Postmodern Legal Movements

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Postmodernism is an elusive idea that is not easily defined. Postmodernism is neither a theory nor a concept; it is rather a skeptical attitude or aesthetic that "distrusts all attempts to create large-scale, totalizing theories in order to explain social phenomena." Postmodernists resist the idea that "there is a 'real' world or legal system 'out there,' perfected, formed, complete and coherent, waiting to be discovered by theory." As developed in linguistics, literary theory, art, and architecture, postmodernism is also a style that signals the end of an era, the passing of the modern age. It marks a certain "chronological progression" that comes after modernism, describing what happens when one rejects the epistemological foundations of modernity.

Modernity, as distinguished from artistic modernism, relies upon a foundational concept of reason identified with the spirit of the Enlightenment. At one time, this spirit was expressed in the romantic confidence of philosophers like Kant and Hegel who thought that human emancipation could be achieved through reason. Today, modernity expresses Weberian despair but clings to the belief in the ability of "man" to emancipate humanity through empirical knowledge, scientific innovation, and rational thought. Modernists attempted to bring order and stability to the world through the rational construction of meta-theories. A central characteristic of modernity is the belief in epistemological foundations—the idea that knowledge can be justified only if it rests on indubitable foundations.

In law, modernity characterizes the view of traditional jurisprudential scholars who shared a common belief in the possibility of systematizing
legal knowledge using coherent and verifiable propositions about the
nature of law and adjudication. Legal modernity purported to secularize
jurisprudential thought. Legal moderns thought about law in essentialist
terms, viewing it as an autonomous, self-generating activity. They fos-
tered the development of grand-scale narratives and discourses. They
believed that a distinct legal method is discoverable and that such a
method could unlock the door to the ultimate truths of the law. The
legal scholar’s responsibility was to discover, develop, and refine that
method. The canons of traditional scholarship were thus thought capa-
ble of revealing the “evidence” for truth determination. As one modern
legal scholar, Matthew Finkin, recently put it: “The canons of responsi-
bile scholarship require the scholar to play fair; to report all the evidence;
neither to distort nor to ignore. But assuming that to have been done,
the conclusion offered will rise or fall on the cogency of the reasoning,
on the closeness of fit of the argument to the evidence.”

While the distinctive discourse of modernity is aimed at prediction
and control, postmodernism brings out the diversity of multiple dis-
courses and is skeptical of all universal knowledge claims. Postmodern-
ism rejects the belief in stable, transcontextual foundations. Postmoderns
claim that there is no logical correspondence between language and the
“objective” world because “language is socially and culturally con-
structed, it is [thus] inherently incapable of representing or correspond-
ing to reality; hence all propositions and all interpretations, even texts,
are themselves social constructions.” Postmodernists do not deny that
there can be knowledge of reality; what they deny is that we can rely on
theory and language to objectively fix the meaning of reality.

Postmodernism is an essentially contested movement of thought that
is defined by practices that resist and react against modernism. It is not
a movement or school, and more than just a description of a style
or aesthetic. Postmodernists disagree about objectives and methods of
postmodern criticism. “What’s at stake is the definition of an era—our
era—and, along with it, the relevance and meaningfulness of our politi-
cal, intellectual, and aesthetic practices.” Postmodernism is a contested
idea associated with “a rising sentiment that we are coming to the close
not only of a century and a millennium but of an era.” One indication
of this sentiment is present in the disagreement about the meaning and
existence of postmodernism. Another indication is the chaos and diver-
sity of the “industrial process of commodification, bureaucratization,
consumerization, and saturation” of social and cultural practices.\textsuperscript{11} Postmoderns are cultural critics who attempt to bring attention to the ambivalence and confusion prevailing in the contemporary intellectual and social situation.

The Postmodern Condition

Postmoderns say that we are now living in the postmodern condition, the postmodern era, or postmodernity, a time that entails new conditions and requires new critical techniques of investigation.\textsuperscript{12} One way to understand this claim is to consider how individual identities of subjects are constructed in the dominant electronic media of our culture, television. A shift in cultural images can be seen by considering how the cultural images of the fifties generation compare to those of the contemporary generation. David Halberstam, in his recent book, The Fifties, describes how the fifties generation became “wired for television,” and how a new electronic medium reflected a sense of “goodness” and “expanding affluence” that characterized the feeling and mood of that era.\textsuperscript{13}

The popular mid-fifties sitcom, The Adventures of Ozzie and Harriet, depicted the average American family (the Nelsons) as having “no economic crises, no class divisions or resentments, no ethnic tensions, few if any hyphenated Americans, few, if any, minority characters.”\textsuperscript{14} The Cleaver family portrayed similar images in the popular 1950s TV comedy Leave It to Beaver. The Cleavers, like the Nelsons, also lived in television suburbia. No one knew in which state or suburb they lived, or what Ward Cleaver and Ozzie Nelson did for a living, except that they were respectable, and they dressed in a white shirt, tie, and suit.\textsuperscript{15} The cultural images of the families in these TV sitcoms suggested that America was a well-ordered and good society, even though the reality facing many Americans was far from perfect.\textsuperscript{16}

By the late 1970s, television imitated the diverse, fragmented, and confusing cultural images of social life. The 1979 Saturday Night Live late-night television comedy made fun of the fifties sitcoms in a show featuring a special guest appearance by Ricky Nelson, who played the wholesome all-American teenager in the Ozzie and Harriet show. The Saturday Night Live skit turned the suburban world of Ozzie and Harriet into the Twilight Zone. Dan Aykroyd, playing Rod Serling, began as
the narrator: “Meet Ricky Nelson, age sixteen. A typical American kid, in a typical American kitchen in a typical American black-and-white-TV family home. But what’s about to happen to Ricky is far from typical unless you happen to live in the Twilight Zone.” The scene then switches to Ricky, wandering home from school, who appears in the home of the Cleavers, from Leave It to Beaver.

The Cleavers treat Ricky as part of their family. “June offers him a brownie but warns him against spoiling his appetite.” When Ricky tells June his name, she responds, “What a lovely name.” Ricky becomes confused; he leaves and wanders into the home of the Andersons, of Father Knows Best. Jim Anderson (the father) assumes that Ricky is his daughter Betty’s blind date. Jim asks Ricky his name, “Nelson,” he says. Jim says, “What a nice name. Presbyterian?” Ricky answers: “My father is, sir. My mother is Episcopal.” Jim replies: “Well, I certainly hope you’ll stay for dinner.” Margaret, Jim’s wife, says, “You’ll want to wash up and have a brownie first.” Ricky then continues on his journey, wandering through the family of Make Room for Daddy and then on to the Ricardos of I Love Lucy, where Ricky arrives just in time to see Lucy burn a turkey in the oven.

Ricky then disappears as he continues his journey, attempting to understand the meaning of the different “forms of life” he encountered in the families of other 1950s sitcoms. Serling (Aykroyd), narrating in the background, stated: “Submitted for your approval. A sixteen-year-old teenager walking through Anytown, USA, past endless Elm, Oak, and Maple Streets, unable to distinguish one house from the other.”

The Saturday Night Live skit made fun of the fifties sitcoms by using the postmodern technique of pastiche to bring out the experience of recognizing the endless connotations and references for defining individual identity. The word “pastiche” describes the experience of multiple identities of the self defined by a contingent set of relations with other individuals and groups. Pastiche helps capture the postmodern condition by bringing out the contingency and fragility of the concept of identity. Pastiche is the experience one encounters after realizing that the universal discourses of Western culture (discourses based on the notion of a universal concept of self) are fragile, unstable, and contingent. Pastiche becomes a powerful tool for gaining critical insight about the fragility of the modernist concept of self.

In the Saturday Night Live skit, Ricky Nelson attempted to find his
identity in relation to the new families he meets. Like the sampling technique of modern rap music, pastiche uses different styles and cultural codes to create new patterns and combinations. This experience describes the “schizophrenia” of living in a fragmented society where self-identity is constantly redefined by the intertextuality of diverse images, symbols, and cultural practices. Ricky’s odyssey on Saturday Night Live brings out the dead styles of the 1950s. Although amusing, it is also somewhat unsettling, because it helps to frame countercultures and multiple communities of postmodern culture.

The postmodernist Fredric Jameson uses the word “pastiche” to describe the experience of living in a society dissected and bombarded by endless symbols and messages of the electronic media that seek to give meaning to the market, bureaucratic, and social processes. In such a world “we are imprisoned, bombarded, connected, inspected, and (potentially) dissected by electronic media: the TV, the VCR, the phone, the fax, and the computer.” The idea of society is fragmented into multiple communities of different cultural and racial perspectives: “In postmodernity, all is diversity and heterogeneity; any discourse of ‘community’ is suspect as a discourse of oppression. The byword is resistance, the refrain ‘Watcha mean we’?”

Jean-François Lyotard’s account of the postmodern condition emphasizes the diversity of local narratives within scientific and academic discourse and the process by which a particular form of knowledge can claim legitimacy. The grand narratives of Western knowledge are said to rest on the suppression and denunciation of local narratives that help define and support the dominant narrative. According to Lyotard, “Scientific knowledge cannot know and have made known that it is the true knowledge without resorting to the other, narrative, kind of knowledge, which is from its point of view no knowledge at all.” Lyotard’s main conclusion is that since the Second World War, these grand narratives have lost power, giving rise to the “incredulity towards metanarratives.” The loss of confidence in foundational narratives has helped bring about diversity, fragmentation, and new scholarly interest in pragmatic “local narratives.” The spirit of the Enlightenment and the organizing power of science is said to have weakened.

Postmoderns attempt to bring attention to the diversity of the current cultural condition by constrasting how the language and theories of modernists attempt to hide, marginalize, and homogenize the fragmen-
tary and chaotic nature of our multicultural society. There are many different ways that postmoderns attempt this (including psychoanalytic, poststructuralist, deconstruction, and feminist approaches), but all efforts aim to expose how the postindustrial process of commodification and consumerization has disintegrated the cultural symbols of the fifties generation and recombined those values in ironic new combinations to produce a postmodern system of bureaucratic thought. Diversity and fragmentation of jurisprudential theories signal the postmodern condition.

The Two Sides of Postmodernism

In law, postmodern criticism has come to represent two dominant perspectives. One group of postmodern social critics adopted a neopragmatic stance framed by the antifoundational philosophy of Richard Rorty. Rorty, the leading living philosopher of neopragmatism (a form of critical pragmatism derived from the pragmatist philosophy), rejects the foundational theories of analytic philosophy. Following the ideas of Wittgenstein, Dewey, and Heidegger, Rorty argues that "investigations of knowledge or morality or language or society may be simply apologetic attempts to externalize a certain contemporary language-game, social practice, or self-image." Rorty believes that the representational systems of meaning used in philosophical discourse derive meaning from social practices and conventions of society. "Nothing 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's neopragmatism coupled with "his insistence on our being determinately embedded in the social and historical is quintessentially postmodern."

Neopragmatism is in some ways only a "close cousin" of postmodernism. It is like postmodernism in that its practitioners accept the postmodern view that truth and knowledge are culturally and linguistically conditioned. On the other hand, neopragmatist practice is unlike postmodern (or what some theorists call poststructuralist) criticism because it is less concerned with exposing the contradictions of modern conceptual and normative thought than revealing instrumental, empirical, and epidemiological solutions for the problem at hand. The neopragmatic critic attempts to use the modernist framework when it seems
to work, after "correct[ing] for biases to which the culturally situated framework is prone." 39

Neopragmatists thus attempt to explain how one can do theoretical work without rejecting all pretenses of foundational knowledge. Neopragmatists argue that the theorists must take a situated stance in their scholarship and adopt an instrumental approach to theory. Whatever works in context becomes the standard for their theoretical investigation and judgment. The goal of these postmodern critics is freedom from theory. Once we move away from the Enlightenment spirit of reason and science, Rorty argues, we can “substitute Freedom for Truth as the goal of thinking and of social progress.” 40

When applied to legal studies, neopragmatism forms the academic perspective of scholars who reject all foundational claims of legal theory but remain committed to the view that legal theory can be useful for resolving legal problems. For neopragmatists like Rorty or Stanley Fish, theory is a tool that can be used to help decision makers resolve problems pragmatically. Neopragmatists thus believe in and are committed to the Enlightenment idea of progress, even while they resist using the modernist’s framework. For this reason, neopragmatists may only be “close cousins” of postmodernists. On the other hand, because neopragmatists reject foundational arguments and the idea of cultural universalism, they distinguish themselves from Enlightenment moderns as well as from traditional pragmatic philosophers.

Another group of postmodern critics, the ironists, 41 attempt to facilitate the crisis and fragmentation of modern theory by employing postmodern criticism to “displace, decenter, and weaken” central concepts of modern legal Western thought. They are ironists because they claim that the discourse of modern Western thought has been effective—very effective—but not for the reason modernists imagine. Ironists assert that the significance of modernism lies not in specific prescriptions or social tasks, but rather that 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.” 42 In law, modernism is said to have established a form of normative legal thought which is “so concerned with producing normatively desirable worldly effects [it] has, ironically, become its own self-referential end.” 43

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. Postmoderns such as Jacques Derrida, Michel Foucault, and Edward Said thus employ deconstructive practices and other critical techniques for displacing and centering the modes, categories, and normative concepts of Western thought.

Derrida's deconstruction of Western philosophy and literature attempts to bring out the play of différence (a word created by Derrida to signify the "other") in various texts to reveal how Western reason excludes different self-identities and life-styles. Foucault and Said attempt to show how Western concepts of humanism and reason have functioned to define social identities in ways that exclude the social conventions and identities of other groups. Postmodern ironists attempt to expose exclusionary effects of rational thought by bringing attention to the relationship between knowledge and power. The goal is to uncover the human identities and dead styles defined by the symbolic system of meaning in modern thought and then to expose how the universal identity of the self excludes and disciplines other self-identities.

Neopragmatists and ironists have thus worked to redefine the political orientation of traditional labels such as liberal and conservative. Modernists are divided between "left," "liberal," and "right" political orientations, but no matter what political label modernists subscribe to, they believe in the Enlightenment idea of a politically correct vocabulary for thinking about political problems. They think it essential to get the "right" political vocabulary and program for government, law, and social relations. The left, liberal, and political right are regarded by postmoderns as different instances of the same universal motif of modernity. Postmoderns resist and react against the different political orientations of modernists because they view modernist conception of politics to be embodied in the fabric of a contradictory and problematized conception of reason. They attempt to decenter this conception of knowledge and politics by exposing contradiction, paradox and irony embedded within modernist discourse. Neopragmatists attempt to transcend the traditional categories of politics through an antifoundational instrumental perspective. Ironist theorists attempt to do the same by employing deconstructive interpretive strategies to show the irony of the
modernists' political scenarios of "social hope." The irony is that the modernists' political scenarios have become a self-referential end rather than a means for achieving a particular social goal or task.47

Each side of postmodernism seeks to highlight the disintegration and fragmentation of modern culture in the representational practices of various intellectual disciplines. Culture, language, and context are the common themes of postmodern criticism. Postmoderns are cultural and literary critics who seek to reveal how intellectual discourses, language, and fields of knowledge reproduce and present questions about social relations and cultural practices. Postmoderns report on the complex motif of the postmodern condition in order to better understand the politics of our time.

**Postmodern Jurisprudence**

Postmodern jurisprudence emerges from the postmodern intellectual condition. It represents the view expressed by Lyotard that the search for new legal theories and metanarratives to solve law's problems has been exhausted. It "announces or implies that a rupture has occurred, an irreparable break with the past, and that nothing can ever be the same again."48 By 1990 there were signs that this had happened in jurisprudential studies. There was a loss of belief in a secular and autonomous jurisprudence as the "Rule of Law" for all rules. Indeed, as the century approaches its end and we enter the next millennium, it is no longer possible to identify a mainstream view of jurisprudence. Even though jurisprudence constantly develops new theories about law and adjudication, the same argumentative patterns are played out. New jurisprudential developments include new twists, new words, and new emphases on common argumentative stories told about jurisprudence.

Jurisprudence at century's end exhibits a certain postmodern aesthetic—an aesthetic that accepts the problematic nature of its own foundations. The experience of pastiche is felt as each new cycle of legal theory of jurisprudence recasts the same structure and same argumentative patterns in different combinations. The study of jurisprudence has thus become like Ricky Nelson's odyssey through the sitcom families of 1950s suburbia. The exhilarating experience of discovering a new idea or theory of jurisprudence soon dissipates as one realizes that the new idea or theory merely recycles an old one.
This experience of pastiche characterizes the \textit{routine} of modern jurisprudence reflected within the various theoretical trends or "schools" of legal thought. Postmoderns reveal how new schools of jurisprudence, and new ideas about law and adjudication, emerge only to fade as they are revealed as flawed attempts to overcome modern problems of jurisprudence. The process of creating the new from the old (the presentation of a new theory eventually revealed to be a copy of an old theory) has weakened legal modernism. Postmoderns believe that the breakdown of the \textit{performative} significance of modern theory has now established a crisis in representation such that the old categories and normative positions of legal modernism are no longer credible.\footnote{49}

The current intellectual mood in jurisprudence 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."\footnote{50} In jurisprudence, pastiche describes the experience of \textit{déjà vu}—the feeling Ricky Nelson had as he realized that each new family he visited represented a slightly different variation of the same old Nelson family. For postmoderns, the current situation of American jurisprudence is a lot like Ricky Nelson's odyssey on \textit{Saturday Night Live}: like Ricky, legal moderns have embarked on an odyssey in search of the "right" jurisprudence for American law. The contemporary problem of jurisprudence, however, is that jurisprudence is \textit{the} problem. The diverse modes of contemporary legal thought project legal identities of many different legal subjects: critical subjects, neopragmatic subjects, feminist subjects, literary subjects, and the like. The fragmentation of subject formations in the law has become a serious problem for legal theorists. The postmodern condition of jurisprudence comes from the awareness that legal subjects have lost confidence in the distinctiveness of the "performative enterprise"\footnote{51} of their discipline that had heretofore defined their professional identity. The problem of jurisprudence is thus the problem of culture and politics.

As an intellectual and political practice, postmodernism views knowledge as mediated by the current social, cultural, linguistic, and historical condition of our time. Postmoderns understand truth and knowledge as contingent social constructions, incapable of being grasped by a fixed, determinate theory or conceptional construct. For some postmoderns, "Rational argument is expressed as . . . a privileging of a perspective, a
move in a power game.” For others, truth can never be transparent because truth is a social construction mediated by a language inherently incapable of capturing reality. Thus, postmodern jurisprudence is not a theory of law, but a kind of antitheory—an antitheory that strives, however problematically, to resist the adjudicatory impulse, the regulatory obsession of modern legal thought.

Postmodern jurisprudence can be found within the legal scholarship of postmoderns who have adopted either the neopragmatist or ironist stance in their legal criticism. Richard Posner is the best-known neopragmatic postmodern legal scholar in the academy today. Pierre Schlag is the leading champion of ironist legal criticism. To understand how these postmodern scholars practice their postmodern criticism, it is helpful to examine how they position themselves in relation to ideas about the nature of theory, language, knowledge, and the identity of the subject.

The Nature of Theory

Postmodern neopragmatism is evident in the Pragmatic Manifesto outline in Posner’s book, The Problems of Jurisprudence. Posner renounced the scientism of the law and economics movement and embraced the pragmatic manifesto of neopragmatic philosophers such as Richard Rorty. According to Posner, pragmatism overcomes the essentialism of legal conceptualism and formalism without falling prey to the moral relativism of legal realism or its modern counterpart, critical legal studies. Posner believes the pragmatic approach is a “middle way” that avoids the exaggerations and pitfalls of legal formalism on the right, and the fundamental contradiction thesis on the left. Instead of relying on abstract propositions of “theory,” Posner argues that judges should rely on instrumental logic; he uses theory and legal reasoning as tools to get a job done. His true test of every legal analytic is whether it “works” instrumentally in maximizing human goals and aspirations. 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.

Richard Posner’s pragmatism exhibits what Thomas Grey calls “freedom from theory-guilt,” a scholarly temperament liberated from the necessity of devising a theory of law rooted in some total perspective. Freedom from theory-guilt places neopragmatists in a theoretical posi-
tion that is critical of modern legal theory as well as the interdisciplinary theories associated with the 1980s movements. 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 perspectives of modern legal theory as well as critical social theories such as Marxism. Postmodern pragmatists argue that their "real interest is not in truth at all but in belief justified by social need."

Posner's pragmatism helps to identify the perspective characterizing the post-Chicago law and economics movement. Although they differ in many respects, post-Chicago law and economics practitioners have unwittingly committed themselves to antifoundationalism, anti-essentialism, and the rejection of any one-dimensional interpretive guide to law and legal decision making. This is also the credo of Posner's pragmatic jurisprudence. The pragmatist argues that no universal perspective exists for resolving problems of jurisprudence. Neopragmatists thus turn their back to jurisprudence and legal theory. They instead embrace a pragmatic form of reasoning that exhibits qualities associated with postmodernism—antifoundational and skeptical attitudes about the study of law. Legal feminists and critical race scholars have also relied on neopragmatism in their work. Pragmatic feminists such as Margaret Jane Radin and Mary Becker, for example, have argued that legal feminists should stop arguing among themselves about feminist approaches and instead use whatever approach works for dealing with gender discrimination in the law. Critical race theorist Cornel West of Harvard University has been a forceful advocate of a "prophetic pragmatic" approach for understanding how structures of domination in society operate to the disadvantage of people of color.

Neopragmatic legal critics also follow Rorty's skeptical attitude toward science and empiricism. Rorty's brand of neopragmatism is also a form of antitheory that insists that truth and authority are social and therefore always contingent upon the meaning constructed by a particular community. What is accepted as truth is merely the expression of universally shared community beliefs about the truth of something. Neopragmatists reject truth assertions based on dogma; they believe that truth is socially constructed by each community in order to achieve certain ends. In keeping with the pragmatic philosophy of James and
Dewey, neopragmatists approach theory as merely a tool or instrument for the achievement of human ends. Unlike James and Dewey, however, neopragmatists do not believe that the scientific method is “efficacious.”

Neopragmatists believe that theory merely establishes the rules for playing a particular language game. They view theory as a function of language, rather than reason, logic, or analytical method. Neopragmatists have accepted two paradoxical ideas about law: first, that it is possible to know the truth without accepting the idea of universal essences; and second, that it is possible to reach principled decisions even though there are no right answers. These ideas are not really paradoxes for legal pragmatists since they reject the philosophy of foundationalism upon which universal truth and right answers rest.

Ironists, inspired by the critical practices of Derrida, Foucault, and Said, reject the essentialist claims of modern theory. Unlike neopragmatists, ironists reject the idea of a “middle ground” of a pragmatic intuition for avoiding the essentialism of foundation theories. They believe that there is no way to avoid the predicaments of modern theory because no “middle ground” exists. These nonpragmatic postmoderns have given up on the Enlightenment idea of normative or regulative theory altogether, and attempt to look beyond theory to recognize and redescribe the normative narratives and discourses of law.

One way to understand the difference between neopragmatists and ironists is to consider how they position themselves in relation to the foundational claims of modern legal theory. While neopragmatists reject the idea of an intellectual foundation, they nevertheless 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 neopragmatists is merely another manifestation of the modernists’ attempt to discover a foundation for legal analysis. Pierre Schlag, for example, 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.” Hence, Schlag argues that neopragmatism is prefigured in a way quite unconscious to itself, by an aesthetic, a rhetoric, a discourse that is quite inhospitable to neopragmatism’s own stated aims and projects.
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." 66

Another way to see the difference between these two sides of postmodern jurisprudence is to consider how each side understands the nature of legal theory. For neopragmatists, legal theory is a tool used for getting a job done. They don't see any sense in debating the truth or objectivity of law; the only thing that matters is deciding which particular conceptions of law work best under the circumstances. While neopragmatists view legal theory as a tool, ironists understand legal theory as a type of theater. Ironists argue that the conceptualist and normative forms of modern jurisprudence are a "kind of theater" for directing the action and subjects of a particular kind of scene in a play. Postmodernists seek to bring out the power of this theater to control and limit the type of narratives found in the law. As Schlag stated: "The rhetorical script of normative legal thought is already written, the social scene is already set and play after play, article after article, year after year, normative legal thought" offers the same normative choices. 67

Ironists maintain an ironic stance in claiming that the bureaucratic practices and values of modern law and society (re)inscribe and monitor the aesthetics of all forms of contemporary legal thought, including those represented by postmodernists. The goal of ironist criticism is to decenter foundational narratives in legal thought, without claiming to stand outside that system. Schlag thus does not attempt to get beyond the "text" of the law; he rejects the idea that the text stands outside of culture. He maintains that the politics of postmodernism must be understood in relation to modern legal thought; the goal of ironists' criticism is to decenter and displace modernist claims of a universalist method guided by a detached and autonomous subject unaffected by the situatedness of her context.

Ironists do not share the same intellectual position of antifoundation-
alist philosophers following Rorty. In philosophy, antifoundationalism has become a popular theme that rejects the idea of shared intellectual foundations. Antifoundationalism is akin to postmodernism in that both reject attempts to explicate rational and objective argument. Unlike foundationalists, ironists seek to (re)describe the normative subject of all foundational and antifoundational accounts of reality and knowledge claims. Through the process of (re)description, postmoderns seek to highlight the different subject formations within foundational and antifoundational accounts of law. They do this to decenter the authoritarian claims of modern theorists in order to reveal how language and reason mediate the modernists' understanding of the world, and to show how modernists lack the ability to grasp the world "as it really is."

Ironists thus refuse to take sides in the debate between foundationalists and antifoundationalists. Ironists express "incredulity" toward all meta-narratives, even those that claim to be antifoundational in nature. They point out the ironic juxtapositions of different "styles" between foundational and antifoundational arguments. They seem to be saying: "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." Ironists remain agnostic about whether one style or another is the "correct" or "best" style for understanding social phenomena. 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."  

The Nature of Language

Modern legal scholars uncritically assume that language is like a mirror capable of accurately reflecting the meaning of objects in reality. The metaphor that captures the modernists' view of language is conduit—language is viewed as a conduit used by lawyers and judges to "get their message across." In this schema, words are (re)presented as containers of meaning. Postmoderns reject this objectivist view of language. They argue that language must be understood in relation to the cognitive processes of the people who speak it. Postmodern neopragmatists argue that language must be understood as a "language game" based on socially contingent rules for determining the truth or falsity of judg-
ments. Ironists adopt a similar stance in arguing that language in the law is a "normative language game." Both strands of postmodern legal thought embrace Wittgenstein's view of language as a "form of life" or "language game."

In describing language as a "game," Wittgenstein meant that language was a practice used by communities to determine the truth and reality of judgments. "The upshot of Wittgenstein's view of language is that all of our language has meaning only within the language games and 'forms of life' in which they are embedded. One must understand the use, the context, the activity, the purpose, the game which is being played." Wittgenstein's view was that human understanding occurs within language games and that there is no way to get outside of the game to ascertain the truth or reality of judgments. Legal postmoderns have adopted this view of language in their effort to bring attention to the underlying context, activity, and purpose of modern legal thought.

Postmoderns thus reject the "common sense" understanding of language which associates the meaning of words with fixed objects in the world. What is challenged is the image of legal discourse as a neutral medium capable of reflecting the true meaning of social events. Postmoderns claim that the common-sense idea that meanings of words reside "in" language is "fundamentally misguided." For them language constructs, rather than reflects, the meaning of things and events in the world. The revival of Wittgenstein's language-game hermeneutics in contemporary legal scholarship suggests that legal thought is slowly assimilating postmodern developments in the theory of language and culture.

The Nature of Knowledge

While postmoderns agree that "truth" is a relative concept, they disagree on the possibility of progress through "knowledge." Neopragmatists believe that practical reason is a form of knowledge that exists and can be relied on in reaching judgment. Legal neopragmatists believe that knowledge of the world can be obtained through the trial and error process of experiences. As Richard Posner states: "There is knowledge if not ultimate truth, and a fallibilist theory of knowledge emphasizes, as preconditions to the growth of scientific and other forms of knowledge, the continual testing and retesting of accepted 'truths,' the constant kicking over of sacred cows—in short, a commitment to robust and
free-wheeling inquiry with no intellectual quarter asked or given.” Postmodern neopragmatists believe that “[t]he soundness of legal interpretations and other legal propositions is best gauged . . . therefore, by an examination of their consequences in the world of fact.”

Ironists have a different orientation toward knowledge. Taking Foucault’s mandate that “power comes from everywhere” seriously, ironists argue that law is a form of knowledge that creates and constitutes power. Thus, Pierre Schlag forcefully argues that “the value (if any) of normative legal thought depends on a decentered economy of bureaucratic institutions and practices—such as those constituting and traversing the law school, the organized bar, the courts—that define and represent their own operations, their own character, their own performances, in the normative currency.” Law as a form of cultural knowledge “becomes the mode of discourse by which bureaucratic institutions and practices (re)present themselves as subject to the rational ethical-moral control of autonomous individuals (when indeed they are not), just as normative legal thought constructs us (you and me) to think and act as if we were at the center—in charge, so to speak—of our own normative legal thought (when indeed we are not).” Ironists alter the concept of knowledge by revealing its political, social, rhetorical, institutional, and aesthetic dimensions.

Ironists thus try to decenter, displace, and weaken the knowledge-claims of conceptual and normative jurisprudence. Their goal is to uncover how bias, prejudices, and normative perspectives affect theories of evaluation and types of knowledge. The point is not merely criticism. It is to show how limits are set, how possibilities are established—in short, to show how law works. Ironists attempt to reveal the ideological bias that prefigures theories of knowledge. Ironist philosophers want to expose how the boundaries of philosophy can be (re)described in ways to enlarge the canons of philosophy to permit cultural and literary criticism. Legal ironists serve a similar function in enlarging the canons of legal interpretation to permit legal thinkers to better understand how the official perspective of the law is culturally and linguistically conditioned.

Identity of the Self

Of the four key ideas relevant for understanding postmodern legal criticism, the concept of self is critical. Indeed, one way to understand legal
postmodernism is to view postmodernism as a subject-formation type of criticism—postmoderns criticize and react against the liberal 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 whom Ronald Dworkin identified as Hercules in Law's Empire. As Schlag puts 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." Schlag calls this idealized definition of the subject the relatively autonomous subject of normative legal thought.

While modern legal theory adopted a "centered sense of the self," postmodern critics adopted either a situated or decentered concept of self. The idea of the situated self is based on an understanding of subjectivity that "emphasizes that self is formed only through a relationship with others." The implications of situated subjectivity can be found in Posner's postmodern legal pragmatism. For Posner, "law is functional, not expressive or symbolic either in aspiration or—so far as yet appears—in effect." The functional nature of law is understood by examining how law functions in context. To comprehend this, judges must develop a situated understanding of human subjectivity in the decision-making process. The individual is seen as an economic rational actor in the context of transactions with other individuals. The economic concept of self is thus defined by a theory of behaviorism of situated individuals. As Posner 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 traceable to its means." The behaviorists' concept of human subjectivity commits postmodern legal pragmatists to a concept of situated self as a product of human relationships.

Ironists are committed to a decentered form of subjectivity. They believe there is no core component of the self, only a shifting set of unstable references of multiple identities, and attempt to bring out the multiple identities of human subjects that contemporary legal scholars have uncritically ignored. As Schlag stated: "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.”

Ironists’ legal criticism is thus based on the idea that the “subject is a problem.” “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.” The goal of postmodern criticism is to decenter the subject so that the human agents of law can appreciate their responsibility for the normativity of law. 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.” Ironists view the politics of postmodernism as the politics of form, which refers to their claims about the way representational practice in modern legal thought reproduces and defines the “political and jurisprudential field” that shapes the identity of legal subjects.

Postmodernists have not limited their criticism to the subject formation of modern legal thought. They also criticize the subject formation represented in interdisciplinary legal studies. Ironists claim that the interdisciplinary work of law and economics is committed to a type of subject formation found in work of Langdellian formalists. Both law and economics and Langdellian formalism define the subject as relatively autonomous. Ironists charge that interdisciplinary approaches in law merely replaced “law” as the source of law’s autonomy.

Interdisciplinary legal formalism reproduces the same autonomous subject reflected in normative legal thought. As Pierre Schlag stated in his 1991 essay, The Problem of the Subject: “The story is the story of formalism and the problem is the problem of the subject. The story of formalism is that it never deals with the problem of the subject. The problem of the subject is that it’s never been part of the story.” Schlag demonstrated how Langdellian formalism presumed the existence of a conscious sovereign subject whose normative and ontological status gives the illusion of law’s autonomy. Ironists argue that the history of legal modernism can be understood as a story of the missing subject.

Rejecting the possibility of finding “correct” solutions to legal problems based on conceptual formulations of some ideal Rule of Law,
postmodernists argue for new understandings derived from an awareness of the reciprocal nature of law, culture, and individual subjectivity. Ironist criticism has inspired legal scholars to contemplate the possibility of a new framework of analysis law, one that offers a transformed concept of what it means to solve legal and theoretical issues generally. What is different about postmodernists is their unabashed acceptance of the impossibility of solving legal problems under an ideal set of conceptual solutions. One way to understand postmodernism is to consider how postmoderns understand the relationship between law and culture.

Postmodernists reveal how Langdellian formalism and Holmesian instrumentalism have reproduced themselves in the contemporary patterns of interdisciplinary legal studies. Postmoderns expose how repetitive sameness in the various modes of interdisciplinary legal studies fail to maintain the modernists' faith in the powers of reason to penetrate the truth of the legal system. They argue that the faith in one true "rule of law" wore out; the belief in law's autonomy ceased to inspire the imagination of the current generation of legal scholars. They recognize this in acknowledging that "[m]any of the critiques developed over the past twenty years or so seem to have reached, if not dead ends, then at least a measure of exhaustion." 98

The transition from the old to the "new" jurisprudence began with the breakdown of the core beliefs and theories that served to define modern jurisprudence. The breakdown is partly a manifestation of the proliferation of new jurisprudential discourses and new movements in legal thought. What energizes jurisprudential discourse today, however, is a general skepticism of all structural, deterministic, and foundational arguments in the law. What is rejected is the "bed rock assumption . . . that we are capable of representing reality more or less precisely and that some knowledge transcends particular perspectives and contexts." 99 Postmodern jurisprudence challenges modern conceptions of law and jurisprudence by undermining the modernist belief in foundations, essences, objectivity, and autonomous law.

Postmodern Politics

It would be misleading to say that everyone finds the postmodern developments in jurisprudence attractive. To the contrary, judging from the academic hype in the general university, postmodernism is held responsi-
ble for a multitude of ills in the modern university—multicultural curricula, political correctness, affirmative action, restrictions on hate speech, and the general disinterest in the great classics of Western culture. In the legal academy, the most frequently voiced objection to postmodernism is that it is a nihilistic scholarly movement that is a recipe for inaction. Modern legal scholars tend to see postmodernism as threatening the progress of modern jurisprudence by destabilizing and rendering uncertain the process of interpretation. Progressives worry that postmodernism may undermine the collective optimism necessary for progressive resistance and renewal.

Progressive legal criticism has presumed that the analyst is already mobilized for action, such that normative legal scholars can activate a form of political action through their normative writing. Postmoderns argue that progressive legal scholars are not mobilized and that their normative law review prescriptions are an exhaustive genre of politics. Postmoderns claim that progressive legal criticism has fallen prey to a type of false empowerment that has led legal scholars (liberals and conservatives) in the law schools to believe in nonexistent forms of abstract power. Legal progressives see postmodernism as demobilizing because they think they are already doing something to engage political action when they are not. Postmoderns start from a different place—they try what is and what is not currently practiced and considered without attempting to resolve the predicaments and paradoxes of the texts and discourses they investigate.

Postmodern legal scholars argue that there are "no necessary contradictions between a continuing loyalty to a postmodern perspective and the practical implementation of a radical political agenda." For Allan C. Hutchinson "postmodernism is the only critical resource that a progressive activist can have or want." Pierre Schlag believes that the attempt to locate law within some conventional understanding of politics "is bound to miss the politics of postmodernism because the politics of postmodernism [attempts] to decenter and displace [the] traditional conception of politics."

For postmoderns the problem with contemporary politics is that the subject thinks he/she is in control of normative legal thought when in fact he/she is not. In short, where the subject thinks it is in control of its discourse, it turns out that the discourse controls the subject by structuring the social system of signification in which that subject participates.
Postmoderns argue that "old-style lefties," liberals, and legal progressives are mistaken in their commitment to "pure" beliefs and the "right theory of human nature." They contend that "[t]here is no better foundation for our values than our own actions. Without that ground, there are no foundations and no values worth speaking of." Postmodernism thus challenges legal thinkers to reconsider their most basic understanding of the nature of law and politics—their belief in an objective and autonomous law. Postmoderns argue that decision making according to rule is not possible, because rules are dependent upon language, and language is socially and culturally constructed and hence incapable of directing decision makers to make consistent and objective choices. Objectivity is possible only if agreement or consensus about different interpretive practices can be reached. Consensus about acceptable meanings of words is possible, but only if legal interpreters can agree about the "correct" method for legal interpretation. The proliferation of different interpretive methods in law means that consensus is no longer possible.

This, of course, is not to suggest that postmodernism will "rescue" modern legal theory from its current dilemmas. Essentialist impulses in postmodern thought, whether they be new claims of legal determinacy in law and economics or literary studies, identity-based politics of CLS or feminism, or the situated subjectivity of postmodern pragmatism, will surely continue to pose a curious paradox for postmodern legal scholars. There is a pull within new movement discourses toward some new meta-narrative or separatist identity politics, although their adherents warn against the mistakes of essentialism. A practical strategy for fostering constructive engagement across the frontiers of race, class, gender, and language needs to be developed. New neopragmatic and ironist criticism offers no new vantage points for analyzing and confronting these problems as the monolithic forms of jurisprudence fragment and break down.

One thing seems certain. The two sides of postmodern legal criticism are working to redefine the benchmarks for evaluating the cogency of legal reasoning and the validity of the legal truth. Postmoderns are cultural critics; they are interested in tracing the various ways law represents different cultural practices, norms, and ideologies. For them "truth" and "knowledge" cannot be empirically verified by the simple process of examining the closeness of fit of the argument to the evidence. Postmoderns claim that "evidence" is a contingent social construction,
and thus reject the belief in a metanarrative of jurisprudence, favoring instead an understanding of law and adjudication in terms of what Lyotard called complex multinarratives or "local discourses" of different cultural and theoretical perspectives. For postmoderns, law cannot be an autonomous, self-generating activity because there are no fixed foundations on which one can ground legal justification once and for all.