Postmodern Legal Movements

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Conclusion: Jurisprudence at Century's End

Academic trends in legal scholarship do not occur in a vacuum, nor are law schools and legal scholars autonomous. To understand what has been going on in contemporary legal theory, one must look to what has been going on at the university. American university campuses have recently witnessed a form of organized dissent not seen since the turbulent 1960s and 1970s. Commentators report that "[a]n intellectual and cultural revolution is now under way at American Universities." The revolution has been stirred in part by cultural changes unfolding in American society brought about by the diversity movement. This movement consists of people of different races, ethnicities, genders, and cultures who share a common desire to bring more diversity to academic studies. The diversity movement calls for a more diversified curriculum of different intellectual and cultural perspectives.

Students and faculty are also protesting the validity of the canons of the Western classics which represent the core curriculum at American universities. They are demanding that a new multicultural curriculum be developed to take account of the interests and perspectives of different cultures, life-styles, and people. Multicultural studies are said to be needed to meet the demands of a multicultural student body that wants to seriously study the history and culture of their different ethnic and racial backgrounds. A multicultural curriculum is thus demanded to meet the needs of Indians, Hispanics, African Americans, Asian Americans, and women of all ethnicities.

The inclusion of multicultural perspectives in the university curriculum has made the study of history, politics, economics, psychology, and
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art more realistic and relevant to a wider audience of students. It has also inspired a debate about the validity of the traditional canons that made the Western classics of philosophy, literature, and art the "official" university curriculum. The exclusion of different perspectives and discourses made mainstream university scholars unable to say much that was relevant to non-white Americans, women and other non-Western people. It made it difficult for the current generation, "Generation X," to understand and evaluate the complexity and diversity of the forms of bureaucratic institutions and practices of late capitalism and the multicultural content of American culture.

This canon debate has been fueled by new academic interests in critical social theory, which revolutionized the way academic scholars think about fundamental ideas of modern theory: the nature of theory, knowledge, language, and human subjectivity. Deconstruction, neopragmatism, social construction, neo-Marxism, feminism, and other new transformative ideas associated with critical social theory have motivated academics in a variety of fields to question the most fundamental categories of their discipline. The development of these ideas has brought about a distinctive postmodern temperament in various academic disciplines. This emerging postmodern temperament celebrates the discovery of contradiction, contingency, and indeterminacy; it uses the techniques of metaphor, narrative, and storytelling for discovering surprising new insights; it embraces a new neopragmatic position, and it justifies the use of "situated" and "local" critiques as a means for decentering foundational theories.

The objective of postmodern criticism is not merely one of exposing contradiction or indeterminacy. Rather, the goal is to recover contradiction, paradox, and so forth, from official knowledges which police thought by disguising, denying, marginalizing, or silencing contradiction, paradox, and so forth. One of the paradoxes of Enlightenment thought, as exemplified in analytical philosophy and rule of law thinking, is that it has become a kind of thought control—making certain inquiries unthinkable. What is appealing about postmodernism is the possibility of recovering aspects of intellectual life that are generally erased by Enlightenment perspectives and knowledges. Postmoderns attempt to bring to life the forms of thought and practice unheard and unseen in the official discourses of law.
New histories, texts, and narrative practices have developed as a new generation of academics turned to critical social theory and the transformative practices of continental philosophers. Critical social theory enabled these scholars to rethink the fundamentals of Western thought. The critical interpretive strategies of Michel Foucault, Jacques Derrida, Fredric Jameson, Edward Said, and others helped precipitate a crisis in confidence over the validity of the canons of interpretation in both the fine arts and in academia. This crisis in confidence concerned the credibility of the traditional canons of interpretation for defining and categorizing knowledge and professional technique. It was only a matter of time until these academic trends in the university would be felt in the law schools.4

It is only now becoming clear that the current malaise and crisis in legal thought is shared by a wide range of intellectual thinkers, involving a variety of subjects and disciplines in the university. This common condition represents what social commentators call “a crisis of representation” or, more accurately, a series of crises of representation. The older modes of defining, appropriating, and evaluating the objects of artistic, philosophical, literary, and social sciences were no longer credible because the boundary between subjects and their objects had dissolved; this has, in turn, resulted in exciting new possibilities as the plurality of theoretical perspectives and interpretive practices have developed.5 The crisis of representation, known as postmodernism, has reached the legal academy and it is represented by a new form of postmodern jurisprudence.6

There is a rising sentiment in the legal academy that modern legal theory has failed to sustain the modernists’ hopes for social progress. Contemporary legal academics are becoming more cynical and skeptical as they realize that legal theorists have been participating in a “recycling process” in which “[e]ach [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] paradox.”7 Cynicism comes with the realization that each succeeding generation of modern legal scholars has merely recycled the work of the previous generation, moving from new and improved conceptual theories to increasingly more complex normative theories, without ever achieving a successful conceptual or normative theory that
can withstand the criticism of the next generation. In the face of this, mainstream legal scholars proclaim that chaos is “good,” that the future will be secured by the development of a new “chaos theory” for law.⁸

Postmoderns assert that the current mood of the cynic is quite normal and to be expected. They assert that this cynicism is what the current postmodern condition in legal studies signifies. To better appreciate the significance of this condition, postmodern legal critics persuade students of the law (professors and law students) to adopt a new metaphor for legal studies. They favor metaphors like “law as a theater,” because they believe that modern legal thought is “a kind of theater.”⁹ Postmodern legal critics argue that the problem with normative legal thought is that “[t]he rhetorical script . . . is already written, the social scene is already set and play after play, article after article, year after year, normative legal thought [repetitively] requires [us] to choose: ‘what should we do? Where should we go?’”¹⁰ Postmoderns argue that these are the wrong questions. What is needed is a drama and a new kind of “scene, agon, and actors.”¹¹ The theater of modern jurisprudence has not permitted other stories to be told, until now.

There are now many different stories being told in the law, different theaters and rich new plots and scenes depicting new vantage points for understanding previously ignored characteristics and subjects of the law. While at one time the study of jurisprudence reflected the 1950s pluralist consensus of the legal process school, the idea of social consensus has long been discarded as legal scholars turn to new, diverse, and eclectic approaches in theory and practice. The “theater” of the 1950s generation of legal scholars reflected the values and consensus of television sitcoms such as The Adventures of Ozzie and Harriet. Like the Nelsons, the 1950s generation was optimistic about the future and believed that progress was possible through the legal system. They believed in the ever increasing pie (the national economy), and a color-blind society defined by the life experiences of upwardly mobile middle-class white males. By the late 1980s, however, the legal academy reflected the more cynical edge of Ricky Nelson’s odyssey through the pristine sitcom families as parodied in the Saturday Night Live skit, except in the case of our culture there is much more diversity encountered along the journey.

Like Ricky Nelson on Saturday Night Live, the student of jurisprudence today embarks on a jurisprudential odyssey by studying the different disciplinary families and movements of law: legal process, funda-
mental rights, law and economics, critical legal studies, feminism, law and literature, critical race theory, Asian American law, gay and lesbian legal studies, Native American law, and so on. Each of these new disciplinary families of jurisprudence are studied to learn about different cultural, linguistic, and theoretical perspectives for legal studies, as they attempt to modernize the dead styles of legal modernism. Generation X is confronted with fragmented and somewhat confusing images and stories about law. These diverse images and stories require the current generation of law students to think more explicitly about the difficulties and opportunities of reaching agreement and consensus in a multicultural world. The experience of this may be unsettling and may even be described as being schizophrenic. The “schizophrenia” of modern jurisprudence, however, may be another signification of the breakdown in the recycling chain of modern discourse.¹²

Unlike legal moderns who have become increasingly cynical, postmodern legal critics remain optimistic. They point to the increased academic interest in new scholarly movements as a healthy and hopeful development for legal studies.¹³ They argue that these movements have become part of the established landscape at the legal academy, and now allow excluded groups to participate in the discourse of jurisprudence. They note how initial fears and claims of protest are giving way to resignation and an overall upbeat mood.¹⁴ While these movements have provoked considerable anxiety, postmoderns seek to show how they have helped to discover new insights about law and how their criticism has stimulated new intellectual activity at the law school. They encourage the current generation to rethink basic jurisprudential assumptions and premises.

The good news is that there is new energy and interest in the legal academy focusing on questions of jurisprudence. Annual meetings of the Association of American Law Schools and various leading legal symposiums now focus on postmodern interpretive strategies, as well as the American Law Institute’s Restatements of the Law. Law professors argue about the pitfalls of deconstruction and narrative pedagogy, as well as common law distinctions of bailment and suretyship. These changes in academic discourse and interest are symptomatic of larger changes. The new movements in jurisprudence, unlike jurisprudence of the post-World War II generation, have helped foster a new form of jurisprudence without fixed foundations and formal boundaries.
Unlike traditional legal theorists who attempt to define autonomous law from the neutral perspective of a critical observer, postmoderns refocus the inquiry on the nature of the subject who interprets and creates legal reasoning. The new scholarly movements compel legal theorists to rethink and examine how law is the product of particular unstated normative conventions of law, our legal analysis and scholarship. The social construction of legal meaning in jurisprudential thought has become the new focus as contemporary legal scholars seek to understand the “politics of form.” Further work is needed to reveal the way in which predilection and normative precommitment are embedded in legal form. For postmodern legal scholars, choosing the “best” answer for legal problems requires “tactical judgments and questions regarding the values of the decision maker much more than a quest for a so-called ‘best’ argument.”

One consequence of this has been the realization that there exists a multiplicity of answers for law’s many problems. The bad news is that legal academics have become more skeptical and pessimistic about the possibility of resolving the big questions of jurisprudence. It is now recognized that there are no quick or easy fixes for dealing with problems of judicial decision making. In opening up the political and moral dimensions of law, new-movement legal scholars have broadened the scope of the debate and discourse about law and jurisprudence. The proliferation of different jurisprudential discourses has, however, erased the lines between description and advocacy, making it much more difficult for traditionalists to maintain that there is a distinct legal method for resolving law’s many problems. There is concern that the new focus on language, meaning, and culture rather than on law and legal reasoning, will divert contemporary jurisprudence from its central mission of enlightening lawyers on the shared values of the profession. Finally, serious communication problems have resulted from too little cross-talk between the movements and minuscule scholarly exchange between advocates of the new movements and the more traditional jurisprudential thinkers.

The tension between foundational and antifoundational approaches will probably continue to structure debates among contemporary jurisprudential writers, thus preventing contemporary legal scholars from ever reaching an intellectual consensus. This tension is reflected in the continuing debate between legal moderns, who cling to foundational accounts of law, and postmodern antifoundationalists. It is also reflected
in the subtle tension between postmodern neopragmatists and ironists who disagree over the possibility of developing an intellectual legal practice from the dynamic of social practices or practical reason. Neopragmatists believe that such a project is possible. Ironists reject the project as another manifestation of the false hope of modernism.

The new scholarly movements have consequently offered different theoretical discourses and practices, but the conflict between foundational and antifoundational approaches recycles the same arguments and theoretical positions that have divided legal scholars since Holmes and Langdell. The disagreement between postmodern neopragmatists and ironists is not unlike the disagreement between Langdell and Holmes, who agreed that conceptualism in law was inevitable, but disagreed on the possibility that conceptualization in legal analysis would make law like a science. Thus, 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 reach correct answers, pragmatically defined. Postmodern neopragmatists seek to reform modern legal analysis and instruct its practitioners on how to be more pragmatic and instrumental in their method. Postmodern ironists attempt to intensify the awareness of the repetitive nature of legal discourse, including neopragmatic discourse, in an effort to facilitate closure and transition.

Closure seems unlikely as the themes of contemporary jurisprudence repeat themselves in surprising new patterns but always reproducing the same common argumentative and normative structures. Because modern jurisprudence never seems to get beyond the structure and content of its own cognitive and normative form, legal scholars yearn for a more realistic jurisprudence—a jurisprudence that is relevant for dealing with the bureaucratic power structures and multicultural communities of postmodern American culture. Modern jurisprudence has become tired as its older scholars have worn themselves out recycling the same argumentative structures and dichotomies, even while the next generation of scholars claims to have developed new, refined methods and approaches.

The rising skepticism has been especially pronounced in other intellectual fields as a new breed of theorists questioned the objective descriptions and truth claims of modern theory. The implications of these intellectual currents have just recently been felt in the legal academy. Throughout the 1980s, the legal academy was an intellectual hothouse,
spinning out new ideas, new discourses, and new solutions for dealing with problems of a changing and culturally diverse society. The proliferation of theories, discourses, and perspectives of the new scholarly movements in law set the stage for the development of a new jurisprudence and a new theoretical paradigm for law.

One indication of this is the view of contemporary legal scholars and practitioners who wonder whether traditional understandings about law and jurisprudence are exhausted. Another is the heightened disagreement between legal scholars over the most elementary issues of jurisprudence, such as the possibility of identifying objective methods and a shared intellectual foundation for legal studies. Yet another is the recognition that modern legal theory has failed to sustain the modernists' hopes about social progress. There is also the cynicism that comes from the realization that legal theorists have participated in a recycling process, coupled with a desire to move on to something else.

The sources motivating the new scholarly movements are, of course, complex and diverse, including internal pressures of tenure, the desire to write new and innovative legal theory, and a myriad of psychological and economic factors that have historically motivated legal scholars to take risks by developing controversial ideas and arguments. While legal scholars have always aspired to say something new and provocative about the law, there has never been a period in the history of American legal theory that approaches the level of intellectual diversity and fragmentation witnessed during the 1980s as intellectual eclecticism intensified and legal scholars became fragmented within different schools and movements. The new scholarly movements shared a common orientation that was defined by their shared opposition to the traditional modes of scholarship and the modern theory of jurisprudence such scholarship sought to refine.

Contemporary legal scholars consider new and different kinds of jurisprudential intellectual inquiry—inquiries about language and the kind of subjects that inhabit the world of legal thought. These new inquiries enable a different kind of jurisprudential "critique"—one that would criticize a school of legal thought, a legal theory, or a doctrine, not in terms of truth, adequacy, or normative appeal of its representations in the objective realm, but rather in terms of the kind of subject that the school, theory, concept, or doctrine presupposes or celebrates. The goal of such work is to better understand the type of subjects that
have been unconsciously reproduced and constituted in legal discourse. Unlike traditional legal theorists who attempt to defend law's autonomy, legal scholars who have adopted a postmodern temperament in their work have refocused the jurisprudential inquiry toward the nature of the \textit{subject} who interprets and creates legal meaning. These scholars have sought to provoke debate and inquiry on the social construction of legal subjects, or what has been dubbed the "problem of the subject in legal studies," \cite{16} which refers to the many ways judges and lawyers avoid "the question of who or what thinks or produces law." \cite{17} It is this forgetting of the "we" who do the "expounding" that a new group of legal scholars claims has been ignored in the debate about law and politics. \cite{18}

On the other hand, postmodern trends in legal scholarship have generated considerable anxiety and discomfort. In challenging traditional notions of jurisprudence, postmodern criticism seems to challenge the very idea of law itself. If decision makers cannot render decisions according to law, then how can we expect "law" to protect us against the many injustices and invasions of the day? If the Rule of Law depends on different normative and theoretical perspectives, how will "law" protect itself against the subjective desires of legal subjects? As we approach the next millennium, it seems certain that anxiety about these questions will heighten.

Postmodernists attempt to heighten, for better or worse, the predicament of our time. Postmodernism may eventually fade into something else, but for now it is here to stay because it best describes the condition of our era. Postmodernism underscores the anxiety and uncertainty of living in a highly fragmented and diverse society at the end of the twentieth century, though it cannot be held responsible for this condition, nor can it be blamed by those who feel alienated by that condition. It is not the lack of a foundational vision or objective perspective that renders postmodernism troublesome; what is troubling is the intellectual bias against politically committed scholarship and action in legal studies. Postmodernists attempt to rectify that problem by providing intellectual legitimacy to a theoretical practice informed by social and political experience.

It may be that the temperament of contemporary jurisprudence evidences a general cultural anxiety that occurs whenever a century ends. \cite{19} In moving from one century to the next, it is hard not to believe that an era is ending and that the old ways are exhausted. \cite{20} Perhaps the current
postmodern condition is part of a historically anxious, contingent moment. In the next millennium, new frontiers and new energy may reinvigorate the quest for answers to the dilemmas of modernism.

What may seem to be "impending annihilation" may in fact be the basis for satisfaction, hope, and new intellectual inquiry in the next millennium. Constructive engagement between the different jurisprudential movements may lead to new jurisprudential insights about law. Law and economics advocates may discover the social-construction thesis that gives their theory the appearance of determinacy. Critical legal studies scholars might discover that a renewed interest in understanding the process of market commodification may provide the vehicle for developing a new agenda for jurisprudence. Law and literature scholars may deepen their interest in the cultural forces of race, class, and gender that influence legal interpretation. Feminists and critical race scholars might develop a new understanding of the relation between the particular and general from their unique method of consciousness-raising.

Perhaps new canons of interpretation for the legal profession can be discovered for developing a new constructive jurisprudence for the discourse of postmodern legal movements. The two sides of postmodernism may be reconstructed and reformed so that they will be absorbed within the two sides of legal modernism created by the forms of legal thought developed from Langdell and Holmes. However, postmoderns would be quick to remind us that we can never go back to the good old days of political and intellectual consensus. They would warn us that all canons of law are man-made and thus always subject to reinterpretation. They would resist the idea of a postmodern theory of jurisprudence; they would instead emphasize diversity, contradiction, and paradox. Postmoderns would say that the future of jurisprudence remains in our hands, that it is up to us to build the legal world we wish to inhabit.

It is a critical time for jurisprudential studies in America. It is a time for self-reflection and reevaluation of methodological and theoretical legacies in the law. At stake is not only the status of modern jurisprudence, but also the validity of the Rule of Law itself. In the current era of academic diversity and disagreement, the time has come to seriously consider the transformative changes now unfolding in American legal thought. The challenge for the next century will certainly involve new ways of understanding how the legal system can preserve the authority of the Rule of Law while responding to the different perspectives and
interests of multicultural communities. It is without a doubt an anxious and exciting time for jurisprudence.

Whether the jurisprudential movements discussed in this book are praised, condemned, or (as I have argued) transformed by a new form of postmodern jurisprudence will ultimately depend on how successful these movements have been in hastening the death, not of jurisprudence, but of the particular methods that modern legal scholars have employed in thinking about their subject: law and adjudication. The proliferation of new forms of competing jurisprudential discourses, the willingness of some to try new methods, and the expression of discontent and resistance signify the end of neither professional discourse nor law as we have known it—all may simply be symptomatic of change from the old to the new.23

What was once understood as the mainstream or modern view has broken into a diverse body of jurisprudential theories and perspectives. The current state of law and modern jurisprudence has become like a delta just before a river empties into the sea. The mighty river that was once modern jurisprudence has broken down into separate rivulets as it merges into a larger and different body of water. The modern river of jurisprudence splinters and is transformed by the sea change of a new perspective. It is time to consider the significance of these sea changes for “[n]o matter how troubling it may be, the landscape of the postmodern [now] surrounds us. It simultaneously delimits us and opens our horizons. It’s our problem and our hope.”24