don't know. But stay with us if you want to."

A swerve of the car made him break off. Then, looking straight in front of him, he said: "For nothing in the world is it worth turning one's back on what one loves. Yet that is what I'm doing, though why I do not know." He sank back to the cushion. "That's how it is," he added wearily, "and there's nothing to be done about it. So let's recognize the fact and draw the conclusions."

"What conclusions."

"Ah," Rieux said, "a man can't care and know at the same time. So let's care as quickly as we can. That's the more urgent job."


ADDITIONAL READINGS


Chapter Nine

POSTMODERNISM

INTRODUCTION

Any discussion of postmodernism must begin with a preliminary account of modernism.

Which is, I suppose, more or less the way you expected this Introduction to start.

Linear. Logical. Neutral. Objective. In all candor, it was rather a good start.

Sorry I wrecked it.
So let us try again.

Any discussion of postmodernism must begin with a preliminary account of modernism . . . preceded, however, by some excruciatingly self-conscious "postmodernist" performative moves.

The question now is where those moves begin.

And end.

And it is undeniably a good idea to change the subject. (The pun is intentional. I think.).

This, perhaps, is postmodernism. It is when we are, where we are, who we are, what we are doing. It is an historical epoch, an economic phase, a social condition, a cultural style, a cognitive mode and an affective attitude. It is, perhaps, a way of life.

"Well if this is postmodernism," you may very well be thinking, "I will have none of it."

But you may have no choice. The postmodern way of life is not to be accepted or refused: it simply is, and to live today—in a postmodern world—is to live a postmodern life, intentionally or not, consciously or not, happily or not. Postmodernism is unavoidable and all-pervasive.1

1 "In any case, we will have to suffer this new state of things, this forced extroversion of all interiority, this forced injection of all exteriority that the categorical imperative of communication literally signifies." Jean Baudrillard, The Ecstasy of Communication, in THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE 126, 132 (Hal Foster, ed. 1983).
Or not.

Unavoidable as it may be, all-pervasive as it may be, the sense of the postmodern life remains remarkably elusive. Postmodern theorists—and theorists on the postmodern—acknowledge the difficulty in defining the phenomenon: for some, the elusive nature of the "modern" makes the "post"-modern doubly elusive; for others, the very relational nature of the postmodern counsels against the definitional endeavor. 2

But we will try. The age of "the modern" likely began sometime in the sixteenth or seventeenth century, with the self-conscious differentiation between advanced and traditional societies. Implicit in this consciousness are three of the major themes of modernism: the belief in the autonomous and self-aware subject, the notion of progress—a notion that would itself generate a wide variety of dichotomies and hierarchies—and the awareness of change, i.e., of history and of time. The chief differentiating feature of advanced cultures was thought to be their embrace of rationality over the traditional orders of spirituality or nature: only through reason was human progress ensured. In the political realm, this differentiation would be manifest in a growing dichotomy between public and private: the result was the liberal state. Within the public realm—the rational realm—the rule of the liberal state was absolute: in the colonial age (advanced societies, after all, had to do something with their primitive counterparts), nothing short of absolute rule would suffice. But absolute authority was purchased in part through respect for some—"private"—difference: in modern terms, "rights." With the division of capital and labor (and later subdivision of labor) to expedite progress (a boon not only to the "private" economy but to the military "state"); the application of the notion of progress to order knowledge (both within and among disciplines); and the construction of sundry neuroses in response to all this self-awareness and progress (within both the individual and society, the private endures an uneasy symbiosis with the public) the project of modernity was, more or less, complete.

What then of the postmodern? Well, it is either none of these things . . . or all of them, exponentially. Indeed, a recurring debate focuses on the proper relationship between the modern and postmodern: is postmodernism really a distinct stage—historically or conceptually subsequent to the modern—or is it rather more a critical phase within modernism? 3 And in either event, is the postmodernism (we think) we now experience really a unique phenomenon, or is it actually part of a cycle, either a recurrent phase within modernity, or a

2 David Harvey, The Condition of Postmodernity 7 (1989).


4 David Harvey, supra note 2, at 116.
phase that succeeds the old modernity and makes a new modernity possible? Post-modernism, then, can be—depending on your view—pre-modernism, part of modernism, or a genuinely post-modern phenomenon. And, of course, if it can be all of these things, then it very well might be nothing much at all.

But still . . . a vague sense persists that there is something going on, something that renders suspect—if not anachronistic—much of the received wisdom of the past two centuries. Conventional descriptions seem out-of-focus and incomplete; conventional prescriptions seem futile or even, perhaps, wrong. It does not seem to matter much whether the modern age has yielded to a new one, or whether modernity in fact persists, "dominant but dead." What matters is the growing divorce between the world as it was supposed to be and the world as it now seems; somewhere in that divorce we may find some sense of the postmodern.

Can we say more, by way of explication, illustration, or demarcation? The fact is that we must. And yet we cannot say it coherently, not in a single voice. If postmodernism suggests anything, it is that no single narrative can ever suffice: it is this dominance, in a sense, that is dead.

This chapter, then, is designed to present some of the many voices that speak on—and generally from—a postmodern sensibility. The materials that follow represent a small portion of the many dialogues about the meaning of the postmodern. They do not share necessarily a common view of the attributes of postmodernism or of its relationship to modernity, neither do they evince a common view on the wisdom, propriety, or inevitability of what are for some the salient features of postmodernism. What they do seem to share—and what places them in this chapter—is a sense that the conventional ways of thinking and talking about the law are no longer adequate to describe law as it is practiced, and law as it is lived. And they arrive at this point not because law has become divorced, in their view, from mainstream epistemologies, but rather because these epistemologies are no longer adequate to convey a sense of the world. The crisis of justice, in short, is concurrent with the crisis of truth.

That crisis of truth may be more particularly described as a crisis of representation. It is essentially (and hence superficially and far too generally), a three-fold crisis, generated by radical challenges to the traditional conceptions, first, of reality; second, of the language we use to describe that reality; and third, of the subject who perceives and describes that reality, that is, the self. In the postmodern world, these three categories largely dissolve: the demise of

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7 Cf. Seyla Benhabib, *Epistemologies of Postmodernism: A Rejoinder to Jean-François Lyotard*, in FEMINISM/POSTMODERNISM 107, 124 ("Questions of truth . . . are questions of justice as well.").
the objective, of the real, is accompanied by the destruction of the subjective, of the self, and what is left is only the language, language that neither describes (there is nothing left to describe) nor animates (there is neither an animating self nor a self to be animated), language that simply is. What we know in the postmodern world is no more (and no less) than what we say we know: there is nothing outside our text.

But how has this come to pass? The demise of the objective, first, is largely wrought by the destruction of the universal foundations of knowledge. Realist epistemologies appear untenable in the face of the claims of perspectivism: new histories, divergent rationalities, contingency in the social sciences, even relativity—and now complexity—in the physical sciences, all disrupt the stable order of a determinable reality, abstract truths and reliable governing laws. The process is intensified by the frenetic changes of postmodern life: history disappears as time is reduced to the fragmented instant, while the compression of space heightens the differentiation within increasingly unstable boundaries. In such a chaotic world, modernity's claims to coherence seem either repressive or illusory; the only truths that seem legitimate are those constructed through local discursive practice.

The concomitant demise of the subject, meanwhile, may signify one or more of several, perhaps barely distinguishable, phenomena. First, the collapse of the objective/subjective dichotomy renders the subject redundant: without the differentiation between "objective reality" and "subjective perspective," there is nothing left for the "subject" to signify. Since there is no "there" there, there can be no "here" either: it is all the same space. Alternatively, the subject may be reduced to the same incoherence as the object, its dichotomous referent.

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9 See, e.g., Richard A. Shweder, Divergent Rationalities, in Metathory in Social Science: Pluralisms and Subjectivities 163 (Donald W. Fiske & Richard A. Shweder, eds. 1986).

10 See, e.g., Metathory in Social Science, supra note 9.


13 David Harvey, supra note 2, at 296.

14 Id. at 52.

15 Jean-François Lyotard, supra note 5, at 66.

In either view, the coherent subjective self has not been killed so much as it has been exposed—together with its opposite—as a myth, created and sustained by a more congenial modernist epistemology.\(^\text{17}\)

Additionally, the demise of the subject might be seen in the destruction of the individualistic, autonomous self at the hands of a technocratic science and a bureaucratic state.\(^\text{18}\) The life-role now seems thoroughly constructed by an inescapable grid of commands and demands: what few options remain seem limited to the selection of one among several well-worn and highly constricted paths. Paradoxically, among the commands extinguishing the self is the relentless call of individualism: unbridled "freedom" in this sense denies all else, and, ultimately, negates itself.\(^\text{19}\)

The death of the subject might also be a concomitant of the explosion of communication and information, a spectacle that expedites the collapse of the distinction between private and public, between the inner self and its outer projections.\(^\text{20}\) The psychological self yields to a purely communicative self, distinguished less by strata of consciousness and more by its ephemeral position in a pervasive network of influences.\(^\text{21}\) There may yet be an extant self in this view, but it is a self that does not amount to much.\(^\text{22}\)

Whatever the particulars, it is clear that the collapse of the object and subject have cast grave doubts on the twin master narratives of modernity: the liberation of humanity and the unity of knowledge.\(^\text{23}\) Is there any humanity left to be liberated, and what is it to be liberated from except its own constructions? Existence, after all, can no longer precede essence; now it is all the same stuff. And how can it be said that humanity desires liberation, except by dictating that choice for it, the distinction between persuasion and coercion having collapsed with the demise of the autonomous self. And how in a postmodern world can a unity of knowledge be achieved, except through the suppression of nonconforming truths? Modernity's myths, in this sense, dictate their own demise: liberty and unity are reconcilable only through consensus, but the hope for consensus largely disappears when the already persuaded are of so many different persuasions. The only possible unity is to be found in useless—and


\(^{18}\) \textit{Id.} at 115.


\(^{20}\) Jean Baudrillard, \textit{supra} note 1, at 127.

\(^{21}\) \textit{See id.} at 132: "Speech is free perhaps, but I am less free than before: I no longer succeed in knowing what I want, the space is so saturated, the pressure so great from all who want to make themselves heard."

\(^{22}\) \textit{Jean-François Lyotard, supra} note 5, at 15.

\(^{23}\) Frederic Jameson, \textit{supra} note 12, at ix.
perhaps tyrannical—levels of abstraction.\textsuperscript{24}

What is left—all that is left—is language, and it is the focus of the postmodern sensibility. Language now no longer describes what we know, it is what we know . . . and what we are. Knowledge is no longer objective, but argumentative; theory is no longer abstract and teleological, but discursive and local.\textsuperscript{25} Meta-narrative yields to simple narrative, and the narrative provides—as it must—its own legitimation.\textsuperscript{26} Language, thus, is no longer denotative, but performative;\textsuperscript{27} there is, after all, nothing left to do.

Or is there? It is here that postmodernism may pose its greatest challenge—at least to jurisprudence—and here that postmodern thinkers seem to radically diverge. On the one hand (and rudely caricatured here for comparative purposes) are the poststructuralists: relentlessly skeptical, vigilantly deconstructing,\textsuperscript{28} they recognize only language games, rhetorical tricks, and performative moves. For them, there is truly no more. Essentially aesthetic in their sensibility, the legitimacy of an utterance for them is to be measured by its narrative dimensions, either, perhaps, as performance—as spectacle\textsuperscript{29}—or as a generative source of additional narratives—as stating a difference.\textsuperscript{30}

On the other hand (and equally rudely caricatured here) are the new pragmatists: relentlessly hopeful, vigilantly reconstructing,\textsuperscript{31} they recognize principally the instrumental value of the language games. For them, there is something more, even if they are not quite certain what it is or how it came to be. Essentially political in their sensibility, the legitimacy of an utterance for them is to be measured by its utility in achieving some social objective, an objective, they recognize, that is wholly contingent, utterly disputable, and purely the product of construction, but an objective that, somehow, matters all the same.

The materials that follow are largely dominated by the dialogue between these thinkers. But before you proceed to it, three warnings are in order.


\textsuperscript{25} Seyla Benhabib, supra note 7, at 113.

\textsuperscript{26} JEAN-FRANÇOIS LYOTARD, supra note 5, at xxiv.

\textsuperscript{27} Frederic Jameson, supra note 2, at xi.

\textsuperscript{28} "I behave—well, it depends on the moment, on the place—with this guiding principle: that we should question, that we shouldn’t sleep, that we shouldn’t take any concept for granted." Interview with Jacques Derrida, in CRITICISM IN SOCIETY 8, 17 (Irene Salusinzyk, ed. 1987).

\textsuperscript{29} DAVID HARVEY, supra note 2, at 56.

\textsuperscript{30} JEAN-FRANÇOIS LYOTARD, supra note 5, at 64-5.

\textsuperscript{31} "In these downbeat times, we need as much hope and courage as we do vision and analysis; we must accept the best of each other even as we point out the vicious effects of our racial divide and the pernicious consequences of our maldistribution of wealth and power." CORNELL WEST, RACE MATTERS 159 (Vintage ed. 1994).
First, reading postmodern writing is like receiving an invitation to think real hard—about thinking real hard. If you survive the initial layers of scrutiny, you soon find yourself perched on a precipice of infinite regress. Or, if the postmodernists are right about the constraints on the self, you find some of the scrutiny simply impossible: there is no way to get beyond the construction because, metaphorically, there is no beyond. Now, of course, how the postmodernists gain this perspective becomes something of a problem; it is one of the "performative contradictions" that they—and you—simply learn to live with.33

Second, the rhetoric of postmodernism—the postmodern "performance"—is often as inaccessible as the vantage point it denies. It is dense, ethereal, self-referential, and cute, very much like the stuff that graces (or plagues) this Introduction. In its pursuit of incommensurability—to state a difference—it is sometimes simply incomprehensible: even the best of postmodern writing, and perhaps especially the best, can be obscure and contentious almost to the point of irrelevance.33

Finally, postmodern thought remains a very loose pastiche of ideas—the discourse is multi-dimensional, multi-directional, and largely unbounded.34 This Introduction—indeed the entire chapter—is in fact decidedly modern in attempting to frame the postmodern sensibility in a more-or-less coherent way; in fact, as you might have discerned, any attempt to re-present prior narratives as re-presentations themselves of some underlying idea is itself a very modern thing to do. But there are limits... What matters, for now, is that postmodernism may not seem nearly as coherent as you might like: perhaps this is a reflection of its still-evolving (anti-)form, perhaps a function of its inner (anti-)logic, perhaps, quite frankly, the incoherence of this chapter is simply the failure of your editors to employ more exacting criteria for inclusion; but this last strikes us, we must note, as a most un-postmodern attitude.

With these caveats in mind, know that what we have attempted to offer here is a collage of postmodern expressions that, first, offer descriptions of a postmodern law and that, second, consider the possibility—or advisability—of meaningful legal discourse in a postmodern age. Some notions are recurrent, and we have used three major themes to organize the chapter. First, "Postmodernism and Objectivity" explores the critique of foundationalism, including the problematization of realist epistemology, formalism, liberalism, and rationality; we have subtitled this section "The Demise of Method." "Postmodernism and Subjectivity" examines the de-centering of the subject, the challenge to the autonomous individual, the much-discussed (at least among

33 Seyla Benhabib, supra note 7, at 116.

33 "... three thousand advanced critics reading each other to everyone else's unconcern." Edward W. Said, Opponents, Audiences, Constituencies and Community in THE ANTI-AESTHETIC, supra note 1, at 135, 142.

34 Frederic Jameson, supra note 5, at 112.
critics) death of the author; we have subtitled this section "The Demise of the Self." Finally, "Postmodernism and Normativity" reviews the critique of legal normativity, the deconstruction of the recurrent form of modern advocacy; we have subtitled it "The Demise of Moral Persuasion." Within each section, you will find some common ground among the writers, but the common ground ends at a poorly defined fork in the road, where (to use the crude categories) the poststructuralists separate from the new pragmatists.

Thus ensues the dialogue on the future of legal discourse. Does the demise of the subject end the possibility of persuasion? Does the demise of commonality end the possibility of consensus? Do the relentless demands of functionary living in the bureaucratic state render normative dialogue either moot, or, perhaps worse, has normativity become the postmodern double-speak? Or, on the contrary, does the threatened demise of normativity complete the aestheticization of politics, and render utterly moot the dialogue on justice? What, in short, will be postmodern law?

A. POSTMODERNISM AND OBJECTIVITY: THE DEMISE OF METHOD.

Peter C. Schanck

UNDERSTANDING POSTMODERN THOUGHT AND ITS IMPLICATIONS FOR STATUTORY INTERPRETATION

* * *

In this introduction it may . . . be useful to provide a brief overview of postmodernism. For a philosophy that eschews foundations and essences, it is fitting that there is no single principle on which postmodernism is grounded or which comprises its essence. Instead, several interrelated concepts do so, each of which in a sense undergirds the others. Each depends on the others for its existence and each is a precondition of the others. These concepts may be summarized as follows: (1) The self is not, and cannot be, an autonomous, self-generating entity; it is purely a social, cultural, historical, and linguistic creation. (2) There are no foundational principles from which other assertions can be derived; hence, certainty as the result of either empirical verification or deductive reasoning is impossible. (3) There can be no such thing as knowledge of reality; what we think is knowledge is always belief and can apply only to the context within which it is asserted. (4) Because language is socially and culturally constituted, it is inherently incapable of representing or corresponding to reality; hence all propositions and all interpretations, even texts, are themselves social constructions.

* * *

Although those academics who are immersed in postmodern assumptions take for granted such ideas as the social construction of reality, the uncertainty
of knowledge, the impossibility of disinterested inquiry, and the indeterminacy of meaning, it is hardly surprising that most people, including many scholars, find these concepts inconceivable, ridiculous, or abhorrent. The average person goes through life believing without hesitation in the certainty of many things. Even within the context of a generally pervasive modern skepticism, in which far fewer propositions are accepted as absolutely true, there is still a vast array of ideas in whose truth people have no doubt. There is thus a large void between most people's common sense understanding and the assumptions of postmodern-oriented intellectuals.

* * *

Postmodern theory may be fruitfully divided into major strains: poststructuralism and neopragmatism. The first tends to emphasize the role of language and language's underlying structures in shaping our understandings of reality and texts, and it is represented principally by such French theorists as Roland Barthes, Jean Baudrillard, Jacques Derrida, Jacques Lacan and Jean-François Lyotard, although Baudrillard and Lyotard can also be considered neopragmatists. The second strain, neopragmatism, agrees with poststructuralism that language mediates our understanding of the world and that we lack the ability to grasp reality "as it really is," but neopragmatism emphasizes the social construction of knowledge and language. Its leading figures are Richard Rorty and Stanley Fish, although in one important respect Fish may not be a pragmatist.

Paradoxically, the two approaches can be conceived of as nearly identical—hence the inclusion of both under the postmodern label—while at the same time they appear to be contradictory. Many poststructuralists assert that "[t]here is nothing outside of the text," and the neopragmatists suggest, in a sense, that there is no text, or at least that we create texts through our preexisting, socially derived interpretations. These superficially contradictory views, however, are really only different ways of conceptualizing and expressing the same ideas: that our perspectives on the world are culturally and linguistically conditioned, that reality is never transparent to us, and that the content of our knowledge depends on our different situations.

* * *

Pragmatism may now represent the principal theoretical approach to statutory interpretation in legal scholarship. Neopragmatists Richard Posner, William Eskridge, Philip Frickey, and Daniel Farber have perhaps written more extensively on this topic than anyone in the past decade. Although they differ in many respects, each is committed to a method of interpretation that recognizes the absence of a philosophical foundation to any theory of interpretation, the inadequacy of any one-dimensional guide to interpretation, and the need to take into account both the conventions of law and the likely practical consequences accruing from an interpretation. In other words, all four utilize postmodern theory as a justification for their own pragmatic approaches to interpretation.
The most explicit advocacy of interpreting statutes within the current context has been made by Eskridge and Frickey, working together and separately, in a number of writings under diverse designations: dynamic, new legal process, public values, "Gadamerian," and practical reasoning. Although espousing an evolutive, practical, fact-based, result-oriented approach to statutory interpretation and disparaging legislative intent as a viable means of determining meaning, Eskridge and Frickey implicitly recognize the existence of powerful legal norms regarding the dominant role of the legislature (and subordinate role of the courts) in lawmaking.

Consequently, even in their highly dynamic scheme, considerations of the present context will fail to trump contrary prima facie clear language that is combined with a contrary explicit statement of legislative intent embodied in a legislative history. This acknowledgment of the practical realities of the legal system (and perhaps of how we can fully account for interpretation) is reflected in Eskridge and Frickey's eclectic and pragmatic approach. In a recent joint effort, they base their scheme on Aristotle's concept of "practical reasoning," which they say "starts with the proposition that one can determine what is right in specific cases, even without a universal theory of what is right." For the purposes of their model of statutory interpretation, they define practical reasoning as "an approach that eschews objectivist theories in favor of a mixture of inductive reasoning (similar to the practice of the common law), seeking contextual justification for the best legal answer among the potential alternatives."

In virtually every respect Eskridge and Frickey's approach is pragmatic in nature. It avoids, for the most part, reliance on universal or objective theory and is skeptical about the ease of determining the "correct" interpretation. Yet it fails to be entirely consistent in its postmodernism for the same reason that Posner's pragmatic jurisprudence fails: It attempts, in part, to use a pragmatic epistemology to justify a pragmatic model of statutory interpretation. As Fish argues of Posner's jurisprudence, a postmodern account of an institution cannot serve as the rationale for a program—pragmatic or otherwise. To the extent that Eskridge and Frickey simply argue persuasively (within the norms acceptable to the legal communities they are addressing) in behalf of a system (or better, a "set of practice") of interpretation—either descriptively (their approach better describes how the legal or judiciary community interprets statutes) or normatively (it will result in better decisions)—they are doing the time-honored work of legal scholars. In fact, these "legitimate" activities are precisely what their scholarship overwhelmingly attempts to accomplish. In the breadth of their scholarship, in the depth and sophistication of their knowledge of the legislature and judiciary, and in their avoidance of explicit political ideology, Eskridge and Frickey have advanced our understanding of statutory interpretation far beyond

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the mostly reductive and simplistic analyses of earlier periods. But in those few instances where they try to justify their model on the ground that it better accords with current philosophical accounts of knowledge or with the nature of law, they have violated postmodern conventions in the name of postmodern tenets.

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One might be tempted to conclude from the foregoing arguments about the lack of consequences accruing from postmodern theory that postmodernism has nothing to say about statutory interpretation. This would be so only if one assumed that statutes must be construed in accordance with a neutral objective, foundational methodology regardless of context and regardless of the particular conventions of the interpretive community within which it operates. The antithetical component of postmodernism, however, actually serves as the basis for the significant implications of postmodern thought for statutory interpretation. Postmodernism may not tell us how to construe statutes, but it very definitely tells us how not to interpret them: That is, one should not employ a foundational theory or a transcendent methodology of interpretation if one adheres to postmodern tenets.

Yet, that injunction against employing modernist or premodernist theory is not the whole story. Postmodernism entails certain other perspectives. As a result of the rhetorical force of postmodernist ideas, one might be expected to carry out certain activities differently than if one believes in, let us say, legal or scientific positivism, natural law, or philosophical realism. Aside from avoiding theoretical foundations, one might attempt, like Eskridge and Frickey, to argue persuasively and in good faith on behalf of the interpretive strategy one is convinced will result in the best judicial decisions and will have the most salutary long-term effect on our legal and political systems. In doing this, one would naturally be aware of the conventions and prevailing norms of both systems and would use those conventions and norms, as well as any other assumptions available, in the service of one’s position. One could also attempt to persuade (using whatever rhetorical devices are tacitly approved by the community) one’s audience that certain conventions or norms are not suitable, that they violate other, perhaps more strongly held values, and that alternative conventions would be more suitable. But in the end what one cannot do is attempt to base one’s particular interpretive practices or beliefs on postmodern theory. In other words, postmodernism cannot serve as the foundation for a new theory of statutory interpretation.

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The reason most proponents of CLS fail to qualify as true postmodernists is that they are motivated more by a political agenda than by a desire to develop a consistent postmodern theory. They employ postmodern concepts as means of achieving their political goals and gladly compromise those concepts when it suits their program. In practice, proponents of CLS attack their traditional and mainstream opponents for failing to realize that their principles and doctrines are contingent linguistic and social constructions, but exempt their own
arguments and conceptualizations from that same postmodern critique. (This is not to imply that they are insincere in this approach; their political agenda and lack of a consistent commitment to postmodern tenets are usually quite explicit.)

One could, of course, also enter into the practice of theorizing. In that case, it would be appropriate to argue, as Fish does, in behalf of a postmodern theory of interpretation against other postmodern theories or any number of foundational (modern or premodern) theories. The practice of theory is a perfectly legitimate activity from a postmodern perspective, but not if it attempts to guide practices from an Olympian perspective. One should disabuse oneself of any notion that one can deduce from a particularly brilliant rendition of a postmodern theory a model of statutory interpretation (or a model of anything else), no matter how general in nature, that will forever and in all contexts serve as the correct method of interpreting statutes (or conducting any other practice). If one is so deluded, one must forfeit any claim to the status of postmodern theorist—or at least to being considered a consistent postmodernist.

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Notes

1. Is it likely, as Professor Schanck suggests, that “most people” find postmodernism’s tenets “inconceivable?” If postmodernism is inconceivable to “the average person,” then is it unlikely that we are truly living in a postmodern age?

2. Consider the difference between “poststructuralists” and “neopragmatists” as described by Professor Schanck: the former emphasize “the role of language and language’s underlying structures in shaping our understandings of reality and texts,” while the latter emphasize “the social construction of knowledge and language.” How are these different? Or are they, as Professor Schanck suggests, “nearly identical”?

3. Professor Schanck’s article illustrates one dilemma of postmodern thought: the difficulty, and perhaps impossibility, of postmodern practice. Professor Eskridge and Frickey’s approach, Professor Schanck contends, “fails to be entirely consistent in its postmodernism” because it “attempts to use a pragmatic epistemology to justify a pragmatic model.” Is it “un-postmodern” to posit a grand theory, even if the theory is non-foundationalist—anti-theoretical? By what criteria can Professor Schanck say that Eskridge and Frickey are not true postmodernists? In making the claim, does Schanck violate “postmodern conventions in the name of postmodern tenets”? Could he do anything else?

4. If postmodernism cannot provide the basis for a model of statutory interpretation, then how can it “definitely tell[] us how not to interpret them”? Is not the difference—between positive and negative—purely semantic? Or is that enough?

5. What is a “consistent postmodernist”? Following Gadamer, a number of postmodern legal theorists have sought to maintain the distinction between a philosophical hermeneutics and an interpretive theory: the former interrogates the experience of meaning, the latter proposes a method for fixing meaning. See, e.g., Francis J. Mootz III, The New Legal Hermeneutics, 47 Vand. L. Rev. 115 (1994); see also J.M. Balkin, Understanding Legal Understanding, in Chapter Ten: Reconstructions. Could one be, then, a postmodern practitioner but not a postmodern theorist, or vice versa? Does this help resolve the dilemma manifest in Eskridge and Frickey’s work? Would Professor Schanck accept this resolution?
Dennis M. Patterson

LAW’S PRAGMATISM: LAW AS PRACTICE AND NARRATIVE


* * *

The demise of foundationalism in twentieth century philosophical thought is largely reflected in the questions philosophers now ask. In epistemology, for example, debate has shifted from questions regarding the indubitable grounds for knowledge to an attempt to specify the conditions under which one can rightly claim to have knowledge. The inclination to ask, not for the grounds of knowledge, but for the conditions under which assertions of knowledge will be accepted is informed by a distinct view of the relationship between language and the world. This view sees language as constitutive, as the medium through which understanding occurs. Once one accepts this view of language, the investigation of the use of language becomes paramount. In other words, the recognition that cognition is a function of language, and not of reason, is the key to the abandonment of foundationalism. For if all understanding occurs in and through language, then only the study of language will bring us closer to truth.

It is the thought of Ludwig Wittgenstein which is central to modern philosophy’s turn to language. For Wittgenstein, all philosophical problems are ultimately problems of language. This approach is evident in his treatment of what it means to "follow a rule." Consider, for example, the rule of "plus." "75" is the answer to the question "what is 50 + 25?" But how do we know that this answer is correct; what tells us that this is the rule of "plus?" A skeptic might claim that "plus" means "add the numbers up to seventy, but after 70, always add an additional 5." Thus for the skeptic, "80" would be the correct answer to the question "what is 50 + 25?" How do we prove the skeptic wrong? To what do we appeal; what counts as evidence for or against our, or the skeptic's, claim to correctness?

These are the questions that surround the now much discussed problem of "the skeptical paradox" of rule-following.

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I shall use the debate over the rule-following paradox as a springboard for the presentation of an original approach to the question of rule-following in law; a view of law as practice and narrative discourse. The later Wittgenstein presents a compelling account of a conventionalist conception of practice. He has, however, little to say about the problem of conceptual change within a practice. While it is an obvious truism that the law changes, the interesting question is whether or not a philosophical account of conceptual change can be given.

The account I offer builds upon the philosophy of the later Wittgenstein, in particular his claim that following a rule is a practice. I take that insight and
develop it into a conception of law as discursive argument. My claim is that law is an interpretive enterprise whose participants engage in the production of, and debate about, explanatory narratives—narratives that account for the history of the practice and are produced in the service of argumentation about how to resolve legal problems. In short, law is an activity and not a thing. Its "being" is in the "doing" of the participants within the practice.

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If anything is central to the later philosophy of Wittgenstein, it is the distinction between reasons and causes. Of the former, he had much to say. Of the latter, he could not disparage enough the psychological theories of his day, particularly their proponents' wish to explain meaning as a mental phenomenon. For Wittgenstein, meaning is a public process, a socially created phenomenon. To know the meaning of a word is to give a correct linguistic performance in appropriate contexts.

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The general philosophical claim that lies at the center of the theory of law as narrative discourse is that the meaning of the activities of rational agents cannot be understood apart from the agents' own perceptions and self-descriptions of the activity under question. In other words, the meaning of a practice is an internal phenomenon. It is within the practice, and by virtue of the acts of the participants in the practice, that the practice has meaning. Without purposeful activity, there would be no practices. Practices are creatures of reason and function as conventions. It is, therefore, against the specifics of a practice that claims for actions consistent with the practice are validated. Our perception of the objectivity of any particular decision is a function of the degree to which the act in question is in conformity with the demands of the practice as understood by the participants.

It is perhaps paradoxical to assert that a practice has standards against which claims of conformity are measured and, at the same time, to claim that those standards are a function of the needs, wants, desires, and purposes of the participants. This is precisely my claim, however. Claims of consistency with the practice are measured against the practice, but the participants in the practice determine what those standards are and will be.

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One possible objection to my general philosophical claim that the meaning of legal rules is unintelligible apart from contexts of use (wherein the point of the rule is made manifest) is the fact that words can often be understood apart from context. In short, the claim is that literal semantic meaning is a feature of linguistic practice, and thus of legal practice as well.

The fact that words can be understood apart from context in no way impairs the substance of my argument. I do not dispute, for example, the claim that Lord Russell's famous sentence, "the present King of France is bald," is understandable by a competent speaker of English. But understanding is not enough. The statement must also be intelligible. If I called upon a student for
the facts of Hadley v. Baxendale and she responded with Lord Russell's famous sentence, I would not know what to say, how to respond to her statement. I would understand her utterance, but it would not be intelligible; I would not know what she meant by it.

Thus, when a sentence is uttered in an inappropriate context, the sentence is understood because the listener associates the sentence with the contexts in which it was learned. The reason the sentence is unintelligible is because, in the situation in which the listener finds himself, he cannot find anything with which to link the utterance. In answer to the question, "[o]n what occasion, for what purpose, do we say this," the listener is forced to say "none." Thus, the statement may be understandable and yet still be unintelligible.

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The implications of Wittgenstein's description of the relationship between language and reality for law are significant. To the extent there is law, we can only know it relative to our practices; the activities we identify as "law." "Law" is not law merely because we call it "law," nor is what we call "law" law because it comports with an a priori Idea of Law. What we call "law" is law because it is that activity by which we institutionally organize collective argument about how we should live. Law is a medium of intelligibility; it is a way of making sense of our collective and individual experience.

As an institution, law gives meaning to utterances which they would not have, but for the institution. In other words, the meaning of the law cannot be separated from the institution of law.

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Thus, knowing the meaning of a legal notion means understanding or "grasping the point or meaning of what is being done or said" by someone employing the concept. Law is a form of social relations: we associate with others through the medium of law. It is a means of ideational expression. Like all cultural forms, law has a history or, to put it better, histories. It is to these that we appeal when we engage in the practice of law.

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My suggestion is that the whole of law is the production of one narrative after another. Every innovative case, law review article, and judicial opinion is an account of the past practice of the law and the advancement of reasons and arguments in support of a claim for the point (form) of law. Of course, each individual focus (a constitution, a statute, the common law) will have unique features that set it apart. Nevertheless, the unity of law as a discursive enterprise will be the primary element of narrative and will lie at the center of arguments over the point of law.

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What are the implications for legal pragmatism of a narrative conception of legal discourse? Perhaps the clearest implication is that vocabulary—the categories with which we make sense of experience—must be the primary focus of attention. One cannot reject the false dichotomy of objectivism and
relativism yet retain the notion that the ways in which we divide up the world can somehow be compared along a neutral continuum of measurement. The success or failure of our conceptual schemes must be judged, not relative to "the world" or "reality" (moral or otherwise), but with respect to the degree to which problems are solved (or dissolved), efficacious doctrinal schemes identified, or, at the level of political action, "by providing piecemeal nudges and cautions in respect to particular projects at particular times."

Pragmatism of the sort argued for here is surely to be criticized for the seeming lack of grandeur in its hopes for the power of theory. While not advocating a position "against theory," the perspective advanced here is humble with respect to the possibilities of "grand narratives." It would be a mistake to attack pragmatism at the level of humility, however, for the position is itself a realistic expression of the recognition that metatheoretical claims to truth are philosophically indefensible. Pragmatism's merit lies in the recognition that our collective energies are better spent working within the limits of the possible rather than attempting to transcend the infinite.

Notes

1. According to Professor Patterson, how do words get their meaning? How does this compare with other theories of meaning and interpretation?

2. Professor Patterson suggests that interpretive conventions are fashioned by the participants in the discourse: their practices—purposeful, rational activity—construct the measures of meaning. Is the "self," the "subject," still an autonomous player on this scene? Does the focus on law as an internal phenomenon (sufficiently) problematize the legal subject? Does Professor Schanck's distinction between "social construction" and "linguistic construction" begin to take a sharper focus?

3. Professor Patterson rejects "the false dichotomy of objectivism and relativism," refuting, in effect, most realist epistemologies. What does he offer as alternative criteria for measuring "the success or failure of our conceptual schemes"?

4. Is Professor Patterson's jurisprudence as radical as his epistemology might suggest? Consider the "appeal to" the histories of law; the traditional reliance on precedent; and his suggestion that "the unity of law as a discursive enterprise will be the primary element of narrative"; are these radical? Are they "postmodern"?

5. Is (postmodern) pragmatism really "humble with respect to the possibilities of 'grand theory'?" Or do the tenets of its "grand theory" simply escape our notice?

Stanley Fish

LIBERALISM DOESN'T EXIST

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[L]iberalism depends on not inquiring into the status of reason, depends, that is, on the assumption that reason's status is obvious: It is that which enables us to assess the claims of competing perspectives and beliefs. Once this assumption is in place, it produces an opposition between reason and belief, and that opposition is already a hierarchy in which every belief is required to pass
muster at the bar of reason. But what if reason or rationality itself rests on belief? Then it would be the case that the opposition between reason and belief was a false one, and that every situation of contest should be recharacterized as a quarrel between two sets of belief with no possibility of recourse to a mode of deliberation that was not itself an extension of belief. This is in fact my view of the matter and I would defend it by asking a question that the ideology of reason must repress: where do reasons come from? The liberal answer must be that reasons come from nowhere, that they reflect the structure of the universe or at least of the human brain; but in fact reasons always come from somewhere, and the somewhere they come from is precisely the realm to which they are (rhetorically) opposed, the realm of particular (angled, partisan, biased) assumptions and agendas. What this means is that not all reasons (or reasonable trains of thought) are reasons for everyone. If (to take a humble literary example) I am given as a reason for preferring one interpretation of a poem to another the fact that it accords with the poet’s theological views, I will only hear it as a reason (as a piece of weighty evidence) if it is already my conviction that a poet’s aesthetic performance could be influenced by his theology; if, on the other hand, I see poetry and theology as independent and even antagonistic forms of life (as did many of those new critics for whom the autonomy of the aesthetic was an article of faith) this fact will not be a reason at all, but something obviously beside the (literary) point. Similarly, a lawyer may give as a reason for acquitting his client the fact that his action was not intentional, but both the fact and the reason it becomes will be perspicuous only because the boundaries between the intentional and the unintentional have been drawn in ways that could themselves be contested, even if at the moment they are not being contested but assumed. It is not that reasons can never be given or that they are, when given, incapable of settling disputes, but that the force they exert and their status as reasons depends on the already-in-place institution of distinctions that themselves rest on a basis no firmer (no less subject to dispute) than the particulars they presently order. In short, what is and is not a reason will always be a matter of faith, that is, of the assumptions that are bedrock within a discursive system which because it rests upon them cannot (without self-destructing) call them into question. (Nor can one avoid this conclusion by invoking supposedly abstract—i.e. contentless—logical operations like the “law of contradiction”; for just what is and is not a contradiction will vary depending on the distinctions already in place; a contradiction must be a contradiction between something and something else and the shape of those somethings will always be the product of an interpretive rather than a formal determination.)

It follows then that persons embedded within different discursive systems will not be able to hear the other’s reasons as reasons, but only as errors or even delusions.

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"Tolerance" may be what liberalism claims for itself in contradistinction to other, supposedly more authoritarian, views; but liberalism is tolerant only within the space demarcated by the operations of reason; any one who steps
outside that space will not be tolerated, will not be regarded as a fully enfranchised participant in the marketplace (of ideas) over which reason presides. In this liberalism does not differ from fundamentalism or from any other system of thought; for any ideology—and an ideology is what liberalism is—must be founded on some basic conception of what the world is like (it is the creation of God; it is a collection of atoms), and while the conception may admit of differences within its boundaries (and thus be, relatively, tolerant) it cannot legitimize differences that would blur its boundaries, for that would be to delegitimize itself. A liberalism that did not "insist on reason as the only legitimate path to knowledge about the world" would not be liberalism; the principle of a rationality that is above the partisan fray (and therefore can assure its "fairness") is not incidental to liberal thought; it is liberal thought, and if it is "softened" by denying reason its priority and rendering it just one among many legitimate paths, liberalism would have no content. Of course it is my contention . . . that liberalism doesn't have the content it believes it has. That is, it does not have at its center an adjudicative mechanism that stands apart from any particular moral and political agenda. Rather it is a very particular moral agenda (privileging the individual over the community, the cognitive over the affective, the abstract over the particular) that has managed, by the very partisan means it claims to transcend, to grab the moral high ground, and to grab it from a discourse—the discourse of religion—that had held it for centuries. This victory certainly sets liberalism apart from the ideologies it has vanquished, but because the victory is political, liberalism cannot finally claim to be different from its competitors. Liberalism, however, defines itself by that difference—by its not being the program of any particular group or party—and therefore in the absence of that difference one can only conclude, and conclude nonparadoxically, that liberalism doesn't exist.

Notes

1. Is it really the case that the conclusions that follow from reason are contestable beliefs? Consider the conclusions that follow from formal reasoning, e.g., the syllogistic conclusion. Or is Professor Fish's point that the conclusion is indisputable only within the deductive framework, itself just one of many discursive systems?

2. What are the criteria of "rationality"? Do they make clear the distinction between "reason" and "belief"? If so, why all the disputes over the "reasonableness" of private conduct or the existence of "rational bases" for public acts?

3. What are the alternatives to reason? Would any carry much cultural capital? Is there anything to be gained from the challenge to reason's hegemony?

4. Does it seem inconceivable that reason—or rationality—should be denied its place as the apotheosis of legal problem solving? Recall the realist critique of classical legal thought, premised in part on the inadequacy of formal reasoning—abstracted from experiential truths—as a problem solving scheme? Recall the critiques of law and economics, rooted in the belief that ultra-rational problem-solving deprived law of its necessary humanity? Is Professor Fish's critique really that different?

5. Can you imagine a non-"liberal" law, i.e., a law that does not privilege "the individual over the community, the cognitive over the affective, the abstract over the particular." Have other jurisprudential scholars attempted to imagine such a law?
6. Granting Professor Fish the validity of his critiques, is it nonetheless possible that "reason" serves a vital function in providing a common ground for discourse within a culture? That, at least, is the premise of many neo-pragmatists. For Jürgen Habermas, rational discourse in a community of free and equal individuals will yield what the constituents might understand as truths. See JüRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (1985).

And Richard Rorty writes:

[Pragmatists] see the gap between truth and justification not as something to be bridged by isolating a natural and transcultural sort of rationality which can be used to criticize certain cultures and praise others, but simply as the gap between the actual good and the possible better. From a pragmatist point of view, to say that what is rational for us now to believe may not be true, is simply to say that somebody may come up with a better idea. It is to say that there is always room for improved belief, since new evidence, or new hypotheses, or a whole new vocabulary, may come along. For pragmatists, the desire for objectivity is not the desire to escape the limitations of one's community, but simply the desire to extend the reference of "us" as far as we can. Insofar as pragmatists make a distinction between knowledge and opinion, it is simply the distinction between such topics on which such agreement is relatively easy to get and topics on which such agreement is relatively hard to get.

RICHARD RORTY, OBJECTIVITY, RELATIVISM AND TRUTH 22-23 (1991)

Joan C. Williams

CULTURE AND CERTAINTY:

LEGAL HISTORY AND THE RECONSTRUCTIVE PROJECT


* * *

People like their conclusions to sound inevitable. A defining characteristic of the Western tradition is that argumentation follows from first principles through deductive logic to objective truth. A traditional argument begins with a highly abstract principle—for example, that human life is sacred. Then, as one's opponents are lulled into agreement, the argument takes unexpected turns: fetuses are babies, babies are human, and abortion is murder . . . The traditional argument proceeds through logic to certainty.

A defining strategy of modernism is to challenge this argumentative style. Since Nietzsche, assaults on truth have pursued a different style of justification. This Essay examines two modernist approaches, critiquing one (which I will call traditionalist) and advocating another (which I will call pragmatist). Both approaches begin with the argument that, though no absolute truths exist, this does not preclude the existence of particular truths. From here the two approaches diverge. Traditionalists abandon absolutes but seek to preserve ready access to certainty. They do so by arguing that, even without absolutes, our certainties remain quite certain, and our agreements, within a given culture,
remain relatively objective. Pragmatism also holds out some hope of certainty, but it is certainty in the sense of knowing what are the moves within a particular language game, all the while recognizing that the governing rules are subject to endless variation and adjustment.

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Although traditionalism identifies some crucial issues within modernism, its initial assumption of a widespread consensus is fundamentally at variance with the image of American society developed during the last twenty years by the new social historians. The traditionalist position attracts historians nonetheless, I argue, because of historians tendency to conceptualize past eras as coherent totalities incommensurate with their own. This characteristic methodology has hindered historians in their reassessment of the assumptions behind the traditional, holistic concept of culture.

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Wittgenstein and the younger anthropologists challenge the traditionalist's view that consensus can provide a substitute foundation for traditional certainties in "the age of interpretation." Once the culture concept dissolves away, the full implication of modernism's social theory of meaning emerge. Haskell's cozy vision of an abiding consensus lasting "more than a few generations" gives way to a picture in which situated, social certainties—and their inevitable clash—become a permanent part of modern society. Ahdair MacIntyre's insight that "[t]here seems to be no rational way of securing moral agreement in our culture" becomes an abiding verity from which there is no philosophical escape.

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A pragmatic approach abandons the search for a single viewpoint because it abandons the search for a certainty that compels agreement. In its place, pragmatism substitutes an "edifying conversation" that views societal differences as food for thought. The pragmatist's search for a workable society is a search not for universal principles but for strategies through which a population, inevitably divided by differences over a very broad range of their affairs, can seek a series of necessarily transient and provisional understandings.

Attempting to locate promising directions within a complex society and a tradition that shapes and limits our understanding, the pragmatic approach focuses not on what could be under hypothetical conditions, but on what is. In her search for an understanding of "particular truths," the pragmatist, like the traditionalist, focuses on history; yet the pragmatist, unlike the traditionalist, does not examine history as the potential repository of objectivity. Instead she looks to history for help in guiding a pluralistic society as it negotiates agreements that remain contested, situated, eternally unsettled.

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We can deepen our analysis by focusing on the different visions of law held by different subgroups. Hendrik Hartog, Martha Minow, and William Forbath have argued that we should examine not only the vision of law held by judges
and other officials, but also that held by peripheral groups.

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While legal histories from the ground up have potential to focus pragmatic inquiries on the question of justice, they also hold promise of a more concrete inquiry into what could be called pragmatic certainty: certainty in the absence of either consensus or absolutes. This project stems from Wittgenstein’s analysis of rules. Rules do not, he argued, yield results in the way they traditionally have been assumed to do so, namely through semi-automatic application of the internal logic of the rule system. Instead, understanding a rule system entails understanding the language game or form of life of which it is a part: rules function to explain the conventions commonly observed in playing the game. Breaking the rules is wrong only in the sense that, if you break enough rules consistently enough, you have ceased to play the old game and have invented a new one.

For me this describes the series of sensations one experiences when studying the history of legal doctrine. Initially the rule patterns seem foreign, the connections bizarre, and the lines drawn quite maddeningly arbitrary. Gradually, arduously, things fall into place, until at last one greets a new case without the initial, wrenching sense of disorientation and surprise. Of course the plaintiff argued this way, you say to yourself. Of course the defendant took that tack. But another would have been more persuasive. Look what Chancellor Kent did with the appeal: he rearranged the entire rule pattern in a way that seems (from within the game) brilliant rather than jarring, innovative rather than bizarre.

Losing one’s sense of disorientation and surprise is only the first step, an intuitive progress in which the historian draws on a broad range of sources, constructing a context that can account for the doctrinal system’s stabilities as well as its instabilities, for its openness as well as its rejection of certain options as unthinkable, sloppy, political, or, quite simply, “wrong.” Learning how to function within the rule system is only the first step. The second, both harder and more interesting from a theoretical standpoint, involves identifying that combination of factors (jurisprudence, the doctrine itself, the characteristics of the area of social life the law addresses, national political mood, regional considerations, socio-economic characteristics of the bar and the bench, etc.) which will offer a convincing explanation for the scope of the thinkable within the rules of the game as it was played.

The study of doctrine and legal rhetoric as a system of rules promises insight into that compelledness within a form of life that traditionally has been thought of as certainty. It may help provide an alternative description of rationality that frees us from the traditionalists’ terror that we will descend into irrationalism or absolute relativism if we abandon our insistence that “[o]ne simply arrives at true beliefs by obeying mechanical procedures.” The study of doctrine is a promising darkroom for developing a new image of rationality, one that can help us explore the shape of the conversations we have chosen, and the conversations we are still free to choose.
Notes

1. Is "law" a language game or form of life, or is it the rule system of a broader game? What of "reason"? Note that Professor Williams places her work within a modernist tradition. Many neopragnatists, often labeled "postmodernists", have in fact claimed an Enlightenment heritage, see, e.g., Jürgen Habermas. Modernity—An Incomplete Project, in The Anti-Aesthetic: Essays on Postmodern Culture 3 (Hal Foster, ed. 1983). In what sense, then, might Professor Williams be considered a postmodernist (whether she would accept the appellation or not)?

2. According to Professor Williams, how does the "pragmatist" differ from the "traditionalist" in her use of history? Is this vision like Professor Patterson's?

3. How will focusing on the vision of law held by "peripheral groups" promote a "more concrete inquiry into what could be called pragmatic certainty"? By demonstrating what has been—and what is—within "the scope of the thinkable"? Can pragmatism change that scope? Does redefining the "thinkable" seem to be a part of Professor Williams' project? Is it part of the modernist project? The postmodernist project? The poststructuralist project?

4. Professor Williams references "the conversations we have chosen, and the conversations we are still free to choose"? In what sense did "we" "choose" "conversations"? In what sense are we still free to choose some? In what sense are we no longer free to choose others?

Allan C. Hutchinson

IDENTITY CRISIS: THE POLITICS OF INTERPRETATION

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Postmodernism is a flat rejection of universal knowledge and an outright denial of essential truths. In contrast to the modernist project it begins with an implacable incredulity toward grand theories of social explanation and meta-narratives of ultimate emancipation. Rather than think of the individual subject as a unitary and sovereign subject whose self-directed vocation is to bring the world to heel through the exacting discipline of rational inquiry, postmodernism interrogates the whole idea of autonomous subjectivity and abstract reason; it places them in a constantly contingent condition of provisionality. Of course, it does not obliterate the experience of subjectivity nor the availability of reason, but it problematizes them in order to understand them as being multiple, contextual and protean. Subjects and reason can never be entirely self-present to themselves in an unmediated and unsituated form. There is no escape from the historical horizons of social living to the transcending imperatives of Destiny, History, Progress, Nature or whatever. In short, knowledge and truth are always fragmentary. Subjects and reasons abound, but there is no Subject nor Reason. By deploying such a skeptical strategy, the political hope is to destabilize power, displace domination and dismantle hierarchy.

Deconstruction is the interpretive relative of the postmodern family. It does not offer itself as one more interpretive methodology in locating textual
meaning. In contrast to Pope’s modernist idea that “Expression is the Dress of Thought,” such a postmodern critique maintains that language is not a jumble of accumulated vestments, but it is a system that neither labels nor represents the world of reality. Meaning is a differentiating function within that linguistic structure itself; reality cannot be apprehended from outside its discursive standpoint.

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The idea that there could be some authoritative act of interpretation that fixed meaning in a final, incontestable or objective way becomes dubious, if not altogether oxymoronic. None of this denies the possibility of meaning or widespread agreement on the particular products of interpretive processes. Deconstruction does not destroy the idea or practice of meaning, but it does disrupt any hermeneutical exercise that claims to offer standards of decidability or closure. Deconstruction views meaning as always contestable. Meaning can never be a ground for discourse because discourse itself encloses meaning. Moreover, discourse is itself never a grounding for anything, it is only a site or opportunity for interested attempts at hermeneutical acquisition. Reading ends not with a final affixing of meaning, but with a temporary undecidability.

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If deconstruction relieves authors of the burden of authority, postmodernism reminds readers of the weight of context. The deconstructive critique strips away false claims to hermeneutical authority wherever and whenever they arise. This is done not to deny forever the possibility of meaning, but to defer and problematize meaning for all time. Having cleared away the metaphysical brush, postmodernism relocates the interpretive exercise into its historically open and openly historical setting. While notions of Author, Text and Interpreter wither and die on the vine, writers, writing and readers are nourished and come to life in the rich soil of social living.

* * *

Notes

1. As Professor Hutchinson notes, deconstruction is the interpretive relative of the postmodern family . . . on the poststructuralist side. From his description, can you see why neopragmatists have not always fully embraced their in-law? For more on deconstruction, see Chapter Four: Critical Legal Studies.

2. What does it mean to say that deconstruction does not deny the possibility of meaning, but merely defers meaning “for all time”?

3. How is deconstruction compatible with the Wittgensteinian conception of rules as “language games” or “forms of life”? Is it possible that the difference is, in a sense, one of degree (albeit with profound philosophical implications)? Consider the possibility that deconstruction problematizes both the game and its players, questioning the extent to which the game is constituted by the players . . . and vice versa, i.e., the way the players are constituted by the game. Accordingly, deconstruction might examine not only the way we play the game, but the way we talk about the way we play the game, which is, of course, the way we think we play the game, and ultimately the way we continue to (think we) play it.
4. Note that the materials thus far have suggested at least three—and possibly four—postmodern approaches to meaning: hermeneutical philosophy's experiential approach to meaning, following Gadamer; meaning as the product of language games, following Wittgenstein; the destabilizing critiques of meaning occasioned by deconstruction, following Jacques Derrida; and, perhaps, the interpretive theory of (the relentlessly independent) Stanley Fish. Compare Dennis Patterson, The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory, 72 Tex. L. Rev. 1 (1993) with Stanley Fish, How Come You Do Me Like You Do? A Response to Dennis Patterson, 72 Tex. L. Rev. 57 (1993). What do they have in common? What makes them "postmodern"?

5. Postmodernism, Professor Hutchinson writes, "reminds readers of the weight of context." In what ways might deconstruction emphasize—or expose—"context"? Is this a part of the project that neopragmatists might join?

Martha Minow & Elizabeth Spelman

IN CONTEXT


What do people mean when they say, "You must see it in context"? Often, such a statement arises in a moment of judgment or decision. Or it can arise in a moment of misunderstanding. In everyday conversation, people call upon context when a question arises about the meaning of someone's statement or action. In contemporary political philosophy and legal theory, demands for "contextual" analysis appear in works by people claiming the name pragmatist and in other works by people calling themselves feminists. As we turn to address the meaning of "context" in these contexts, we are pointedly aware of a plausible question likely to occur to a sensitive reader: What is the context for our inquiry?

So let's start over. Welcome to our context. Though we do not wish to claim that our contexts are thoroughly known to us (or to you, whether or not you share them), we feel particularly obliged, in the context of an essay on context, to situate our concern about it. On reflection we realize that we have been using the phrase "in context" for most of our lives. But we note with considerable interest how, in recent years, we have begun depending increasingly upon it. In our writing and our teaching, we find ourselves insisting on the importance of the context in which someone lived, the context in which something was said, the context in which a problem arose, the context in which someone proposes a response to it, and the context in which some comment or idea made or did not make sense. The heightened concern about context is not, we dare to hope, simply a case of academic flu, even though the current ubiquity of the phrase "in context" suggests the possibility of unthinking conceptual contagion.

* * *

[W]e mean to signal with "context" a readiness, indeed an eagerness, to recognize patterns of differences that have been used historically to distinguish
among people, among places, and among problems. This focus distinguishes our interest from what was probably a more common usage of "context" by the early pragmatists.

* * *

It is not the familiar competition between the universal and the particular that motivates our interest in context. Like others concerned with the failures of abstract, universal principles to resolve problems, we emphasize "context" in order to expose how apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual adult men for whom those rules were actually written. It is the particular particularities associated with legacies of power and oppression that we mean to highlight by the interest in context. In so doing, we aim to question the distinction between abstraction and context, while also paying attention to the risk that calling our concerns "contextual" in fact may bury them and remove their political implications. Yet we are equally interested in the charge that an emphasis on context undermines capacities for political, moral, and legal judgments.

* * *

Perhaps paradoxically . . . the call for context represents a call to consider societal structures of power that extend far beyond the particularities of a given situation. The call for context itself tacitly signals both that the selection of some context is unavoidable, if only by default, and that the selection of one context over another implies a preference for one set of analytic categories rather than another. Against the background assumptions of liberal political and legal theory that treat principles as universal and the individual self as the proper unit of analysis, a call for contextual interpretation may well defend switching from one set of analytic categories to another that may only seem more "contextual" because it emphasizes group-based traits of individuals. In the late twentieth century in the United States, those who urge contextual interpretation often point to the harmful effects of legacies of exclusion based on race, gender, class, or other group traits. They imply new normative directions for legal and political life.

* * *

For both Cornel West and Carol Gilligan, interests in context express larger concerns about moral orientations, conceptions of human relationships, and commitments to confronting real limits and proposing real possibilities for particular societal struggles. Although neither West nor Gilligan bases arguments on a defense of contextual interpretation, varied meanings of context appear both in their methodologies and in their substantive claims. Along with others who urge greater attention to context, West and Gilligan advocate attention to the assumptions and frameworks underlying any given expression and any given interpretation. They also urge a focus on the particular features of human situations in order to capture the complexities of moral and political situations and thereby address moral and political dilemmas more responsively.
and responsibly. The argument for context occurs amid criticism of other ways of reasoning and arguing—and proponents of those other ways are bound to raise objections to the emphasis on context. It is to these potential objections that we now turn.

* * *

Although joined in opposition to the call to context, some may object that contextual analysis blasts away foundations in reason for moral and political claims and leaves brute political power, while others may object that contextual analysis eliminates generalizations and the possibility of politics. The two views converge in suggesting that contextual approaches disable judgment and produce dangerous relativism. These are essentially consequentialist arguments: they are objections that the move to context will have bad consequences.

But there are also two converging internal criticisms of the call to context. One is that contextualists cannot reasonably advocate contextualism if they reject all grounds for preferring one way of knowing and one set of judgments over others. The second is that the contextualist cannot meaningfully talk of context without using categories that simplify, in at least some respects, the particularities under examination.

Although we ultimately support many of the moves to context for reasons we will elaborate, we begin our response to the objections by accepting these internal criticisms as correct (though, as will soon become apparent, such criticisms end up having an important bearing on the views of the objectors as well). Indeed, we believe that these internal criticisms usefully demonstrate a defect in the usual rhetoric of contextualism: the usual rhetoric mistakenly implies a binary distinction between abstraction and context, when at best there are constant interactions between them.

* * *

Abstract theories are in some sense rooted in particular contexts and operate within contexts with real and particular effects that often benefit some people more than others. At the same time, contextual approaches are in some sense expressive of abstract theories. The contextualist has moral, political, and epistemological theories for preferring contextual approaches. Moreover, the contextualist uses categories to select which particular details matter. Those categories can be generalized. The binary distinction between abstraction and contextualism is not only mistaken, but also obscures these important points of interdependence between them.

A second reason for rejecting the distinction between abstraction and contextualism also provides a response to the charge that contextual approaches undermine the possibility of moral judgments beyond the particular situation at hand. The call to look at context typically represents a call to focus on some previously neglected features. It does not, however, mean focusing on all possible features. As human beings, we simply cannot hold in our heads all possible sensory inputs. Thus, we may say "don't forget the historical context," but we do not then mean, "don't forget to look at all possible features of the
historical movement and its place in the chronology of history." Perhaps even more obviously, many calls to look at context specifically refer to the traits of race, gender, and class that have been ignored by a more general statement. Thus, once the pretended distinction between context and abstraction is discarded, the important question becomes which context should matter, what traits or aspects of the particular should be addressed, how wide should the net be cast in collecting the details, and what scale should be used to weigh them? Whether you prefer to be called a contextualist or a devotee of principled reason, you make choices about what features of context to address.

* * *

The focus on context leads us to consider the surprisingly neglected topic of human judgments. Looking at context could mean a constant reminder of the human beings connected and separated by moments of judgment, acts of decision, requests for solution. The reminder that we are all in context might lead to different understandings of who and what we are all about.

Notes

1. What do Professors Minow and Spelman mean by "context"? In what ways does their use of "context" differ from its conventional usage? Does it differ from Professor Hutchinson's?


3. Contextual approaches, Professors Minow and Spelman write, "are in some sense expressive of abstract theories." Which "abstract theories" ordinarily find expression in mainstream legal decisions? Which find expression in Minow and Spelman's contextual approach? Do they seem to acknowledge those theories?

4. How will an appreciation of context problematize "societal structures of power"? Consider one aspect of power, as described by Michel Foucault:

   "Truth" is linked in a circular relations with systems of power which produce and sustain it, and to effects of power which it induces and which extends it. A "regime" of truth...

   The essential political problem for the intellectual is not to criticize the ideological contents supposedly linked to science, or to ensure that his own scientific practice is accompanied by a correct ideology, but that of ascertaining the possibility of constituting a new politics of truth. The problem is not changing people's consciousness—or what’s in their heads—but the political, economic, institutional regime of the production of truth.

   It's not a matter of emancipating truth from every system of power (which would be a chimera, for truth is already power), but of detaching the power of truth from the forms of hegemony, social, economic, and cultural, within which it operates at the present time.

Michel Foucault, *Truth and Power*, in *The Foucault Reader* 51, 74-75 (Paul
Rabinow, ed. 1984).

**B. POSTMODERNISM AND SUBJECTIVITY: THE DEMISE OF THE SELF.**

Pierre Schlag

THE PROBLEM OF THE SUBJECT


* * *

The apparent radicalism of critical legal thought does not stem from a new conceptualization of the subject, but rather from a reversal of the valences in the same old rule-of-law depiction of subject-object relations. Whereas the rule-of-law thinkers radically separate and distinguish subject and object, seeking to restrain and constrain the legal subject by means of "objective law," critical legal thinkers adopt the mirror image and strive to accomplish exactly the reverse. For critical legal thinkers, as for Sartre, the perpetual problem is that the subject is always constrained by "reified structures" and "thingified social roles" and that everything turns into "pods."

The only change in this picture of subject-object relations is the reversal of the traditional valences. Critical legal thought celebrates precisely what the rule of law fears: the emancipation of the individual subject. In turn, this cls reversal authorizes a whole series of aesthetically analogous reversals on the political plane—the reversal of the orthodox preference for rules over standards and the reversal of the orthodox preference for freedom of contract as opposed to paternalism. What we find, then, in orthodox critical legal thought is a kind of upside-down version of liberal legalism: the valences change, but the aesthetic structure remains the same.

One consequence of this critical reversal is that all the critical hopes—political, aesthetic and intellectual—are staked on the (liberal) individual subject who, once freed from the reifications of thought and role, is to emerge as a competent intellectual and normative agent. Terrific pressure is thus placed on the individual subject, both in theory and in practice, to develop all the right normative moves and to do the right thing.

* * *

In orthodox cls thought, the spaces occupied by the legal subject are almost always explored from a phenomenological perspective (and never from a structuralist perspective). One result, then, is that these spaces are in effect immunized, removed as they are from the purview of structuralist interpretation. A second result is that the subject is almost always conceived as a projection of the critical thinker himself.

On the other side of the ledger, the objective moment in law (i.e., doctrines and policy arguments) is almost always approached from a structuralist
perspective (never a phenomenological one). One result is that doctrine, policy, and other objectified sites of the law are almost always represented as alien and object-like, never quite resonant with the subject. A second result is that the reappropriation of doctrine and policy by the subject is not possible except in a very distanced instrumental sense. Yet a third result is that phenomenological accounts of law remain mediated by a subject who already experiences himself as free, as the original creator of his own meanings.

What we get, then, in orthodox critical legal thought is a kind of structuralism that remains confined to the most object-like moments in law: a structuralism of appellate doctrine. On the phenomenological side, what we get is a sense of the tremendous freedom of the critical subject, who cannot be constrained or confined by the objective moments of law because these objective moments are never him. The unbearable lightness of being a subject is a consequence of never recognizing one’s self in the meaningless solidity of dead doctrine.

* * *

Ironically, what I have been trying to suggest is that this structured practice of critical legal thought is itself disabling. It is not that there is anything wrong with doing a structuralist number on doctrine or moral theory. Nor is phenomenological inquiry misguided. What is wrong is that this division among the structuralist (appellate doctrine in itself) strand and the phenomenological subjectivist (value choices) strand has become, consciously or not, the master rule, the totalizing framework. Not only is this totalizing, structured practice intellectually limiting, it is politically disabling and oppressive.

* * *

Each and every social, legal, and political event is immediately represented as an event calling for a value-based choice. You are free to choose between this and that. But, of course, you are not free. You are not free because you are constantly required to reenact the motions of the prescribed, already organized configuration of the individual being as chooser. You have to, you already are constructed and channeled as a choosing being. Not only is this social construction of the self extraordinarily oppressive—but it often turns out to be absurd as well. Much of its absurdity can be seen in the normative visions that routinely issue from the legal academy urging us to adopt this utopian program or that one—as if somehow our choices (I like decentralized socialism, you like conservative pastoral politics, she likes liberal cultural pluralism) had any direct, self-identical effect on the construction of our social or political scene. The critical insistence on making political value choices is utterly captive to a conventional and nostalgic description of the political field—a description and definition of the field that is guaranteed to yield political disablement and disempowerment. To tell people that they are already empowered to make political value choices is, in effect, to bolster the dominant culture’s representation that we are free-choosing beings and to strengthen the forces that lead to our own repeated, compelled affirmation of (meaningless) choices. By presupposing the authenticity of the Sartrean subject, critical legal thought has
greatly underestimated the extent to which this "free" subject, in its very "freedom to choose," is already constructed to compulsively act out choosing behavior—regardless of whether the social, political, or rhetorical scene warrants or even enables a choice to be made at all.

* * *

Now, for pragmatists, the problem raised here is unlikely to seem acute—at least, not yet. The problem does not seem acute for pragmatists precisely because they arrive on the scene of pragmatic jurisprudence as already-constituted individual subjects with pregiven political agendas in a pregiven political division of the field in which they "stand." One of the things that is attractive for some legal thinkers is that, even in its perspectivist moment, pragmatism does very little to initiate an interrogation of the pragmatist subject or its political agenda. If it did, we would be back to jurisprudential vertigo.

But we’re not. Instead, we see neopragmatists providing the most strikingly conventional description of their own scene and doing so uncannily at precisely the moment when they are also insisting upon the need for critical perspectivism and the recognition of indeterminacy.

* * *

If pragmatism "means," it is because the pragmatist subject makes it "mean." And if the pragmatist subject makes pragmatism mean something, it is because he or she arrives on the scene already conventionally constituted with a series of pregiven political aims. It is pragmatism’s conventional depiction of the field of action, of thought, and of plausible political aims that leads the pragmatist subject to make pragmatism mean something.

* * *

This is not our context. This is simply one of our contexts—the standard legal academic romanticization of the scene of legal thought. It is our convention to pretend that judges have the wit, the intelligence and the craft of an Oliver Wendell Holmes. But once the romance stops, we see the judge for what he or she usually is: a harried bureaucrat of limited intellectual and perceptual faculties. This is a man or a woman whose mind has been addled by Restatements and C.F.R., and (what now amounts to the aesthetic equivalent) the constitutional opinions of the Supreme Court. It is our convention to pretend that law is a self-conscious, self-critical enterprise, but in fact its meaning is largely instrumental and performative; that is, governed by its ability to deliver the goods—goods whose identities are largely decided upon elsewhere.

* * *

Who or what is the subject in such a world? Currently, every human contact between selves who are declared, ab initio, to be self-directing and already free is mediated and constructed by techno-bureaucratic strategies. There is no human participation in the creation of culture or relations with others that is not already an instance of the regimen of techno-bureaucratic strategies: Sesame Street, MTV, Federal Express, malls, HMO's, word processing, endless ratings, endless polls, endless interest groups, endless
reflexive commentary on commentary, endless processing of services, endless differentiation of culture, and endless celebration of difference, all ironically leading to a regime of pervasive sameness: the radical differentiation of life and meaning, the context of no context, the crash.

So the problem of the subject for the pragmatist also arises in very stark terms. The pragmatist subject, understood in pragmatic terms, is the shopper at the universal mall making meaning with the commodified signs of our traditions and culture while the social aesthetics of techno-bureaucratic strategies are making him think he means something. Everything else is just nostalgia.

* * *

Recognizing and addressing the problem of the subject is not simply a question of resolving a particular kind of error in our jurisprudence, our theories, our institutional practices. Rather, addressing the problem begins with the recognition that the sort of subject formation we have been constructed to be is one that systematically reproduces a false aesthetic of social life.

I have tried to show how this subject formation is unconsciously reproduced and maintained by ostensibly very different, even radical and critical modes of contemporary legal thought. These modes of legal thought are nested within a Langdellian form and rhetoric which shapes the kinds of subjects who practice these modes of thought. The result is that regardless of their (good) intentions, these subjects unconsciously replicate the Langdellian paradigm and its subject formation. This is the process that I call the politics of form.

* * *

What concerns me about this Langdellian subject formation is that despite its exhaustion, it nonetheless remains dominant in the legal academy. Not only does the dominance of this subject formation prevent the development and recognition of other subject formations, but it effectively colonizes and homogenizes otherwise interesting and potentially edifying intellectual approaches. Perhaps most significant is that this Langdellian subject formation is deeply implicated in the reproduction of images of law, society, culture, and politics and their relations that are now seriously out of date, and positively detrimental to the intellectual and social construction of our world. For instance, the aesthetic that enables the formation and currency of political categories such as "conservative," "liberal," and "radical" is fast being eviscerated. What we have now is simulated conservatism, simulated liberalism, and simulated radicalism. One can bemoan this state of affairs, but, of course, the risk is that this will be simulated bemoaning.

Sometimes it seems that there is only one story in American legal thought and only one problem. The story is the story of formalism and the problem is the problem of the subject. The story of formalism is that it never deals with the problem of the subject. The problem of the subject is that it’s never been part of the story.

* * *

Until now.
Notes

1. Professor Schlag observes that "critical legal thought is a kind of upside-down version of liberal legalism: the valences change, but the aesthetic structure remains the same." Assuming this is correct, is the aesthetic similarity really significant in view of the political differences? Or are there no significant political differences either?

2. Just what is "the problem of the subject?" Professor David Caudill writes:

There is some ambiguity in Schlag's use of the term "self." The rational, autonomous self is a rhetorical fiction in the form of American legal thought; the individual legal subject is a "relatively autonomous self," but this is also a fiction or construct of traditional legal thought; the actual "self of the legal thinker" is divided against itself, consciously recognizing its sociality and seeking refuge in texts that provide a picture or image of stability and defense against its mere social or rhetorical existence.

David Caudill, Pierre Schlag's "The Problem of the Subject": Law's Need for an Analyst, 15 CARDOZO L. REV. 707, 716 (1993). Professor Caudill suggests that the legal subject is a good candidate for Lacanian psychoanalysis; for Jacques Lacan, "[t]he subject of language is . . . the subject of psychoanalysis in the Freudian tradition." Id. at 718.

3. In what ways is the social construction of the self as a choosing being "extraordinarily oppressive?" In what ways is it "absurd?" Consider Professor Schlag's suggestion that "[t]o tell people that they are already empowered to make political value choices is, in effect, to bolster the dominant culture's representation that we are free-choosing beings and to strengthen the forces that lead to our own repeated, compelled affirmation of (meaningless) choices." Why is "meaningless" in parentheses?

4. What is the role of deconstruction? Can it: (a) reveal the oppressive subject formation?; (b) liberate the subject from its constraints?; (c) clear the way for alternative subject formations? In considering all of these possibilities, how do you conceive the deconstructing subject? Consider the following assessment from Professor J.M. Balkin:

[D]econstruction, as actually performed by individuals, is always and already parasitic on some form of logocentric practice. This is every bit as true of critics of the autonomy of the self as it is of critics of any other subject of deconstruction. The deconstructor of the self is still picking her targets—she is still writing about the illusion of the self and not about the errors of Justice Scalia's opinion, or the wickedness of apartheid. And this choice (for we can find no other word to describe it) is still the grinding of a particular ax, whether its real motivations are conscious or unconscious, whether the self who makes this choice is wholly autonomous or wholly constructed. And the more cleverly and skillfully the deconstructor of the self argues her case, the more overtly she displays her mastery and her purposefulness in doing so—that is, the self. For only selves can put the self in question—there is quite literally no one else to do it. And only selves with preexisting commitments (political or otherwise) would engage in such a project.

5. Professor Schlag notes that the subject formation which dominates law "effectively colonizes and homogenizes" other intellectual approaches. This was, in his view, the potential fate of deconstruction, which might be reconceived (and misconceived) as a tool to be used by the autonomous deconstructing subject:

[T]he irony is that by putting the individualist self in charge of deconstruction, legal discourse (once again) re-establishes what Derrida derides as "the full presence, the reassuring foundation, the origin, the end of play." The self has been put outside the challenge of deconstruction and thus it remains a self-assured, coherent, integrated, rational, originary source of moral and political action. But to put the self outside the text in this way, turns deconstruction on its head. More precisely, it sends deconstruction reeling back to the eighteenth-century metaphysics of the individual and his reason as the origins of truth, morals, etc.


6. The demise of the self—that is, the demise of the coherent, integrated, autonomous, self-conscious subject—might make somewhat problematic the communitarian project of the neopragmatists. Professor Iris Marion Young writes:

If the subject is heterogeneous process, never fully present to itself, then it follows that subjects cannot make themselves transparent, wholly present to one another. Consequently the subject also eludes sympathetic comprehension by others. I cannot understand others as they understand themselves, because they do not completely understand themselves. Indeed, because the meanings and desires they express may outrun their own awareness or intention, I may understand their words or actions more fully than they.

IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 232 (1990). Professor Young concludes that the ideal of community "denies the difference between subjects" and "often operates to exclude or oppress those experienced as different." Id. at 234.

Guyora Binder
WHAT'S LEFT?

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Deconstructive critics, such as Jacques Derrida, Iris Marion Young, and Bernard Yack, see... Rousseauian radicalism as expressing a totalitarian drive for homogeneity. Hence they charge that demands for democratic participation are motivated by an anti-intellectualism that limits political argument to the repetition of prevalent clichés and the reinforcement of common prejudices; that devotion to community is motivated by a need for insularity and conformity; and that the longing to fulfill one's humanity or root one's identity in a culture reflects a need to stigmatize others as inhuman or inauthentic. In sum, deconstructive critics read the desire for self-realization as a yearning to overcome alienation by restoring a natural or authentic self. Arguing that all of our thoughts and desires are mediated, deconstructive critics view any such
aspiration as unachievable. But in an effort to purify the self of external influence, deconstructive critics charge, radicals are prone to purge their social environments of dissenting voices and heterogeneous populations.

As the ensuing sections demonstrate, this deconstructive critique profoundly misconstrues radicalism.

First, radicals demand universal participation in politics, not to lower debate to the level of the least educated and most parochial, but to broaden and educate all citizens by involving them in intellectual debate; assuming that everyone is capable of self-realization, radicals are anti-elitist, not anti-intellectual.

Second, far from privileging an authentic, unmediated self, radicalism proceeds from the premise that all self-knowledge is mediated through the eyes of others, so that we can change only with the help of others who are different from us. This entails a community premised on difference and dissent, not conformity and comfort.

Third, radicalism doesn't seek to restore a natural self, insulated from external influence, but to cultivate new selves by means of mutual influence. Thus, the "nature" radicalism hopes to realize is conceived as a cultural artifact.

Finally, radical theory's identification of discrete cultures is not motivated by the pursuit of cultural purity. The concept of culture explains how instrumental identity can be at once contingent and resistant to change; and gives hope that self-realizing identities can be similarly reinforced by their cultural surroundings. By depicting social life as more contingent, unstructured, and unpredictable than it really is, deconstruction discourages the long-term commitment to a community or calling that self-realization requires, and so reinforces instrumental culture.

* * *

[Is the naive assumption that individuals are transparently self-aware inherent in the value of community? Radicals are drawn to the idea of community to the extent they believe we can only realize ourselves with the help of others. Why would they embrace the view that we can know ourselves without the help of others? Young endorses Hegel's claim that others understand us better than we understand ourselves, but ignores its implication that we need relations with others in order to understand ourselves. Thus community is created not by allowing the other to see us through our own eyes, but by allowing the other to see herself through our eyes. That is why community can occasion self-realization—because it constantly changes the way we see ourselves. It is the self-transformation generated by commitment to others that enables us collectively to recreate society—and that is what opens up the possibility of radical change.

* * *

[De]constructive critics ascribe totalitarian implications to the concepts of participation, community and human nature. According to these critics, radicals deploy these terms in an effort to portray social relations among heterogeneous elements as inauthentic, incoherent, unnatural, or inhuman. Deconstructive
critics assign the concept of cultural identity a similar rhetorical function: by bounding off discrete cultures, we stigmatize the rest of our social surroundings as foreign or inauthentic. And by identifying ourselves with discrete cultures, we suppress heterogeneity within ourselves. Accordingly, the deconstructive critic views the radical’s aspiration to redefine her culture as a totalitarian impulse to purify herself.

* * *

[In the deconstructionist view, because any criterion of cultural authenticity bounds culture artificially, its correlative criterion of inauthenticity carves out an internal Gulag to which we can exile all the parts of ourselves we would prefer to view as alien. Unable to purify ourselves of shameful traits, we disown them and blame their presence within us on foreign influences. And the more we unjustly project our sins onto others, the greater the burden of sin we have to displace; so that our cultural traditions consist in the bequest of memories repressed rather than preserved. On this view, there are no continuous cultures. The construction of any cultural tradition involves a lie, violently erasing the evidence of earlier lies. Since there can be no discrete, self-identical cultures, culture cannot confer the kind of bounded and coherent identities its participants yearn for.

* * *

If the deconstructive critique of cultural identity resonates with our psychological experience, that may be because its psychological assumptions fit our particular culture. Denying that there are any discrete cultures, deconstructive critics assume that psychological intuitions applicable in one cultural setting are universally valid. But in so doing they assume what they should prove.

The claim that there are no discrete cultures is probably true within an instrumental culture that treats cultural commitments as the choice of a garnish or an ornamental façade—Dijon or Teriyaki, Tudor or French Provincial. And skepticism about personal identity is justified when consumers are reduced to identifying themselves by such choices. The more we consume empty packages of cultural associations, the emptier we feel inside—an emptiness we hasten to heal with another image-making purchase. All of this is true of our particular culture. But it doesn’t prove that we cannot construct a radically different culture. By treating instrumental culture as the only possible culture, deconstruction discourages any effort to replace it.

Because the deconstructive critique of instrumental culture is premised on that culture’s inevitability, it has a disturbingly ambiguous quality. It is made to look like the scaffolding that attends the dismantling of a condemned building. But it can also be read as the latest fashion in architectural illusion, a façade of ironic detachment suspended from the sturdy structure it ornaments. Deconstruction offers us a hip attitude toward what we are destined, in any case, to accept. And so makes its acceptance that much easier.

This ambiguity between critique and ornament is typical of postmodernist
cultural movements generally.

* * *

Postmodernism began as a critique of modernist culture and its obsession with planning social life. But like so many other rhetorics of resistance, postmodernism was quickly bought up by the very culture it critiqued and then resold for profit. Developers slapped art deco façades on suburban shopping malls, while motel chains repapered their walls in aubergine and British racing green. Behind the ornament, however, the machinery of modernism proceeded according to plan: "We feel that postmodernism is over," a prominent United States developer told the architect Moshe Safdie. "For projects which are going to be ready in five years, we are now considering new architectural appointments." The planned obsolescence of postmodernism, however, merely reiterates the original joke: that the term refutes itself. What could be more modernist than a critique of modernism as outmoded? And what could be more complicit than trashing a culture designed for disposal?

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The way that social actors can radically transform themselves is by constructing social settings which enable self-realization for themselves and others—typically by constituting communities which define and allocate the responsibilities of their members through participatory decision making. Such communities need not be universal or all-encompassing. Democratic culture is no hothouse specimen that shrivels upon exposure to heterogeneity. It is an open system, robustly capable of influencing its surroundings and reproducing itself in an inhospitable environment. The task for radical theory is to look hard at the glittering façade of instrumental culture: in the tiniest crack, democracy can take root.

Notes

1. What is a "community premised on difference and dissent"? Is there, in such a community, a Rawlsian "overlapping consensus"? See Chapter One: Legal Realism. What if there is no consensus even as to the necessary predicates for community? And what, in any event, is the likely fate of dissenters among constituents who are determined (in either sense of the term) to preserve community?

2. Does Professor Binder elude the poststructuralist critique through the hypostitization—or anthropomorphization—of "radicalism"? How does "radicalism" "seek to . . . cultivate new selves"?

3. According to Professor Binder, postmodernism is essentially modernist. Is this correct? What of "radicalism"?

4. Professor Catherine MacKinnon has described the postmodern praxis—or impossibility of praxis—as "discourse unto death." Catherine A. MacKinnon, From Theory to Practice, or What is a White Woman Anyway? 4 Yale J. L. & Feminism 13 (1991). "As theory," she concludes, postmodernism "it is the de-realization of the world." Id. at 14. Do you agree? Would Professor Binder?

5. Interestingly, Professors Binder and Young seem to find common ground on the value of difference: for Professor Binder, it is the predicate to community "self-realization"; for Professor Young, "a politics that asserts the positivity of group
difference is liberating and empowering." Iris Marion Young, Justice and the Politics of Difference 166 (1990). But if the subject is dead, and if cultural identity is impossible, then what is "group difference"? What of the "feminine voice"? The "voice of color"? What of the narratives of out-groups? What, for that matter, of the promise of narrative, generally? See, e.g., Arthur Austin, Deconstructing Voice Scholarship, 30 Hous. L. Rev. 1671, 1678 (1993) ("Subjected to deconstruction, the voice agenda dissolves.")

Allan C. Hutchinson

IDENTITY CRISIS: THE POLITICS OF INTERPRETATION


"I speak in sexual drag." With these words, Mary Joe Frug announces the promise, problems and politics of the postmodern writer. Her pithy pronouncement puts firmly into play the compelling questions of identity, authority and authenticity that dominate much modern theorizing. Who is this "I" that speaks? Whose voice does she "speak" in? What is the force of "sexual"? Is there an "I" beneath the "drag"? Can the "I" ever not be in "drag"? Are there only different "drag" costumes to be fitted and later discarded? Does the "I" choose the attire of living? Is the "I" chosen by the "drag"? What would it mean for the "I" to be spoken rather than to speak? Can there be a "drag" that is not "sexual"?

It is the burden of this essay to place these questions in a postmodern frame of reference and to offer some tentative and provisional answers. If recent episodes in literacy and legal circles are anything to go by, there seems to be some force to the claim that the contested questions of identity, authority and authenticity are back in vogue and with a vengeance. The operating assumptions and informing suppositions of the legal community's practice and politics on race and gender are closely implicated in such issues.

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In order to get at and explicate the contested notions of authorship, authenticity and authority, I will re-pose and re-answer Michel Foucault's famous and characteristically enigmatic question—"[w]hat difference does it make who is speaking?" Taking aim at the traditional matching of authorial identity and interpretive authority, he sought to disrupt efforts to use authorial intent as a principle of thrift in the proliferation of meaning. His whole essay can be read as a largely rhetorical dismissal of the relevance of authors in the hermeneutical enterprise—in effect, an indifference to the difference that difference might make, if any, in who is speaking. Foucault is interested in the operation of discourse as a productive process of subject-formation rather than as the formed process of productive subjects; discourse à la Foucault creates as

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¹ Eds. note: Mary Joe Frug, Postmodern Legal Feminism 229 (1992).
much as it is created.

While I want to hold on to that account, I also want to elaborate and supplement it by showing that there is a different notion of difference that is at work and that is important in understanding fully the hermeneutical problematic—in effect, a serious interest in the kind of difference that difference might make in who is speaking. In short, I will draw a distinction between the metaphysical claim of ‘difference’ and a political understanding of ‘difference.’ Whereas the former ought to have no purchase in the world of interpretive practice and theory, the latter is of vital significance. It is through the metaphysical death of the author that the political writer (and reader) comes to life. It is in this important sense that it matters and makes a difference who is speaking (and reading).

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[Many contemporary jurisprudence has been devoted to working through the implications of ‘the death of the author’ for legal interpretation. That debate has been most vigorous in constitutional law. The basic claim is essentially normative. Judicial interpretation can only be legitimate so long as it seeks to give democratic effect to the original act of consent by the people to the Constitution as a document to limit governmental power. Most importantly, it is recognized that the best evidence of the Constitution’s meaning is the Framers’ intentions. The overwhelming response to this has been that not only is this claim normatively dubious and contestable, but that, even if it were somehow desirable, it is entirely unrealizable. It is by no means self-evident that democracy is best served by giving effect to the views of long-dead politicians which received only indirect consent from the enfranchised few at the time. Moreover, past intentions, particularly of collective entities, seem doggedly resistant to future understanding. Intention is not a simple fact that stands antecedent to interpretation, but is in need of interpretation before it can be understood in general or specific terms.

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Although the majority of mainstream jurists have conceded, if reluctantly, the death of ‘the author’ as a figure of interpretive authority, they are still fully committed to the hermeneutical enterprise of trying to locate and justify an authoritative method of interpreting legal texts. While there are almost as many theories of interpretation as there are interpreters, legal theorists refuse to accept that there is no legitimate and appropriate form of judicial review—what they choose to call ‘constitutional law’—in a democratic republic. The particular challenge that they have set themselves is to ensure that, having wrested control of the text from the tyrannical grip of the author, the interpretive enterprise is not allowed to slide into a maelstrom of reader anarchy in which interpretation is an occasion for personal caprice and self-serving prejudice.

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Accordingly, as a hedge against the imagined twin evils of an overbearing authorial constraint and an undisciplined reader freedom, mainstream theorists
attempt to cabin the textual search for meaning in some communal precepts of interpretive regularity or in the establishment of an interpretive practice of institutional integrity. For example, Ronald Dworkin maintains that legal interpretation should proceed on the basis that legal rights and duties "were all created by a single author—the community personified—expressing a coherent conception of justice and fairness." There still remains the enduring formalistic belief that law involves politics, but only neutrally so; it is important and possible that interpretation be kept distinct from outright ideological debate. Within this framework, the emerging pragmatic understanding holds that interpretive authority is generated in the organic, sophisticated and responsive interaction between the law and its interpreters.

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One group of critics has refused to play this mainstream game. While obviously not alone in posting the obituary of the legal author, their postmodern or deconstructive approach to matters of legal interpretation makes them its most uncompromising and least tentative necrologists.

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However, so the argument goes, the critics have become political victims of their own hermeneutical success. At bottom, the spirited rebuttal to critical attempts to sabotage the mainstream hermeneutical project rests on the argument that the defeat of authorial tyranny and the political inconvenience of textual certainty has been bought at the bankrupting price of reader anarchy. It is claimed that, when push comes to shove, critical skepticism leads to the conclusion that texts mean everything and, therefore, nothing: any text can mean anything that anybody wants it to mean. If any text can mean anything, then all interpretations are equally valid and any interpretation is as valid as any other. The only constraints on interpretation are imaginative ingenuity and political cunning.

* * *

This line of theoretical criticism leads to a more political objection to the critical approach. It is asserted that, even if there were to be a successful demonstration of textual indeterminacy, it would be of very dubious political merit. By adopting a posture of thoroughgoing skepticism, the critics cut the ground from under their own feet.

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For instance, it is argued that, if deconstruction is such a potent method for transforming and radicalizing textual meaning, there is not only no interpretive warrant for introducing black-authored texts into the canon of literacy or legal scholarship, but there is no hermeneutical need for such a political change. The works of white authors will serve as ample diet for the deconstructive appetite and reconstructive imagination. Moreover, the introduction of women-authored texts will be of no particular consequence because, as the critics themselves have amply demonstrated, the authors of texts have no influence over the meaning that can be attributed to their texts; the text and its meaning will be interpreted
as its readers decree.

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As such, mainstream theorists conclude that any support that critics want give to the appointment of more women judges or the admission of more black students into law school is fatally undermined: deconstruction undercuts politics and politics marginalizes deconstruction.

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In modernist discourse, an identity is something that each person has by virtue of their existence as unique individuals. At its most extreme and historical, there still seems to persist the idea that each subject is born normatively full-grown, like Zeus’ children, with a raw set of values, preferences and characteristics that can be more or less given expression to in the historical act of living and socializing. For instance, women are marked by their biology and it is for society to organize affairs in such a way that they can be truly women and express the essence of their female being. Under this view, freedom is the successful resolution of both the search for that true intrinsic identity that lies within and the struggle to live one’s life in accordance with its dictates. In both its vulgar libertarian and Marxist guise, justice is reached when people attain an unimpeded sense of themselves: false consciousness is so much old clothing to be discarded in the unveiling of the true self. On a more enlightened modernist version of identity, society plays a more formative role, but is still secondary to the givenness of a particular identity. Either way, the identity is a given quality that must be perceived and preserved.

By contrast, postmodernism rejects the notion of an abiding, fixed or essential identity. Identity is relative, not intrinsic; fluid, not fixed; perspectival, not neutral; and protean, not perfected. The subject is a cultural creation, not a biological given. Nevertheless, while people are not fundamentally fixed by their experience of race, gender and class, they are distinctively marked by such social categorizations: “Identity is in the etched details of mediated lives and struggle.” Like history, identity cannot be completely got out of or into: its presence is never entirely self-present to itself so that it can be summarily embraced or evaded. Always shifting and often self-contradictory, identity is part of history, not a ground or precondition for attempts to resist or reinforce history’s meaning.

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False consciousness becomes less of a mask that must be pried off to reveal the true identity of its wearer and more of a situational impediment that stymies efforts at collective and personal transformation. Although thoroughly situated, subjects are not entirely saturated. Indeed, the postmodern re-formulation of identity invigorates the subject as an emancipatory agent and contributes to the likelihood of social renovation. Postmodernism calls into question liberalism’s fixation with the strong subject and its presumed lightness of social being. It does not problematize agency and politics so as to abandon them. On the contrary, by re-locating subjects in their constitutive culture, it hopes to
embolden agents in their political awareness and empowerment. Rather than start with the repressed individual and strive for hermeneutical liberation, postmodernism challenges the bourgeois format of society. It aims to reorganize itself in line with the radical imperatives of an experimental democracy that recognizes the systemic and social character of oppression at the same time that it facilitates provisional, revisable, yet real responses to the alleviation of suffering.

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Identity's significance is political and all the more significant for that. The relation between persons and their contexts is life that between writers and texts—nothing necessarily follows. Context is not the author of the person in the sense of inhibiting, binding, or constraining its identity. It is relevant, but not determinative. Similarly, while it is never possible to pin down context in any fixed or finished way, so it is not possible to isolate authorial identity and, therefore, the meaning of the text from that author.

By divesting identity of its spurious claim to metaphysical authority, it is released to play a more important and less confined role in textual, sexual, racial and any other politics. Identity becomes a site that, while guaranteeing nothing, makes everything possible. By moving beyond the debilitating politics of abstraction and ahistoricity, postmodernism looks to create meaning and knowledge in the situated particulars of embedded experience. The ambition is not to fix an all-encompassing Truth in a distant metaphysical realm, but to pay constant attention to the multiple truths and contextual details of engaged living in the here-and-now. Of course, being political, that process will always be open and fluid; meaning will always be provisional and revisable. Moreover, by using rich accounts and critical readings of historical experience to promote political knowledge and action, that politics will always be contestable: politics itself can never be a privileged ground for anything.

* * *

As the postmodern challenge is to Identity as an essential ontology rather than to identities as socio-historical constructs, the deconstruction of identity does not proscribe the possibility of a reconstructed politics. A politics of identities will be attainable and attractive. As long as it is not thought of as a backward-looking project to preserve or retrieve a lost identity, but is acted upon as an engaged means of working to overcome all sectarianism. After all, identity is forged through action. Action is not an independent behavior from or an instinctive reflex of a fixed and settled identity: the postmodern temper accepts that "there need not be 'a doer behind the deed,' but that the doer 'is variably constructed in and through the deed." What people do is what people are and what people are is what they do.

In understanding action and identity as inseparable and mutually reconstituting, it becomes possible to grasp race, gender, sexual orientation and class as thoroughly historical and, therefore, inescapably political in character. There is nothing essential or "natural" about people's identities. While
experienced as real, they are always constructed and, therefore, always reconstructible. None of this denies the stubborn and almost recalcitrant patterns of oppressive conduct—economic exploitation, sexual violence, racial hatred—that continue to exact their daily toll. However, contrary to their critics' jeremiads, postmodernists refuse to be despondent or despairing. By hammering home the reconstructive incitements of the deconstructive insight, they can, at least, contribute to the struggle for social justice and individual empowerment.

Notes
1. What is the difference between a metaphysical conception of authorial integrity and a political conception of voice? Is it essentially an appreciation of the notion that the salient features of identity—including group identity—are not innate and immutable but socially constructed and historically contingent?

2. Is Professor Hutchinson a neopragmatist or a post-structuralist? Or both?

3. How are the salient features of identity constructed? What political forces, for example, construct "race"? What forces construct "gender"? What of mental disability, or physical disability? What of sexuality? See, e.g., Robert L. Hayman, Jr., Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent, 103 HARV. L. REV. 1201 (1990) (construction of "mental retardation" and "disability"); Robert L. Hayman, Jr. and Nancy Levit, The Constitutional Ghetto, 1993 Wis. L. REV. 627, 677 (construction of "race"); Martha Minow, Foreword: Justice Engendered, 101 HARV. L. REV. 10 (1987) (construction of "gender"). The recurring scientific debate on the origins of sexuality—i.e., is it nature or nurture—assumes a peculiar legal significance given the constitutional doctrine suggesting that some form of heightened judicial scrutiny might be appropriate for discrimination against groups characterized by an "immutable trait." Professor Janet E. Halley suggests that "[t]he postmodern critique of liberal explanations of the self posits that culture, not human nature, gives humans their sexual orientation." Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability, 46 STAN. L. REV. 503, 505 (1994). What, then, is the postmodern response to the "immutable traits" doctrine?

Kendall Thomas
BEYOND THE PRIVACY PRINCIPLE

Proponents of the right of privacy have spent enormous critical energy seeking to establish the proposition that the interests the doctrine has been framed to protect are integral to the moral life of the individual. The felt necessity to secure the metaphysics of privacy has left defenders of the doctrine insufficiently attentive to what might be called its materiality. That is to say, in its extant formulations, privacy analysis lacks the terms for understanding how the laws it assesses mark the flesh-and-blood bodies of real, actual individuals.

This claim regarding privacy's lack of specificity implicates two different concerns. The first has to do with the theory of the state, or as I prefer, the
police power, that is brought to bear on individuals whose sexual acts and identities are subject to its regulation. I describe the precise workings of this technology of state power more fully in later sections. I want to focus here on a second concern, namely, the theory of the human subject that informs privacy analysis.

To the extent that proponents of the right to privacy have offered a theory of its individual agent, that theory is found in the idea of "personhood." As Jed Rubenfeld has noted, the notion of "personhood" has so invaded privacy doctrine that it now regularly is seen either as the value underlying the right or as a synonym for the right itself." Privacy doctrine's reliance on the concept of personhood is not surprising; after all, personhood (in either singular or plural form) is the predominant category employed in the rights-granting provisions of the Constitution.

Defenders of the right argue that privacy is "a condition of the original and continuing creation of 'selves' or 'persons.'" At the same time, proponents of privacy fail to provide anything more than an abstract, etiolated conception of the human agent for whom the protection of the doctrine is claimed. An axiological case for privacy perforce presupposes some theory of the subject to whom the right of privacy runs. The force of the case for privacy very much depends on the strength of its substantive conception of the individuals who are its origin and end. And indeed, it is precisely here that I find axiological privacy analysis' most debilitating limitation: its curiously disembodied understanding of the living subject of privacy rights.

For the most part, the body is an absent concept in privacy thinking. Although one can point to a few instances in which its proponents have acknowledged the relevance of corporal interests for privacy doctrine, these discussions remain underdeveloped and incomplete.

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In my view, in order to develop a sufficiently precise conception of the human beings whose "personhood" is the target of homosexual sodomy statutes, we need a "concrete" rather than an "abstract" understanding of the body. I have already suggested why it would be a mistake to view Hardwick as raising only the question whether the State of Georgia could prohibit and punish Michael Hardwick for engaging in sexual acts with another consenting adult male in the privacy of his own home. Close attention to its factual background indicates that an even more fundamental issue presented in Hardwick was whether the State of Georgia could constitutionally permit its police power, specifically, its criminalization of homosexual sodomy, to serve as a justification for threatened and actual violence toward one of its citizens. We would do well here to remember that the road that led Michael Hardwick to the bar of the Supreme Court was, in his words, "a trail of blood" — his own. Hence, I believe that it would be a mistake to view Hardwick as a case about the state's

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power to regulate sexual intimacy or personal morality. Rather, Hardwick ought to be understood as a case about Michael Hardwick’s right to be protected from state-sanctioned invasion of his corporal integrity, that is, of his very bodily existence.

From this perspective, Hardwick casts the limitations of the theory of the subject in which privacy principle is grounded into stark, unflattering relief. The "personhood" privileged in privacy analysis relies too heavily on an abstract image of the human subject as a moral self. The "personhood" at stake in Hardwick, however, calls for a more materialist view of the human subject as an embodied self. Hardwick powerfully underscores the fact that the interests privacy analysis seeks to defend are initially, and indispensably, body-generated. In the instant context, this means simply that the bodies of the actual, empirical individuals to whom homosexual sodomy statutes are addressed are not merely a derivative supplement, but the generative substrate of the constitutional rights the privacy principle attempts to secure. The rights claimed under privacy doctrine live and move and have their being in the material body of the human subject. Without the prior and primary recognition of a basal right of corporal integrity, the right of privacy is not only incomplete, but quite literally impossible.

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The terrorization of gay men and lesbian women through homophobic violence dramatizes two intersecting political relationships. The first is the internal relation between perpetrators of homophobic violence and their victims. The second is the external relation in which both victims and torturers stand to the political regime that variously incites, aids or allows homophobic violence to take place. This latter relation forces the recognition that homophobic violence at one and the same time expresses the power of the perpetrator of that violence and the power of the regime that the perpetrator represents. The person of the torturer (and the torturer’s weapon) is the agency through which the strategy of the regime finds its substantive shape and force. If we were to use the conventional language of American constitutional law, we might say then that violence inscribed on the bodies of gay men and lesbians constitutes an extra-legal exercise of police power.

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American constitutional theory has been hampered by a conception that sees power in terms of possession. Thus, we speak of Congress "having" the power to regulate interstate commerce, of the President "having" the power to appoint members of the Supreme Court, of the Supreme Court "having" the power to hear cases arising under the Constitution. This, of course, betrays a highly formalistic conception of power. Recent theoretical work on the question of power, however, suggests that a formalist framework is too crude a conceptual resource for understanding the actual operation of political power in contemporary societies. A number of writers have argued for an alternative analytical model that sees power as much more open and mobile, as a mechanism of devious, dispersed and supple energies.
One such alternative can be found in the work of Michel Foucault. Foucault is best known for his theoretical attack on what he calls the "repressive hypothesis," which holds that the mechanisms of power are primarily negative, prohibitive and interdictive. Foucault insists that "[w]e must cease once and for all to describe the effects of power in negative terms: it 'excludes,' it 'represses,' it 'censors,' it 'abstracts,' it 'masks,' it 'conceals.'" Foucault attends instead to the "productivity" of power and proffers an analysis aimed to show that power is not something that "just says no." "In fact," argues Foucault, the most salient characteristic of modern power is that it "produces; it produces reality; it produces domains of objects and rituals of truth." In its sustained focus on the productive or generative dimensions of power, Foucault’s project marks a decisive break with traditional method.

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Recent scholarship on the theory of power thus represents a powerful challenge to traditional understandings. The central proposition established in contemporary work on power is that the effective exercise of state power in the modern period does not require a formal apparatus or agency. This is not to say that the forms in which the political is clothed are utterly illusory and without ideological consequence. It is to suggest that the substantive operation and effects of state power cannot always be determined solely (or even primarily) by reference to its formal agency; the state power in contemporary American society can be seen not only in the force relations involving public officials and private citizens, but in those among citizens as well. As Nicos Poulantzas writes: "[A] number of sites of power which [appear] to lie wholly outside the State . . . are all the more sites of power in that they are included in the strategic field of the state." "[R]elations of power go far beyond the State." In consequence, any adequate analysis of the political technologies of the modern state must attend not only to the form power takes, but to its function as well. Power relations do not have to be localized within the formal institutions of the state in order to serve the substantive interests of the state.

Taking these theoretical lessons about state power as a point of reference, one may now specify precisely why the relationship between homosexual sodomy statutes and homophobic violence is constitutionally suspect. In assessing the constitutionality of these laws, I would argue that violence against gays and lesbians perpetrated by other citizens represents the states' constructive delegation of governmental power to these citizens. As a constitutional matter, the covert, unofficial character of this violence does not render it any less problematic than open, official attacks against gay men and lesbians. To state the point in slightly different terms, the fact that homophobic violence occurs within the context of "private" relations by no means implies that such violence is without "public" origins or consequence. The apparently private character of homophobic violence should not blind us to the reality of the state power that enables and underwrites it. The functional privatization of state power that structures the triangular relationship among victim, perpetrator, and state does not render the phenomenon of homophobic violence any less a matter of
constitutional concern.

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In the instant context, this more nuanced understanding of the combined force of the private action and state inaction that are so violently brought to bear on the bodies of gay men and lesbians clears the ground for clearer specification of the coordinal relationship between criminal laws against homosexual sodomy on one side, and criminal acts of homophobic violence perpetrated by private citizens on the other... Broadly speaking, homosexual sodomy statutes express the official "theory" of homophobia; private acts of violence against gay men and lesbians "translate" that theory into brutal "practice." In other words, private homophobic violence punishes what homosexual sodomy statutes prohibit. When situated within this framework, the terms and target of my Eighth Amendment-based account of the criminal laws against homosexual sodomy become clear: one might call it an "anti-terrorist" case for judicial invalidation of homosexual sodomy laws, whose textual grounding is a functional, rather than formal interpretation of the prohibition against the infliction of cruel and unusual punishments.

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Notes

1. In Bowers v. Hardwick, 478 U.S. 186 (1986), the Supreme Court upheld a Georgia law which criminalized sodomy. The Court, per Justice White, held that the due process right of privacy did not include a fundamental right to engage in "homosexual sodomy"; the Court's constricted view of the issue prompted Justice Blackmun to observe that the majority opinion belied an "almost obsessive focus on homosexual activity." Id. at 200 (Blackmun, J., dissenting).

As Professor Thomas indicates, Michael Hardwick's journey to the Supreme Court was marked by "a trail of blood." Hardwick had been ticketed by an Atlanta, Georgia police officer named K.R. Torick for "drinking in public" outside the gay bar where he worked. He missed his court appearance due to a discrepancy on the ticket; within two hours of the missed appearance, Officer Torick was at Hardwick's home with an arrest warrant. Hardwick was not home, but upon learning of the officer's visit, went immediately to the Fulton County courthouse where he paid the necessary fine. Several weeks later, he was violently assaulted outside his house by three men whom he suspected might have been police officers. He crawled from the scene of the assault up to his bedroom, leaving "a trail of blood all the way back." A few days later, Officer Torick again arrived at Hardwick's home, ostensibly to serve a warrant for his arrest in connection with the citation. Torick found Michael Hardwick in his bedroom having sex with another man. See Professor Thomas' article, citing Peter Irons, The Courage of Their Conviotions 392-403 (1988).

2. The postmodern destruction of the "self" may entail the destruction of its metaphysical integrity. As Professor Thomas indicates, however, a possible response in certain contexts is to shift the focus to the corporeal integrity of personhood: postmodernism, after all, has not destroyed the biological self. Does this view square easily with Professor Hutchinson's postmodern reconception of personhood?

3. Note that there are two sets of "selves" in Professor Thomas' depiction: the biological "selves" of gay men and lesbians, and the politically constructed "selves" that
commit acts of homophobic violence. Are both postmodern?

4. Professor Thomas relies on Michel Foucault’s suggestion that “power” can be generative. But can such an understanding be transplanted to American constitutional law? Would it destroy the public/private dichotomy? See, e.g., Cooper v. Aaron, 358 U.S. 1 (1958) ("private" mob violence in response to planned desegregation of Little Rock schools is “directly traceable” to state actions reflecting a determination to resist desegregation); Palmore v. Sidoti, 466 U.S. 429 (1984) (“The Constitution cannot control [private] prejudices but neither can it tolerate them.

C. POSTMODERNISM AND NORMATIVITY: THE DEMISE OF MORAL PERSUASION.

Joan C. Williams

RORTY, RADICALISM, ROMANTICISM: THE POLITICS OF THE GAZE


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The felt implausibility of nonfoundationalism has been exacerbated by the aestheticist style of many of its advocates. A good example is Friedricich Nietzsche, who argued that once God was dead, morality came tumbling after, leaving only the raw exercise of power. Perhaps the most influential contemporary practitioner of the aestheticist style is Jacques Derrida, with his vivid sense of the melodramatic, his abandonment of conventional philosophical prose, and his irresistible desire to shock the bourgeois by exploring in a shocking and stylish way the “free play” left over after the death of "metaphysics."

The aestheticist celebration of found freedom is profoundly threatening if it signals the freedom to torture innocents. To make nonfoundationalism plausible in ethics, Rorty’s resuscitation of pragmatism holds much greater promise. While aestheticists focus on what’s gone once God is dead, pragmatists focus on what’s left. Aestheticists aim to shock; pragmatists to reassure. Pragmatists’ central message is that the critique of absolutes is not so threatening, after all. We can function without absolutes, they argue; in fact, we always have. Words were tools even when we thought they were mirrors. The mere admission that they are not more than tools will not cause them suddenly to break.

* * *

In pragmatist ethics, objective moral certainties are both undesirable and unnecessary. Objectivity is undesirable for a very simple reason. As recent work shows, forging some coherency for neoprpagmatism will be difficult. If pragmatism is to prove more than "generosity of spirit in search of something to say," we as pragmatists ought to agree on a vigorous nonfoundationalism. Not only is objectivity undesirable; it also is unnecessary to explain our sense
of certainty about torture and other horrors.

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Why is the torture of innocents wrong? A Wittgensteinian strategy provides the most direct response. The torture of innocents is wrong because of the grammar of the sentence. If someone is "innocent," then by definition she should not be punished: by calling her innocent the speaker presupposes that conclusion. And "torture"? Let us begin by noting that, within our contemporary language of morality, torture provides the touchstone of moral bankruptcy. Whatever the Evil Ones did to their Innocents, if Amnesty International can successfully label it as torture, it has won the battle for moral condemnation. A successful charge that someone has tortured innocents ends the discussion: Torture's status as a trump card signals its central ideological role as a reference point of immorality.

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Pragmatists should object to the notion of moral absolutes, not because we want people to be free to torture or enslave, but because using the language of absolutes lets us evade the troubling fact that our moral choices fall on a continuum on which we set limits far short of our power to intervene. This notion of self-responsible freedom is a key theme in pragmatic thought.

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Without absolutes, anything is possible, but everything remains difficult.

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Notes

1. Does the "Wittgensteinian strategy" really offer a way to a pragmatist ethics? The example of the "torture of innocents" is easy. But is it wrong for the state to physically beat (e.g., with whips or canes) youthful offenders? Is it wrong for the state to execute persons with mental retardation? How, in these cases, does the Wittgensteinian strategy work?

2. Select a judicial decision that you believe was morally wrong. Can you make the case for the moral error in the decision without reference to moral absolutes? Can you persuade someone of a contrary opinion either with or without the reference to moral absolutes? Will you be able to persuade everyone?

3. Do people really make moral choices? Or is their range of freedom more limited than Professor Williams suggests?

Pierre Schlag

NORMATIVITY AND THE POLITICS OF FORM


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What should be done? How should we live? What should the law be? These are the momentous questions. These are the hard questions. These are the questions that animate virtually all of contemporary legal thought—from the most modest doctrinal reform proposals to the most ambitious utopian
speculation. In our classes and in our writings, we speak ceaselessly of ways to improve law. We seek to bring law into greater consonance with moral value, or the public interest, or justice, or some other worthy conception that celebrates its own take on the social good.

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It must thus come as quite a shock to discover (as one invariably does) that this passionate normative life of the law has no readily apparent relation to the actual structure or content of legal practice. For our students, the transition is extremely abrupt. For three years, the talk is of bringing law in accord with purposive reason, of refining the efficiency calculus, of being very pragmatic and oh so contextual. Rudely, however, these three years are brought to a close by the vulgar reality principle of the bar exam. This is quickly followed by one (quite possibly) last, exceedingly hedonistic vacation.

This vacation typically ends badly with the law student finding himself confined in a small cool cubicle with a window, a couple of diplomas one potted plant, and a very bad view. From that cubicle, law begins to seem far less genteel, far less intellectualized, and, most of all, far less respectful of its own inner normative text than it did in law school. In that cubicle (and in tens of thousands like it), the student-become-lawyer will learn and learn quickly that law is a power game. In that cubicle, doctrine, arguments, causes of action, defenses, and the like will undergo an almost magical metamorphosis. They will be recast as the rhetorical moves that allow lawyers, clients, and courts, to get more of what it is they want. In legal practice, the noble values immanent in positive law will lose much of their moral sheen. They will be recognized for what they effectively are: part of the arsenal of rhetorical levers by which institutional authorities can be instrumentally summoned to visit coercion on selectively named parties. The normative values embedded in the law will become part of the prime cultural set pieces by which lawyers manipulate the self-image of jurors, clients, judges, and other lawyers to get more of what it is the lawyers ostensibly want. For many students-become-lawyers, this will seem a very glamorous and exciting game—one that smacks of real consequences, real power, and real life. And it will continue to seem glamorous and exciting at least so long as the student-become-lawyer continues to believe that he is in control of the power game. It will not be until much later (if at all) that the student-become-lawyer will recognize that it is more likely the other way around.

If this seems like an unusually dark vision of the practice of law, it is likely to be so for those whose understanding of law is informed principally by the dreamy normative visions that issue routinely from the legal academy. Practicing lawyers, by contrast, are likely to find this vision unexceptionable: practicing lawyers experience law as a complex network of bureaucratic power arrangements that they have learned to manipulate. That is what legal practice is about. Words get used, arguments get made, institutional pressure builds, situations become increasingly intolerable, somebody gives, and a settlement is reached, or a contract is signed, or a jury comes back with a verdict. It’s law.
It's power.

Against this backdrop of bureaucratic power games, it becomes an interesting question just what all of our passionate and very moral normative conversation does or does not contribute. Against the backdrop of this power game of law, our normative conversation can seem exceedingly polite—given to a rather unbelievable romanticization of the enterprise we call "law."

Many legal thinkers understand this dramatic conflict in terms of an opposition between the "realities" of practice and the "ideals" of the legal academy. For these legal thinkers, it will seem especially urgent to ask once again: What should be done? How should we live? What should the law be? These are the heard questions. These are the momentous questions.

And they are the wrong ones.

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Normative legal thought tends to disavow its own performative dimension; it tends to hide from itself the kinds of social and rhetorical uses to which it is put. Rather uncritically and solipsistically, normative legal thought tends to concern itself only with its own "substantive" propositional normative content and its own normatively sanctioned uses. In this sense, we can say that normative legal thought is not a "serious" enterprise—but rather one that presumes uncritically that its main, or critical, significance is self-determined.

This fixation of normative legal thought on its own "substantive" propositional normative content is sustained by a second kind of prototypical mistake. Having abstracted its own discourse from the bureaucratic setting of L.A. Law, normative legal thought tends to assume that its own "substantive" propositional normative content somehow controls the way in which normative legal thought is used—that somehow its propositional normative legal content regulates the ways in which people get kicked around. Normative legal thought is thus prone to a naive form of identity thinking where the normative significance of a legal term in the legal academy is blithely assumed to correspond roughly to the same normative significance in law practice. But it's not so.

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The incommensurability of normative discourse with bureaucratic practice suggests that opportunities for the exercise of any "authentic," normatively competent behavior are extremely restricted within bureaucratic forms of life. For one thing, the organizational structure of bureaucracy—its zero-sum quality, its diffusion of causal lines of responsibility, its incentive/disincentive structures, and its routinization (raison de bureaucracy)—are often structured in a way to preclude and obstruct normatively competent behavior. For another thing, the incommensurability makes it unclear how one would recognize or name "authentic" normative bureaucratic behavior in the first place.

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[There is something about the way the theater of contemporary normative
legal thought is defined or established that leads legal thinkers away from taking cognizance of the scene in which they are acting or the kind of action in which they are engaged. Within the unspoken norms of legal thought, it is not considered legitimate, relevant, or serious to draw attention to this scene.

As you might imagine, this is an interesting recognition to achieve at this point because the very enterprise pursued here is precisely the sort that normative legal thought considers beyond inquiry—illegitimate, irrelevant, and unserious. What I am writing about in this article is thus the same thing as the resistance to what I am writing; I am trying to reveal the network of social, cognitive, and rhetorical forces that shape our thought and yet remain unconscious. I am trying to reveal the character of the legal unconscious. And we have now encountered a serious blockage—an unwillingness, an inability of legal thinkers to consider the scene of their own thought even when such a move would seem at once intellectually obvious and obviously beneficial.

This blockage is easily understandable in practical terms. For any of these approaches to question the cognitive, rhetorical, or social scene of their own writing would immediately place in question their present formal configuration.

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But while these are obvious risks, the critical reflexive turn also offers obvious intellectual rewards. Nonetheless the reflexive turn is virtually never taken. Why not?

The very way the question has been framed here presupposes what is routinely presupposed in legal academic thought: that legal thinkers (you and I) are sovereign individual subjects who choose their own discursive positions and thought processes and announce these positions within a self-sufficient and weightless medium of communication, that you and I as sovereign individual subjects make rational decisions about such questions as whether or not to take a reflexive turn.

Now, it is precisely these pervasively sedimented assumptions that prevent us from understanding why the critical reflexive turn is not taken. We have thus reached that critical point in this article where the same rhetorical constructions that disable legal thinkers from taking the critical reflexive turn are also disabling us (you and I) from understanding how the critical reflexive turn is not taken. Our thought, our theater, and our selves are rhetorically constructed so that the critical reflexive turns become (virtually) unthinkable. The very form and practice of our thought already establishes us as such competent conversants in an already rational and rationally legitimated discourse—as such relatively autonomous, coherent, integrated, rational, as originary, individual subjects—that, for the most part, we are simply not capable of even entertaining the requisite doubts to investigate how we are socially and rhetorically constructed. Indeed, even as you read this (and as I write it), it is difficult for each of us to remember that it is the way you and I think that is being put in question and that, therefore, at this very moment, there is no safe external place for you or me to go to adjudicate the truth or falsity of what is
being said by recourse to some set of pre-established, noncontroversial criteria.

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Indeed, as you read, you experience this conversation as an attack on the self—your self. But that is the point: it is perfectly understandable that you should feel assaulted. The rhetorical turn here is leading you, the reader, to deal seriously with the question of your own autonomy as reader. And, of course, this is not easy or pleasant because you, as a legal thinker, have already been rhetorically constructed to think of yourself as an autonomous, self-directing, rational, choosing entity, and this text, in its very form and rhetoric, is disturbing that self-image. It is rather rudely, without asking your permission, leading you to question the status of your self-image as such an autonomous entity.

Believe me, at this moment, we are most definitely not having a rational conversation among rational autonomous choosing entities. Rather, you are being manipulated and in a way you may not find particularly pleasant. For even as you recognize that you are being manipulated, you are also being reminded—even as you read the next word of this sentence—that you are not the autonomous, rational, self-directing, choosing entity you assume yourself to be. Part of what makes this text so trying at this point is that it is refusing to honor, even in the most superficial ways, the conceit that the reader is a rational, self-directing, choosing subject. And we (you and I) are so invested in and invested with that self-image that I almost feel I should apologize to you for some breach of some unspoken rule of author-reader courtesy. There has been a breach of good form here. And that is because the challenge has not been just a substantive, remote, theoretical challenge, but a challenge to the very form and practice of the thinking of the rational, self-directing, choosing self—your self.

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Inasmuch as we are constructed as sovereign individual subjects, the very idea of troubling the process, form, and practice of our own thought simply does not, and often cannot, occur to us. And insofar as it doesn't occur to us, it becomes our process, form, and practice not to inquire into the process, form, and practice of our thought. If we take a look at the field of legal thought, it is apparent that it is already constructed in our own image. The very process, form, and practice of legal thought systematically situates both author and reader in a rhetorical field that represents itself as an already extant, self-sufficient, virtually complete mode of rational discourse—just waiting to be put to good use by sovereign individual subjects (conversant in the field). The rhetoric constructs both reader and author as the beneficiaries of an already constituted, nonproblematic, nonparadoxical, already rationalized mode of argumentative strategies, reasoning moves, and the like—not just as a potential, but as an already realized, already in place, first-best world of reasoning and communication.

This, in a sense, is the crowning success of Enlightenment epistemology. But there is an ironic twist: Enlightenment rationality has become so
successfully engrained in our processes, forms, and practices that (ironically) we have (almost) completely lost the quintessentially Enlightenment capacity to question, to criticize our processes, forms, and practices themselves. So in another sense, the rationality of the Enlightenment has become so successful, so hegemonic that it has become immobilized through its own institutionalism. The Enlightenment commitments to reason, to criticism, and to rebellion against unreasoned convention have themselves become firmly embedded as a barely visible, largely unquestioned, almost unquestionable convention.

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What are the politics of normative legal thought? Political stasis and intellectual syndicalism. One of the consequences of the dominance of the normative, its positive prescriptive aspect, and its value orientation is that legal thinking becomes subordinated to political value commitments. I am not saying that legal thought has now become politicized in contrast to some imagined, prior period where legal thought was supposedly free from politicization. Rather, the claim is that legal thought has now become politicized along some rather static, fairly blunt, and normatively oriented lines.

For instance, consider this familiar division of the field: law and economics, mainstream doctrinalism, liberal legal theory, feminist jurisprudence, etc. Virtually each of these groups of legal thinkers depicts its situation and its intellectual approach as embattled—as engaged in a struggle for the direction of law. This configuration of the jurisprudential field is quite familiar to all of us. I could call it "premature politicization" or "the politics of nostalgia." I am going to call it both.

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What I am claiming here is that within the legal academy (and perhaps outside as well), not only the political programs, but the political identities of the left, liberals, and conservatives, are now very much in question. The left's glorification of the Sartrean individual subject helps produce a self that in its high Sartrean moments recognizes its own absolute freedom, but that for the rest of the day is shaped and driven by precisely the same market-bureaucratic practices that conservatives and liberals are also helping to establish, expand, and entrench. Liberal humanism, with its insistence on legalizing all aspects of social intercourse through its "rights" rhetoric, is in effect imposing a politically correct, totalitarian sameness on everyone. They can be called "rights," but that does not immunize them from becoming a kind of bureaucratic social control device. The conservative call seeks to preserve "our" traditional values, but because it is late, it helps entrench precisely the sort of market-bureaucratic state that has already rationalized, regimented, and effaced those values.

In this way the "value orientation" hegemony of legal thought does promote a kind of political stasis. Indeed, in the maintenance of this value orientation hegemony there is a great deal of unconscious complicity among the various groups. Conferences, colloquia, and symposia are typically arranged along the
usual normative break-lines among the camps such that all camps have to be represented. The militancy of each group serves to police and regiment not only its own forces, but, ironically, the forces of the other camps as well. There is a tremendous degree of intellectual and political reductivism among all groups. What we get is a kind of intellectual syndicalism, in which the jurisprudential order is maintained and the intellectual or research agenda is stabilized by an ironic yet tacit agreement among openly antagonistic parties.

No one chooses this state of affairs.

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[The] separation between the theater of the rational and *L.A. Law* thus finds one of its most material, and hence most durable and indelible inscriptions in the division between the legal clinic and the traditional classroom. The physical separation authorizes student role differentiation. The social significance of this separation is that it constructs students who behave as if the two worlds—the legal clinic and the traditional classroom—have little to do with each other. Students quickly learn that anything assimilated in the legal clinic is irrelevant to the traditional classroom in which the law is explored from "the internal perspective." The student learns that she can be one kind of law person in the clinic and a completely different kind of law person in the classroom. She learns one of the key lessons the legal academy imparts to its students: to internalize contradiction and to defuse contradiction by compartmentalizing the self.

This ability to compartmentalize the self in terms of performative roles becomes very important to the student once she becomes a lawyer—it is the technique by which the student-become-lawyer resolves the contradictions practice presents. It is the technique by which ugly actions are insulated in a compartment of the self and rationalized away. As the saying goes, "it's just my job." It is in this way that the lawyer is constructed to become a key site for the management of social contradictions.

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1. Is our "passionate and very moral normative conversation" relevant to the practice of law? If there is a divorce between what might be called the aspirations and realities of law, which should yield? Or does normative discourse offer no hope for realizing our aspirations—is it only simulated aspiration? Can there be anything else?

3. In what sense does recognition of the "legal unconscious" seem "obviously beneficial" and offer "obvious intellectual rewards"? Is it not plausible that relentless introspection can cause a "serious blockage" of its own? Is not the critical reflexive turn disabling in its own right? Is it ever enabling?

4. To whom is Professor Schlag writing? How is he able to take the critical reflexive turn? Does he think his readers will take that turn? Did you?

5. Is Professor Schlag correct that during at least portions of your reading: (a) you were being manipulated; and (b) you did not find it "particularly pleasant." How did you respond? Does that prove—or disprove—Professor Schlag’s thesis?

6. Taking his cue from the observation that modernism persists, "dominant but dead," Professor Schlag notes an "ironic twist" to the success of Enlightenment epistemology. But is deconstruction rational? If it is, then modernist epistemology ought to be fairly hospitable to the deconstructionist project. If it is not, then there is nothing really ironic about its immobilization. So, is deconstruction rational?

7. Is Professor Schlag correct that "No one chooses this state of affairs?" If the jurisprudential order is maintained "by an ironic yet tacit agreement," does this not reflect a choice? Is the real problem that legal academics—and other legal professionals—are constructed only to simulate choice, or are they simply embarrassed (or find it inexpedient) to admit that they choose the status quo?

8. At many law schools, clinics are housed in buildings separate from the other classrooms. Clinical credits are treated distinct from classroom credits. Clinic teachers may be on separate professional tracks. Many of the same observations hold for classroom courses—like trial advocacy, legal method, legal writing—that are known euphemistically as "skills courses." Why?

9. Professor of Philosophy Martha Nussbaum writes:

   I am sure that it is a terrible question for the law professor whether to encourage in students habits of thought that the legal profession on the outside will quickly stamp out, crush, extirpate. On the other hand, it seems to me that judges and legal thinkers could do with a bit more wonder of the Socratic sort: not unguided free play of the faculties, but a concerted rigorous inquiry into the subtleties of some foundational issue, informed by the relevant empirical information. I also think, with Socrates, that this sort of thinking is a good thing for human beings to do in general. So I am willing to say, let the law students learn to wonder, and then perhaps, wherever they are, they will feel the pressure of a Socratic question rising up to annoy them as they are trying to be simple.


Stephen L. Winter

CONTINGENCY AND COMMUNITY IN NORMATIVE PRACTICE


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My claim is that both the success and the very coherence of normative
practice are contingent upon community. But the concept of "community" that I will employ in this argument is not the conventional one that understands community primarily as a matter of political organization, geographic location, or consciously shared creed. Rather, my claim is that the social phenomena that correspond with each of these more conventional understandings are themselves possible only because community is first and foremost a cognitive phenomenon. In this view, what is referred to as a community is a group identification (whether partial or complete, self-conscious or not) that is a function or end product of common ways of understanding and living in a world. To put it another way, "community" is the name we give to a group of people who share a paradigm, a nonos, a culture, or a world view.

In large part, my argument will consist in the development and explication of just what I mean by this notion of community as a cognitive phenomenon. My premise, however, is that the internal determinants of community—and, thus, of all forms of normative practice—must be understood in terms of the cognitive processes of internalization and imagination.

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The full argument [on behalf of persuasion] would be rather straightforward: Because prescriptive normative practice attempts to constrain or act on the will of another, its effectiveness is limited by the will of the legal subject and her capacity to evade or resist compliance. Accordingly, the success of prescription is a function of either: (1) the favorable predisposition of the legal subject; or (2) the meaningful threat of the coercive power of the State. Persuasive normative practice, on the other hand, is by definition a noncoercive effort to engage with another to induce her willingly to arrive at and adopt a particular normative standard. In that case, all that is really needed is a clear playing field—something like a Habermasian ideal speech situation.

The ultimate aim of this essay is to demonstrate that prescriptive and persuasive normativity are necessarily dependent upon exactly the same preconditions. As a preliminary matter, however, one should consider how quickly the prescriptive/persuasive distinction collapses under examination. Every prescription, even "No Turn on Red," has a hortatory character; indeed, for the person who has internalized an ethic of compliance with legal directives, it is an exhortation entirely sufficient to persuade that person to behave in a certain manner regardless of the advantages of noncompliance (like getting home more quickly). For the driver who runs the light and disobeys the sign, its injunction is as much an effort at persuasion as prescription. Indeed, the more cavalier the driver, the more blithely the driver disregards the relevant traffic laws, the more it will be the case that the sign can be understood only as a last ditch attempt at persuasion.

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The distinction between prescriptive and persuasive normativity is no more stable when examined from the other side. Persuasive normativity cannot be understood apart from its prescriptive dimensions; in an important sense, every
act of persuasion has its origin and end in prescription. This is self-evidently true of normative legal scholarship. At the outset, it must take certain forms if it is to be recognized as legal rather than purely political and as scholarship rather than mere advocacy. Its yield, moreover, is explicitly prescriptive. The very point is to persuade the reader that a particular prescription should be adopted—whether it be the author’s proposed three-part test, theory of interpretation, or recommended approach to legal theory.

But this dependence upon prescription is no less real for the more ambitious, democratic versions of persuasive normativity. Every effort at normative persuasion, by necessary implication, presupposes that there is divergence amongst the initial normative positions. Except in the rarefied realm of pure theory, even the most utopian normative aspirations must take into account the possibility of imperfect agreement. It follows, therefore, that persuasive normativity is utterly dependent upon prescription. For, in the face of imperfect agreement, all efforts at persuasion must conclude in prescription. Moreover, if those prescriptions are to derive their legitimacy from the persuasive (rather than coercive) nature of the decision-making process, then that process must itself be premised on some prescription that specifies in advance the conditions under which dialogue will count as persuasion rather than coercion.

This deconstruction of the distinction between prescription and persuasion is more than a clever rhetorical ploy. It sets the stage for my argument that all forms of normativity—both prescriptive and persuasive—are unavoidably contingent on community.

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Persuasion entails "community" in the very sense that I have employed it. For it is only within a community of shared understandings that one could experience as noncoercive, noninvasive, and respectful of one’s freedom, a process in which one is the object of dialogic modulation by others. It is only when all the participants have internalized the same set of prescriptions as constituting a dialogue (and not, say, a diatribe or harangue) that undergoing dialogic modulation by others would be experienced as persuasion and not prescription.

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Much of this is familiar to us as the concept of a role model. We frequently miss the more profound implications of the concept, however, because we think of a role model as something external to the self. Yet, the power of a role model is internal—as we experience when we suddenly find ourselves sounding just like our parents or, in a moment of self-conscious reflection, we realize that the way in which we taught a class, made a point, or handled a question was exactly the way in which a favorite or influential teacher would have done it. It is in just this way that the self is constituted by and cannot be separated from its roles and other models. A "self" is a thickly textured complex of learned modes of interaction with the physical and social world; both the "self" and its "roles" are largely matters of what in psychology is called "internalization."
From this account of every self as necessarily a situated-self with a particular social history, one might conclude that every self must be a "unique" individual whose "content" is entirely contingent upon its peculiar life experiences. But this conclusion would mistake social construction for solipsism. The roles and other modes of interaction that constitute the "self" are acquired through interaction with others who themselves, in turn, have acquired those roles in the same way. Thus, the interactions necessarily take place in an already existing social context in which the actions and roles are already endowed with social meaning.

This means that what binds one person to another in a community is not the attachment between their respective non-detached roles, but rather the fact that they share the same way of understanding each other's performance of those roles and other modes of interaction. That is, they have learned and therefore share common ways of understanding and living in a world. They maintain this community by their mutual enactment of these roles or by their complementary and reciprocal engagement on the basis of these understandings. There is, therefore, no separation between the self and its communities. Self and community are mutually constitutive.

I have, so far, focussed on processes of internalization and said very little about the role of imagination. Imagination has nevertheless been an implicit part of the account. Once we have made the connection explicit, we will have established why normative practice is necessarily contingent upon community.

An understanding of a role as a mode of interaction with others necessarily implies that a role is not a determinate "thing," but rather a dynamic, adaptive pattern of actions and responses. Consequently, to speak of a role or a model as something that is internalized is just a conventional way of describing a more complex process that is necessarily imaginative. To acquire a role, one must abstract from practice, repetition, and experience a generalized, imagistic pattern of behavior that does not correlate with the original in a one-to-one fashion.

I have argued that there is never an exact correspondence, but rather an imaginative relationship between the model that is internalized and the behavior that it is modeled upon. If this is correct, it means that the processes of cultural learning and reproduction are characterized by slippage. If we conceptualize a community as a group of people who share common ways of understanding and living in a physical and social world, then the existence of slippage will mean that community is necessarily a relative phenomenon characterized by degrees of plurality and divergence.

If the community is in fact cohesive, then the participants may share a
commitment to empathize and identify with each other. This may lead them first to explore and ultimately to appreciate the perspective of the other. Indeed, this experience of mutual recognition and shared identification is probably the most salient characteristic of what we ordinarily take to be a community.

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You will have noticed, no doubt, that whether the participants set out to resolve their controversy through strategic interaction or through dialogue and "communicative action," the conditions of success are exactly the same. In either case, effective and efficient resolution will be a function of the degree to which they share internalizations and the capacity for imagination. In either case, community is the practical precondition for meaningful communication.

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In our conventional understanding, community is a background condition of social order against which individual acts of deviance are measured. Deviance, in this view, is a failing of the self; prescription (i.e., the law) serves as the occasional corrective that provides the right "external" motivation. Instead, I have argued that community is located in and reproduced by a self that cannot be abstracted from its social context nor understood apart from it. Which means that deviance is not so much a problem of wayward selves as it is an index of the relative degree of slippage within a community.

Conventional normativity blames the self for processes that are themselves dependent upon achieving and maintaining the right kind of community. One need only look to the ghettos that so frequently are only a stone's throw from our law schools to observe the degree to which, in our society, slippage has become social hemorrhage. . . . If, at times, the coherence and intelligibility of normative practice within the legal academy seems in similar jeopardy, it is for exactly the same reason: Both inside and outside the ivory tower, the conditions of community that are necessary to maintain its coherence are everywhere in disarray. It is not too soon to say that we are threatened by fragmentation and social disintegration.

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I have frequently argued that our linguistic and conceptual capacities are grounded in our physical embodiment. But if that is all we share, communication will be very difficult and rudimentary. To deal with the complex, intractable problems about which real law happens, we need a lot more to go on. My point is not that dialogue, persuasion, and normative practice are all impossible, but that their effectiveness is contingent upon community understood as a shared way of living in and understanding a world. This explains why my work keeps taking such a strongly communitarian turn. Ultimately, we must come to see it is our similar embodiment and shared social situatedness that jointly provide the common grounds upon which the work of empathy can—and must—be done.

Notes

1. How does Professor Winter's conception of community compare with others?
2. As Professor Winter notes, people may share certain linguistic and conceptual capacities as people. He suggests that these shared capacities will permit only a dialogue that is "very difficult and rudimentary." Do you agree? Professor Anthony J. Fejfar suggests that "a well-ordered society can only occur when each person in his or her own unique circumstances, seeks the common good in those particular circumstances, employing a fully developed critical moral conscience which integrates concrete and formal understanding (both intuitive and analytic), passionate loving, and interactive critical judgment." In Search of Reality: A Critical Realist Critique of John Rawls' A Theory of Justice, 9 St. Louis U. Pub. L. Rev. 227, 279 (1990).

3. How can community be constructed? If dialogue is premised on the existence of community, then dialogue obviously cannot provide the basis for its formation. What can? Experiential commonality? Can this be secured in a national community characterized by radical inequality? Is there no hope for community?

Margaret Jane Radin & Frank Michelman

PRAGMATIST AND POSTSTRUCTURALIST CRITICAL LEGAL PRACTICE


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The poststructuralist moment in critical practice is conceptual, diagnostic, and global. It fastens on intellectual structures and denies their analytic probity. It indicts whole discourses and all their works by showing their conceptual, categorical frameworks in a state of collapse. In the poststructuralist frame of mind, we search for dialectical fault lines implanted in discursive frameworks. We deflate argumentative paradigms built around a characteristic set (one for each target jurisprudence) of categories, distinctions, and oppositions. We show their failures of closure—perhaps by exposing addiction to a "fundamental contradiction," perhaps by exposing tactics of recursion and deferral.

The pragmatist moment in critical practice is, by contrast, empirical, epidemiological, and local. It notices characteristic kinds of errors or biases that recur when target discourses are deployed by nonideal—incompletely committed and assiduous—practitioners caught in specific cultural environments. The pragmatically minded critic does not deny or ignore conceptual instability. Neither does she hold that conceptual instability per se discredits a framework. Indeed, she does not especially care to discredit any discourse intrinsically or holistically, She rather seeks to evaluate the discourse in use (given its conceptual instabilities) by ordinarily complacent, culturally bound practitioners.

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From the poststructuralist vantage, all [rights-centered] jurisprudences are "riven by internal conflict between the demands for abstraction and for concreteness in legal norms." Universality implies transcendence of difference, a reach for consensus. So it requires that an order's fundamental premises of right be cast at very high levels of abstraction. But from highly abstract principles of right, convincingly neutral and consistent treatments of concrete
cases cannot be derived.

From this seed grow the distinguished critiques of rights—as inherently indeterminate or inherently too abstract to do more than provide rhetorical cover for hegemonic power—produced by writers like Dalton, Gabel, Klare, Olsen, and Tushnet. These critiques all make use of the antinomy of universality and consistency—the perception that the abstraction required of propositions of right by professions of universality forecloses the prospect of determinate (hence consistent) application to concrete cases.

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For example, it can be shown that abstract, universalistic propositions about rights of civil liberty and civil equality yield no determinate (hence can underwrite no consistent) answer to the question of government regulation of pornography or racist speech. It follows that those who have confident, "law-like" answers to the question produce them out of partisan views of social relations.

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Readers stung by such critiques too often read them as nihilistically intending their exposés of structural instabilities in normative discourses of rights as sufficient refutations of the discourses or their liberatory potentials. But often one can find in the critiques a pragmatic as well as a deconstructive side. In the pragmatic moment of critical practice, one may understand the structural weakness of a target discourse not as its already fatal flaw, but as its working interface with surrounding cultural dispositions. One may then consider whether the discourse is salvageable by work on those dispositions. When the pragmatic critic's answer is NO, as it sometimes is, no event of nihilism has transpired.

Of course, the answer may not be NO. The trouble with universalist rights discourse (the pragmatically minded critic might say) isn't simply structural instability; it is also complacency, incomplete commitment to go all the way down the emancipatory path that the discourse opens. More specifically, the trouble is that the complacent rights practitioners in a dominantly privatist-legalist culture too readily fly from the stresses of public commitment to the refuge of abstract rule. In the case of our example, the stress of public commitment means facing the conundrum of subordination recycled, universality subverted, through abstract, formal freedom of speech (the freedom of derogatory utterance that reentrenches subordination). The refuge of abstract rule means cleaving to privatistic, formal equality—the absolute ban on state-sanctioned, content-biased regulation. The pragmatist feels drawn to face the conundrum and deal with it, perhaps by the use of judgment in context—"balancing" or "line-drawing".

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The passions of rights-critics are not misplaced: people can discuss abstract freedom and equality forever and never lay a glove on subordination. Freedom can turn out to mean trading who you are and what you've got—markets as
usual. Free speech can turn out to mean pornography and racist hate. But it is still possible to think that the passion should be directed not against the very thought of rights, but rather at the characteristic failings of nonideal rights practice in our specific cultural context.

The knowledge of peoples of color, for example, has been that it is not just legal consciousness but racial consciousness that supports (among whites) the prevailing power dispensations in American society. In the experience of peoples of color, the universalistic idea of rights, indeed the very formalism of the idea, can become reconstructive. It can serve as a probe to the feeling—or if not to the feeling then to the nerve, to the motivation—of dominant group members who do not feel the "substantive" force of expostulations of need, or calls for reparation, coming from people they have learned to see as different and subordinate. The trick is to make dominant society confront itself in the mirror of its own most idealistic professions. Pragmatist critical practice here means seeing the possible effects, in practice and in context, of the formalism that is a hallmark of the jurisprudence of rights.

You can then, perhaps, take up where deconstruction sometimes ends. Deconstructions of rights sometimes end in the knowledge that abstract rights cannot be rendered concrete without help from partisan constructions of social reality. You adopt that knowledge. You want to use whatever is at hand in the work of dislodging bad-subordinative-constructions. One of the things at hand is the abstract, the aspirational, the formal idea of rights.

* * *

The jurisprudence of rights pragmatized—colloquialized, contextualized to conditions of cultural pluralism—shades into the jurisprudence of dialogue.

Dialogic jurisprudences focus on the search for social conditions, including cultural understandings of the ideas of law, legality, and rights, under which collective determinations of aspects of social life are consistent with personal freedom. They ask how the laws and rights issuing from dialogic interactions can possibly merit recognition as self-government that constitutes, reflects, and furthers such freedom—for all, universally. Jurisprudential dialogism belongs to a distinct tradition of political-moral thought, "in which nonconsensual influences on the self are perceived as coercive invasions of the autonomy of the subject, to be overcome by" participatory politics.

From the pragmatist vantage, what is the incomplete dialogist's telltale complacency? Surely, it is overconfidence, unexamined trust, in the extent to which "we" can all talk meaningfully, persuasively, and yet nondominatively to each other. The complacent dialogist admits social plurality but misgueses its depth. Maybe she sees a "society" strained by conflicts of interests. Maybe she does not focus hard enough on those who stand estranged from this society, this "we," by epistemic distance, by profounder conflicts of worldviews. Maybe she too readily assumes that all the members of society share enough in language and self-conception to allow for undominated dialogue... if only just up to and not beyond a certain point.
Such a point might be that of an "overlapping consensus." Consensus on what? Perhaps on the dangers and evils of pseudo-dialogic domination, majoritarian or bureaucratic tyranny. Also, then, on the consequent presumptive prudence of restricting the state to the promulgation of abstract rules, or to regulating in the "public" sphere, as its chief or characteristic mean for realizing the basic liberties of persons. But what, the pragmatist-minded critic may ask, has that construct, redolent of privatist-legalist culture, to say about entrenched racism and sexism speaking through "private" preferences, or about entrenched poverty based on "private" markets? How can we hope to approach or preserve a state of undominated dialogue without concerted assault on such stratifications? Yet how could we mount that concerted assault, with our politics under prohibition against non-neutral intervention into the social processes of ideological exchange?

From the poststructuralist vantage, on the other hand, dialogism's dilemma is that dialogue (insofar as it is not disguised coercion) presupposes community; but community is not, finally, a matter of will or sympathetic exertion but rather is a contingency of cognitive structures into which we are thrown. Deconstruction finds in the very idea of self-emancipatory political dialogue a disturbing conceptual instability: the collapse of conceptual walls between personal and societal, internal and external, self-active and compulsive; and the concomitant confusion of persuasion (choice, freedom) with prescription (necessity, compulsion). The dialogic idea entails "prescription that specifies in advance the conditions under which dialogue will count as persuasion rather than coercion. If this prescription is itself coercion—but what else could it be—then how can dialogue be undominated, a medium of self-emancipation?

To the pragmatist temperament, no such purely conceptual bind can be terminal to the practical pursuit of democratic, collective self-government. The pragmatist may still find it right to pursue the issue of the social and cultural conditions of self-government for all—universally—through democratic politics. Still, the question left by deconstruction cannot honestly or intelligently be ignored. Where can we possibly hope to find the unprescribed yet pre-dialogic "community" required for undominated dialogue?

Winter's answer to this phenomenologically modified deconstruction of persuasion/prescription is, one might say, another deconstruction: the deconstruction of nature/nurture that appears in his notion of "slippage." This "slippage" then represents the possibility of dialogue (not just recycling monologue), given physique-based cognitive commonality. Slippage instigates the evolutionary rise, in sharply differentiating social environments, of epistemic plurality. Winter argues, in effect, that in the condition of postmodernity, it is now epistemic plurality, not monism, that poses the problem for normative dialogue. The epistemic distances have grown too great, the ethers too rarified, to allow for any but the merest slivers of persuasive communication across the gaping subcultural fissures in our fractured society. Still (we read Winter as saying), the receding but never completely vanished physical substrates of cognitive likeness always offer—to those who will trouble to understand
them—the hope of slowly, laboriously, inching towards the cognitive community on which undominated dialogue depends. Winter joins Habermas. 

Poststructuralism joins pragmatism.

* * *

Structures or discourses that dissolve into each other conceptually may nevertheless tend in experience to be stubbornly different. It is not that someone temperamentally inclined towards deconstruction never looks to how problems are solved in practice, and it is not that someone temperamentally inclined towards (re)construction never faces up to structural incoherence. It is just that in practice we often find that those temperamentally inclined to poststructuralism emphasize the moves that confound our categories and shake our certainties, and those temperamentally inclined to pragmatism emphasize the moves that can function as ameliorative guidelines for ongoing projects.

In practice, it is useful to separate, sometimes, the poststructuralist and pragmatist moments in criticism. (Being of pragmatist temperament or at least in a pragmatist phase of mind at the moment, we think so.) We are talking about characteristic leanings, or habits of thought, not about logical necessity or entailment; but when it comes to thinking about the characteristic limitations of a discourse as it is used by imperfect practitioners, distinguishing these habits of thought can be important.

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Notes

1. Professors Radin and Michelman suggest that a legal thinker can be both pragmatist and poststructuralist, both deconstructive and reconstructive. Are they correct? Have they coopted (colonized/domesticated) deconstruction?

2. Professors Radin and Michelman note their concerns about the complacent dialogic jurisprudence. But what makes the dialogist "compliant"? Do structural forces contribute to this complacency? Does the very language of "dialogue"? Can committed dialogists will themselves beyond these limitations?

3. Professors Radin and Michelman suggest that the difference between the poststructuralist and pragmatist is essentially one of temperament. But what inclines someone toward poststructuralism? Toward pragmatism? Why does the pragmatist stop deconstructing and start reconstructing? Why does the poststructuralist continue the deconstructionist project? Will they generally find themselves doing the same things? Will they ever?

Richard Delgado

NORMS AND NORMAL SCIENCE: TOWARD A CRITIQUE OF NORMATIVITY IN LEGAL THOUGHT


* * *

Well, then, what should we do? A normative question, naturally—but normativity is deeply ingrained. Must we abjure the grand phrases, look for
other employment? What would replace priest-talk among the legal priesthood, if we did? And what about those earnest reformers, imbued with passion and zeal, anxious to move our society toward greater and greater reaches of... (fill in the blank with your favorite normative notion). Surely you are not accusing them, the heroes of our age, of being insurance adjusters too? And what would replace normativity? What would we do? A small step from the first sentence of this paragraph: What should we do?

A. What Would Replace Normativity? (What We Should Do)

What would replace normative legal thought is legal thought. One does not seek to replace a disease with another disease, but with health; a crutch not with another crutch, but with walking. We could look at and study law, actually observing and describing it for example. Law might become, almost, a branch of hematology. We might begin to notice things like beggars or the countless other wounded that our system throws up. We might focus for the first time on subsistence claims, appreciate the dance between huge bureaucracies and those they serve. We might descend from the abstractions of ethical discourse and its emphasis on deductive reasoning—this case is an example of that (a general rule, so I now know how to handle it)—and focus on this.

This raises the problem of all those normatives with finely honed rhetorical skills, and all those nearly finished normative manuscripts about love, compassion, equity, fairness, and so on, nearly ready to be mailed out, with the usual, predictable normative letter explaining why, dear editor, this article is the most normative of all and worthy of your esteemed pages. Only three answers occur to me: (1) we can hold a garage sale; (2) we can export our excess normative expertise to Third World countries, many of whom seem anxious to develop bureaucracies like ours; or (3) we can try retraining programs, like those set up in the wake of the earlier two revolutions in legal thought. Law professors are smart; they will pick up on the new skills soon enough. Look what happened when the Critics and Realists came. The time between a new critique and its successor is becoming shorter and shorter, the adjustment easier. We can offer summer seminars, perhaps sponsored by the National Endowment for the Humanities.

B. What About the Cause of Social Reform?

What about Martin Luther King, Jr., I Have a Dream, the law and theology movement, and the host of passionate reformers who dedicate their lives to humanizing the law and making the world a better place? Where will normativity’s demise leave them?

Exactly where they were before. Or, possibly, a little better off. Most of the features I have already identified in connection with normativity reveal that the reformer’s faith in it is often misplaced. Normative discourse is indeterminate; for every social reformer’s plea, an equally plausible argument can be found against it. Normative analysis is always framed by those who have the upper hand so as either to rule out or discredit oppositional claims, which are portrayed as irresponsible and extreme. Normative talk is
deadening—it points us off into abstraction when it is particularity and detail that kindle conscience. Normativity is a kind of oil that lubricates the shifting plates of our experience, helping us ignore our inconsistency and others' pain. It sets us up to be taken in and blind-sided by impersonal bureaucracies. It enables us to act according to lower ethical standards than the ones we might otherwise adopt. It does all this while enabling us to be comfortable with our roles; normativity feels good.

Yet normative appeals sometimes do move an audience, do cause a listener—if not to change his or her position for another—to act on a principle he or she already subscribes to. There is nothing wrong with employing normative arguments on behalf of one's cause. Sometimes a kind driver will actually stop for the helpless doe. But one needs to be prepared to deal with the road as well, and if one has the ability to do that, one can probably dispense with the normative appeal. Accustomed to using normativity as it universally is used, that is, in its "normal science" fashion to validate and praise the status quo, most audiences will generally react to the reformer's message with either anger or puzzlement. Members of the control group will be angry: How dare they use that argument against us? And persons not members of either the insurgent or the control group will respond with puzzlement: I thought they meant the other thing by justice. At best, academicians make law more moral in the manner of a sanitation department—we are the sanitizers of a decaying world. For example, the women's movement did not gain the success that it did because it appealed to men's better natures.

Cannot dead discourse nevertheless be useful? Of course. But we must be on guard against over-confidence. The game is rigged against us—one cannot use categories like justice, equality, etc., to overturn the very system of justice and equality that talks, redefines, and promotes justice and equality endlessly, believes itself to be the paragon, the living embodiment of those virtues (with a few modest blemishes here and there; nobody's perfect). We must above all avoid the "category" mistake of speaking to the insurance adjuster when we should be addressing the Home Office.

But, dear folks and friends, the Home Office, when you get there, you will find, does not speak normatively at all, but a sharper, brusquer, unfamiliar language full of consonants and commands. This language will not pretend that we are all equal, precious creatures before God. It will have passionate commitments of quite different types. But if we talk endlessly, futilely, in the other language, we will never learn what they are.

Notes

1. Is normativity vital to social progress? "[I]t seems fair to point out," Professor Regina Austin writes, "that normative concerns have not and never will move poor blacks from the periphery to the center of the economy." Commentary: Concerns of Our Own, 24 Rutgers L.J. 731, 731 (1993). But would anything be lost with the demise of normativity? Consider Professor Anthony E. Cook's suggestion that "spirituality" must remain a part of the critical vision:

This spirituality is the cry of human anguish across the chasms of class, gender,
race, and ethnicity. This spirituality is the longing for understanding based [on], yet not wholly defined by, the particularities of our own identities and experiences. This spirituality is an attempt to balance the uneasy tension between a unifying universalism and a parochial particularism. This spirituality is an understanding that when all is said and done and the final act of our struggle for justice is played upon the stage of life, our legacy must be one of love, a legacy that faithfully struggled to mend the broken humanity of our fractured existence, a legacy of love that tried to heal the wounds inflicted on those marginalized within our own race as well as the races of others, a legacy of love that flows outward from the basin of our own experiences, intellectual histories and cultural traditions to connect with other tributaries that flow once again into the gulf of common concern.


2. Well, then, what should we do?

ADDITIONAL READINGS


Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communities (1980).

Mary Joe Frug, Postmodern Legal Feminism (1992).


