ONE HUNDRED YEARS OF MODERN LEGAL THOUGHT: FROM LANGDELL AND HOLMES TO POSNER AND SCHLAG

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One hundred years ago, a distinctively modern condition, what some have called "legal modernism,"[1] came to dominate and shape the visions and ideas of modern legal thought. The influence of legal modernism has been pervasive and long-lived. It is difficult to identify a single theoretical development in this century that has not exhibited the effect of the form, the logic, and the implicit beliefs of legal modernism. The form, logic, and style of legal modernism can be found in the development of mainstream legal theory as well as contemporary movements in legal thought, such as critical legal studies, law and economics, feminist legal theory, and law and literature, that have been critical of mainstream legal theory. It would seem that legal studies have never quite overcome the influence of legal modernism, though many have tried to shake free from its influence.[2]

What, then, is "legal modernism"? Legal modernism is an aesthetic, political, cultural and intellectual movement, or set of movements, motivated largely by the lawyer's romance, faith, and, yes, obsession with the central idea that it is possible to uncover and explain the essential truths of the world by employing the correct methodology, narrative, technique, or mindset. Legal modernism is the lawyer's Enlightenment project to perfect and render pure law's claim to foundational authority.[3]

 Professor of Law, Brooklyn Law School. This essay develops a theme from my recent book, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END, *infra* note 1. I would like to thank James Fanto, Stephen M. Feldman, and Pierre Schlag for sharing with me their reactions to my work. The writing of this essay was supported by a summer research grant from Brooklyn Law School.

1. *See, e.g.*, DAVID LUBAN, LEGAL MODERNISM (1994); David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656 (1986); STEPHEN M. FELDMAN, *From Modernism to Postmodernism in American Legal Thought: The Significance of the Warren Court, in* THE WARREN COURT: A TWENTY-FIVE YEAR RETROSPECTIVE (B. Schwartz ed., 1995). *See also* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995) [hereinafter POSTMODERN LEGAL MOVEMENTS].

2. "Jurisprudential ideas are rarely born; equally rarely do they die." NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (forthcoming 1995) (manuscript at 3-4, on file with author) [hereinafter PATTERNS OF AMERICAN JURISPRUDENCE].

3. *See, e.g.*, Morton Horwitz, *Forward: The Constitution Of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 32-33 (1993) (describing how the Enlightenment's picture of art and science as a "mirror of nature" shaped and destabilized the conceptualism of constitutional law during the past half century).

My description of Enlightenment ideology was influenced by ROY BOYNE & ALI RATTANSI, *Theory and Politics of Postmodernism, in* POSTMODERNISM AND SOCIETY (R. Boyne & A. Rattansi eds., 1990). In law, the Enlightenment project can be discovered in forms of legal scholarship seeking to discover some source—either some internal legal logic (*e.g.*, a conceptual process or normative principle) or some external process or principle (*e.g.*, some economic, political or social concept, principle or force)—as law's foundational authority. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 225-75 (1986) (describing and defending a normative foundation of legal decision-making based on the idea of "law as integrity"); HENRY M. HART, JR. & ABERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tentative ed. 1958) (describing and

Legal modernism reflects the confidence that has come from the belief in the powers of legal reason to penetrate the essential mysteries of the legal and social worlds, rendering them amenable to legal authority and control.

Until recently, legal theorists were unaware of the influence of legal modernism. Indeed, legal thinkers did not become aware of the existence of legal modernism until a rival perspective, postmodernism, appeared in the legal academy and challenged the visions, ideas, and practices of modern legal thinkers. In law, postmodernism signals a movement away from forms of legal modernism premised upon the belief in universal truths, core essences, or foundational theories. Postmodernists question the modernist's aspiration to discover the objective truth about the world by challenging the modernist's effort to endow law with qualities of "objectivity," "neutrality," "autonomy," "internal integrity," "consensus," and the like. However, because postmodernism is itself an unstable category (and because the tradition it challenges is also unstable), it ends up meaning many things to different people. Postmodernists would, in fact, resist the effort to reduce the meaning of postmodernism to a single conceptual definition or interpretative strategy.[4]

It would also be a mistake to conclude that jurisprudential postmodernism is something that is fundamentally different from jurisprudential modernism, or that postmodernists harbor some dark desire to be the new jurisprudential masters of the legal system. Postmodern legal criticism should be characterized not by its ability to transcend the style and aesthetic of traditional legal studies but rather by its ambivalent and inexorable link to the current situation in contemporary legal studies. Postmodernism's critical dimension lies in its problematic relationship to the modernist tradition it attempts to identify and criticize.[5] What postmodernists do is intensify dissatisfaction with the *narrowness* of professional knowledge about the law.

Postmodernists do not, therefore, claim that they can rescue legal modernists from the predicaments and paradoxes of modern law. Indeed, postmodernists recognize and embrace these predicaments and paradoxes in their own narratives and practices. They do this because they believe that the texts, discourse, vocabulary, and grammar of the professional field cannot be "intentionally" overcome by a lone author. Moreover, the existence of predicament and paradox in the texts and discourse of modern legal theorists, as well as those of everyone else, are seen by postmodernists as part of the current

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defending a process foundation of legal decision-making); CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871) (establishing a form of legal logic as the foundation of contract law). Many other examples of this could be cited. *See also* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 9-23, 424-33 (1990) (describing the rise and fall of the lawyer's traditional faith in the autonomy of law).

4. *See* POSTMODERN LEGAL MOVEMENTS, *supra* note 1, at 2-5. *See also* Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice*, 88 NW. U. L. REV. 1046 (1994).

5. *See* Andreas Huyssen, *Mapping the Postmodern*, 33 NEW GERMAN CRITIQUE 5 (1984).

intellectual "situation" they call the postmodern condition.[6] In other words, postmodernists do not claim that they stand outside of the system they criticize.

In this Essay, I will attempt to offer a description of postmodernism by focusing on how postmodernism relates to the current situation of modern legal studies. In particular, I argue that postmodern legal criticism arises from the attempt of contemporary legal theorists to develop new legal movements in order to overcome a certain predicament. This predicament—the modernist's predicament—has been precipitated by new forms of scholarly legal criticism increasingly departing from the traditional methods and theories that have historically supported the modernist's faith in a universal method and perspective for engaging in meaningful legal analysis. The predicament of modern legal studies is that it has become increasingly difficult to maintain the modernist's faith in an academy and legal culture fragmented by diverse perspectives; methodologies; and, theoretical, as well as cultural, social, political, and literary, traditions.

For much of this century, legal thinkers have worked hard to discover general principles and operative processes that a consensus of the bench, bar, and the academy would regard as the foundational "rules" of the legal system. This effort has increasingly come to be associated with the values and perspectives of a legal culture premised upon the overriding importance of reaching consensus and agreement. Some legal scholars claim that the law enforces a type of consensus based on the views, perspectives, and interests of a particular group in American society. Some believe that modernist legal culture entrenches the professional habits and normative aesthetics of a fictitious and imaginary reasonable, rational person.

Many people believe that the normative discourse of modern law's rational person—the discourse of rights, legal process, and neutral principles—has worked to entrench subtle forms of discrimination against non-traditional cultures. Some people believe that the law and its discourse have failed to take seriously other perspectives and other experiences framed by the lives of Native Americans, Latinos, African-Americans, Asian-Americans, and women and gay people of all cultures.[7] For others, the problem is that the law has failed to develop a more sophisticated understanding of the world based upon the other knowledges and other cultural traditions (*e.g.*, the knowledges and

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6. For those who identify postmodernism with moral relativism or "nihilism," the arrival of postmodernism in legal studies may seem alien—indeed even frightening. *See* Pierre Schlag, *Values*, 6 YALE J. L. & HUMAN. 219, 231-32 (1994). In this essay, I argue that postmodernism must be understood not so much as an oppositional or deviant movement (though to a degree it is), but rather as an inevitable development in the evolution of modern legal studies. I want to insist, as Pierre Schlag has insisted, that if there is something "frightening" or "nihilistic" about postmodernism, it is because a "frightened and weary perspective"—call it legal modernism, or a particular understanding of the "law," feels threatened by its own state of development. *Cf. id.*

7. Contemporary culture, of course, is not monolithic; it is comprised of many smaller cultures. Within each smaller culture one can discover fundamentally different perspectives, life-styles and languages for interpreting and resolving conflict. Hence, while modern law aspires to govern all people of different cultures under a universal "Rule of Law" perspective, the different cultures of society challenge law's claim that there should be one Rule of Law for all people of all cultures. With this realization has come a crisis of legitimacy which many attribute to postmodernism. In law, this "crisis of legitimacy" has been brought about by the destabilizing tendency of the legal modernists' effort to create new movements in law.

traditions of non-Western philosophy, feminism, critical social theory, cognitive theory, etc.).

In response to these frustrations, legal scholars of different political orientations have in the last few decades helped form legal movements attempting to make law more responsive to changing values and attitudes resulting from the diversity and plurality of an increasingly multicultural world.[8] From this effort has come what many now regard as postmodern legal criticism. In questioning the fundamentalism of modern law, postmodernists attempt to bring out the perspectives and narratives of other subject identities, other cultures, and other traditions marginalized and ignored by modernist legal culture. Postmodernism can thus be understood to be a form of "identity" criticism aimed at making law more responsive to the interests and needs of a multicultural world. In this important sense, postmodernism is not just a matter of style or aesthetics but is rather a new form of legal criticism that purports to provoke new questions about the relation between law, culture, and politics.

It is thus fitting that in a legal symposium honoring the 100th year anniversary of a great American law school we pause to consider the intellectual aesthetics, moods, and styles of modern and postmodern forms of legal thought. My effort here is to describe in a very general way the basic pattern, style, and aesthetic of modern and postmodern forms of jurisprudence. I argue that postmodern legal thought is the most recent "cycle" in the development of jurisprudential forms that can be traced back to the early part of this century when legal modernism first emerged. The recent postmodern "cycle" in legal studies presents, however, the very real possibility of a completely new intellectual direction for legal studies—one which signals a potentially transformative paradigm shift in legal thought.

Part I will briefly review the methods and dominant themes of modern legal thought. These themes reflect the intellectual background of twentieth-century legal modernism. I have identified these themes within the scholarship and teaching of two enormously important figures in the intellectual history of American law: Christopher Columbus Langdell and Oliver Wendell Holmes.[9] Part II will attempt to describe contemporary

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8. I have in mind here the scholarly legal movements of the 1970s and 1980s such as law and economics, critical legal studies, feminist legal theory, law and literature, critical race theory; as well as specific minority critiques of law presented by the gay and lesbian, Asian American, Native American, and Black feminist movements. These movements, and the critiques of law they have created, have brought diverse forms of legal criticism to legal studies that represent a more radical movement away from modern to postmodern jurisprudence. Each of these movements offers a constellation of ideas about law that has served wittingly and unwittingly to bring out marginalized and hidden perspectives within modernist legal culture. What is unique about these movements, and what distinguishes them from the law and society movement of the 1960s is that they signal the possibility of a new era in legal studies developed from a new critical understanding of the relationship between law, language, culture and politics. *See* POSTMODERN LEGAL MOVEMENTS, *supra* note 1, at chs. 5-10; *see also* Gary Minda, *Jurisprudence At Century's End*, 43 J. LEGAL ED. 27 (1993); Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L. J. 599 (1989); *infra* notes 63-72 and accompanying text.

9. I wish to note at the outset that I am not suggesting that Langdell and Holmes were responsible as originary agents for the development of legal modernism. Rather, Part I attempts to show how the work of Langdell and Holmes exemplifies the themes of modernity that were unfolding during their lifetimes. The point

trends in legal scholarship that arose during the 1970s and 1980s and sowed the seeds for postmodern legal criticism in the 1990s. In Part III, I will focus on two sides of postmodern legal criticism reflected within the work of two prolific contemporary writers and scholars: Judge Richard A. Posner and Professor Pierre Schlag. While they may disagree, I will attempt to show how Posner and Schlag represent two sides of postmodern jurisprudence, just as Langdell and Holmes represented two sides of legal modernism. The conclusion speculates on the meaning of postmodernism for the future of legal studies and also, hopefully, stimulates interest in the study of the contemporary legal version of modernism.

I. LEGAL MODERNISM

In America, modernism became a dominant style as social theorists in the late nineteenth century applied the work of Charles Darwin and Adam Smith to social problems.[10] From Darwinism, modern theorists developed the notion that truth and knowledge develop on the basis of an evolutionary process driven by the quest for mastery and perfection.[11] From Smith, modern theorists developed political and social theories of individualism and free choice to explain legal and political concepts of individual liberty. Smith's idea of economic individualism provided support for the image of the "invisible hand" regulating the operation of markets. Nineteenth-century society was thus thought to be regulated by some "ideal" model of the individual.[12] The influence of these ideas in law can be found in the writing and teaching of two of America's greatest legal teachers and thinkers: Christopher Columbus Langdell and Oliver Wendell

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is that legal modernism must be understood as a "way of being" and, as such, cannot be attributed to the work of a lone author.

10. Undoubtedly, the intellectual condition that initiated the aesthetic of modernism in legal studies developed from Enlightenment philosophers who expressed faith in the powers of human reason to unlock the mysteries of the world. *See, e.g.*, IMMANUEL KANT, CRITIQUE OF PURE REASON, (Norman K. Smith trans., St. Martin's Press, 1965). For a recent defense of this tradition in contemporary legal studies, see Martha C. Nussbaum, *Valuing Values: A Case for Reasoned Commitment*, 6 YALE J. L. & HUMAN. 197 (1994).

11. Darwin's evolutionary thesis located humanity within the animal kingdom and "made it plausible to treat human mental capacities as evolved functions of natural organisms, arising from simpler forms of animal behavior as a result of their survival-promoting tendencies." Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 796 (1989). This evolutionary form of thinking encouraged philosophers and social thinkers to internalize a positivist autology that separated mind from matter. It enabled intellectuals to contemplate the possibility that nonbiological processes of social relations developed in an evolutionary manner. Scholars in various academic fields used evolutionary thinking in their analyses of nonbiological processes, such as social and political events. *See* EDWARD A. PURCELL, THE CRISIS OF DEMOCRATIC THEORY, SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 5 (1973). Scientific naturalism nurtured the modernists' obsession with the existence of autonomous spheres of pure reason for discovering the objective order of the universe. As scientific naturalism spread, American lawyers began to develop naturalistic and scientific theories for law and jurisprudence.

12. *See* LAWRENCE FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE 27, 31-2 (1990) (describing how nineteenth-century individualist ideology "presupposed a particular kind of society and generated a particular kind of legal order").

Holmes.[13] Both men developed modern approaches to legal studies based on ideas of scientific naturalism and competitive individualism which can be traced to Darwin and Smith.

A. Langdell

Langdell, of course, is the man who is best known today for a number of spurious notions about law and legal education.[14] Langdell believed that "law is a science," that the law school classroom is analogous to a medical school laboratory, and that the case method of legal instruction[15] is analogous to what medical students do when they dissect cadavers under the tutelage of a trained medical doctor for purposes of learning about the laws of biology and anatomy. The following statement from the preface of Langdell's contracts casebook, *Selection of Cases on the Law of Contracts*,[16] the first modern law casebook to be published in America, captures the essence of his pedagogy:

> It is indispensable to establish at least two things, first that law is a science; secondly that all the available materials of that science are contained in the printed books. . . . But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for any purpose of systematic study. Moreover the number of fundamental legal doctrines is much less than is commonly supposed; the many great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found

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13. *See also* PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at ch. 1 (examining the patterns of American jurisprudence developed from the ideas of Langdell and Holmes).

14. It has been said that "[w]ith [Langdell's] appointment [at Harvard], modern American legal education began to evolve." PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 16. Duxbury notes that Langdell was the protegé of Harvard's president, Charles William Eliot. PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 16. Eliot, a mathematician and chemist, while at the Massachusetts Institute of Technology, developed the "laboratory classroom method" for teaching of chemistry. When Eliot was later appointed president of Harvard University, he advocated the use of the "laboratory method" of instruction for other disciplines. According to Duxbury, "Langdell looked to Eliot's method of teaching to find the separate but compatible 'jurisdiction' which would provide him with the precendential authority and guidance that he needed" to develop and enhance the reputation of Harvard Law. James Bar Ames, Langdell's successor at Harvard, was largely responsible for successfully launching the case method of law teaching at Harvard. PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 17.

15. The Langdellian initiative was launched with the case method of instruction, which dispensed with the traditional lecture method of instruction and eliminated the necessity of clinical experience. The basic idea was that students would be required to read all the relevant cases in a field of law. The cases were selected by the law professor and published as a casebook. The professor would then engage a Socratic-method of rigorous questioning in the classroom for the purposes of guiding students in the discovery of the "true" principles of law. Underlying Langdell's case method was faith in the powers of reason to uncover the essential truths of the law. PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 17.

16. LANGDELL, *supra* note 3.

> in its proper place, and nowhere else, they would cease to be formidable from their number.[17]

This statement expresses one of the great unfulfilled promises of legal modernism: the belief that the deep structure of law is knowable, that fundamental principles can be discovered from an examination of complex phenomena, and that the secrets of the law are intellectually and rationally discoverable through the application of the correct scientific-like methodology. These ideas are characteristic of the scientific naturalism associated with Darwinian thought of the early nineteenth century.

Langdell's idea of "law as science" thus developed from the notion that law was a "mirror of nature."[18] Law was thought to be based on a natural and fixed evolutionary principle not unlike what Darwin observed in his evolutionary studies of the animal kingdom. Law, like science, was viewed by Langdell as involving a progressive and incremental process that could be discovered like an empirical fact. Ideas of scientific naturalism, associated with Darwin's theory of evolution, thus helped to frame a highly influential perspective for American legal studies.

Langdell's version of scientific naturalism enabled legal analysts like Langdell to believe that they could, if they employed the correct method and perspective, discover "right answers" for the legal problem at hand. Langdell argued that the universal principles of law could be discovered by studying a limited set of appellate court decisions for each field of law. It was the law professor's responsibility to collect these cases in a single text, called a casebook, and to instruct law students how to discover the principles of law in the cases through Socratic case instruction.[19]

It has been said that Langdell was "a reclusive, unworldly and uncharismatic scholar, a poor communicator who suffered from failing eyesight."[20] For all of his flaws, however, Langdell was a smashing success in bringing a new generation of professional academic lawyers to the law school who, following Langdell's model of legal science, modernized legal education and the study of law.[21] Indeed, largely as a result of the Langdellians at Harvard, the modern law school as we know it was born.[22] In keeping with the spirit of

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17. LANGDELL, *supra* note 3, at *viii*.

18. The picture of law and science as a "mirror of nature" is the Enlightenment's picture of art and science. *See* Horwitz, *supra* note 3, at 32-33 (describing how the picture of a "mirror of nature" describes the influence of modernism in constitutional law for the past half of this century).

19. *See* PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 17-18.

20. PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 23 (citing SAMUEL WILLISTON, LIFE AND LAW 200 (1940)).

21. Prior to Langdell's arrival at Harvard in 1869, American law schools were largely trade schools operated by full time practicing lawyers and judges who lectured by reading verbatim from reported cases, legal treatises and legislation. The vast majority of law students in the pre-Langdellian era learned the law by gaining employment as an apprentice in law offices. *See* PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 19-20.

22. Following Langdell's model at Harvard, a new generation of academic lawyers gave up on private practice, traditional lectures, and rote memorization, and instead turned their attention to the theoretical study and teaching of law and legal reasoning. *See* PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 19-20. Law teachers became serious "academic lawyers" who could claim for the very first time that law teaching was

Enlightenment, Langdell had *faith* in the powers of science and reason to uncover universal truths.

Langdell's legal science has since evolved to the modern view that law is a complete, formal, and conceptually ordered system that satisfies the legal norms of objectivity and consistency. Completeness meant that this system was capable of providing uniquely correct solutions or "right answers" for every case brought for adjudication.[23] Formality meant that the system was capable of dictating logically correct answers through the application of abstract principles derived from cases.[24] The system was conceptually ordered to the extent that its substantive bottom-level rules were coherently derived from a small number of relatively abstract principles and concepts, creating a holistic system.[25] These norms came to represent the classical orthodox system of legal modernism reflected within the styles of legal thought known as legal formalism, legal positivism, or what many have called conceptual legal thought.[26]

If law could be a science, then legal studies could be approached from the "scientific perspective" required for laboratory experiments testing the validity of a hypothesis. Law professors, following Langdell's vision of legal science, could claim that the law could be analyzed as a system consisting of a set of universal principles, policies, and rules. The reduction of law to scientific concepts systematized by an abstract general method also rendered legal apprenticeship largely obsolete as a means for professional law training, since it was now thought that law students no longer needed to study law as a practice; all that one needed was a classroom, casebooks, and a teacher trained in the Socratic method of instruction.[27]

The modern American law school, modelled after Langdell's Harvard Law School, subsequently enjoyed membership in the university community with equal, if not greater, stature and status.[28] Law professors could consequently become serious academics in the

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a distinct academic endeavor requiring special skills and insight. As Langdell himself explained: "What qualifies a person . . . to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law." Christopher C. Langdell, *Harvard Celebration Speeches*, 3 LAW Q. REV. 124 (1887).

23. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 6-8 (1983).

24. *Id.* at 8.

25. *Id.*

26. *See* POSTMODERN LEGAL MOVEMENTS, *supra* note 1, at ch. 2. "Conceptualism is the project of structuring law into a system of classification made up of relatively abstract principles and categories." Grey, *Holmes and Legal Pragmatism, supra* note 11, at 822. Conceptualism ("law as logic") is what Karl Llewellyn called the "Grand Style" in American legal thought—a form of logic that classifies legal phenomena on the basis of a few fundamental abstract principles and concepts developed from the distinct methods of legal reasoning. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 35-45 (1960). Grey states that conceptualism "describes legal theories that place a high value on the creation (or discovery) of a few fundamental principles and concepts at the heart of a system, whether reasoning from them is formal or informal." Grey, *Langdell's Orthodoxy, supra* note 23, at 9-10.

27. Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law,* 78 CAL. L. REV. 1441, 1455 (1990).

28. *Id. See also* Robert Stevens, *Two Cheers for 1870: The American Law School, in* LAW IN AMERICAN HISTORY 405 (D. Fleming & B. Bailyn eds., 1971).

university, joining other professors in the common quest for the discovery of truth. These developments permitted law to be studied as a "normal science," and it provided legal academics with faith in their ability to overcome the predicament of modern law through the development of a professional method and discourse to locate and defend the internal logic of the law and its processes.

B. Holmes

The course of modern American jurisprudence was influenced by another great legal modernist: Oliver Wendell Holmes.[29] Holmes, of course, is a legal icon in the history of American legal thought; his humanity was long ago turned to marble as hordes of historians and legal theorists idolized and mystified the man.[30] Nonetheless, there is no denying Holmes's heavy hand on the course of American jurisprudence. Indeed, the modern era in jurisprudence did not bloom full-flower until Holmes arrived on the scene. It has been said that "[i]f Langdell gave the new jurisprudence its methodology, Holmes, more than any one else, gave it its content."[31] For this, Holmes is now regarded as "one of the most modernist of modern thinkers."[32]

Holmes's modernism, however, was different from that of Langdell. Langdell embraced the deductive method of formal logic and thus believed in the possibility of discovering solutions to law's problems through human reason. Holmes, on the other hand, was a skeptic. He downplayed the importance of the deductive method of formal logic and instead directed his attention to the world of brute power and experience. Holmes's skepticism enabled him to accept uncertainty and the intellectual darkness that comes from doubting truth.[33] As John Patrick Diggins has recently explained, Holmes's "genius was to shift legal thought from theory to practice. [Holmes believed that the] student and scholar should study not what the judges know but what they do, and regard law as a function of need rather than an embodiment of truth."[34]

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29. Holmes, America's most famous jurist, was a student at Langdell's Harvard Law School. He briefly served as a professor at the law school until becoming a judge on the Massachusetts Supreme Court. He eventually took a seat on the United States Supreme Court and remained active on that bench into his nineties. *See, e.g.*, BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 376-96 (1993). Holmes was a deeply skeptical, but practical man. Holmes's professional life, and thus his view of jurisprudence, were shaped by his experience as a judge.

30. As the late Grant Gilmore once explained: "Holmes is a strange, enigmatic figure. Put out of your mind the picture of the tolerant aristocrat, the great liberal, the eloquent defender of our liberties, the Yankee from Olympus. All that was myth, concocted principally by Harold Laski and Felix Frankfurter, about the time of World War I." GRANT GILMORE, THE AGES OF AMERICAN LAW 48-49 (1977) [hereinafter AGES OF AMERICAN LAW].

31. *Id.* at 48.

32. JOHN PATRICK DIGGINS, THE PROMISE OF PRAGMATISM, 344 (1994) [hereinafter PROMISE OF PRAGMATISM]. Diggins goes on to suggest that "Holmes is almost postmodern in that the doubts and tensions that troubled other thinkers like Adams—the tension between knowledge and experience, events and meaning, truth and change—scarcely concerned Holmes. . . . Holmes savored life. A natural skeptic, he felt no need to flee the 'irritation of doubt' to arrive at settled beliefs." *Id.*

33. *Id.*

34. *Id.* at 350-51.

For Holmes, the search for truth ultimately depended upon a struggle of competition in the open market of ideas. Holmes was thus critical of formalistic forms of jurisprudence because he felt that a jurisprudence based exclusively on logic would fail to take account of forms of knowledge coming from human experience.[35] While Langdell focused on the logic of cases in the printed books, Holmes looked to the "felt necessities of the times" drawn from his own experiences—as an officer during the Civil War, wounded in three engagements with the enemy, and struggling to survive and succeed. Much later, Holmes, the jurist, would declare: "The life of the law has not been logic: it has been experience."[36] Holmes thus accepted the contingent and arbitrary nature of legal truth in a world of brute power.

Holmes was a pragmatist of sorts.[37] In the opening passage of *The Common Law*, Holmes enunciated what contemporary legal thinkers have identified as "central, pragmatic tenets" of American law.[38] In conceiving "law as experience," Holmes echoed the views of American pragmatist philosophers such as John Dewey and Charles Peirce, who rejected the foundationalist tradition in Western philosophy and accepted the thesis that knowledge and human thought is situated within the social and habitual practices,

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35. While many have regarded Holmes as an "unequivocal anti-formalist," Neil Duxbury argues that Holmes's "jurisprudential work [was] every bit as formalistic as anything that came from the pen of Langdell." PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 40. Professor Diggins, on the other hand, has found within Holmes' work anti-formalistic predilections that are almost postmodern in character. *See* PROMISE OF PRAGMATISM, *supra* note 32, at 344.

It is not surprising that contemporary readers like Duxbury and Diggins might reach different conclusions about the meaning of Holmes's work. Holmes was a man who brought to light the full implications of the ambiguities and ambivalances of modern legal thought. He has, therefore, provided historians with ideas that can be interpreted to support many contemporary theories about the law. For this reason, Professor Diggins was apt in his observation that Holmes "was one of the most modernist of modern thinkers." PROMISE OF PRAGMATISM, *supra* note 32, at 44.

36. OLIVER W. HOLMES, THE COMMON LAW 5 (Mark D. Howe ed., 1963).

37. *See* Grey, *Holmes and Legal Pragmatism, supra* note 11, at 795. It is generally recognized that Holmes was influenced by the American pragmatist philosophy of Charles Sanders Peirce and John Dewey. Grey, *Holmes and Legal Pragmatism, supra* note 11, at 788. *See also* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 239-44 (comparing Holmes to Nietzsche and pragmatism); Richard A. Posner, *Introduction in* THE ESSENTIAL HOLMES SECTIONS FROM THE LETTERS *ix* (1992).

It is far from settled whether Holmes was a philosophical pragmatist in the tradition associated with Peirce, James and Dewey. Peirce, James and Dewey were never willing to accept Holmes as a fellow pragmatist and, as Diggins has noted, Holmes himself was never prepared to accept the three pragmatic philosophers as his intellectual equal. *See* PROMISE OF PRAGMATISM, *supra* note 32, at 345. Holmes's pragmatic stance in law should be understood as a form of legal pragmatism as distinguished from the pragmatic philosophy associated with Peirce, James and Dewey. Holmes's view of law as a "science of prediction" was pragmatic in spirit, but Holmes's instrumentalism (law is a science of experience, facts and deduction drawn from context) offered a method of formal logic that Holmes himself believed to be a tough-minded alternative to the philosophy of pragmatism. "In Holmes' [sic] estimate, pragmatism lacked tough-mindedness and allowed sentiment to do the work of thought." PROMISE OF PRAGMATISM, *supra* note 32, at 346. *See also infra* notes 40, 44.

38. *See* Grey, *Holmes and Legal Pragmatism, supra* note 11, at 788.

"experiences," or "forms of life" of culture.[39] For Holmes, "law [was] constituted of practices—contextual, situated, rooted in custom and shared expectations."[40] Holmes believed that law should be studied as a "profession" or "business-like" calling to satisfy specific societal needs and functions.[41] He thus believed that judges had a duty to weigh considerations of social advantage in decision making, and he practiced his belief by grounding his own judgment in social and historical context.[42]

Influenced by American pragmatist philosophers of his day,[43] Holmes thus favored a practical and contextualist understanding of law.[44] Holmes admonished law students of his day to study economics and statistics and to adopt the discipline of the social scientist in their studies because he wanted law students to deepen their understanding of the relation between law and society.[45] Holmes embraced Langdell's notion that law was like a science; but, for Holmes, the "science" was of the softer version found in the social science curriculum.[46] Thus, although Holmes believed that law ought to be a science, it was a science of experience, facts, and induction drawn from social and historical

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39. The sources and analysis of this point are developed more fully in Grey, *Holmes and Legal Pragmatism, supra* note 11, at 793-801. Holmes was not an unequivocal pragmatist; he never declared that he shared the same pragmatist premises of Peirce, James, or Dewey. *See also supra* note 37 and *infra* note 44.

40. Grey, *Holmes and Legal Pragmatism, supra* note 11, at 805. Holmes believed that the meaning of law must be situated in the world of "felt necessities" of intuition, prejudice, tradition, and social context. *See* HOLMES, THE COMMON LAW, *supra* note 36, at 1.

41. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458-59 (1897).

42. *See, e.g.*, Vegelagh v. Gunter, 44 N.E. 1077 (Mass. 1896) (Holmes, J., dissenting).

43. Holmes was a member of the Metaphysical Club, a discussion group that met regularly in Boston and Cambridge from 1870 to 1872. Members of this club included, in addition to Holmes, a number of leading American pragmatic philosophers such as William James and Charles Peirce. *See* AGES OF AMERICAN LAW, *supra* note 30, at 50. It is a fair assumption that Holmes was influenced by the pragmatic theories of these philosophers. *See, e.g.*, Grey, *Holmes and Legal Pragmatism, supra* note 11, at 788; Catharine W. Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 580-90 (1988). But to say that Holmes was a pragmatist is controversial. Holmes may have embraced ideas associated with the philosophy of pragmatism, but the label does not easily "stick" to Holmes, and it can be misleading as to what Holmes believed. *See supra* note 37.

44. For Holmes, truth was a function of social power, and law expressed that power. "The felt necessities of the time," Holmes wrote, "the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." HOLMES, THE COMMON LAW, *supra* note 36, at 1. Holmes thus criticized Langdell for giving too much importance to the power of syllogism and logic. He believed that any generalized theory of law would have to take into account and respond to social conditions. For Holmes, the conceptual order of the legal system was merely a "practical aid in teaching and understanding law." Grey, *Holmes and Legal Pragmatism, supra* note 11, at 816.

45. *See* Holmes, *The Path of the Law, supra* note 41, at 469. ("For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

46. *See* G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51, 56 (1971).

context.[47] Consequently, in Holmes' jurisprudence, legal study was to be approached from the pragmatic perspective of a social scientist and law was to be studied as a "science of prediction."[48]

Holmes's pragmatic insight has enabled contemporary legal scholars to accept the modern idea that "the creation of legal meaning—[what the late Robert Cover called] '*jurisgenesis*'—takes place always through an essentially cultural medium."[49] Holmes's hypothesis, as the late Gilmore has said, "was that inquiry is a never-ending process whose purpose is to resolve doubts generated when experience does not mesh with preconceived theory."[50] This hypothesis has led modern-day legal scholars to argue that law must be understood as a contingent political social practice.[51] The notion that the meaning of law can only be found in the "struggle for acceptance" has enabled modern legal theorists to approach legal studies from a more pragmatic and normative perspective. Legal thinkers have taken the position that the law should establish the moral rightness of its rules.[52]

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47. *See* R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION 115 (1984).

48. *See* PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 41. In emphasizing the need for developing external social standards for the law, Holmes advanced a theory of judicial decisionmaking that attempted to separate law from morality. Holmes believed that law should be responsive to social conditions and that it was the responsibility of judges to respect the wishes of the majority. Holmes thus believed that judges should forsake their own subjective understanding of the law and instead strive to decide disputes by employing external, objective standards developed to advance policy outcomes reached in the legislative and political arenas of society. In Holmes's jurisprudence, the law was a medium for preserving the social tranquility of majoritarian politics. Modern legal scholars, following Holmes, exclude ethical and moral considerations from their purview, and they, like Holmes, understand that the meaning of law can only be gleaned from an examination of law's contextual setting, including the normative social practices and habits of the entire community.

Holmesian jurisprudence thus set the stage for the divorce of moral considerations from legal studies and committed the next generation of legal scholars to demonstrating the objectivity of law. This shift in ideology has led to forms of sociological jurisprudence and interdisciplinary legal studies, which have brought to the study of law a new form of interdisciplinary formalism not unlike the formalism proposed by Langdell. *See* PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 40 (arguing that Holmes was as much a formalist as Langdell).

49. *See* Robert M. Cover, *Forward: Nomos and Narrative,* 97 HARV. L. REV. 1, 11 (1983). *See also* Robert Post, *The Relative Autonomous Discourse of Law, in* LAW AND THE ORDER OF CULTURE *vii* (1991).

50. AGES OF AMERICAN LAW, *supra* note 30, at 50.

51. As Thomas Grey noted, "[t]he application of this idea to law has been one of the central themes of the Critical Legal Studies movement." Grey, *Holmes and Legal Pragmatism, supra* note 11, at 814 (citing Robert W. Gordon, *New Developments in Legal Theory, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 286 (D. Kairys ed., 1982)).

52. Thus, Benjamin N. Cardozo, for example, following Holmes's pragmatic philosophy, argued that "[t]he judge interprets the social conscience, and gives effect to it in law, but in so doing he helps to form and modify the conscience he interprets. Discovery and creation react upon one another." THE GROWTH OF THE LAW 96-97 (1924).

C. The Two Sides of Legal Modernism

When woven together, the motifs of legal modernism found in the work of Langdell and Holmes reflect the intellectual mood of the post-World War II generation of legal scholars who believed in the possibility of identifying a distinct legal method for yielding a distinct set of correct answers for law's many problems.[53] The post-war generation came of age during what Gilmore called "the Age of Faith"—a time when lawyers, judges, and a new breed of law professors were "so confident, so self-assured, so convinced beyond the shadow of a doubt, that they were serving not only righteousness but truth."[54] For the post-World War II generation, Langdell and Holmes symbolized the confidence of legal scholars to develop an autonomous, coherent, rational, and normative concept of law.[55]

Gilmore stated that "Langdellian jurisprudence and Holmesian jurisprudence were like the parallel lines which have arrived at infinity and have met."[56] The lines of legal thought derived from these two American legal thinkers establish the contours of the dominant styles of legal modernism in American jurisprudence. Langdell's faith in the scientific method (formalism) combined with Holmes' belief in the evolutionary progress of law (pragmatic instrumentalism) and work together to affirm the conflicting objectives and diverse styles of modern legal studies. The most extraordinary aspect of modern jurisprudence has been the belief that Langdellian and Holmesian jurisprudence could somehow be synthesized to establish an autonomous and universal jurisprudence based on a belief in the ideal of one true "Rule of Law."

The history of modern legal thought is a story of a series of failed attempts to reconcile and synthesize these two styles of jurisprudence. The attempts to synthesize the ideas of Langdell and Holmes have never been successful because these two great legal thinkers expressed contradictory views about the meaning of law in the modern age. Langdellian formalism valued and protected law's autonomy by minimizing the instability resulting from uncertainty. Holmesian pragmatic instrumentalism (law should serve the interest of the majority), on the other hand, valued and protected law's autonomy by permitting law to adapt and change to new circumstances. The two styles of legal reasoning known today as *formalism* and *instrumentalism* capture the essence of the two conflicting and indeterminate sides of modern legal thought.

Modern legal formalists have attempted to develop a platonic-like theory of law based on the discovery of the permanent and unchanging internal logic of the law.[57] Other formalists have attempted to defend an understanding of law based on the Langdellian

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53. *See, e.g.*, CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 216 n.32 (1991) (claiming that "there is a distinct method which is the legal method, [which] . . . can be deployed more or less well, and [which] . . . yields a distinct set of answers more or less out of itself").

54. AGES OF AMERICAN LAW, *supra* note 30, at 41.

55. This is not the place to review the intellectual history of the post-World War II generation of legal scholars. For my modest attempt in summarizing this history, see POSTMODERN LEGAL MOVEMENTS, *supra* note 1, at chs. 1-4.

56. AGES OF AMERICAN LAW, *supra* note 30, at 56.

57. *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 14.

notion that legal method follows the methodology of the inductive sciences.[58] Modern-day formalists "insist that law contains within itself all the resources necessary for the correct resolution of legal disputes, no matter how momentous the dispute (it might be over racial or sexual justice, abortion, economic liberty, capital punishment—whatever)."[59] Legal instrumentalists, on the other hand, look outside the law for its missing foundation. Instrumentalists view the law as an instrument or medium for accomplishing objectives and goals. Their standard is an objective one framed by either some non-legal methodology developed for legal studies (*e.g.*, economic, political, or other social science methodology) or the pragmatic intuition of the legal analyst seeking to accomplish a particular task.[60]

Legal formalists and instrumentalists share a deep-seated belief that a foundation exists to legitimate law's assertion of some self-evident truth about law and the legal system. Legal formalists believe that the foundation exists within some internal logic; within the process of law; in some non-legal source such as economics, history, politics, and the like; or, in the pragmatic intuition of legal actors themselves. Legal modernists, both formalists and instrumentalists, thus believe that there is a rational structure to law and culture independent of the beliefs of any particular people. Legal modernists share the view that this structure exists and can be used objectively to describe and represent the reality of things "out there" in the law and in the world at large. A central distinguishing motif of legal modernism is reflected in the picture of law as a "mirror of nature."[61]

Legal modernism has come to characterize the interpretive practice of modern legal scholars as one which "reflects" the truth of the world "out there." This practice is based on an understanding of language that assumes that words and conceptual ideas are capable of objectively capturing the meaning of events the law seeks to describe and control. The professional language of law thus uses abstract categories and universal classification systems to construct rules of law that satisfy jurisprudential prerequisites of generality and objectivity. Modern liberal scholars assume that representational dichotomies such as object/subject, law/society, substance/procedure, and public/private, constrain the power of judicial interpretation. Hence, when they are in role, at the podium, before the bar, behind the bench, etc., legal moderns understand themselves to be capable of excluding their subjective identities from their analyses of the law.[62]

In summary, legal modernism is a term that attempts to identify and describe the aesthetics of modernism within the discourse and practice of American law. Legal modernism reflects a set of beliefs exemplified in the work of Langdell and Holmes, which has influenced the way modern legal theorists experience the law in their writing

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58. *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 15.

59. *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 424.

60. *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 424 (describing the instrumental judicial philosophy of Benjamin N. Cardozo).

61. Morton Horwitz, drawing from Richard Rorty, has noted how this picture of law as the "mirror of nature" characterizes not only modern constitutional law, but also modern art and modern science. *See* Horwitz, *supra* note 3, at 32 (citing RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 333 (1979)).

62. They are capable, in other words, of "becoming relatively empty, abstract and universal subjects." Letter to author from Pierre Schlag (Dec. 22, 1994) (on file with author).

and teaching. Legal modernism is neither a theory nor a philosophy but, rather, a distinctive strategy or set of strategies utilized by modern theorists in reacting to the predicaments of modern law. Legal modernism has never realized its goals; and, for many, the faith in the projects of legal modernism has come to establish a type of "language game" or "language practice" erected upon the object of perfection for perfection's sake.

II. Contemporary Developments In Legal Studies

By the late 1960s it was apparent that the political and legal consensus that seemingly held together the modernist's vision of law no longer reflected the mood and temperament of those who personally experienced the conflict and divisions of Vietnam; Watergate; the race relations crisis; and, the cultural, sexual, and gender revolutions. American society was becoming ethnically, racially, and economically divided. These divisions were revealed in the contemporary legal controversies of the day. There was no consensus to which law could appeal because there was no consensus "out there." The contradictory mood and temperament of the 1960s made it difficult for anyone to argue the possibility of reaching a consensus through law. Modern jurisprudence was confronted with a crisis of confidence that ultimately raised methodological issues about the validity of some of law's most basic conceptual and normative justifications.

Throughout the late 1970s and 1980s, a new generation of legal academics helped to form movements in legal thought that offered new discourses about the law and legal decision-making. During the decades of the 1970s and 1980s at least five new jurisprudential movements—law and economics, critical legal studies, feminist legal theory, law and literature, and critical race theory—came onto the legal scene and began questioning the once-dominant hold of modern jurisprudence. Legal scholars began to examine aspects of the interrelationship between law and culture. The combined result of these new forms of legal criticism challenged a number of core assumptions central to the work of modern legal scholars.

Law and economics scholars argued that modern liberal scholars had internalized a "political" view of law as an autonomous discipline. This view assumed that law was "a subject properly entrusted to persons trained in law and in nothing else."[63] They asserted that the modern modes of legal thinking were "old-fashioned, passé, tired";[64] that traditional legal scholars ignored the insights of other disciplines (namely, economics) and failed to contemplate that a political consensus might not be sustainable for legal decision-making.[65] Law and economics scholars maintained that it was "wrong" to assume that legal problems could be informed by a fixed set of premises and a single method of argument. Law and economics scholars looked beyond the law to develop new determinate theories for establishing law's legitimacy.

Critical legal studies (CLS) scholars ("crits"), in turn, argued that "it just isn't possible to do legal scholarship without making [ideological] choices" about how to

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63. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 Harv. L. Rev. 761, 762 (1987).

64. *Id.* at 773.

65. *Id.*

explore particular issues and paths of theoretical inquiry.[66] Crits claimed that "ideology is commitment" whether it is consciously or unconsciously acknowledged.[67] In drawing from Foucault's insight that "power comes from everywhere," crits developed a *post-realist* analysis of the relation between power and knowledge to show how legal institutions and legal analysis itself creates and perpetuates social power.[68]

Feminist scholars, in turn, rejected the notion that law could be studied as an autonomous system abstracted from the reality of gender differences. Feminist scholars argued that claims of objective and universal law mask discriminatory content and application under male-constructed norms of jurisprudence. Feminist critics looked beyond the law to ascertain how the traditional understanding of adjudication reflects a cultural perspective that fails to respect the realities of women in the world. Like law and economics scholars, feminist legal scholars evaluated the effectiveness of legal rules by judging their instrumental capacity in promoting the well-being of women. Like CLS scholars, feminist legal scholars argued that law must be approached from an ideological perspective, but one which focuses on gender differences and the social basis of gender rather than just politics in general.[69]

Law and literature scholars argued that contemporary legal methods taught in legal education are representative of "a craft that has been dead in the water since the late fifties."[70] They advance insights from literary studies and the application of new forms of literary criticism in an effort to "jump-start legal education's engine."[71] The narrative and interpretive practices of this movement have provided an important literary medium for stimulating a more literary understanding about how law might serve human goals in a more just world.

Critical race theory has offered its own narratives and critical methodologies to underscore how traditional theories about law fail to account for the experiences and perspectives of African Americans and other people of color. Critical race theory seeks to expose the "ways in which those in power have socially constructed the very concept of race over time, that is, the extent to which White power has transformed certain differences in color, culture, behavior and outlook into hierarchies of privilege and subordination."[72] The "essentialism of universal sameness [between White and Black] is rejected" in order to acknowledge "differences between Blacks and Whites that are 'sufficiently' real, namely, differences in experience, outlook, and response."[73]

These proliferating legal discourses created the critical space for new and different discourses to develop within legal studies. New movements in the law transformed the

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66. DUNCAN KENNEDY, SEXY DRESSING, ETC. 68 (1993).

67. *See* POSTMODERN LEGAL MOVEMENTS, *supra* note 1, at 106, 108.

68. *See* POSTMODERN LEGAL MOVEMENTS, *supra* note 1, at 120-21.

69. *See* POSTMODERN LEGAL MOVEMENTS, *supra* note 1, at 128-48.

70. John Henry Schlegel, *Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology,* 34 J. LEGAL EDUC. 103, 103 (1984).

71. David Ray Papke, *Problems with an Uninvited Guest: Richard A. Posner and the Law and Literature Movement,* 69 B.U. L. REV. 1067 (1989).

72. Anthony E. Cook, *Symposium on Race Consciousness and Legal Scholarship: The Spiritual Movement Towards Justice*, 1992 U. ILL. L. REV. 1007, 1008.

73. *Id.* at 1009.

way legal scholars talk and think about the law. Today, legal scholars examine how legal discourse affirms, excludes, marginalizes, and ignores different discourses in the communal conversation. This culturally based inquiry has led to the discovery of competing communal languages for developing new legal languages in law. The different intellectual agendas of different cultural groups, and the intellectual orientation of those espousing them, provoked a multicultural form of legal criticism which is now aimed at bringing out the perspectives and narratives of cultures and traditions marginalized and ignored by the dominant discourse of modern law. By 1990, legal studies in America could no longer claim to be based on an autonomous narrative or discourse of law.

The discourse of law, what I call "law talk," fostered new dialectical discourses defined by economic analysis, critical legal studies, feminism, literature, and race consciousness. By the late 1980s, lesbian and gay legal scholars launched the gay and lesbian legal studies movement devoted to the development of a new legal discourse aimed at correcting the biases and inaccurate views of sexual orientation in Western legal culture.[74] William N. Eskridge, Jr. has articulated a "Gaylegal Agenda" for American law developed from the discourse of the counter-culture of the gay and lesbian communities.[75] One important goal of gaylegal discourse is "to provide more reliable information and rigorous legal arguments for discussions of issues important to the bisexual, gay, and lesbian communities; and to criticize laws and legal interpretations that penalize or stigmatize [bisexuals, gays and lesbians]."[76]

Similarly, Native American legal scholars have recently argued that Western jurisprudence has developed an assimilationist discourse that has been used as a sword against Native American cultures to prevent their diversity from becoming part of the "official" American culture.[77] Native American law is aimed at preserving the traditions of Indian tribalism and protecting their unique discourses of law and justice from the assimilationist tide of American law.[78]

Asian legal scholars have also recently joined the legal academy in increasing numbers, proclaiming the existence of an Asian American movement that offers a new critical race-conscious discourse to reverse the problem of discrimination against Asian Americans. These scholars claim to offer a narrative account of exclusion and marginalization from the perspective of Asian Americans.[79] Race discrimination is thus shown to have many faces and colors; its harms are not the same for all minorities.

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74. An early example of *Gaylaw* jurisprudence was Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

75. *See* William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's* Sex and Reason: *Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992). Eskridge is a Professor of law at Georgetown University Law Center.

76. *Id.* at 335.

77. *See* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990). *See also Symposium, Native American Law*, 28 GA. L. REV. 299 (1994).

78. *See* Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994); Kevin J. Worthen, *Sword Or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty*, 104 HARV. L. REV. 1372 (1991).

79. *See* Robert S. Chang, *Toward An Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993).

Another offspring from critical race theory has been Black feminist discourse which offers its own legal narratives to capture the unique situation and voice of black women. Black feminist discourse arises from the intersection of interests of women who experience discrimination both as women and as people of color. The intersection of race and gender has enabled Black feminists to discover a unique discourse of race and sex discrimination unique to Black women. The Black feminist critique of antidiscrimination law has addressed the way the modern construction of sex and race consciousness has ignored the experience of Black women. Embracing the intersection of race and gender, Black feminists have started to develop a critique of law that speaks the language of those women located at the intersection.[80]

The proliferation of multicultural legal criticism has refocused legal studies on the importance of understanding how culture shapes and influences the values, beliefs, and thoughts of legal subjects. The study of jurisprudence is consequently becoming the study of diverse legal subjects who inhabit the law. Jurisprudence is becoming a multicultural study of rich and diverse theoretical discourses. The new interest in forms of legal discourse has started a transformative process in jurisprudence that has broken down the barriers that separate law from culture and jurisprudence from its interpreting subjects. Identity politics of *multicultural legal criticism*[81] encourages contemporary legal scholars to be more sensitive to the differences between groups and individuals in society. This new sensitivity to the difference of "others" (other cultures, genders, races, socio-economic classes, etc.) has opened the door to a new form of legal criticism which many now regard as postmodern. Postmodern legal criticism arises from the efforts of legal scholars experimenting with alternative and different notions of subjectivity. In bringing attention to alternative and different notions of subjectivity, postmodernists question the identity of the subjects and the author of the law. It is in this critical dimension that postmodern legal criticism provokes new questions about the relation between law, culture, and politics.

III. POSTMODERN LEGAL MOVEMENTS

In law, the contours of postmodern criticism are currently shaped by two dominant intellectual perspectives. One group of postmodern legal critics has adopted a *neopragmatic* stance framed by the antifoundational philosophy of Richard Rorty.[82] The

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80. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory,* 42 STAN. L. REV. 581 (1990).

81. *See* POSTMODERN LEGAL MOVEMENTS, *supra* note 1, at ch. 10.

82. *See* RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, *supra* note 61. Rorty defines pragmatism as an "attempt to replace the notion of true beliefs as representations of 'the nature of things' and instead to think of them as successful rules for action." RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 65 (1991) [hereinafter PHILOSOPHICAL PAPERS].

Neopragmatists adopt postmodern strategies when they are confronted with doubts and predicaments about the modernist's framework. They attempt to explain how one can do theoretical work without rejecting all pretenses of foundational knowledge. The goal of these postmodern critics is freedom from theory. *See* Peter C. Schanck, *Understanding Postmodern Thought and its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2514 (1992). Schanck identifies postmodern legal thought with neopragmatism. As Schanck has

neopragmatic stance, which I tentatively identify as a "postmodern pragmatist" strategy, asserts that theoretical speculation has proceeded under the false assumption that knowledge exists and is discoverable. Postmodern pragmatists argue that "there's no there there."[83] Postmodern pragmatists tend to argue that it would be better if we gave up on the search for truth and instead concerned ourselves with the more mundane task of comprehending how knowledge, power, and society function within particular communities and societies.

When applied to legal studies, postmodern pragmatism helps to identify the academic mood of scholars who reject foundational claims of legal theory but remain committed to the view that the empirical method can be useful for resolving legal problems. For postmodern pragmatists, theory is a tool that can be used for helping decision-makers resolve problems pragmatically. Neopragmatists thus believe in and are committed to the Enlightenment idea of progress. For this reason, neopragmatism may only be a "close cousin" of postmodernism.[84]

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explained: "The second strain (of postmodernism), 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." *Id.* (citing RICHARD RORTY, CONSEQUENCES OF PRAGMATISM *xix-xx* (1982)).

83. Neopragmatists such as Rorty have attempted to go beyond the old pragmatism by taking the instrumental and scientific-oriented philosophy of Peirce, James, and Dewey and reformulating it as a form of conversation or "linguistic enterprise." PROMISE OF PRAGMATISM, *supra* note 32, at 3. Diggins notes that Rorty has been criticized for doing this even though at least one early pragmatist thinker, John Dewey, was himself "sympathetic to literature and its ambitions to understand the world as well as write about it." PROMISE OF PRAGMATISM, *supra* note 32, at 3.

The unique feature of neopragmatism is that it attempts to locate pragmatism within an anti-foundational perspective and adopts a linguistic orientation that attempts to explain the meaning of things in terms of conversation. Whereas early pragmatists advocated the role of intuition and experience as their method, neopragmatists have turned to "[r]hetoric, conversation, narration, and discourse . . . [as their] means of coping in the modern world." PROMISE OF PRAGMATISM, *supra* note 32, at 3. Following the ideas of Wittgenstein, Dewey and Heidegger, Rorty argues that "investigations of the foundations of knowledge or morality or language or society may be simply apologetics, attempts to eternalize a certain contemporary language-game, social practice, or self-image." RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, *supra* note 61, at 9-10. Rorty believes that the representational systems of meaning used in philosophical discourse derive meaning from social practices and conventions of society. "[N]othing counts as justification unless by reference to what we already accept, and . . . there is no way to get outside our beliefs and our language so as to find some test other than coherence." RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, *supra* note 61, at 178. Rorty's neopragmatism, coupled with his insistence that the meaning of things are embedded in social and historical practices, is "quintessentially postmodern." JOHN MCGOWAN, POSTMODERNISM AND ITS CRITICS 192 (1991). And, yet, postmodernism and neopragmatism, though they overlap, are not homogeneous. The critical discourse of postmodernism emphasizes radical rapture and discontinuity between modernism and its ideals, whereas neopragmatists such as Rorty seem to advocate that a new pragmatic form of knowledge (one without foundations) may rescue modernism from its dilemmas by rendering it capable of accomplishing its ideals. Neopragmatists appear more cheerful and idealistic than their more sober and worrisome postmodern counterparts. *See infra* note 84.

84. Labelling neopragmatism as postmodern is indeed controversial. In fact, neopragmatists tend to

The other postmodern strategy, which I have labelled as "ironist legal criticism,"[85] is more radical. It focuses on how theoretical views about coherence, consistency, and empirical verifiability are structured by a normatively charged vocabulary and grammar of a particular culture. In bringing attention to the flaws, weaknesses, and failures of this vocabulary and grammar, these postmodern critics hope to expose how language reinforces particular perspectives and establishes the power and dominance of certain cultures. These postmodernists thus attempt to displace, decenter, and weaken the modernists' conception of law.

Ironist legal critics are *ironists* because they claim that the discourse of Western thought has been very effective, but not for the reason modernists imagine. Ironists assert that the significance of modernism lies not in specific prescriptions or the accomplishment of particular social tasks; rather, it lies in the intellectual pursuit of theory as an end to itself. In philosophy, modernism is said to have become "more important for the pursuit of private perfection rather than for any social task."[86] In law, modernism is said to have established a form of normative legal thought which is "so concerned with producing

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avoid the postmodern label. Neopragmatism is like postmodernism in that its practitioners accept the postmodern view that truth and knowledge are culturally and linguistically conditioned. *See* Schanck, *supra* note 82, at 2515. Neopragmatist practice is unlike postmodern in that neopragmatism is less concerned with exposing the contradictions of modern conceptual and normative thought than revealing instrumental, empirical or epistemological solutions for the problem at hand. *See also* Margaret J. Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practices,* 139 U. PA. L. REV. 1019, 1031-32 (1991).

85. *See* POSTMODERN LEGAL MOVEMENTS, *supra* note 1, ch. 12. My use of the label *ironist* is drawn from Richard Rorty's notion of *ironist theorist* in RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 73 (1989). According to Rorty, an *ironist* is someone who fulfills three conditions:

> "(1) She has radical and continuing doubts about the final vocabulary she currently uses, because she has been impressed by other vocabularies, vocabularies taken as final by people or books she has encountered; (2) she realizes that argument phrased in her present vocabulary can neither underwrite nor dissolve these doubts; (3) insofar as she philosophizes about her situation, she does not think that her vocabulary is closer to reality than others, that it is in touch with a power not herself."

Id. An *ironist* who is "inclined to philosophize see[s] the choice between vocabularies as made neither within a neutral and universal metavocabulary nor by an attempt to fight one's way past appearances to the real, but simply by playing the new off against the old." *Id.* Rorty *ironically* calls himself an *ironist theorist,* but the *irony* is that his brand of neopragmatic philosophy has been used by pragmatic critics to sustain the usefulness of the modernist framework and vocabulary.

Other commentators use the term *poststructuralism* to distinguish this separate strand of postmodern thought from neopragmatism. *See* Schanck, *supra* note 82, at 2514; Radin & Michelman, *supra* note 84, at 1031-32. Postmoderns, however, disagree about whether the poststructuralism is a modernist or postmodernist concept; and, therefore, there is reason to doubt whether neopragmatism is a postmodern strategy. *See* ANDREAS HUYSSEN, AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, POSTMODERNISM 207-16 (1986) (claiming that poststructuralism is a modernist concept). *See also* Jerry Frug, *Decentering Decentralization,* 60 U. CHI. L. REV. 253, 304 n.221 (1993).

86. RORTY, CONTINGENCY, IRONY, AND SOLIDARITY, *supra* note 85, at 94.

normatively desirable worldly effects [it] has, ironically, become its own self-referential end."[87]

Ironists attempt to "intensify the irony" of modern discourse by exposing how the descriptions and prescriptions of the discourse fail to support the objective truth claims that the theorists make for advancing social progress. Ironists argue that the modernist framework for theoretical and practical discourse fails to have worldly effects and that such "effects" represent the hidden power of the modernists' normative projects. Postmodernists such as Jacques Derrida,[88] Michael Foucault,[89] and Edward Said[90] thus employ techniques for displacing and decentering the modes, categories, and normative concepts of Western thought in order to bring out the irony and paradox of modernist culture.

A. The Two Sides of Postmodern Legal Criticism

Postmodern legal criticism can be found in the work of contemporary legal scholars who have adopted either the *postmodern pragmatist* or *ironist* stance to offer an alternative to legal modernism. Richard A. Posner, the founding father of the conservative legal movement known as the law and economics movement,[91] is becoming one of the best known pragmatic legal scholars in the academy today. Pierre Schlag, a second-generation critical legal studies[92] scholar, is the leading champion of ironist legal criticism. The current position of postmodern legal criticism can be discerned by examining the jurisprudential views of these two important and influential legal scholars.

1. Posner.—I admit that one does not usually think of Richard A. Posner as a postmodernist. Posner himself would, in fact, most likely object to being associated with postmodernism.[93] Yet, undeniably, Posner's recent work in jurisprudence has an unwittingly postmodern character to it: his articles and books in jurisprudence are a *pastiche* of grand philosophical luminaries cited in the most traditional legal form combined with a nostalgic, almost religious, yearning for common-sense reasoning, held together by neopragmatic philosophy.[94] This philosophy is advertised as a long-lost "Holmesian tradition," a tradition that makes Holmes the first pragmatic legal thinker in America. The postmodern movements in Posner's recent jurisprudential writing can be detected in his effort to "overcome" the silences, ambiguities, and schisms of modern legal thought.

Postmodern pragmatism is evident in Richard A. Posner's *Pragmatic Manifesto* initially outlined in his 1990 book *The Problems of Jurisprudence*.[95] In this book, Posner

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87. *See* Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 186 (1990) [hereinafter *Normative and Nowhere to Go*].

88. *See, e.g.*, JACQUES DERRIDA, OF GRAMMATOLOGY (1976).

89. *See, e.g.*, MICHAEL FOUCAULT, POWER/KNOWLEDGE (1980).

90. *See, e.g.*, EDWARD W. SAID, CULTURE AND IMPERIALISM (1993).

91. *See supra* notes 63-65 and accompanying text.

92. *See supra* notes 66-68 and accompanying text.

93. *See* RICHARD A. POSNER, OVERCOMING LAW 317 (1995) ("I would not describe myself as a postmodernist thinker.").

94. I am indebted to Pierre Schlag for this point.

95. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 454-69.

renounced both the economic formalism of the law and economics movement and the deconstruction practice of the left and embraced, instead, a pragmatic alternative. According to Posner, pragmatism overcomes the predicament of modern conceptual and normative jurisprudence without falling prey to the moral relativism of legal realism or its modern counterpart—critical legal studies. Posner's pragmatic alternative is portrayed as maintaining "a middle ground between formalism and realism in American jurisprudence."[96]

Posner is willing to embrace the formalism of economic analysis because it is, unlike Langdellian formalism, "empirically verifiable."[97] As for legal realism and its modern counterpart, critical legal studies, Posner asserts that these movements in law eventually succumb to the dangers of moral relativism because they fail to provide practical guidance to lawyers and judges.[98] Instead of relying on formalistic logic or abstract theory, Posner seemingly adopts the modernist view and argues that judges should use theory and legal reasoning as a tool to get a job done.

According to Posner's view of jurisprudence, legal reasoning should be practical and instrumental, not formalistic or political. In his view, the merit of every legal analytic must be tested by asking whether it "works" instrumentally in maximizing human goals and aspirations.[99] Posner justifies the application of economics to law on a practical level: economics wins because it "gets the job done" better than any other method.[100] Posner's message in *The Problems of Jurisprudence* is that lawyers and judges should take a more practical and relaxed look at things; they should give up on the search for logical perfection and instead concern themselves with figuring out how they can better attain socially useful goals. Posner thus argues that legal theorists should employ empirical methods in their work.

Posner's pragmatism exhibits what Thomas Grey calls "freedom from theory-guilt,"[101] a scholarly temperament liberated from the necessity of devising a theory of law rooted in some total perspective.[102] Freedom from theory-guilt places pragmatists in a theoretical position that is critical of modern legal theory as well as the interdisciplinary theories associated with the 1980s movements in legal studies. Grey believes that the liberation of freedom from theory-guilt enables these legal critics to avoid the logical paradoxes posed by the contradictory views of "perspectivist self-reference" (there are no universal truths) and "perspectivist dogmatism" (my truth is the *real* truth), which characterize the view of modern legal theory as well as critical social theories such as Marxism.[103]

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96. Neil Duxbury, *Pragmatism without Politics*, 55 MOD. L. REV. 594, 596 (1992).

97. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 362. Hence, "[t]he difference between the economic analysis of law and Langdellian legal science, Posner insists, is that the former is 'empirically verifiable.'" Duxbury, *Pragmatism without Politics*, *supra* note 96.

98. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 154-56, 255-59.

99. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 460.

100. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 460.

101. Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990).

102. *Id.* at 1576-77.

103. *Id.*

In *The Problems of Jurisprudence*, Posner attempts to show how the history of modern legal thought has been plagued since its inception by predicament and paradox. The book, as the English legal theorist Neil Duxbury noted, "turns out to be an attempt to take just about every theory that has traditionally occupied the minds of American legal philosophers and demonstrate that the problem, in each case, is that there is somehow something missing; to demonstrate, in short, that every theory has its stumbling block."[104] In Posner's view, modern legal thought represents a series of felt absences or gaps that have never been fully explained nor resolved (*e.g.*, the problem of maintaining the belief in autonomous law, the problem of defending a concept of law without ideology, the problem of knowledge without truth, etc.).

Instead of attempting to offer a new theoretical approach for resolving the puzzles of modern legal thought, Posner has adopted the characteristic postmodern strategy of simply refusing to engage in further "theory talk." Posner thus turns to Rorty's brand of neopragmatism as an alternative to theoretical speculation, arguing that legal theorists should turn away from the goal of perfecting legal theory and instead focus their attention on empirical practice and experimentation.[105] Posner's pragmatic message is that students and scholars should study not what the lawyers and judges know, but what they do. He essentially has put his intellectual talents to the task of overcoming the problems of jurisprudence by advocating the postmodern alternative of neopragmatism.

Neopragmatists, like contemporary postmodernists, are prone to declare that modern theoretical studies have reached a "dead end" (hence, like all postmodernists, they are known to utter the now-famous characteristic "end of history" pronouncement). Having declared theoretical knowledge of philosophy or law to be at an "end," neopragmatists assert that we should now go beyond modernism and re-examine the way theoretical knowledge actually functions in society. The purpose of this declaration is to bring attention to the contingent nature of truth and to reveal how foundational knowledges are the product of socially constructed beliefs and practices.

Thus, Posner concludes in *The Problems of Jurisprudence* that we can "improve our understanding of law" by "letting pragmatism emerge as the natural alternative" to cure the problems of jurisprudence.[106] The "fundamental problem of jurisprudence is jurisprudence;"[107] and, Posner's reaction to that problem is to acknowledge it, embrace it, and then move on to more practical matters. In *The Problems of Jurisprudence*, the problem is recognized; and, the alternative, Posner's pragmatic manifesto, is identified.

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104. Duxbury, *Pragmatism Without Politics, supra* note 96, at 608.

105. *See, e.g.*, POSNER, OVERCOMING LAW, *supra* note 93, at 316-17, 444-63; POSNER, THE PROBLEM OF JURISPRUDENCE, *supra* note 3, at 27, 67, 384-87, 464-65. Richard Rorty, for example, advocates looking at philosophy and history as a conversation situated in a particular culture and society. By looking at philosophy and history in this way, Rorty seeks to learn how theoretical beliefs and dogmas come to be formed and how those beliefs reflect impartial and sometimes incorrect views of the world. *See* RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, *supra* note 61, at 389 ("If we see knowing not as having an essence, to be described by scientists or philosophers, but rather as a right, by current standards, to believe, then we are well on the way to seeing *conversation* as the ultimate context within which knowledge is to be understood.").

106. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 163, 225.

107. Duxbury, *Pragmatism without Politics, supra* note 96, at 610.

In Posner's more recent book, *Overcoming Law*,[108] Posner takes the next postmodern step in declaring that it is time to move beyond modernism.

As the title suggests, Posner's *Overcoming Law* seeks to *overcome* the problems of modern jurisprudence by adopting a basic postmodern avoidance strategy. In Posner's view, it is time that legal theorists give up on the projects of legal modernism and accept the impossibility of discovering settled solutions to legal problems. While he expressly disassociates himself from the form of postmodernism that practices deconstruction interpretation,[109] Posner unwittingly sets out in *Overcoming Law* to develop the political argument in favor of a distinctively postmodern brand of pragmatism. His basic thesis is that pragmatism can be understood as consistent with the political ideology of conservative liberalism informing his early law and economics writing.[110]

Posner also finds inspiration for his pragmatism in none other than Oliver Wendell Holmes. Posner's Holmes is not, however, the same Holmes that inspired the legal realists or modern day instrumentalists. Posner's Holmes is decidedly more pragmatic and *almost* postmodern. Posner argues that Holmes was the first legal pragmatist in the academy to recognize that we must overcome the doubts and tensions of modern legal theory.[111] In *Overcoming Law*, Posner paints a picture of Holmes as a Nietzschean who believed that all "meaning is social rather than immanent."[112] Posner finds within Holmesian thought a form of skepticism that is wedded to the enterprise of neopragmatic philosophers such as Richard Rorty. Posner thus proclaims Holmes as inspiration for his pragmatic manifesto, and he finds within Holmes's jurisprudence the inspiration to move beyond legal modernism.

What has impressed Posner about Holmes is that he "could doubt the foundation of any objective reality and still value common sense as an act of intellectual modesty."[113] Holmes argued that the meaning of law as well as the nature of truth is contingent upon events, competition, and historical context. Holmes downplayed theoretical speculation about the law in his academic writing because his focus was aimed at shifting legal thought from theory to practice.[114] Thus, Holmes argued that "[t]he object of our study . . . is prediction, the prediction of the incidence of the public force through the

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108. POSNER, OVERCOMING LAW, *supra* note 93.

109. POSNER, OVERCOMING LAW, *supra* note 93, at 317 ("I would not describe myself as a postmodernist thinker. Postmodernism is the excess of pragmatism. They [postmodernists] are not merely antimetaphysical, which is fine, but also antitheoretical. Almost all of them are infected by the virus of political correctness, as well. And, though with notable exceptions, they write in an ugly, impenetrable jargon, sometimes with the excuse that to write clearly is to buy into Enlightenment mythology of unmediated communication between author and reader.").

110. POSNER, OVERCOMING LAW, *supra* note 93, at 29 ("[L]iberalism and pragmatism fit well with each other and, as we saw earlier, with economics. The fusion can transform legal theory. This at least is the thesis of this book.").

111. POSNER, OVERCOMING LAW, *supra* note 93, at 13-14.

112. POSNER, OVERCOMING LAW, *supra* note 93, at 390. *See also* POSNER, THE PROBLEM OF JURISPRUDENCE, *supra* note 3, at 239-44.

113. PROMISE OF PRAGMATISM, *supra* note 32, at 350.

114. *See* PROMISE OF PRAGMATISM, *supra* note 32, at 350-51 (describing Holmes's "genius" in [shifting] legal thought from theory to practice").

instrumentality of the courts."[115] Holmes's response to Langdell was one of avoidance; he simply moved away from Langdellian formalism toward a different approach.[116]

Posner has discovered in the vast writings of Holmes the traces of postmodernism—the "sensing [of] the dead end of all theoretical speculation."[117] Holmes's skeptical form of practical reason emancipates contemporary legal theorists like Posner from questioning the meaning of law deduced from abstract concepts and formal texts. For Holmes, the meaning of law remained hidden within an on-going cultural struggle about knowledge, truth, acceptance, and belief. Holmes believed that "truth" evolves from struggle and acceptance. Holmes rejected the modernist urge to "solve" the problem of "truth" once and for all. Posner accepts this Holmesian insight about truth and discovers within it a postmodern strategy. Like Holmes, Posner believes that pure theoretical speculation in the law leads nowhere.

For Posner, Holmes was the first serious legal scholar to attempt to overcome the predicaments of legal modernism. Holmes's success was in getting legal thinkers to shift their attention from Langdell's theory of "law as a science" to the empirical and practical study of "law as prediction." This shift was possible because Holmes was able to show how one might overcome the pitfalls of theoretical speculation in the law.[118] Holmes was able to do this because he was a natural skeptic; he distrusted the foundational claims of the Langdellians who believed that legal meaning could be deduced from an objective reality.[119]

Posner finds within Holmesian thought the inspiration to be skeptical about the foundational claims of modern legal scholars who purport to deduce legal meaning from legal texts. Posner wants to overcome the urge to fix the meaning of law in some objective reality. He wants to overcome the modernist impulses of those legal thinkers who believe that the law is an autonomous object. In *Overcoming Law*,[120] Posner aspires to overcome, once and for all, the limitations and pitfalls of the legal modernists'

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115. Holmes, *The Path of the Law*, *supra* note 41, at 457.

116. "Whereas, for Langdell, everything about the law could be fitted between the covers of a book, Holmes introduced a totally new element into the jurisprudential framework: namely people." PATTERNS OF AMERICAN JURISPRUDENCE, *supra* note 2, at 38.

117. PROMISE OF PRAGMATISM, *supra* note 32, at 350.

118. As Patrick Diggins has recently put it: "Holmes was a precursor of postmodernism in sensing the dead end of all theoretical speculation. Somehow he could doubt the foundation of any objective reality and still value common sense as an act of intellectual modesty." PROMISE OF PRAGMATISM, *supra* note 32, at 350.

119. The simple Holmesian pronouncement, "[t]he life of the law has not been logic; it has been experience," *supra* note 36 and accompanying text, expresses the glimmer of a postmodern insight. This insight can be discovered in the view of postmodernists who associate knowledge, truth and power with the system of communications and societal practices of different cultural communities. As one recent commentator has put it: "No body of knowledge can be formed without a system of communications, records, accumulation and displacement which is in itself a form of power and which is linked, in its existence and functioning, to the other forms of power . . . . There is not knowledge on the one side and society on the other, or science and the state, but only the fundamental forms of knowledge/power." STEVEN CONNOR, POSTMODERNIST CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY 11 (1989) (quoting ALAN SHERIDAN, MICHEL FOUCAULT: THE WILL TO TRUTH 131 (1980)).

120. *See* POSNER, OVERCOMING LAW, *supra* note 93.

theoretical search for legal truth in the formal texts of the law that purport to inscribe the meaning of law.

It is also true, however, that Posner's brand of pragmatism is *not quite* postmodern. It ultimately falls back on an ideology, even though this is something that Posner seemingly attempts to overcome. Posner's *Overcoming Law* clings to a political ideology—the classic liberalism of John Stuart Mill—that is very much part of the aesthetics and style of the type of legal thought he seeks to transcend with his pragmatic manifesto.[121] The classical theory of liberalism, which Posner wishes to defend pragmatically, is committed to the modernists' definition of law.

The classical liberal is the person who believes in tolerance and diversity but also believes that the state must remain neutral on substantive choices of the individual. This liberal person assumes that a "large sphere of inviolate private activity" can be located for "personal liberty and economic prosperity."[122] Classical liberalism attempts to develop its understanding of the legal concept of liberty based on knowledge about some universal reasonable person living in the pristine world of the private sphere. Mill and his followers assumed that a universal definition of liberty could be developed to inaugurate a more liberal and autonomous legal system.[123]

In *Overcoming Law*, Posner wants to do to law what Mill did to utilitarianism: render it more pragmatic and more useful.[124] But, to do this, Posner must reject the modernist's urge to locate the foundational essence of legal rights, such as liberty, which Mill never questioned. Ironically, in following the footsteps of Mill, Posner is led back to the very legal essences he labors to "overcome."

Contemporary pragmatic thinkers such as Richard Rorty have moved beyond liberalism because they regard it as being caught up in the belief that "man has an essence—namely, to discover essences."[125] Posner's pragmatic orientation rejects the search for essences on one level, but his political commitment to the views of John Stuart Mill (and Adam Smith) recommits him to the modernist idea that the essences of the world can be discovered by adopting the master-vocabulary of liberalism and the laboratory orientation of the natural scientist. Liberalism, in its modern legal form, must

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121. *See, e.g.,* POSNER, OVERCOMING LAW, *supra* note 93, at 23-24. "I take my stand with John Stuart Mill of *On Liberty* (1859), the classic statement of classic liberalism." POSNER, OVERCOMING LAW, *supra* note 93, at 23.

122. POSNER, OVERCOMING LAW, *supra* note 93, at 24.

123. In modern law, this view is associated with the idea that the legal system must treat every person as an equal, or, as Posner has put it: "[E]very person [must be] entitled to the maximum liberty—both personal and economic—consistent with the liberty of every other person in the society." POSNER, OVERCOMING LAW, *supra* note 93, at 23. (citing JOHN STUART MILL, ON LIBERTY (1859)).

124. Richard Rorty notes how pragmatists thought of themselves as following the footsteps of Mill in "making [utilitarianism] something you could use instead of something you could merely respect, something continuous with common sense instead of something which might be as remote from common sense as the Mind of God." RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, *supra* note 61, at 308. It would seem, then, that Posner wants to do to law what Mill did to philosophical utilitarianism; that is, to make law capable of *doing* things instead of being something that is merely respected and obeyed.

125. *See* RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, *supra* note 61, at 357.

be overcome if Posner is to overcome law; but, this, Posner is reluctant to do because he remains trapped by an external conservative philosophy and orientation.

2. Schlag.—Unlike neopragmatists, ironists reject the idea of a "middle ground" of a pragmatic intuition for avoiding the essentialism of foundation theories and perspectives. They believe that there is no way to avoid the predicaments of modern theory because no "middle ground" exists. These non-pragmatic postmoderns have given up on the Enlightenment idea of theory altogether; they strive to look beyond theory to discover the normative narratives and discourses of law. Ironist legal criticism presents a different way of reacting to legal modernism. It may be considered an attempt to comprehend the predicament of legal modernism by comprehending how beliefs and meaning come to justify and personify the interests and mindset of modern bureaucratic officials.

One way to understand the critical stance of ironists is to consider how they position themselves in relation to neopragmatists such as Posner. While neopragmatists reject the "centered" foundation of modern legal theory, they believe that intuition and practical reason can situate the pragmatic theorist and enable her to develop an instrumental way of knowing what to do. Ironists claim that the situatedness and instrumentalism of neopragmatism is merely another manifestation of the modernists' attempt to discover a foundation for legal analysis. One of the leading ironist critics in the legal academy today, Pierre Schlag,[126] concludes that "[n]eopragmatism . . . remains a protest against philosophical idealism, rationalism, and transcendentalism that ironically remains confined to the realms, the matrices already carved in the self-images of philosophical idealism, rationalism, and transcendentalism."[127] Hence, Schlag argues that neopragmatism is *prefigured* by its own foundation.[128]

Neopragmatism's foundation is the intuition and common sense of the situated pragmatist. Ironists attempt to decenter the foundation of neopragmatism by revealing how pragmatic judgment reflects the view of a situated subject who tries to be very pragmatic in reacting to the postmodern condition. As Schlag has amusingly put it: "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."[129]

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126. *See, e.g., Normative and Nowhere to Go, supra* note 87. Other ironist critics would include Rosemary Coombs, Drucilla Cornell, Steven L. Winter, David Kennedy, Gerald Frug, Mary Joe Frug, and Nathaniel Berman. *See* Rosemary Coombs, *"Same As It Ever Was": Rethinking the Politics of Legal Interpretation,* 34 MCGILL L.J. 603 (1989); Drucilla L. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation,* 136 U. PA. L. REV. 1135 (1988); Winter, *supra* note 27; David Kennedy, *Spring Break,* 63 TEX. L. REV. 1377 (1990); KENNEDY, *supra* note 66; Jerry Frug, *Decentering Centralization, supra* note 85; MARY JOE FRUG, POSTMODERN LEGAL FEMINISM (1992); Nathaniel Berman, *"But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law,* 106 HARV. L. REV. 1792 (1993).

127. Pierre Schlag, *The Problem of the Subject,* 69 TEX. L. REV. 1627, 1721 (1991).

128. *See* Pierre Schlag, *Pre-Figuration and Evaluation,* 80 CAL. L. REV. 965 (1992). Pre-figuration is the "reflexive" bias embedded within all theoretical perspectives.

129. Schlag, *The Problem of the Subject, supra* note 127, at 1721.

Schlag's postmodern strategy sets out to reveal the identity of the legal subjects of modernists and pragmatists who have largely remained missing in the contemporary discussions of law. Schlag has illustrated how this problem—the problem of the subject—is exemplified in the writing of Langdell. Schlag argues that this problem of the missing subject can be discovered in the way Langdell wrote about the law.[130] When discussing the law of contracts in his casebook, Langdell became a passive observer. Schlag thus observes how Chris Langdell, the author of the casebook, is absent from the discussion of legal doctrine, but is briefly present in his discussion of pedagogy in the preface. As Schlag explained: "[W]henever Chris addresses a matter of pedagogy in his preface, the *I* is all over the place. And yet, quite mysteriously, as soon as the law makes its appearance in the preface, the *I* vanishes. Chris disappears. Dean Langdell is removed."[131]

Indeed, Langdell wrote as if the legal rules of contract law "stand alone, [as] self-sufficient, self-sustaining systems."[132] Contract law does things; the rules speak, the doctrine evolves and develops. The author, Langdell, who was the analyzing subject and in reality the maker and interpreter of the casebook, is removed from the discussion. The problem is that the individual creating the law, the person creating the discourse of the text, is removed from the discussion. Modern legal scholars have since followed Langdell's example; accounts of the subject are rare in contemporary legal scholarship because subjectivity is subliminated in legal forms and because only certain kinds of subjects can be vested in these legal forms.

Only recently have contemporary legal critics recognized that the missing subject in modern legal thought *is* a problem.[133] The problem of the subject poses three distinct dilemmas for legal modernists.[134] The first dilemma concerns the tendency of legal theorist to ignore who or what it is that thinks or produces law. The second concerns the task of transcending the rhetoric or discourse that prevents legal scholars from confronting the problem; and, the third concerns the problem of accounting for the subject-in-control of the law. These three related dilemmas have posed serious predicaments for contemporary legal scholars.

The first dilemma, the belief in an autonomous analyzing subject standing outside of law, was reflected by Langdell's iconoclastic vision of "law as a science." It was Langdell's vision of law as a legal science that encouraged modern legal academics to write in the passive voice and to rigorously maintain the detached demeanor of a scientist conducting a controlled experiment. Modern legal scholars experience the law as being somehow "constrained" and "bounded" by law's professional method of analysis and orientation. And, yet, in removing *their* subjective presence from their discussion of the

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130. This point is more fully developed in Schlag, *The Problem of the Subject, supra* note 127. *See also* David S. Caudill, *Pierre Schlag's "The Problem of The Subject": Law's Need for an Analyst*, 15 CARDOZO L. REV. 707 (1993).

131. Schlag, *The Problem of the Subject*, *supra* note 127, at 1633 (emphasis added).

132. Schlag, *The Problem of the Subject*, *supra* note 127, at 1640.

133. Pierre Schlag was the first to identify the problem of the subject. *See* Schlag, *The Problem of the Subject, supra* note 127.

134. "The problem of the subject is not a single problem, but three distinct problems." Caudill, *supra* note 130, at 709.

law, modern legal scholars have also assumed that they are capable of excluding their own personal subjective identities from their work. Modern legal thinkers assume, in other words, that they are capable of becoming relatively empty, abstract, and universal subjects-in-control of the law. Hence, the expression "thinking like a lawyer" makes sense because it is thought that all lawyers think alike.[135]

The second dilemma concerns how the rhetorical form of legal reasoning makes it difficult for legal subjects to inquire into the hidden assumption of the autonomous subject. One aspect of this problem involves the objectification of law—legal rules are explained, analyzed, and criticized as if they were transcendental objects unaffected by analyzing subjects. In Langdell's contracts casebook, for example, the law is a transcendental object unaffected by social and economic context.[136] "[A] debtor becomes personally bound to his creditor for the payment of the debt . . . ."[137] The debtor and the creditor are unnamed individuals who are the legal abstractions of Langdell's analysis of commercial law.

Langdell, the interpreter of the law, never let the reader know that it was he, rather than the "law," that created the discourse and conducted the analysis.[138] In contemporary jurisprudence, this way of talking and thinking about the law is recognized as the "formal style" of conceptual legal thought otherwise known as "legal formalism." Conceptualists who are formalists believe that law should be justified on the basis of uncontroversial rules and abstract doctrinal formulations insulated from external moral and ethical concerns.[139] Formalism in law has become a popular mode of legal rhetoric that has prevented legal scholars from confronting the hidden assumption of the autonomous legal subject.

A variant of this occurs when the analyzing subject becomes subordinated to the law as a "transcendental subject."[140] Langdell's discussion of contract law, for example, also proceeded as if law itself was speaking to the reader and hence capable of creating its own meaning. "The law, like a subject, [did] things; doctrines [became] subjects, and [did] things to each other."[141] The rhetoric of transcendental subject, like that of the transcendental object, has enabled modern legal scholars to avoid the problem of the

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135. *See* Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053 (1993). In the discursive world of the law, "the *identity* and the *ontological status* of the main terms and the main grammar are at once almost always beyond question, and yet almost always dramatically underspecified." *Id.* at 2069.

136. *See* Schlag, *The Problem of the Subject, supra* note 127, at 1632-62.

137. Christopher C. Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55, 68 (1887) (*quoted in* Schlag, *The Problem of the Subject, supra* note 127, at 1632).

138. As Schlag put it: "Langdell's work reads like law's immaculate conception." Schlag, *The Problem of the Subject, supra* note 127, at 1632.

139. *See* Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 814-28 (1991); Grey, *Langdell's Orthodoxy, supra* note 23, at 9. Non-formalists who remain conceptualists want clear autonomous rules, but they place little importance on more abstract doctrinal formulations. They believe, as Holmes believed, that "[g]eneral propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). *See also* Grey, *Langdell's Orthodoxy, supra* note 23, at 9 n.29.

140. *See* Schlag, *The Problem of The Subject, supra* note 127, at 1646; Caudill, *supra* note 130, at 711.

141. Caudill, *supra* note 130, at 711. *See also* Schlag, *The Problem of the Subject, supra* note 127, at 1647.

subject. The rationalist artifice of law as the autonomous subject raises the perplexing question of where the boundaries (if any) of law are located, and whether this system can even be adequately conceptualized as having a determinant inside and outside.

Legal formalists who follow Langdell's orthodoxy assume that law is either a transcendental object or a subject possessing universal properties unaffected by interpreting subjects. Formalists thus project a particular interpretive stance onto the object of their contemplation, based upon a highly abstract mode of logical analysis taken out of context. Under Langdell's view, a contract for the sale of groceries is like all other contracts, because all contracts worthy of legal enforcement must satisfy certain universal rules established by an objective theory of contract law.[142] "*A* contracts with *B*" became the universal mode for analyzing contracts for the sale of groceries as well as contracts for employment. Langdellian formalism portrayed law as a grounded, self-defining, foundationally secure, and bounded "object" capable of being discovered by legal subjects.[143]

The third dilemma arises once it is realized that the subject is a problem. Once the subject is revealed and articulated, legal scholars are confronted with a serious predicament. There are many different subjects who interpret the law; and, their identity is constructed from different cultural contexts, traditions, and gender and racial perspectives. This, in turn, raises the predicament of modern law; namely, the problem of justifying the ideal of a universal "Rule of Law" in a multicultural world. If the meaning of law depends on the various constructions of different subjects, then "law" remains problematized by the identity of the subjects-in-control of the law. Therein lies one predicament of legal modernism: since law is man-made, the meaning of law can only be indeterminate given the diverse theories and practices of speaking, writing, and acting. But, the indeterminacy at the heart of the law calls for inquiry into the diverse identity of the subjects-in-control of the law. This inquiry can be threatening and, indeed, frightening to many contemporary legal thinkers because it potentially exposes how legal codes, texts, professional habits, and grammar constitute subjectivity in the law.

Ironist legal criticism is thus informed by the awareness that the subject is a problem for legal modernists. "The problem arises as each school [of jurisprudence] recognizes that its own intellectual architecture, its own normative ambitions rest upon the presupposition of a subject—a subject whose epistemic, ontological, and normative status is now very much in question."[144] The political action of postmodern ironist criticism is to highlight the decenteredness of the subject so that the human agent of law can appreciate her precarious situation within a discourse of law whose identity and actions are not what they are (re)presented to be. For ironists, "the humanist individual subject has now become one of the main disciplinary vehicles by which bureaucratic institutions stylize, construct, organize and police their clientele."[145]

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142. *See* GRANT GILMORE, THE DEATH OF CONTRACT, 43-44 (1974).

143. *See* Schlag, *The Problem of the Subject, supra* note 127, at 1632-56.

144. Schlag, *The Problem of the Subject, supra* note 127, at 1738.

145. *Normative and Nowhere to Go, supra* note 87, at 173.

Ironists view the politics of postmodernism as the "*politics of the form.*"[146] The "politics of the form" refers to the way representational practice in modern legal thought reproduces and defines the "political and jurisprudential field" that shapes the identity of legal subjects.

Ironists maintain that this representational practice has produced a form of legal normativity that has prevented legal subjects from appreciating how law limits their imagination and action. The political action of Pierre Schlag's ironist criticism attempts to produce an awakening in the human agents of law so that they might become more aware of the unstable and duplicitous nature of the discourse in which they are implicated. The difficulty of this ironic enterprise—and indeed the very reason it must be ironic—is that this type of legal criticism constantly risks (re)producing in new ways the same old subject roles and identities, the same old stabilized accounts of law, that it seeks to trouble and displace.

Ironists refuse to take sides in the debate between foundationalists and antifoundationalists. Ironists express "incredulity" towards all meta-narratives, even those that claim to be antifoundational in nature.[147] They point out the ironic juxtapositions of different "styles" between foundational and antifoundational arguments. They seem to say, "Here, look how this style embodies a particular vision . . . and how it is challenged by the style next to it, and by the style next to that."[148] Ironists thus remain agnostic about whether one style or another is the "correct" or "best" style for understanding social phenomena.[149]

Ironists are not terribly interested in deciding which is the best or correct approach for legal analysis because they do not think anyone is in a position to know. Unlike legal thinkers who act as if they are putting the last final touch on a nearly completed legal edifice, ironists assert that legal thinkers actually know little about how the law actually works as a discursive form of knowledge. Ironists argue that legal thinkers should spend more time figuring out how the discursive regimes they practice—formalism, instrumentalism, legal process, grand theory, etc.—serve to "legislate" the normative character of their academic and professional work.

For example, while Schlag's form of postmodern criticism is aimed at getting legal theorists to question who is the subject in control of modern legal analysis, Schlag remains silent about what legal theorists should do once they become aware of the necessity of this inquiry. The point is that ironists like Schlag resist issuing their own normative judgment about the missing subject. Schlag's strategy in dealing with the problem of critical inquiry about the subject is to produce a recognition in the subjects of law of their own decenteredness so as to allow them to appreciate their role in fostering

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146. *See* Pierre Schlag, *"Le Hors De Texte, C'est Moi" The Politics of Form and the Domestication of Deconstruction,* 11 CARDOZO L. REV. 1631 (1990).

147. Of course, even antifoundational discourses have similar intellectual foundations even though these "foundations" are characterized as being antifoundational, anti-essential, and anti-Western.

148. James Boyle, *Is Subjectivity Possible? The Postmodern Subject in Legal Theory,* 62 U. COLO. L. REV. 489, 503 (1991).

149. Instead, they seek to expose how intellectual practices in the law are mediated and constructed by their own "self-referential end . . . [which is] coextensive with the operation, performance, reproduction, and proliferation of bureaucratic practices and institutions." *Normative and Nowhere to Go, supra* note 87, at 186.

a legal normativity that is forever producing soothing, self-congratulatory accounts of itself.[150] What is missing in ironist legal criticism is a convincing account about what legal subjects are supposed to do once they become aware of their decentered and precarious situation within the discourse of law. Some believe that law's need for an analyst compels ironists to break their silence on this basic question.[151] This Schlag refuses to do.

B. Modern and Postmodern Concepts of the Self

One way to understand postmodern jurisprudence and its dilemmas is to view postmodernism as a subject-formation type of criticism: Postmoderns criticize and react against the definition of the legal subject found within modern conceptual and normative jurisprudence. The concept of self in modern theory defines the legal subject or person "back there" in control of the analysis and reason of the law. In modern legal theory, the subject is the judge who engages in "reasoned elaboration" and applies "neutral principles." In fundamental rights discourse, this subject is the idealized judge, Ronald Dworkin, identified as Hercules in *Law's Empire*.[152] As Schlag describes it, he "*is* the idealized self-image of the legal academic who by virtue of his intellectual prowess and his commitment to the rule of law applies his overarching legal knowledge to rewrite the case law in a way that is morally appealing."[153] Schlag calls this idealized definition of the subject the *relatively* autonomous subject of normative legal thought.[154]

While modern legal theory internalizes a "centered sense of the self," postmodern critics advance either a *situated* or *decentered* concept of self.[155] The idea of the *situated self* is developed from an understanding of subjectivity that "emphasizes that the self is formed only through a relationship with others."[156] The implications of situated subjectivity can be found in Posner's pragmatic manifesto. For Posner, "law is functional, not expressive or symbolic either in aspiration or—so far as yet appears—in effect."[157]

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150. *See, e.g.*, Schlag, *Problem of the Subject, supra* note 127, at 1629; *see also* Pierre Schlag, *Contradiction and Denial*, 87 MICH. L. REV. 1216 (1989).

151. *See generally* Caudill, *supra* note 130.

152. *See* Schlag, *Normativity and the Politics of Form*, *supra* note 139, at 845.

153. *See* Schlag, *Normativity and the Politics of Form*, *supra* note 139, at 845.

154. Schlag, *Normativity and the Politics of Form*, *supra* note 139, at 845. According to Schlag, "[t]his self is relatively autonomous in several senses of the term relative. First, this self is only *relatively* autonomous as opposed to say *fully* autonomous or *non*-autonomous. At the same time, however, this self is also *relatively* autonomous in the sense that it takes a 'relative' stance concerning its own autonomy. The relatively autonomous self is *relatively* so in yet a third sense of relative .... *Paradoxically,* this self is a creature whose structure is in part constituted by the legal texts, but who is in part constituted to act and understand itself to be autonomous." Schlag, *Normativity and the Politics of Form, supra* note 139, at 845. *See also* Schlag, *The Problem of the Subject, supra* note 127.

155. *See generally* Frug, *Decentering Centralization, supra* note 85.

156. Frug, *Decentering Centralization, supra* note 85, at 273. As Frug notes, the form of subjectivity has inspired a "wide variety of communitarians, civic republicans, and feminists, among others." Frug, *Decentering Centralization, supra* note 85, at 273.

157. POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 460. The functional nature of law is understood by examining how law functions in context. To comprehend this, judges must develop a situated

Posner's functional orientation is guided more by the contingent fact analysis of an interpretive subject than objective, neutral, and external interpretive criteria.[158] Posner's pragmatism thus criticizes modernist theories of law from the perspective of a situated functional interpretive subject. Legal modernists are criticized for misunderstanding the nature of the human subject and for confusing their descriptions and analyses of the law with objective, autonomous law. Hence, Posner declares: "I call what lawyers do in their argumentative or justificatory capacity *rhetoric* rather than *reasoning* because so much legal writing, even of the most celebrated sort, has only the form and not the substance of intellectual rigor."[159]

Postmodern ironists believe there is no core component of the self, only a shifting set of references of multiple identities.[160] Ironists attempt to bring out the multiple identities of human subjects that contemporary legal scholars have uncritically ignored. As Schlag states, "Postmodernism questions the integrity, the coherence, and the actual identity of the humanist individual self—the knowing sort of self produced by Enlightenment epistemology and featured so often as the dominant self-image of the professional academic."[161]

Rejecting the possibility of finding "correct" solutions to legal problems based on conceptual formulations of some foundational concept of the "Rule of Law" or "legal subject," postmodernists argue for new understandings derived from an awareness of the reciprocal nature of law, culture, and individual subjectivity. Postmodernists thus attempt to inspire legal scholars to contemplate the possibility of a new framework for analyzing law, one that offers a transformed concept of what it means to solve legal and theoretical issues generally. Their goal is to awaken the legal subjects of law so that they might better appreciate how they are implicated in the production of a rather arid form of legal normativity.

What is different about postmodern jurisprudence is its unabashed acceptance of the impossibility of solving legal problems under an ideal set of conceptual solutions. While modernists seek to solve and overcome paradox and predicament, postmodernists embrace paradox and predicament as an unescapable condition of contemporary intellectual thought. One significant advance that postmodernists have made is to recognize that the

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understanding of human subjectivity in the process of decision-making. The pragmatic concept of self is thus defined by a theory of behaviorism of *situated* individuals. As Posner has explained: "The law is not interested in the soul or even the mind. It has adopted a severely behaviorist concept of human activity as sufficient to its ends and tractable to its means." POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 460.

158. *See, e.g.*, POSNER, OVERCOMING LAW, *supra* note 93, at 532 ("We construct—not always consciously of course—the self that we present to the outside world."). Posner seems to believe that human subjects can construct their identity from their contextual and social situation in a very self-conscious manner much like the way we choose to dress in a certain way or change our physical appearance by cosmetic surgery. ("We construct [our identities] by what we do, what we wear . . . , what we say, and what we don't say; by cosmetics and sometimes by cosmetic surgery."). POSNER, OVERCOMING LAW, *supra* note 93, at 460. Ironists would reject this view of the subject because they do not believe that subjects can intentionally will their own identities. *Cf.* Schlag, *Clerks in the Maze*, *supra* note 135.

159. POSNER, OVERCOMING LAW, *supra* note 93, at 73 (emphasis in original) (footnote omitted).

160. *See* Frug, *Decentering Centralization*, *supra* note 85, at 304-12.

161. *Normative and Nowhere to Go*, *supra* note 87, at 173.

puzzles and predicaments of modern theory (the gaps between what we know and what we desire to know and control) are irreconcilable.[162] What distinguishes postmodernists from modernists is the way they position themselves in relation to intellectual paradox and predicament.

Modernists can neither accept nor rest content with paradox and predicament. For modernists, paradox and predicament are flaws or weaknesses that must be overcome. Postmodernists, on the other hand, regard paradox and predicament as important aspects of the postmodern condition. As John Patrick Diggins put it:

> [T]he contemporary 'postmodernist' offers a different message: we should go beyond modernism and take a more relaxed look at things, either by comprehending how knowledge, power, and society function, by viewing history without purpose and meaning as simply the longing of human desire for its completion, or by giving up trying to explain the nature of things and being content with studying how beliefs come to be justified.[163]

Postmodern legal critics like Posner and Schlag break from the modernist dogma of universal and autonomous law to step beyond modernism and its culture of fundamental individualism. Contemporary legal pragmatists such as Richard Posner want to bracket or set aside questions of legal coherence and instead emphasize what is useful or helpful in the way of belief. Ironists such as Pierre Schlag want to focus more directly on problems of legal coherence in order to better understand how legal discourse and practice works to "legislate" particular sorts of beliefs such as law's normativity. The dilemma of postmodernism, however, is that it resides within the predicaments and paradoxes of modernism. Postmodernism remains ambivalent about its own attachment to modernism. While postmodernists may have failed, at least as of yet, to transcend the predicament of the current intellectual situation in legal studies, they have been successful in teasing that predicament out of the styles, aesthethics, and condition of modern legal studies.

Postmodernism emerges in response to the crisis and predicaments intensified by contemporary pragmatic and ironic criticism. These new forms of legal criticism have brought attention to the need for tolerance of diversity existing in the larger culture. Without doubt, the "buzz word" in the academy today is multiculturalism. Multiculturalism is about diversity and culture. Its appeal is based on the belief of many women, gay, and non-white Americans that the discourse of modern law has erected a barrier that excludes minority perspectives and discourses from active participation in the deliberative processes of the law. In their writing about the law, contemporary legal thinkers, whether they be pragmatist or ironist critics, reveal, wittingly and unwittingly, how legal texts, discourses, codes, and canons of legal interpretation deny the existence of alternative and different notions of the self. Neopragmatists provide examples of what law might be like if legal analysts adopted a more situated concept of subjectivity,

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162. Or as Pierre Schlag put it: "[o]ne significant advance that postmodernists have made is to recognize that thought and the thinker (you and I) themselves operate within what economists call a *second best world* and that the *first best world* of traditional legal, social, and philosophical thought which routinely insists on naive rationalist conceptions of coherence, consistency, elegance, etc., is largely the product of disciplinary hubris and the inertia of academic bureaucracy." *Normative and Nowhere to Go, supra* note 87, at 174 n.18.

163. PROMISE OF PRAGMATISM, *supra* note 32, at 8.

whereas legal ironists advance the cause of a more radical transformation by championing the intellectual virtues of a decentered concept of subjectivity. While they reflect different critical moods and intellectual aesthetics, pragmatist and ironistist legal critics reinforce the postmodern revolt against the style, form, and aesthetic of legal modernism. Hence, while they are hardly homogeneous, Posner and Schlag are working to shape two different sides of postmodern legal thought.

CONCLUSION

Modern legal scholars—theorists, historians, doctrinalists, and the like—have insisted upon the need to separate law from society in order to say meaningful things about the relation law shares with culture. The boundary between law and society has consequently become a familiar way legal moderns maintain their belief that the law can be discovered conceptually in the object-forms of rules, principles, doctrines, or "culture." Langdell believed that the object-forms of the law were immune from the ever-changing nature of society. Holmes believed that external objective legal standards were needed to ensure that judges refrain from taking sides in "struggles for life." Society might change, but both Langdell and Holmes thought universal principles of law would endure. Modern-day legal theorists reject the idea of an artificially fixed line between law and society, but they continue to believe as Langdell and Holmes believed that law and culture must be studied separately for purposes of understanding law's role in society.

Postmoderns reject the inside/outside law-and-society distinction. Postmoderns claim there is no "outside" position that one can define or locate for studying either law *or* society as a separate, autonomous entity. Postmoderns assert that the study of law and society must be re-examined from different intellectual practices, discourses, life-styles, and world views of different cultures. Postmoderns, whether of the quasi-postmodern variety represented by Posner or the more robust ironic variety represented by Schlag, are in agreement in their rejection of forms of jurisprudence committed to the legal modernist's belief in foundational essences. The dilemma of legal modernism has been its inability, despite the best intentions of modern legal scholars, to mount an effective counter-attack to the subversive assault of the likes of seemingly dissimilar legal thinkers such as Posner and Schlag.

Yet, there is reason to wonder whether postmodern legal criticism is but another development in the cycle of exhaustion and renewal of the "movements" of legal modernism. The current intellectual mood is captured by the experience of "exhilaration" that soon gives way to *"ennui"* as the latest "provocative new piece of legal thought" is classified as "yet another possibly clever, perhaps thoughtful, but nonetheless utterly failed contribution."[164] In following the twists and turns of legal scholarship, the word *pastiche* comes to mind: It is the experience of *déjà vu*, the feeling that comes from the realization that each new development in legal theory represents a slightly different variation of an older idea or theory. New jurisprudential developments seem to offer only new twists, new words, and new emphases on old argumentative patterns of jurisprudence generating what Robert Scott has called a "recycling process."[165] The position of

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164. *Normative and Nowhere to Go*, *supra* note 87, at 167.

165. *See* Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329, 330

contemporary postmodern legal theorists such as Posner and Schlag is not unlike the position of Langdell and Holmes, who agreed that conceptualism in the law was inevitable, but disagreed that conceptualization would make the law more like a science. Posner and Schlag agree that legal analysis is culturally and linguistically contingent, but disagree on the possibility of discovering a situated, instrumental analysis to coherently guide legal analysis to correct answers, pragmatically defined. Postmodern pragmatists seek to reform modern legal analysis and instruct its practitioners on how to be more pragmatic and instrumental in their method. Postmodern ironists, on the other hand, attempt to intensify awareness of the inability of any legal method to reach closure.

The two sides of postmodernism reflected in the legal scholarship of Posner and Schlag thus mirror the tension and disagreement of the two sides of legal modernism reflected in the legal scholarship of Langdell and Holmes. Some may see this as evidence that postmodernism is merely the latest permutation of the "boom and bust" cycle of legal modernism.[166] To legal modernists, postmodernism may be just another interesting attempt to advance legal modernism to a new and different intellectual level.

Postmodernists are quite unlikely to deny the patterns and movements of legal modernism.[167] Postmodernists would point out that the recycling process of modern legal

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(1993). According to Scott, this "recycling process" has enabled each new generation of legal scholars to repackage old ideas and old theories in new theoretical packages. Hence, "Each [new] generation . . . offers a different metatheory to explain or understand legal phenomena, rejecting the perspectives of the previous generation in the hope of more successfully solving [law's many problems]." *Id.*

166. One might argue, as David Luban has argued, that postmodernism in legal scholarship expresses a late-1980s *neo-Kantian* perspective characteristic of late modernism. The *improvisations* of postmodernism in Luban's view are a form of "self-criticism" that attempt to develop "jurisprudence within jurisprudence" and thus repudiate the negation of modern jurisprudence. *See* Luban, *Legal Modernism, supra* note 1, at 1663 ("Modernist art is the *determinate* negation of premodernism."). Luban's view suggests that recent legal criticism attempts to "live up to the quality achieved by the great premodernist (classical) works." Luban, *Legal Modernism, supra* note 1, at 1663.

Luban's neo-Kantian characterization of postmodernism, however, is too self-consciously rooted in the past, too caught up in Kantian rational thought, to capture the irony of postmodern criticism. As Luban acknowledges: "I am no fan of the avant-gardist interpretation of modernism. . . . I revere too much of the past—too much art, too much history, too many ideals and institutions—to have any real sympathy with the avant-gardist sensibility." Luban, *Legal Modernism, supra* note 1, at 1681-82. Kantian rational thought cannot survive postmodernism because postmodernism seeks to overturn linguistic, conceptual, and normative underpinnings of the modernist conception of reason attributable to the philosophy of Kant. Kant believed that individual freedom and human rationality were ineluctably connected, and neo-Kantians remain committed to that view. Postmoderns (the robust ironic critics as distinguished from the neopragmatists) argue that concepts about rationality and individuality are mediated and constructed by a language which is incapable of grasping reality. "The postmodern conception of individuality [thus] casts the individual not as the subject in control of discourse, but as an artifact produced by discourse." Dennis Patterson, *Postmodern/Feminism/Law*, 77 CORNELL L. REV. 254 (1992). The *improvisations* of postmodernism represent the creation of new identities and new subjects for overcoming, not improving, the vestiges of modernism.

167. They would assert that "[t]here is no sense in doing without the concepts of metaphysics in order to shake metaphysics . . . . [They would say that they] can pronounce not a single destructive proposition which has not already had to slip into the form, the logic, and the implicit postulations of precisely what it seeks to

scholarship is not unique to law but is rather characteristic of a more general mood of unrest in the university. They would bring attention to the spectacle of a slowly emerging awareness of a new type of crisis not just in the law, or in the arts, or in the sciences, but *of* modernist culture itself.[168] Postmodernists would assert that the growing awareness of this crisis within the legal academy has "moved" modernism to a new transformative "postmodern" position.

Thus, there is reason to believe that there is something fundamentally different about the aesthetic forms of legal criticism that I have attributed to the recent work of Posner and Schlag. These legal scholars, unlike their modern counterparts, are forthright about their desire to move beyond modernist legal culture. Both seem to say that modernist legal culture is itself the source of the modernist's predicament. In reacting to the predicament of modern law, both of these legal scholars seem to be offering a new message for the legal academy. Posner seems to argue that legal theorists should "overcome" the modernist's urge to discover the foundations of jurisprudence and instead adopt a more pragmatic "relaxed" attitude predicated upon a "jurisprudence without foundations."[169] Posner thus cheerfully encourages legal theorists to give up on their traditional "preoccupation" with establishing the "autonomy" and "objectivity" of law because he believes we in law can do everything we did before, even better, without foundations or essences.[170] Schlag, on the other hand, is more serious and less sanguine; he argues that modernism and its influence can never be overcome by a lone author. He urges modern legal scholars to spend a lot more time trying to figure out what is going on in the discourse of law; and a lot less time prescribing or dictating what should be going on, and using their knowledge to "legislate" what is going on.[171]

The static conceptualism of Langdell and the fundamentalism of Holmes's legal pragmatism are thus put into question by the forms of legal criticism engaged by Posner and Schlag. Posner and Schlag have challenged aspects of legal modernist culture that purport to endow the law with the qualities of objectivity and neutrality, properties which have heretofore provided legal scholars, judges, and practitioners with an autonomous and fundamental subjectivity. Posner and Schlag, whether they acknowledge it or not, are very much writing in a new tradition for legal studies, a tradition based on a new mood and cultural perspective which may lead to the discovery of new meaning and new understandings about law, culture, and politics.

It is still an open question, of course, whether modern legal scholars will be able to reverse this course and revive the confidence they once enjoyed in the projects of legal modernism. Legal modernism has always thrived on crisis and movement, and it is possible that it will survive the crisis of postmodernism. The ability to absorb new movements has always been a strong quality of modernism. Postmodernists must wonder, then, whether their mood and their aesthetic form of criticism can survive the reductive

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contest." *Normative and Nowhere to Go*, *supra* note 87, at 174 n.18 (quoting Jacques Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences*, *in* WRITING AND DIFFERENCE 280 (A Bass trans., 1978)).

168. *See* Huyssen, *supra* note 5, at 48.

169. *See, e.g.*, POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 425-69.

170. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 3, at 454.

171. *See, e.g.*, *Normative and Nowhere to Go*, *supra* note 87.

and deeply conservative ideology of modern legal culture.[172] One wonders whether the postmodernist is in the proverbial position of the hare being chased by hedgehogs: "In some ways, the story of modernism and postmodernism is like the story of the hedgehog and the hare: the hare could not win because there always was more than just one hedgehog. But the hare was still the better runner . . . ."[173]

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172. Confronted by the critic who rhetorically asks: "What does this essay have to do with the law?", I am reminded of the dilemma of the postmodernist critic who is put to the task of defending her work on modernist terms. Postmodernists are, at every turn, asked to explain and defend the foundational essence of postmodern "theory," postmodern "practice," and the "normative" postmodern vision. Postmodernists, of course, refuse to do this since it would require them to accept the modernist's aesthetic framework. Instead, postmodernists offer modernists a new message: legal thinkers should adopt a new attitude in their work; they should "overcome" their compulsive urge to know fundamental "truth" and instead focus their intellectual energies in figuring out how their knowledge, language, culture, gender, class, and race help them shape what they think lawyers actually do when they say they are "doing law."

173. Huyssen, *supra* note 5, at 49.