Missing Pieces: A Cognitive Approach to Law

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I. Introduction

Dissident voices in legal discourse often meet with swift and unequivocal responses:

They have in common their postulation of a world, at least a legal world, that is fundamentally unorderly. They unite in repudiating the possibility or the existence of a rule of law, that is, of precepts, rules or norms of conduct laid down by the state, and measurably enforced by the state through institutions called courts of law. The existence of such a rule they regard as the Basic Myth, foisted on a gullible public by lawyers who themselves are prone to be gulled by the same myth . . . .

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Judges not only do not but cannot decide cases by law; the very concept is an illusion. Every problem has a solution—that is, you can decide it one way or another. But beyond that, nothing. Neither way is right . . . .

This attitude is difficult to understand or to explain . . . . We have likened it to the attitude of the modern painter who feels that he achieves some ultimate reality—or perhaps some real ultimate-ness—in forgetting all that has been learned through centuries about perspective and design, and trying to draw with the candid naivete of the savage . . . .

The New Realist . . . sees no escape from an arbitrary rationalism save into a hopeless nihilism. Or, rather, he exaggerates the arbitrariness of the rationalism he is so busy escaping and doesn’t see that his escape leads him into nihilism.\(^1\) This critique is fairly typical of the mainstream responses to legal realism in the late thirties.\(^2\) The critique is striking—both in its prescience and in its error.

The critique is prescient in its analogy between legal realism and modern painting: not only did legal realism draw on modernist texts (such as those of Freud and Wittgenstein) for authority and inspiration,\(^3\) but like modern art, legal realism devoted itself to revealing the un-p resentable dark side.\(^4\) The critique is also correct in understanding legal

2. See, e.g., E. Bodenheimer, *Jurisprudence* 316 (1940) (noting that the “skeptical” aspects of legal realism “prepare the intellectual ground for totalitarianism”); L. Fuller, *The Law in Quest of Itself* 122-27 (1940) (suggesting that the questioning of ethical norms and reason undermines democracy); Cohen, *On Absolutisms in Legal Thought*, 84 U. PA. L. REV. 681, 690-91 (1936) (characterizing realist psychoanalytic approaches to law as “anti-intellectualism” and suggesting that they lead to nihilistic absolutism); Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 191 (1937) (noting that when scholars consider rules as inconsequential, psychology supplants legal knowledge and makes self-conduct in accordance with law an illusion); Harris, *Idealism Emergent in Jurisprudence*, 10 Tul. L. REV. 169, 177-82 (1934) (accusing the realists of irrationalism and radical subjectivism); Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240, 1252 (1934) (suggesting that because the objective of legal science is to ascertain future judicial behavior, law students would necessarily study the “art of bribing judges”); Pound, *The Future of Law*, 47 YALE L.J. 1, 2 (1937) (describing the realist proposition that law is “no more than a matter of what those who wield the authority of politically organized society choose to do”).

For a general treatment of the legal academy’s reception of legal realism in the thirties, see E. Purcell, *The Crisis of Democratic Theory* 159-78 (1973). Both Edward Purcell and a reading of the above articles make clear that the critics of realism generally coupled their alarmist charges with more interesting and intellectually respectable criticisms.

3. See, e.g., J. Frank, *Law and the Modern Mind* 88-92, 117, 164-68, 200-03 (1930) (relying in part on Freud and Piaget for the interpretation of law in terms of subconscious drives and projections); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 826-27, 830 (1935) (relying on the works of William James, Charles Peirce, John Dewey, and the early work of Ludwig Wittgenstein as a framework for legal analysis); see also Adler, *Legal Certainty*, 31 COLUM. L. REV. 91, 91, 92 & n.5, 97 (1931) (arguing that the champions of empiricism and pragmatism philosophically indoctrinated the legal realists and thus freed them from the weight of formal logic, Platonism, and rationalism). The view that legal realists were informed by modernism should not be overstated. But, to make my point, it does not need to be.

4. What seemed dark and obscure in the thirties, of course, can seem patently obvious now.
realism as a threat to the established legal topology—those precepts, rules, and norms of conduct that constitute the rule of law. Legal realists sought to de-center this topology as an object of scholarly study and to subvert its ruling stature in practice.

The critique is no doubt correct in other respects. But to postrealists, various parts of the critique must also seem glaringly wrong. For example, contrary to the critique, most of us do not understand legal realism to posit a "fundamentally unorderly" world. Similarly, legal realism is not a license that entitles you "to decide [cases] one way or another." "Neither way is right." And legal realism is certainly not commonly understood as a plunge into nihilism.

How then could the critics of legal realism have understood it as embracing disorder, sanctioning arbitrariness, and endorsing nihilism? The answer of immediate interest here holds that the critique of realism is actually quite sensible—sensible, that is, if one understands the legal world in "rationalist" terms. Indeed, if (as the rationalist maintains) the only significant order in law rests in its formal expression, the realist attacks on traditional doctrinalist jurisprudence are tantamount to a rejection of order—pure and simple. Similarly, if it is only the articulation of doctrine and rules that can constrain legal decisions (as the rationalist maintains), the realist claims that doctrinal argument is undecidable

The very idea that law had a dark side—one properly the domain of economics or psychology—was fairly dark itself. See supra note 2. Equally disturbing was the radical supposition that the origin or character of law did not rest upon doctrine or deductive logic but upon decisions, value judgments, and empirical induction. See infra note 5.

5. See J. FRANK, supra note 3, at 127-28 (arguing that law consists of decisions rather than rules and that whenever a judge decides a case, he is making law); K. LLEWELLYN, THE BRAMBLE BUSH 4 (1930) (calling the theory that rules decide cases a "delusion"); Cook, The Logical and Legal Bases of the Conflict of Laws, 33 YALE L.J. 457, 475-76 (1924) (decrying the tendency to reify and hypostatize rights and legal relations and relocating the locus of law from the rules to the behavior of legal officials); Yntema, The Hornbook Method and the Conflict of Laws, 37 YALE L.J. 468, 480 (1928) (arguing that jurists make decisions largely on emotive experience and that logic and principles are secondary). Or in sum, as Herman Kantorowicz so succinctly put it, "[t]hese are the doctrines which threaten the quiet progress of science." Kantorowicz, supra note 2, at 1242.

6. In the hands of the legal realists, these semiautonomous directive precepts, rules, and norms instead became subordinate tools, see Cohen, supra note 3, at 834-49; or perhaps simply mnemonic devices, see Yntema, supra note 5, at 480-81; or maybe nothing at all, see J. FRANK, supra note 3, at 136-38. See also supra note 5.

7. I use the term "rationalism" to refer generally to a cognitive perspective that privileges ego-centered reason as its foundation. See infra text accompanying notes 70-77. But having said that, let me disclaim all initial definitions as misleading and oversimplified. Shortly, I will describe rationalism as well as "modernism" and two additional perspectives in much more detail. See infra text accompanying notes 66-98.

8. How else is the rationalist supposed to understand Cook's and Moore's apparent endorsements of ethical relativism? See Cook, Scientific Method and the Law, 13 A.B.A. J. 303, 305-06 (1927); Moore, Rational Basis of Legal Institutions, 23 COLUM. L. REV. 612, 614 (1923). Purcell argues that realism's insistence on ethical relativism at a time when the European dictatorships were on the rise strongly influenced its rejection. See E. PURCELL, supra note 2, at 159-62 (also emphasizing the importance of Catholic scholars in the opposition to legal realism).
must be an endorsement of the untenable view that anything goes. And more globally, if rationalism is the only sensible approach to law, then the realist rejection of rationalism is indeed a plunge into nihilism.

In sum, this critique of realism is perfectly sensible—perfectly sensible, that is, if one understands the legal realist project from within a rationalist framework. From such a framework, the modernist contributions of legal realism do indeed entail disorder, arbitrariness, and nihilism. But if—and this is the important part—one drops the rationalist perspective, it is simply not true that modernism is bereft of order; nor that it embraces arbitrariness; nor, yet again, that it endorses nihilism. On the contrary, modernism insists on order—(its own); and in its assertion of totalizing constructs, modernism denies the radical subjectivism of “anything goes”; and in its sustained drive to dissolve political or psychological mystification, it is anything but nihilistic.

Most postrealist lawyers and scholars understand this and no longer find the modernist claims of legal realism threatening. Indeed, we have all learned our lessons from legal realism. And it has become a characteristic gesture of contemporary legal scholarship to scorn Cartesian rationalism and to assume (as quickly as possible) one or another of the available modernist stances.

Given this laudable collective self-image, it is a rude shock to discover in recent legal literature (and in very high places) exactly the same kind of rationalist misunderstanding of contemporary modernist thought that greeted legal realism some fifty years ago. In his recent book, for instance, Ronald Dworkin summarily dismisses the Critical Legal Studies (CLS) claim that law has an ideological dimension—one that mediates and suppresses the contradictory human impulses toward altruism (and community) on the one hand and individualism (and self-sufficiency) on the other. Says Dworkin: “Unfortunately, much of the litera-

9. How else can a rationalist interpret Yntema’s conclusion that general principles do not control because they do not inform, and that rules are mnemonic devices—hollow diagrams of what has been? See Yntema, supra note 5, at 480-81.
10. This claim is not at all inconsistent with the positions taken by any of the contemporary works on realism cited above. See supra note 3.
11. Modernist thought is holistic in character. It attempts to understand phenomena in terms of their relations in a greater or grander context. The theoretical articulation of the character or structure of the greater or grander context is a “totalizing construct.” For further elaboration, see M. JAY, MARXISM AND TOTALITY 13-80 (1984). For further qualifications, see supra note 7.
13. The realist claims have been adopted, defused, diffused, rejected, or simply overcome. For examples, see the sample of recent literature cited at supra note 3.
14. This is not to say that we have all learned the same lesson. Id.
15. This observation is drawn from S. FISH, DOING WHAT COMES NATURALLY 436-67 (1989).
ture of critical legal studies announces rather than defends these claims, as if they were self-evident. This may reflect a serious misunderstanding of the kind of argument necessary to establish a skeptical position: the argument must be interpretive rather than historical." 16 This passage is striking. Dworkin seems to say that in order for CLS to raise valid claims, it must engage in the same kind of interpretive or theoretical enterprise that Dworkin himself undertakes. This is a very curious understanding of CLS arguments. It is especially curious given that CLS writers have been rather explicit in voicing the transparently modernist theme that it is the very sort of abstract, ahistorical, normative discourse championed by Dworkin that serves as an ideological medium to suppress the contradictions of legal liberalism. 17 Dworkin's characterization of CLS as committed to a "skeptical position" is equally curious. If anything, CLS pieces tend to err in the opposite direction—they typically make strong, unequivocal claims about the character and role of law. 18

Dworkin obviously does not see things this way. He understands CLS to be a competitor in the same theoretical arena in which he plays. And inasmuch as Dworkin understands the rules of the game to include coherence, principled argument, and a certain philosophical outlook, he (quite understandably) would like CLS to play by the same rules. 19 That is why Dworkin insists that CLS engage in "interpretive" theoretical arguments. When instead CLS attempts to score by producing indeterminacy, irreconcilable contradiction, or the like, Dworkin (again understandably) characterizes the CLS strategy as a "skeptical position." 20 That characterization makes perfect sense—from a rationalist position like Dworkin's. Indeed, if one is committed to the rationalist

18. Most sophisticated critiques of CLS criticize it from that angle, arguing that CLS is too determinate or too voluntaristic in its accounts. See, e.g., Delgado, The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?, 22 HARV. C.R.-C.L. L. REV. 301, 303-07, 314 (1987) (criticizing some CLS positions as too narrow and too rigid in their rejection of formality and rights discourse); Hunt, The Theory of Critical Legal Studies, 6 OXFORD J. LEGAL STUD. 1, 11-13 (1986) (arguing that the CLS legitimation thesis assumes that legal ideology is effective in creating popular consciousness); Kornhauser, The Great Image of Authority, 36 STAN. L. REV. 349, 380-89 (1984) (arguing that CLS has failed to explain the process by which law legitimates, has truncated the roles and functions of law, and has failed to differentiate the role that law plays vis-à-vis other ideological mechanisms).
19. See infra note 39.
view that law must be principled and coherent, as Dworkin is, an argument that proclaims the existence of irreconcilable contradictions has clear skeptical implications. Indeed, one might say that from a rationalist perspective, virtually any modernist account will appear to have skeptical implications, if taken too seriously.

Now, perhaps Dworkin does not misunderstand the CLS claims at all. Perhaps his characterization of CLS is simply a matter of advocacy. Or perhaps I am mistaken in my understanding of Dworkin—or of CLS. But even if the example fails, the rationalist (mis)reading of modernist texts is too common to write off as some isolated intellectual error.

Consider, as another example, Stanley Fish’s attacks on Mark Kelman’s argument that legal analysis depends upon nonrational interpretive constructs. At the outset, it is important to understand that neither Fish nor Kelman are particularly well cast as representatives of rationalism. Quite the contrary. Still, watch what happens when the two meet.

Kelman has argued that determinations of substantive guilt in criminal law often depend upon whether the conduct of the defendant is described in a broad or narrow time frame. The choice of time frame, Kelman notes, is typically implicit, nonreflective, and never explained. This shifting frame of reference argument, of course, is a classic modernist trope. And Kelman’s attempt to foreground the character of the implicit and repressed process that allows the application of legal categories is a characteristically modernist project.

But what is not modernist at all is Stanley Fish’s rationalist account of Kelman’s point. Fish understands Kelman to “lament” the fact that interpretive constructs (such as broad and narrow time frames) skew rational analysis. Accordingly, Fish takes Kelman’s point as a “demand for a state of consciousness in which nothing has yet been settled and choices can therefore be truly rational”—a state without interpretive

21. I use the terms “(mis)understanding” and “(mis)reading” in a deliberately equivocal manner. Two things, however, should be understood: (1) that rationalism has an understanding of modernism and has its own criteria for assessing the correctness of that understanding; and (2) that modernism understands rationalist understandings of modernism to be misunderstandings. I have tried to capture these two points by using the terms “(mis)understanding” and “(mis)reading.”


24. See id. at 672.

25. If we were to evaluate Kelman’s efforts in modernist terms, we would ask whether he has revealed anything interesting about the hidden, the implicit, or the repressed aspects of legal analysis.

26. See Fish, supra note 22, at 1795.
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constructs, in which rationality could be grounded on its own bottom.27
Armed with this rationalist understanding of Kelman’s point, Fish promptly demolishes it as pure nonsense.28

For those interested in keeping score, Fish clearly would be right as against a rationalist understanding of Kelman. Equally clearly, Fish would be irrelevant (that is, wrong) as against a modernist understanding of Kelman. Much more interesting than the score, however, is the astonishing fact that Fish could understand Kelman, a fellow antifoundationalist, to be making a rationalist argument in the first place.

More astounding still are those situations in which the (mis)reading comes not from some intellectual or ideological opponent, but rather from one’s own allies.29 Consider a famous (and persistent) example of misreading of modernism—this one on the right. Adherents of the Chicago School30 often argue, for instance, that when high transaction costs preclude market-registered exchanges, the efficient solution is to mimic a zero-transaction-cost world.31 This rationalist formula is ostensibly derived from Ronald Coase’s seminal article on social cost.32 But in fact, the formula betrays Coase’s modernist message: that it is wrongheaded to confine the analysis by idealizing and attempting to construct a single legal or social arrangement.33 Indeed, by idealizing the market as first among social arrangements, the formula suppresses precisely what Coase thought most important:

27. Id.
28. See id. at 1795-97.
29. Indeed, I think it would be fair to say that within any school, there are works that wittingly or unwittingly propagate precisely these sorts of (mis)readings. Thus, one cannot ascribe the rationalist (mis)reading of modernist texts, for instance, solely to opponents or outsiders.
33. For the full argument, see Schlag, An Appreciative Comment on Coase’s The Problem of Social Cost: A View from the Left, 1986 Wis. L. REV. 919 (exploring the implications of Coase’s seminal article and arguing that lawyer-economists on the right have disregarded or distorted Coase’s warnings not to idealize social arrangements); Schlag, The Problems of Transaction Costs, 62 S. CAL. L. REV. — (forthcoming 1989) (turning Coase’s arguments in The Problem of Social Cost, supra note 32, against the Chicago market-based transaction cost approach). Coase recently reiterated his warning not to idealize social arrangements as a basis for solutions:

The Pigovian approach, as I have just said, sets up an ideal world and then by government action, usually some form of taxation or less commonly government regulation, endeavors to reproduce that ideal state in the real world. . . . I argued in “The Problem of Social Cost” that in deciding on economic policy, we should not concern ourselves with the ideal (whatever that may be) but should start with the available alternatives and should endeavor to discover which among them produces, in total, the best result.
Coase, The 1987 McCorkle Lecture: Blackmail, 74 VA. L. REV. 655, 672-73 (1988). This tendency to idealize conditions and then to try to realize the ideal in practice is characteristic of rationalist thinking and rhetoric. See infra text accompanying notes 70-77.
But in choosing between social arrangements within the context of which individual decisions are made, we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening of others. Furthermore, we have to take into account the costs involved in operating the various social arrangements (whether it be the working of a market or of a governmental department) . . . .

Despite the prominent appearance of this modernist message in the conclusion to Coase's article and despite Coase's explicit warnings against the idealization of a zero-transaction-cost world, the rationalist (mis)readings continue—and here too, in very high places.

Now, just as rationalist (mis)readings are hardly limited to leftist texts or to the texts of opponents, neither are they limited to modernist texts. It is also possible to have rationalist misunderstandings of "prerationalist" positions. Consider Dworkin's view that originalists must somehow give convincing, principled justifications for recourse to the original understanding in constitutional interpretation. Again, this position makes perfect sense from Dworkin's rationalist perspective, which requires adjudication of all claims about the character of law in the court of principled, coherent theory. But as with Dworkin's reading of CLS, something is askew in his understanding of the originalist claim: he never seriously entertains the possibility that originalists do not operate from his own rationalist framework. This is odd, because most originalists make it quite clear that recourse to the framers' intent is an article of

34. Coase, supra note 32, at 44 (emphasis added).
36. For a recent example, see Easterbrook & Fischel, supra note 31, at 298 ("The right inquiry is always what the parties would have contracted for had transaction costs been zero.").
37. By "prerationalism," I refer in general to a cognitive perspective that relies unreflectively upon faith, intuition, or tradition as its ultimate basis. See infra notes 66-69. But again, I reiterate my disclaimer against such a misleading and oversimplified introduction. See supra note 7.
39. Dworkin's metatheory of law is encapsulated in the claim that law is an interpretive enterprise and that interpretation seeks to "make of the material being interpreted the best it can be." Dworkin, The 1984 McCorkle Lecture: Law's Ambition for Itself, 71 VA. L. REV. 173, 177 (1985) [hereinafter Dworkin, Law's Ambition]. Hence, for Dworkin, "[a] plausible interpretation of legal practice must also, in a parallel way, satisfy a test of two dimensions: it must both fit that practice and show its point or value." R. Dworkin, supra note 38, at 160; see also R. Dworkin, supra note 16, at 87-88 (suggesting that judges decide cases by determining for themselves "the best interpretation of what judges characteristically do" in certain situations and acting upon that determination); R. Dworkin, Taking Rights Seriously 105-23 (1977) (arguing that courts must develop consistent legal theory combining policy and traditional legal principles).
faith. And as an article of faith, originalism does not require (and does not tolerate) further justification: it is simply a prerational, tacit given of the law. Tradition—if one is a traditionalist—is its own legitimation. But this sort of cognitive commitment to originalism is something that Dworkin does not (and cannot) understand without abandoning his own rationalist commitments.

Thus far, I have focused on rationalist (mis)readings of modernist and prerationalist texts. In part that is because I think these kinds of (mis)understandings are the most significant and interesting. Obviously, it is also possible to have modernist or prerationalist (mis)readings of rationalist texts. And that is to say nothing of the cognitive carnival that arises once postmodernism enters the scene.

But before that happens, it might be a good idea to state the thesis of this Article. My point is simple: we operate from incommensurable cognitive frameworks, which I will describe as prerationalism, rationalism, modernism, and postmodernism. Although the substantive philosophical and historical content associated with these four world views is readily recognizable (and very much in discussion these days), the cognitive

40. Nontautological attempts to justify intentionalism cause problems for originalists. Self-justification of intentionalism implicitly acknowledges that it is not a first principle, but that on the contrary, law rests on something more fundamental. Sophisticated intentionalists avoid this trap by declaring (or simply assuming) an absolute faith in intentionalism and then proceeding to demonstrate the embarrassments that follow from its abandonment or from any other approach. See, e.g., Monaghan, Our Perfect Constitution, 56 N.Y.U. L. REV. 353, 361-74 (1981) (exploring and elaborating on the embarrassment of nonintentionalist modes of interpretation).

41. Anything else is just not law, they might say. To a rationalist or a modernist, this statement reads simply as a feeble-minded slogan. But read from the prerationalist perspective, it is much more than a slogan; it is a defining characteristic of law.

42. Some people might say that Dworkin’s impoverished rationalist reading of CLS-modernism or prerationalist-originalism is just advocacy on his part. But I think not. For one thing, it would be bad advocacy. For another, it runs afoul of Dworkin’s own metatheoretical insistence on making “of the material being interpreted the best it can be.” Dworkin, Law’s Ambition, supra note 39, at 177.

43. See infra text accompanying notes 66-98. By “incommensurable,” I mean that there is no cognitive framework that can faithfully express each of the cognitive frameworks in total. This incommensurability does not mean that there is no overlap among the various frameworks. Nor does it mean that a particular framework cannot provide an understanding of the others. (If it did, I would not have much of a place from which to write.) Richard Bernstein elaborates this view of incommensurability at greater length in R. Bernstein, Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis 79-93 (1983) (developing this conception of incommensurability from Kuhn and Feyerabend).

frameworks that form and organize these world views are not so easily discernible—and are easily confused. Not surprisingly, we tend to shift from one cognitive framework to another rather frequently and without warning.\textsuperscript{45} None of us operates within just one cognitive framework.\textsuperscript{46} The upshot of all this is that we go along (mis)understanding each other (and ourselves) in more or less systematic ways.\textsuperscript{47} For a number of reasons, we tend to deny both the fact of such (mis)understandings and their systematic character.\textsuperscript{48} This "legal dissonance" has significant intellectual and political implications for the character, the understanding, and the practice of law.\textsuperscript{49}

The categories prerationalism, rationalism, modernism, and postmodernism have featured prominently in recent theoretical disputes about epistemology and hermeneutics.\textsuperscript{50} It is not necessary to rehearse these disputes here. On the contrary, it is necessary to do the opposite—to guard and warn against understanding the differences among prerationalism, rationalism, modernism, and postmodernism as \textit{merely epistemological} or \textit{merely hermeneutic}. Indeed, to conceive the differences among prerationalism, rationalism, modernism, or postmodernism in epistemological or hermeneutic terms is to prejudge the disputes; it is to


45. This observation resembles James Boyle's modernist picture of personality: "The modernist picture of personality shows us that our beliefs and ideals are not a unified Cartesian system of interlocking and consistent rational arguments. We believe different things at different times; we inhabit multiple discourses, each of which has its own mini-constellation of obligatory beliefs." Boyle, \textit{supra} note 44, at 771. There is an important difference, however, between Boyle's modernist picture and the one I offer. Although I agree that the self is not a unified Cartesian field, neither is it some modernist constellation of different discourses. To reduce the self to some modernist aesthetic is (from my perspective) wrong in the same way that it is wrong to reduce it to a Cartesian field of interlocking propositions. Both views impose some stabilized, overarching order on the self. My argument is that things are far more volatile than that: the self has prerationalist, rationalist, modernist, and postmodernist moments.

46. \textit{See infra} text accompanying notes 123-69.

47. This is not a rehearsal of the claim that we are all caught within our own cognitive frameworks and thus we can never communicate with those in other frameworks. Nor is it a claim that we can never escape from our own framework or talk others out of theirs. For a discussion of this "myth of the framework," see Popper, \textit{Normal Science and Its Dangers}, in \textit{Criticism and the Growth of Knowledge} 51, 56 (I. Lakatos & A. Musgrave eds. 1970).

48. Individuals often lack conscious or verbalizable awareness of their own cognitive activity. Their accounts tend to be "inaccurate and imprecise in rather systematic ways." A. Miller, \textit{Historical and Contemporary Perspectives on Stereotyping}, in \textit{In the Eye of the Beholder} 1, 7 (1982).

49. The legal or cognitive dissonance that I discuss in this Article has a loose relation to the concept of cognitive dissonance in psychology. The seminal work on cognitive dissonance is L. Festinger, \textit{A Theory of Cognitive Dissonance} (1957). Festinger describes cognitive dissonance as the absence of fit among knowledges, opinions, and beliefs. \textit{See id.} at 1-3, 9-15. He argues that the presence of dissonance motivates its subject to engage in dissonance reduction or dissonance avoidance. \textit{See id.} at 29-31, 263-66; \textit{see also} J. Brehm & A. Cohen, \textit{Explorations in Cognitive Dissonance} 3-7 (1962) (summarizing cognitive dissonance theory and giving examples of dissonance reduction); \textit{infra} Part V.

50. \textit{See supra} note 44.
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treat all these outlooks as if they were on the same footing, in the same philosophical competition—each just waiting for you and me to buy its philosophical furniture for an already-created world.\textsuperscript{51} It is, in short, to make exactly the same sort of mistake that Dworkin makes—to construe all theories within a rationalist cognitive framework.\textsuperscript{52}

To grasp the systematic character of legal dissonance, it is thus necessary to break with the currently fashionable focus on epistemology and hermeneutics. The current discussions of epistemology and hermeneutics by legal academics are helpful, but they also have a performative dimension that is not.\textsuperscript{53} The deeply stylized and professional character of these debates tends to obscure and efface even the most critical of challenges.\textsuperscript{54} The debates have become far too subdued. It is thus no surprise that epistemological and hermeneutic inquiries in law are widely understood to be about what to think (substance) as opposed to the infinitely more disturbing how to think (form).

Let me illustrate. Consider Nietzsche's suggestion that every philosophy has been nothing more than the generalized expression of its author's desire.\textsuperscript{55} Now this statement may or may not be true. It depends,
one might say, on how one interprets desire—broadly or narrowly? The admitted vagueness of the terms “expression” and “desire,” of course, prompts the question of whether the statement is true in anything more than a trivial way. These type of questions could go on and on. And the more they do, the more you will come to accept that there is nothing threatening about Nietzsche’s claim. Indeed, so long as Nietzsche’s claim is understood in this professionalized substantive manner, there is no threat. By contrast, if one could remove the professionalized substantive orientation, Nietzsche’s statement could again appear threatening.

You might read the same statement in a reflexive manner: in other words, you could realize that your reaction to Nietzsche’s statement may be an expression of your desires. You could also realize that the reason you automatically read the statement in the first “substantive” manner (and never even saw the second “reflexive” reading until now) may have something to do with your own desires to keep texts, particularly strange texts, at a safe intellectual distance.

Now if this text continues along in this vein, it will soon become offensive. On the other hand, if the discussion returns to the intellectually respectable plane of epistemology and hermeneutics, the disciplined

56. Nietzsche was not always considered strange. He used to be viewed as extremely dangerous—not only the author of dangerous thoughts but also the very cause of dangerous acts. See S. GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE, AND MADNESS 60-62 (1985). Gilman provides a wonderful corroboration of this point in an actual prosecutorial interrogation of a confessed murderer. This fin de siècle interrogation shows just how dangerous Nietzsche was perceived to be—and how comical that perception seems in light of contemporary stereotypes of Nietzsche:

Attorney: How did you come, as a high school student, at such an immature age, to study philosophy?
Accused: I was drawn to it by my natural disposition.
Attorney: What do you mean?
Accused: I am naturally ugly. I have a repulsive nature, and my fellow students and my teacher treated me in a manner that indicated their repulsion.
Attorney: What sort of constitutional error do you have?
Accused: I don’t have a normal head, rather a badly formed one.

Attorney: And therefore you withdrew into philosophy.
Accused: Yes.
Attorney: ... We already have had the testimony of some witnesses that your behavior caused their alienation. One described you as a “funny sort of fellow,” the other as a “tough egg.” A third felt that you are an “egotist.” It seems that you had few social graces. This was an error in your education. Perhaps you were not taught what is appropriate.
Accused: I am not conscious of that.
Attorney: What did you read?
Accused: Nietzsche and Schopenhauer.
Attorney: Why these two philosophers?
Accused: A postal employee who I know suggested them.

Attorney: Wouldn’t you have done better then to have read Caesar’s Gallic Wars and Greek history than the work of a man who ended in madness?

Id. at 61-62.
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and professionalized form of the debates will seldom succeed in troubling the self of the reader (or of the author). On the contrary, the professionalized debates have largely left the self intact—allowing it the customary professional courtesy of choosing among the various epistemological and hermeneutic options available. It is as if prerationalism, rationalism, modernism, and postmodernism were simply ideas with no particular implications for the self of the reader (or the author) and their relation to each other and the world. This picture of intellectual inquiry, of course, is characteristic of the rationalist tendency to constantly reduce intellectual endeavor to the plane of ideas.57

To avoid prejudging the inquiry so blatantly, it is necessary to scuttle, at least temporarily, the fashionable understanding of prerationalism, rationalism, modernism, and postmodernism as mere epistemological or hermeneutic stances that one chooses safely from a distance. Instead, they must be treated as different cognitive frameworks.58 In part, this means that effective exploration of these matters must go beyond the presentation of ideas and arguments to the creation of cognitive experiences.59

Each of the four cognitive frameworks presents different cognitive

57. Legal scholars frequently present and understand modernist and postmodernist insights in rationalist terms. Two implications follow. The first is that modernism and postmodernism are more or less systematically (mis)understood—pretty much in the same way that the legal realist attempt to acquaint law with modernism was (mis)understood. The second implication is that the typical rejection of rationalism or the obligatory bow to this or that modernist or postmodernist stance indicates very little about what is to follow. Sworn allegiance to modernism, contextualism, pragmatism, deconstruction, and so on, even when attended by copious citations to the appropriate philosophical heavies, confirms nothing about the form of thought or the manner in which beliefs are held. See Schlag, supra note 53, at 955-56 n.95; see also infra text accompanying notes 104-22.

58. The shift I advance bears some similarity to that advocated by Stanley Fish, insofar as he attempts to demonstrate the dependence of theory on practice, epistemology on ontology, and interpretation on interpretive practices. See Fish, supra note 22, at 1794-97. I reject, however, Fish’s claim that theory, epistemology, and interpretation are entirely dominated by and incapable of penetrating practice, ontology, and interpretive strategies. In short, I reject the sort of radical disjunction, sharp-edged distinction, or impenetrable vacuum boundary that Fish systematically imposes between theory and practice, thinking and being, text and interpretive communities, and so forth. For elaboration, see Schlag, Fish v. Zapp: The Case of the Relatively Autonomous Self, 76 GEO. L.J. 37 (1987) (analyzing the rhetorical structure of Fish’s arguments for interpretive communities). Wittgenstein rejected such sharp-edged boundaries: “I do not explicitly learn the propositions that stand fast for me. I can discover them subsequently like the axis around which a body rotates. This axis is not fixed in the sense that anything holds it fast, but the movement around it determines its immobility.” See L. WITTGENSTEIN, ON CERTAINTY ¶ 152 (G. Anscombe & D. Paul trans. 1969) (emphasis in original).


59. For instance, to talk to the reader about paradox is hardly the same thing as putting the reader in a paradox.
goals, opportunities, and horizons. Prerationalism asks no questions and takes things as given. It is extremely secure in its understanding of the world; it does not allow the internal intellectual distance that would permit self-reflection.\textsuperscript{60} Rationalism is cognitively upsetting, because it constantly calls the world into question and asks for the redemption and justification of descriptive and normative claims.\textsuperscript{61} Modernism pushes the critical edge even further and puts reason on trial. Modernism constantly strives to articulate in polite, theoretical terms the unpresentable underside of reason.\textsuperscript{62} Postmodernism continues the modernist project, but drops the polite, theoretical conversation.\textsuperscript{63}

Perhaps it remains difficult to see significant \textit{cognitive} differences among these various types of consciousness. If so, that is precisely the point. Legal academics (like lawyers, judges, law students, and others) operate within distinct cognitive frameworks. In part, misunderstandings arise not only because the conversants are not operating within the same cognitive frameworks, but also because they are not \textit{aware} that they are not operating within the same cognitive frameworks. In turn, law and legal discourse do not provide enough reliable signals to allow the

\textsuperscript{60} This voice scorns the skeptical turns of rationalism and the self-despairing gestures of modernism. It embraces tradition, custom, authority, and the axiomatic nature of law.

\textsuperscript{61} The most common view among legal academics understands law and legal discourse as something that occurs on the plane of ideas. This view demands that scholars justify and redeem all claims in the court of reason. For rationalist consciousness, legal thought controls its own situation. Through self-reflection, reason can adjudicate the value of its own creations and determine their validity. Indeed, the great achievement of rationalism is that it is cognitively self-reflective, because it constantly calls its understanding of the world into question and demands the redemption and justification of claims.

\textsuperscript{62} I use the term "modernism" more in its philosophical than in its artistic sense. My account of modernism as a cognitive orientation thus has more in common with the modernism described in Cornell, \textit{Toward a Modern/Postmodern Reconstruction of Ethics}, 133 U. PA. L. REV. 291, 376-78 (1985) (describing legal modernism in philosophical terms), than with the "aesthetic modernism" described in Luban, \textit{supra} note 44, at 1657-59 (comparing CLS to modern art). The principal philosophers I associate with modernism are Hegel, Marx, Freud, and, to a lesser extent, Nietzsche.

\textsuperscript{63} See, e.g., G. DELEUZE \& F. GUATTARI, \textit{Anti-Oedipus: Capitalism and Schizophrenia} (1977) (presenting a frantic, intensely critical attack on reductive psychoanalytic and political analyses, drawing lessons from the schizophrenic to initiate radical politics free from the baggage of belief). The postmodernist voice is irreverent, excruciatingly self-conscious, and typically bent on irony. This is the voice of detotalization and disaggregation—a voice wary of the treacheries of language. Postmodernism revels in putting reason on trial and refuses to abide by the distinctions and categories that the enlightenment and modernism have bequeathed. In perpetual rebellion against both, postmodernism always seems to be reacquainting reason with the new forms of power. See, e.g., G. DELEUZE, \textit{FOUCAULT 27-28} (S. Hand trans. 1988) (describing power as lacking essence; as simply a relation that runs not to one agent, but rather to both dominators and the dominated); M. FOUCAULT, \textit{Power/Knowledge: Selected Interviews and Other Writings 1972-77}, at 131 (S. Hand trans. 1980) (commenting that truth is worldly and is "produced only by virtue of multiple forms of constraint"); J. LYOTARD, \textit{The Postmodern Condition: A Report on Knowledge} at xxiv, 37-41 (1984) (arguing the loss of power of the grand "meta-narratives"); see also \textit{infra} note 88 (citing examples of reactions to postmodernism's rebellious nature).
participants to recognize easily when or whether they are operating within the same or different cognitive frameworks.

Virtually all legal texts, even sophisticated ones, are polymorphously perverse—almost always comprehensible in a prerationalist, rationalist, modernist, or postmodernist way. All such readings may not be elegant or pleasing. The most discordant readings occur when there is no correspondence between the cognitive frameworks of reader and author. The striking thing about such occurrences, which are probably fairly frequent, is that the dissonance generally remains undetected.64

All of this suggests that there is a great deal more dissonance in law and legal discourse than we usually (or would like to) acknowledge.65 Indeed, as I will argue, there are incommensurable differences in the formal structure of prerationalist, rationalist, modernist, and postmodernist legal thought. These differences can (and often do) have significant implications for the way we practice legal thought, for the way the self is constituted within these practices, and for the conduct of politics in general. In what follows, I attempt to demonstrate the existence of this dissonance in law and legal discourse and to draw out its implications.

II. Four Cognitive Modes

A. Prerationalism

By definition, prerationalist consciousness does not encounter any of the problems, problematics, or paradoxes that are inherent in the other modes of consciousness. Prerationalist consciousness takes things as given and asks no questions. Prerationalism, like its pre-Enlightenment historical counterpart, does not offer the internal cognitive distance necessary for self-reflection.66

Prerationalism in law takes the form of an abiding and unquestioning observance of intuition, craft, convention, tradition, or other sacred texts. This does not imply that advocates of conventionalism or traditionalism are necessarily prerational—it is quite possible to defend conventionalism from a rationalist, or even a modernist, standpoint.67 What
is not possible, however, is to practice conventionalism in a rationalist or modernist manner. The reason is simple: both rationalism and modernism imply a degree of self-consciousness or reflexive thinking that is not merely foreign but antithetical to conventionalism.

The aesthetics of prerational legal thought are fairly simple. Fidelity to the sacred texts is the paramount aesthetic requirement, and appeal to authority is the main argumentative strategy. For the prerational legal thinker, "creativity" is a dirty word. Prerational legal theory thus embodies an absence of critical distance from its own object of inquiry and its own materials. In this sense, one can understand partisans of the lawyer's "craft," such as Alexander Bickel and Lon Fuller, as defending a sort of prerational commitment to the lawyer's viewpoint. More generally, most legal academics seem to maintain a prerational commitment to their own professional expertise and to the intellectual sources of their own professional status. For instance, philosophically inclined legal theorists are likely to interpret rival schools in philosophical terms, despite clear indications from rival schools that they are not engaged in that sort of enterprise.

B. Rationalism

The hallmark of rationalist consciousness is the privileging of ego-centered reason. As its name indicates, ego-centered reason affirms the validity of the rule of reason as determined by the individual rationalist reconstruction of the traditionalist view that judges should apply law, not make it. See Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 3-4 (1971). Bork's stance is at least partially inspired by modernist doubts about the possibility of constructing some philosophical consensus as well as modernist doubts about the institutional context. See infra text accompanying notes 123-29.


One caveat to the text is appropriate here. Lon Fuller and Alexander Bickel may have defended a prerational commitment to the lawyer's craft, but that is not to say that they did so with prerational arguments or from a prerational vantage point. Besides, from a rationalist standpoint, it is difficult to distinguish prerationalism and modernism—for instance, consider the characteristic (and not altogether wrong) rationalist equation of modernist art to savagery and modernist thought to unsocialized behavior. See supra text accompanying notes 1-12.

69. See, e.g., Stick, supra note 44, at 335-38 (criticizing critical legal theory on the grounds that it misuses certain philosophical texts). This tendency is hardly limited to legal academics. The spectacle of academics projecting their own professional norms and problematics onto the work of others is exemplified over and over again. See Bove, Foreword to G. DELEUZE, supra note 63, at xiv, xxi, xxxi-xxxvi (taking Charles Taylor and Frederic Jameson to task for imposing their own professional norms and projecting their own anxieties onto Foucault's text).
self. This consciousness posits a strongly idealist conception of reason in which the rationalist self knows few (if any) limits on its ability to understand and rationalize the world. Ego-centered reason understands that all claims or arguments about the nature of law or the world are addressed to the rational ego itself. The rationalist self is radically free—it need not (and should not) accept any claim that would de-center itself or its reason in adjudicating the nature of reality.

Rationalist consciousness insists first and foremost on the justification of claims according to established rules of logic, or, more broadly, good reasoning. Claims are redeemable for rationalist consciousness if one can demonstrate that they follow correctly from accepted premises. Because, in principle, the rationalist self knows few (if any) limits on its capacity to understand or explain the world, any limits (or other vexations) it does encounter must result from intellectual sloth, outright error, or intentional distortion by other conversants.

Because rationalist consciousness views all other selves as capable of the same intellection, at least in theory, the rationalist assumes that reasoned deliberation must govern all interpersonal enterprises. If all parties conduct this deliberation in good faith, the better argument will necessarily win the day. If the better argument does not prevail, it can only be because some of the parties have chosen to be disingenuous, dishonest, or fraudulent, or because they still do not understand the rules of the game.

In legal theory, rationalist consciousness leads to a view of law as a text (as opposed to a practice) that must constantly adhere to the aesthetic requirements of reason. There are two related aspects to this claim. First, although the application of the law itself may have some admittedly extratextual effects (such as fines, imprisonment, injunctions, and judgments), the law itself is principally a text rather than a practice. The rationalist's only concern is whether the text comports with the rules of the applicable overarching theoretical structure: logical, normative, microeconomic, practical, or otherwise. Second, because reason rules, law determines its own relation to the social sphere. The relation cannot be anything other than perfect correspondence—so long, of course, as the

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70. See generally M. HORKHEIMER, THE ECLIPSE OF REASON 5-57 (1947) (describing "subjective" or ego-centered reason).

71. By this I mean more than formal deductive reasoning. Rationalism maintains that discernible, predictable rules govern analogical and inductive reasoning as well. Even practical reason in the hands of the rationalist will have its own rule-like logic. See infra text accompanying notes 109-16.

working text of the law is in good order. Thus, bringing law into line with the aesthetic requirements of reason is, for the rationalist, essentially a mental operation, a matter of thinking things through.

Because rationalist consciousness is supremely confident in its power to reason with other selves, it constantly makes normative recommendations about the law. Indeed, rationalists particularly value normative discussion, because they are confident that reason rules and that the better argument will win the day. Given this philosophical optimism, the only truly significant task for rationalist consciousness is to answer the normative question: what should be done?73

Generally, then, rationalism acts upon the legal system by making normative recommendations about the system's ideal structure. The rationalist believes that these recommendations will be adopted if they are correct. Accordingly, rationalism offers its own metatheory: the validity or value of descriptive and normative accounts of law depends on whether (and how well) they meet certain aesthetic criteria.74 Rationalists use these aesthetic criteria, which are related to the content and structure of truth, to assess the value of theory.75 In turn, the criteria provide the stock of objections or arguments that rationalism employs to attack any given legal theory. The most important criteria, and the stock objections or arguments they generate, include:

(1) "Representational accuracy": the theory relies on assumptions or advances propositions that are untrue or improbable or that simply have no referent.
(2) "Consensual acceptability": the theory relies on assumptions or advances claims with offensive, absurd, or unbelievable implications.
(3) "Coherence": the theory is internally contradictory, is composed of mutually repugnant parts, or is simply so incomplete that it fails to hang together.
(4) "Elegance": the theory is too complex or heterogeneous to allow any explanatory, normative, or predictive implications.

73. Hegel was not particularly keen on this sort of crusading spirit:
Imaginary idealities and purposes of that sort fall on the ear as idle phrases, which exalt the heart and leave the reason a blank, which edify but build up nothing that endures: declamations whose only definite announcement is that the individual who professes to act for such noble ends and indulges in such fine phrases holds himself for a fine creature: a swollen enlargement which gives itself and others a mighty size of a head, but big from inflation with emptiness.

74. The possibility of setting forth such purely formal criteria corresponds to what Max Horkheimer decried as the instrumentalization and formalization of reason. See M. HORKHEIMER, supra note 70, at 7-8.
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(5) "Sweep": the theory is too narrow or fails to account for problems or issues that it must address, given its ambitions.

(6) "Determinacy": the theory allows too many potentially conflicting interpretations, applications, or conclusions.

(7) "Realizability": the theory is incapable of guiding action, providing conclusions, or generally showing the way to its realization in practice.

For rationalists, the court of ego-centered reason adjudicates the validity of these types of objections or arguments in any given case. Indeed, rationalist legal consciousness typically privileges the individual legal self as the origin and prime adjudicator of truth value. As long as the self has proper training, makes no intellectual errors, and tries its damndest to overcome its own prejudices and environmental bias, it is intellectually authorized to adjudicate normative legal questions on its own.\(^76\) Any inability to solve normative puzzles or any breakdown in the prescriptions can only be attributed to intellectual error or sloth. And as for those approaches that devalue or trivialize normative inquiry—they must be inherently irrational, disingenuous, or nihilistic, because the only truly significant inquiry is normative.\(^77\)

C. Modernism

Modernism troubles the rationalist picture. For modernists, theory, reason, and discourse are not only autonomous forms of thought but also activities or practices whose status is underwritten by some nonrational underside: contradictions among the means and relations of production (Marx), the advent of bureaucratic organization (Weber), the unconscious (Freud), will to power (Nietzsche), cultural practice (Wittgenstein). For modernists, reason itself must be scrutinized before its products can be admitted into the intellectual arena.\(^78\) Indeed, one must

\(^76\) Dworkin’s myth of Hercules, the ideal judge, is in effect a glorification of precisely this sort of ego-centered reason. The man works alone. Through extraordinary powers of intellection and by following his own political values, he is able to construct a coherent theory of law that fits the institutional history in an appealing way. See R. DWORKIN, supra note 16, at 239-40. For an argument that Hercules is too isolated and asocial to satisfy our demands of law, see Michelman, Traces of Self Government, 100 Harv. L. Rev. 4, 76-77 (1986).

\(^77\) See supra notes 1-12 and accompanying text.

\(^78\) As one commentator puts it:

Ce qui, justement, appartient en propre aux formes nouvelles du soupçon, celui des “maîtres”, [Marx, Nietzsche, Freud], c’est d’abord cette radicalité, c’est-à-dire le fait qu’elles atteignent aussi l’instrument: conscience, pensée, raison. Marx, Nietzsche (après Schopenhauer) et Freud vont débusquer sous la raison, ou sous la conscience, ce qui, à travers le langage, en fausse la perspective, la prise sur les choses. Ils soulignent que la conscience n’est pas source du sens, n’a rien d’une origine; ils expliquent pourquoi, temporairement ou non, la raison est foncièrement abusée.

Crahay, La Pratique du Soupçon Chez Marx, et Chez Nietzsche, 51-52 C. Int. de Symb. 9, 12 (1985). Roughly translated:
take care not to confuse reason on the one hand with ideology, information management, projection, will to power, or impossible language games on the other.

Modernism thus demands a de-centering of ego-centered reason. It demands that the individual ego renounce its claims to the status of the *fundamental* epistemological, ontological, or methodological unit. This demand does not just require the development of new categories. It is not, for example, merely a matter of substituting will to power or class interest for Aristotelian logic. What is required is nothing less than a change in the very form in which categories are used to think—a change not just in what is thought, but in the way it is thought. This is a slippery and systematically repressed distinction, but it is extremely important. To understand the distinction, one must abandon the characteristic focus on substance in favor of form. As modernists see it—rationalists do not—the difference between modernism and rationalism is not just a difference in theory, but a difference in the practice of theory.  

Perhaps an example will help. One of the things that Marxism does is de-center bourgeois consciousness by viewing it in terms of production. In other words, bourgeois legal ideas like “Let’s maximize liberty” or “Individual rights protect freedom” are to be viewed not as species of thought but of ideology. A Marxist might well say: “Such maxims must be understood not in terms of the rules of reason, but rather as production itself.”

A rationalist would interpret this statement very differently from a modernist. The rationalist would construe the statement as an injunction to apply the paradigm of production to bourgeois consciousness. He would understand the statement as meaning that bourgeois thought is *like* production. The rationalist reads the term “production” as a metaphor or an analogy, because he always knows—before, and even after, he reads the statement—that reasoning is *fundamentally* different from pro-

What belongs most to the new forms of suspicion, those of the masters [Marx, Nietzsche, Freud] is first this radicalism, in other words, the fact that they reach the instrument itself: consciousness, thought, reason. Marx, Nietzsche (after Schopenhauer) and Freud will dislodge under reason, or under consciousness, what through language distorts their perspective, their hold on things. They underscore that consciousness is not the source of meaning, that it is not anything like an an origin; they explain why, temporarily or not, reason is thoroughly abused.

79. Rationalists typically see modernism (or its various versions) as theories that compete with rationalism on the same level. For rationalism, the difference between rationalism and modernism is just one of theory.

80. For further discussion of the paradigm of production, see J. HABERMAS, *Excursus on the Obsolescence of the Production Paradigm*, in *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* 75, 78-82 (F. Lawrence trans. 1987) (criticizing the production paradigm on the grounds that it fails to account for nonlabor forms of expressive activity, it naturalizes practice, and it eclipses the emancipatory potential of theory).
duction. For the rationalist, everything remains on the plane of ideas, on the plane of epistemology. This statement links bourgeois thought metaphorically to production, but only on the intellectual or ideational plane. It remains self-evident to the rationalist, even as he accepts the metaphor, that bourgeois thought and production remain ontologically distinct. The modernist will understand the statement differently. The modernist will understand the above statement as meaning that bourgeois thought is itself production. To generalize from this example, the rationalist understands theoretical disagreement as stemming from differences in theory. The modernist, by contrast, insists that the differences are not just differences in theory, but differences in the way theory is practiced. (To the rationalist, of course, this “but” clause is just another idea.)

The implications of this fragile and fleeting distinction are very significant—both cognitively and politically. The rationalist understanding allows the ego to stand outside of the inquiry and adjudicate the validity of the statement in the court of individual consciousness. The modernist relinquishes this philosophical idealism and stands inside. For the modernist, the production paradigm is not merely a social reality for her; it is the social reality that she is within.

A modernist thus treats reason and theory very differently from a rationalist. For a modernist, rationalism holds an incredibly flattering vision of its own role and its theoretical aesthetics. Not surprisingly, modernism questions the autonomy and integrity of the rationalist account. Modernism acknowledges that the rationalists’ aesthetics of theory may have some connection to truth and understanding, but not an exclusive one.

The modernist will question what values or interests are served by the rationalist aesthetic. The modernist might point out, for instance, that the rationalist frequently uses the language of power to adjudicate the value of legal arguments or legal theory. For instance, rationalists typically describe theoretical assumptions as “weak” or “strong.” Some theoretical explanations are “vulnerable”; others have great “power.” For the modernist, then, the rationalist aesthetics of theory relates not only to truth but also to a certain conception of power. Indeed, a theory that meets the rationalist aesthetic criteria can be instrumentally useful. A descriptive or normative theory that meets these criteria can constrain, control, direct, guide, or inform action. It can constrain judges, identify available means for achieving certain ends, control legal interpretation, predict behavior, and so on.

81. See supra note 78.
A theory that is representationally accurate allows the theorist to make recommendations about the world, secure in the knowledge that the world the theory describes is the same as the real one it seeks to describe. If the theory is consensually acceptable, it will not meet with much resistance once the theory or its products are put into operation. Coherence allows the theory to identify the relation of its parts in a way that avoids the uncertainties and ambiguities that stem from the presence of contradiction. Elegance signifies that the theory requires only a small number of explanatory variables; thus, elegant theories are epistemologically economical to put into operation. A broad sweep in the theory guarantees that it applies across a wide area. Determinacy guarantees that the theory will yield definite outcomes. Realizability means that the theory will operate without resistance. In sum, a theory that meets each of these aesthetic criteria will be powerful, at least in the way the rationalist conceives power.

As this account suggests, modernism understands the fields within which theory operates very differently from rationalism. While the rationalist celebrates his ability to detach reason from unthinking convention (the triumph of the Enlightenment), the modernist tends to view this detachment with more suspicion. For the modernist, this detachment entails a solipsism and a shallow circularity—the theoretical expression of alienation.82 The modernist thinks she sees through the rationalist world view and can thus treat it as a circular arrangement of propositions reflecting the underlying reality unconsciously and in a distorted manner.83 It is thus no accident that schools inspired by modernism, such as legal realism, Critical Legal Studies, and feminist jurisprudence, make frequent and global claims of circularity against rationalist arguments.84

The modernist thus understands the role and vision of reason and theory very differently from the rationalist. Indeed, modernism is likely to situate the limits and potential of reason and theory in some greater,


84. See, e.g., C. Mackinnon, Feminism Unmodified 8 (1987) (noting that the explanation of sexual inequality in terms of biological differences is circular); Cohen, supra note 3, at 814-21 (attacking various conceptions of property, fair value, and due process as circular); Cook, supra note 8, at 305 (attacking the circularity of deductive logic); Kennedy & Michelman, Are Property and Contract Efficient?, 8 Hofstra L. Rev. 711 (1980) (arguing that efficiency arguments depend in circular manner on initial entitlements).
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grander, and also less hospitable field—one with its own economics—for instance an economics of the market, of the unconscious, or of power.

D. Postmodernism

The question of whether there is any significant difference between postmodernism and modernism is certainly arguable. The difference may turn out to be largely one of form. Modernists attempt to put forward the unpresentable, but the form of presentation remains recognizable—offering the reader or viewer some solace. The form of modernist intellectual work is not wholly alien to the rationalist. The postmodernist, by contrast, puts the unpresentable forward in the presentation itself.

From the perspective of the unpersuaded, this style of presentation is precisely what is most infuriating in postmodernist works: they seem deliberate (and wholly unnecessary) attempts to estrange, irritate, and offend the reader's sensibilities. The rationalist and, to a lesser extent,

85. A rationalist will read "form" here as meaning a derivative, secondary, or trivial distinction. A modernist will read "form" as an important difference between modernism and postmodernism. A postmodernist will be alert to the possibility that a divergence in "form" may signal an incommensurable difference.


Postmodernists strain both language and thought to make the unpresentable appear. Consider, for instance, this extraordinary (read "nonsensical" from a rationalist perspective) postmodernist description of power:

*Power-relations are the differential relations which determine particular features (affects).... There is.... a multiplicity of local and partial integrations, each one entertaining an affinity with certain relations or particular points. The integrating factors or agents of stratification make up institutions: not just the State, but also the Family, Religion, Production, the Marketplace, Art itself, Morality, and so on. The institutions are not sources or essences, and have neither essence nor interiority. They are practices or operating mechanisms which do not explain power, since they presuppose its relations and are content to 'fix' them.... There is no State, only state control, and the same holds for all other cases. G. Deleuze, supra note 63, at 75 (emphasis added) (recounting Foucault's conception of power). This is an extraordinary account of power: one that refuses to give it any positive content. It simply talks about the effects and manifestations of power. See id. at 74; see also J. Derrida, *Différence*, in *Margins of Philosophy* 1, 25-27 (A. Bass trans. 1982) (taking extraordinary care to deny positive content or master status to the expression *différence*); J. Derrida, *Positions* 39-44 (1981) (discussing *différence* in terms of what it is not). For a structuralist inspired discussion of Derrida's *différence* in the legal context, see Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 751-61 (1987).*

88. Postmodernism irritates the hell out of the unpersuaded and invites summary dismissal. See Luban, supra note 44, at 1672 (describing his initial irritation upon reading Gabel & Kennedy, supra note 17); see also Teachout, *Chicago Exposition: The New American Jurisprudential Writing as*
the modernist will reproach the postmodernist for unnecessarily breach- ing the forms of discourse. For the rationalist and, to a lesser extent, the modernist, the conventional forms of discourse are adequate to convey any “substantive” message. Accordingly, there is no need (and no justification) for breaking the rules of discourse. And yet, from the postmodernist perspective, little else seems worth doing.

To make sense of this disagreement, it is necessary to understand a more important difference between the modernist and the postmodernist outlook. In some ways, modernism does not break entirely with the hopes of the Enlightenment. Instead, modernism seeks to deepen Enlightenment projects by acquainting them with the dark side of reason. Yet, in the holistic concept of totality—be it Geist, class relations, will to power, or id/ego/superego—modernism retains some hope for epistemological or even ontological coherence. As modernism is the first to recognize, however, this hope is usually ruthlessly denied. The modernist thus understands the present as a period of anguish, estrangement, and alienation.

Postmodernism, by contrast, rejects the lingering modernist attachment to the Enlightenment project and attacks the modernist attempts at totalization:

Indeed, rather than registering that pain, many of the contemporary devotees of Nietzsche have found it possible to rejoice in the crisis of Enlightenment values whose loss they refuse to mourn. . . . Attracted neither by the nostalgia for a lost order they detect in Lévi-Strauss nor by the hopes for a future one they see in the Western Marxists, the post-structuralists affirm instead the infinite play of desire, non-identity, difference, repetition and displacement that earlier thinkers had decried as an expression of alienation and estrangement.

Postmodernism is thus frequently advancing detotalizations. Negation
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and absence (and other terms previously associated with nothingness) come to play a new role. The following comparison of rationalism, modernism, and postmodernism illustrates the point.

Rationalist discourse often presents (and “present” is the right word) negation as an absence of being. Even in simple language use, declarations that something “does not,” “has not,” or “is not” are derived from the understanding of acting, having, and being. Even when rationalist discourse acknowledges negation as more than simply an absence—say, as a force, as in “the forces of evil”—negation nonetheless remains abnormal, peripheral, deviant, secondary.

Modernism typically accords negation a stronger role. For instance, Sartre said that “[n]othingness lies coiled in the heart of being—like a worm.”93 The worm turns out to be consciousness.94 Because consciousness, in turn, plays a leading role in the construction of reality—not just in Sartre’s understanding, but in Western thought generally—Sartre has accorded negation a much stronger role than the rationalist usually allows. Negation is now on center stage.

But for the postmodernist, the worm metaphor is inadequate—or, rather, it does too much. The reason is simple. Even though modernism gives negation a central role—the worm inside the apple of the world—the role is still inappropriate. Sartre’s metaphor gives negation a positive form: negation for Sartre is like a worm, a corroding, corrupting, destructive, continuous presence.95 But for the postmodernists, this is to

94. See M. JAY, supra note 11, at 338.
95. Notions of nothingness—incompleteness, absence, loss—have been systematically suppressed in Western thought, and the efforts of persons like Nietzsche, Derrida, and Foucault to retrieve the missing term have met with all sorts of invective, abuse, and (worst of all) misinterpretation. In a sense, of course, this merciless response is just a confirmation of their views. The most odious epithets for philosophers are principally terms of nothingness: “nihilist” and “irrationalist.”

Both nihilism and irrationalism as philosophical labels result from the misunderstanding of various philosophical stances. The philosophers of nothingness are neither nihilists nor irrationalists in the way their critics claim. Rather, nihilism and irrationalism are constructs developed by the philosophers of being to characterize philosophers of nothingness. The mistake lies in using the language of being or rationality as a form to describe the philosophy of nothingness. The philosophers of being assume that the philosophers of nothingness are simply their mirror counterparts—people who assert that nothing is or that unreason prevails in the same way that the philosophers of being claim that being is or that reason rules. But such positions, of course, would be absurd. Given a language that systematically privileges being and reason, it is simply impossible to use that language in unmodified fashion to talk about nothingness or irrationality. Given the initial formal preference of rational language for being and rationality, it would be absurd and wrong to assert in that language the truth of nothingness or irrationality.

Thus, the philosophers of nothingness (of absence, of the gap, of treachery, of the missing) have had to speak indirectly and elusively—by disconnected poetic aphorisms (in the case of Nietzsche), by internal deconstruction (in the case of Derrida), by constant doubling back and evasion (in the case of Foucault). This sort of violation of the ground rules is perhaps a necessary aspect of the enterprise, but its esoteric nature has ambivalent implications. See supra text accompanying notes 170-77.
treat negation in a positive form—it is to maintain the metaphysics of presence by simply substituting terms of negation for positive terms while keeping the positive character of the surrounding cognitive structure unchanged. By contrast, the postmodernist insists that negation must be experienced negatively. In more than just a manner of speaking, then, the postmodernist insists that negation can never be presented. Accordingly, such postmodernist concepts as différance, nonidentity, displacement, and dangerous supplement are not the respective symmetrical counterparts of commonality, identity, integrity, and plenitude. Counterparts they may be; symmetrical counterparts, they surely are not. To understand postmodernist terms such as dangerous supplement, displacement, or the like as the negative symmetrical counterparts of positive terms is to make a characteristically modernist mistake: it is to transplant postmodernist terms into the grand modernist frameworks.

III. Discussion

The previous Part presents four different models of cognitive orientation. In some sense, such a clean, sharp-edged taxonomy conforms most with the rationalist orientation. The prerationalist, by contrast, is likely to look at the last Part and find his worst prejudice against rationalism confirmed, for what has this rationalist inquiry into the structure of legal thought produced, if not fragmentation? The modernist is likely to be equally displeased: something is missing here. As for the postmodernist, this model-building is all cause for a good laugh.

But put aside prerationalist, modernist, and postmodernist responses and consider one last nagging rationalist doubt: if the four cognitive orientations do indeed describe the forms of legal discourse, why is the experience of dissonance so infrequent? One modernist answer is that the presentation above improperly implies that the cognitive frameworks are distinct, fully integrated and representative of different readily identifiable modes of thought. It would be a serious mistake to believe that any of these four models accurately represent any significant part of the legal community. On the contrary, the legal community is characterized at once by far less and far more dissonance than the presentation of these four cognitive models would suggest.

The reason that we do not experience dissonance more often is that

96. See infra text accompanying notes 185-89.
97. For a discussion of these detotalizations, see M. Jay, supra note 11, at 514-37.
98. See Boyle, supra note 44, at 769-71 (suggesting that scholars have (mis)understood local, indeed modest, CLS stances by confusing them with the ambitions of the grand modernist frameworks of the nineteenth century).
the very conditions that create dissonance are also the conditions that keep it from coming to light. For instance, the possibility of reading a modernist text in a rationalist way not only creates a dissonant reading but also prevents that reader from experiencing dissonance. For that reader, there is never any modernist text behind his rationalist reading of it.

Indeed, the thought that because there are four distinct cognitive modes within a community, members of the community must experience or at least witness a great deal of dissonance is a characteristically rationalist way of thinking. It is the sort of thinking that makes perfect sense within a rationalist framework—within a framework that implicitly assumes the view that the ego is in control of its own rational thought processes. If that were the case, the ego would routinely stand outside of the four cognitive orientations and exclaim, "Oh my God, what a cognitive mess—we've got four different cognitive orientations going on here—quick, we've got to warn everybody." But as the modernist would see it, the ego is never in such a situation. To borrow part (but definitely not all) of Stanley Fish's line, the ego is already within its own cognitive orientation of the moment—or at least, that is the way the modernist might see it.

As the modernist sees it, the problem is not only that the conditions creating dissonance keep us from recognizing it as such but also that even when the glimmer of dissonance does surface, legal discourse provides some powerful story lines to defuse (or explain away) the unwelcome experience. Perhaps the most common and significant story line

99. To put the ego in that sort of situation, one would have to collapse the structuralist distinction between competence and performance. A competence theory focuses on the structure of a system (for instance, the grammar or syntax of language). Performance theory, by contrast, focuses on the processes used by the actual user (speaker) of the system (language). See G. Mandler, Cognitive Psychology: An Essay in Cognitive Science 39-40 (1985). The modernist typically sees the two as pertaining to two different domains. As one cognitive psychologist puts it, "the structure of language or logic is one domain; whether and how that structure is perceived and incorporated into the human mental apparatus (if it is at all) is an entirely different domain." Id. at 40. The same is true of dissonance: the question of whether dissonance exists within legal thought is entirely different from the question of whether and how the participants experience that dissonance. Festinger explains the difference in terms of "dissonance reduction." L. Festinger, supra note 49, at 29-31 (stating that the existence of dissonance creates pressures to reduce dissonance through changes in behavior or cognition or through exposure to new information).

100. See Fish, Fish v. Fiss, 36 Stan. L. Rev. 1325, 1333-34 (1984). For an examination of the rhetorical links between Fish's "interpretive communities" and Fish's conception of the "self," see Schlag, supra note 58, at 37-52.

101. The postmodernist would instead think of dissonance as something that can constitute us as disintegrated—but that is getting ahead of the game.

102. For elaboration of these storylines, see Schlag, supra note 82 (describing denial strategies of subject-object reversal, grand solipsistic theory, entrenchment of contradiction, sectorization, and theoretical unmentionables).
is the rationalist reduction of dissonance to intellectual error. In order to understand how this rationalist story line could come to dominate legal thought, the modernist will insist on relocating the four types of cognitive orientation within legal discourse itself. For the modernist, the previous Part provides an interesting but ultimately false picture of legal discourse and the legal community. That is because for the modernist, there is both far less and far more dissonance than Part II suggests.

A. Far Less Dissonance

First, there is far less dissonance than Part II suggests, because the four types of cognitive frameworks are not equally represented within the legal community. Rationalism is the dominant cognitive mode. Rationalism has, of course, assimilated some of the insights of modernism and postmodernism, but ever so cleverly, it has done so in a way that neutralizes precisely those aspects of modernism and postmodernism that tend to subvert ego-centered reason. Indeed, what constitute formal insights in modernism become, for rationalist consciousness, much safer and more stable substantive insights.

For rationalists, one disturbing contribution of modernism is the recognition that theory and reason are situated in fields that are themselves nonrational: the material relations of production (Marx), the unconscious (Freud), and cultural practice (Wittgenstein). Another troubling modernist insight is the view that values and language are (largely) social constructions. Probably the most distressing insight (for empowered rationalist egos) is the notion that the individual self is not the ultimate addressee of theory, reason, or history.

103. According to Festinger, there are three general ways to reduce dissonance: changing one or more elements in the dissonant relation, adding new cognitive elements consonant with existing cognition, and decreasing the importance of the elements in the dissonant relations. L. FESTINGER, supra note 49, at 264. For a more detailed discussion of various dissonance reduction responses, see id. at 260-66.

104. See, e.g., Nagel, Rationalism in Constitutional Law, 4 CONST. COMMENTARY 9, 9 (1987) (noting a fundamental similarity in the Supreme Court's rhetoric in cases concerning substantively different constitutional provisions, namely, a requirement that a rule must be justified by and must achieve some important purpose); Nagel, supra note 44, at 165-69 (1985) (noting the emphasis on formulae in constitutional decision making).

105. See supra text accompanying note 78.

106. See id.

107. This message rarely seems to get through to the rationalist ego. On the contrary, supported by an impressive array of professional and cultural conventions, the rationalist ego rarely questions its own competence to adjudicate the validity of potentially ego-decentering claims. For further elaboration, see Heller, Structuralism and Critique, 36 STAN. L. REV. 127, 173-80 (1984) (noting that "[t]he principal symbolic significance of American law is its reproduction of the categories of phenomenological discourse and its ideological centerpiece, the existentially free subject"). See also Schlag, supra note 58, at 43-52 (discussing the defenses of the rationalist ego against the ego decentering contributions of modernism).
A Cognitive Approach to Law

Taken seriously, these insights de-center the self as the privileged source of meaning and truth. Rationalist consciousness, however, uses the modernist insights to its own advantage. Rather than understanding these insights as *formal* characteristics of a troubling and troubled modernist world, rationalist consciousness transforms these insights into *substantive* claims. And in this one move, the disturbing new house rules of modernism become just so much furniture for rationalist consciousness to push around. Indeed, the modernist insights become enlisted in the rationalist ego's bid for power. Once crystallized into a rigid analytical form, what were previously volatile (and thus unusable) modernist insights become instead instrumentally useful rationalist tools. In the legal literature, the rationalist (mis)reading of modernism gives rise to some familiar stereotyped stances that I will call pragmatism, skepticism, and modeling.\textsuperscript{108}

1. **Pragmatism.**—Rationalism can easily accommodate the modernist message under the rubric of pragmatism.\textsuperscript{109} The result is an impoverished pragmatism—one that "true" pragmatists would rightfully disown.\textsuperscript{110} Impoverished pragmatism is thus one of the ways that rationalists transform modernist form into modernist substance.\textsuperscript{111} But to illustrate the transformation, let's start with a "true" pragmatism and degenerate gradually. The pragmatist understands the modernist critique of rationalism as a critique of ostensibly disinterested, universal, transcendent discourses. Accordingly, pragmatism endorses functional, contextual, and immanent discourses. As William James put it:

A pragmatist turns his back resolutely and once for all upon a lot

\textsuperscript{108} The following sections bear some similarity to Hegel's descriptions of stoicism, skepticism, and the unhappy consciousness. See G. Hegel, *supra* note 73, at 241-67.

\textsuperscript{109} Pragmatism is self-consciously opposed to rationalism. See, e.g., W. James, *Pragmatism's Conception of Truth*, in *The Writings of William James* 429, 439-43 (J. McDermott ed. 1967) (noting that "the most fateful point of difference between ... a rationalist and ... a pragmatist" is that for the former, but not the latter, "truth has nothing to do with our experiences"); W. James, *What Pragmatism Means*, in *The Writings of William James*, *supra*, at 376, 379 (contrasting pragmatism with rationalism). Arguably, pragmatism is the indigenous American version of modernism or postmodernism. See, e.g., R. Rorty, *Method, Social Science, and Social Hope*, in *Consequences of Pragmatism* 191, 203-08 (1982) (updating the presentation of American pragmatism in a way that comes to resemble the contemporary American understanding of the European modernist and postmodernist traditions); R. Rorty, *Pragmatism, Relativism, and Irrationalism*, in *Consequences of Pragmatism*, *supra*, at 160, 160-75 (same). For a sophisticated account of pragmatism, see Gray, Holmes and Legal Pragmatism, 40 Stan. L. Rev. 787 (1989).

\textsuperscript{110} I want to describe this impoverished pragmatism for a reason that pragmatists would understand very well: this impoverished pragmatism is probably more influential and more widespread within the legal community than some "truer" version. In other words, I am more interested in the *practice* of pragmatism within the legal community than in some *idealized version* of what pragmatism means. The two are obviously related, but it does no good to have one stand in for the other.

\textsuperscript{111} But instead of turning a rationalist understanding of modernism against *all forms* of thought, as skepticism will want to do, the rationalist here is a bit more selective.
of inveterate habits dear to professional philosophers. He turns away from abstraction and insufficiency, from verbal solutions, from bad *a priori* reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action and towards power.\(^{112}\)

There is nothing necessarily impoverished about the James version of pragmatism. The problem is that very few of the faithful actually follow the James version.\(^{113}\) The rationalist (mis)reading of pragmatism goes something like this: if theory is embedded in practice, language in culture, and values in convention, the mind must alter its view of theory, language, and values to take into account their practical, cultural, and conventional dimensions. Accordingly, one should *systematically* reject disinterested inquiries in favor of purposive inquiry, reject universality in favor of the context, and reject transcendent discourse in favor of immanent discourse.\(^{114}\) In turn, this reorientation implies that one should use the categories, the expressions, and the relations of everyday life as the appropriate vehicles of thought. The result is not pragmatism at all, but instead a sort of unquestioning pluralist consciousness that surrenders to the received description and understanding of the world.\(^{115}\) In doing so,
of course, this consciousness can become instrumentally powerful (or at least think of itself as powerful). Nonetheless, this impoverished pragmatism is a kind of stoicism, and it fails for the same reason that stoicism fails in Hegel: it is "wearisome."  

2. Skepticism.—Because rationalist consciousness understands the insights of modernism as substantive claims about the nature of the world, rationalist consciousness insists that these claims be redeemed and justified in accordance with ego-centered reason. Unsurprisingly, rather than validating these substantive claims, the application of ego-centered reason reveals them to be inconclusive—totally paradoxical and enigmatic.

For instance, as the rationalist sees it, if theory is a product of material practice (as Marx maintains), the theory that advances this very claim cannot be demonstrably valid, for it too is embedded in material practice. Likewise, the claim that the self is not the ultimate addressee of history, reason, or theory was itself authored by a self. Thus, the validity of this claim itself is beyond demonstration, and so on. Understood in this rationalist manner, modernist substance produces all sorts of paradoxes, enigmas, and nonsense. But all this nonsense is simply the result of the conjunction of modernist substance and rationalist form. Modernist theory tends to be self-consciously reflexive. Read from a rationalist perspective, however, the modernist self-consciousness drops out. Quite predictably, the reflexivity becomes paradox and self-contradiction. And ultimately, the rationalist understanding of modernism yields skepticism. The rationalist who accepts modernist substance thinks of his new-found skepticism as a type of modernism—though, of course, it is not. On the contrary, this skepticism leads to an unbridled individual subjectivism. That is the telltale sign not of modernism but of the rationalist understanding of modernism. By erecting this barrage of

legal community in particular”). In legal scholarship, then, pragmatism often yields an unquestioning professionalism that simply assumes the realpolitik world view of the lawyer. It tends to become a public relations image for technocratic forms of governance. See G. Hegel, supra note 73, at 246.

116. This self-conscious reflexivity is certainly true of Hegel (dialectic), Marx (dialectic), Freud (psychoanalysis), and Nietzsche (eternal return).

117. Stanley Fish’s rationalist interpretation of Kelman’s arguments about broad and narrow time frames is one example. See supra text accompanying notes 22-28. If one understands Kelman in the rationalist way that Fish does—in other words, as asking for transparent self-consciousness—then Kelman clearly is uttering sheer nonsense.

118. Skepticism (as in Hegel’s Phenomenology of Mind) constantly denies not just the object, but whatever relation consciousness establishes to the object. See G. Hegel, supra note 73, at 247-48. It is this constant doubling back that leads to the unhappy consciousness—a state in which consciousness comes to regard itself as divided against itself. See id. at 250-51.
skepticism, the rationalist succeeds in undermining the troubling aspects of modernism—those aspects that demand a more radical de-centering of the self as the origin of action, interpretation, and evaluation.

3. Modeling.—Skeptical legal consciousness is always at war with itself. It sees law as divided against itself—in continual self-contradiction. This realization leads to another rationalist (mis)understanding of modernism. The rationalist comes to understand that if he keeps looking at law as a whole, he will never have a thoroughgoing understanding of it that is not contradicted. Picking up on this cue, the rationalist comes to understand modernism as an argument that the whole is extraordinarily complex, composed of many disparate parts. Accordingly, the rationalist sees modernism as an invitation to narrow the scope of his professional gaze and to specialize. This strategy at once acknowledges the modernist messages and yet defuses their troubling character.

With this reading of modernism, not only is modernist form domesticated through a transformation into substance, but in turn the modernist substance is safely cabined within discrete areas of specialization: law as interpretation, law as economics, law as literature, law as institutional process, law as normative philosophy, and so on. The divided world view resulting from this sectorization leads to the unhappy legal consciousness. This is the sort of consciousness that constantly tries to assert the primacy of its own favorite text. The irony, of course, is that such an assertion, if it is to be at all persuasive, must invariably address and invoke the foreign texts of others—texts that have already been inscribed as law. And in addressing and invoking those foreign texts, consciousness becomes acquainted with the unhappy realization that law is never simply the working out of its favorite literary, philosophical, or economic text.

In sum, rationalism can easily assume a modernist pose by assimilating the substantive hardware of modernism while rejecting its form. For the rationalist self, this combination of rationalist form and modernist substance is no problem at all. The combination typically yields skepticism, pragmatism, or modeling, all three of which insulate the rationalist

120. Elsewhere, I have described the structure of this unstable modern self, which seeks to assimilate modernist substance but retain the rationalist freedom to adjudicate the limits and validity of the modernist substance. This "relatively autonomous self" accepts the importance of social context in the construction of social life. It accepts the teachings of modernist theory and modern social science. It will even accept that it is not fully autonomous. It will accept all of those things—accepting, of course, in principle. Meanwhile, it will retain for itself full rights to determine precisely where the scope and boundaries of its own autonomy lies. In short, it retains for itself full autonomy to decide how relative its relative autonomy really is. See Schlag, supra note 58, at 44.
ego (and its bid for instrumental power) from troubling modernist contributions.

In all three stances, the individual ego remains the privileged adjudicator of claims about the nature of reality. The privileged role of the ego is obvious in the case of skepticism, because skepticism is constantly using rationalist thought to destroy the outside world as well as the epistemological links that consciousness makes to the outside world. In the case of impoverished pragmatism, the destruction of rationality, universality, and transcendence leaves only the individual self to make the key decisions. In the case of modeling, the substantive insights of modernism are not only transformed into dead substance but also safely cabined within various sectors of professional specialization. The self remains unquestioned.

The upshot of all this is that legal thought often incorporates modernism within rationalist form. The same sort of rationalist (mis)reading occurs with prerationalism and postmodernism. In both cases, the imperialism of rationalist form displaces the prerationalist or postrationalist world view. A clear example of the rationalist neutralization of prerationalism is the destruction of intentionalism in constitutional law. As soon as the critical edge of rationalism begins to dissect the framers' intent and ask for an inventory of the concept, the framers begin to lose authority. Once the rationalist disenchantment is complete, the prerationalist commitment to the framers' intent is revealed as just another silly animism. Rationalism can neutralize postmodernism in the same way. Simply imagine Diderot interrogating Derrida on the question of where and how deconstruction should be treated in the encyclopedia. Should it be entered under the subject heading of philosophy or literary criticism? What are its main points? Themes? Underlying assumptions?

By subsuming prerationalism, modernism, and postmodernism within rationalist form, rationalism succeeds in achieving dominance within the legal community. In this sense, there is far less dissonance within the legal community than my earlier description of the four incommensurable cognitive frameworks would suggest.

121. For piercing analytical inquiries into the composition of the framers' intent, see Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. REV. 204, 223-24 (1980); Dworkin, The Forum of Principle, supra note 38, at 471-500.

B. Far More Dissonance

But at the same time, there is also much more dissonance than the presentation thus far suggests. The reason is simple: no individual operates from within a single cognitive framework. On the contrary, each of us continually slips, switches, defaults, or jumps from one framework to the other.

Consider, by way of example, Judge Robert Bork's famous article on neutrality and the first amendment. In that article, Bork (not surprisingly) takes certain things as given. For instance, he assumes that rational argument will persuade his audience. More concretely (and more controversially), he also assumes that article III requirements (with regard to judicial review) take precedence over the meaning of the free speech clause. He also assumes that article III is a proper starting place for constitutional exegesis. All these assumptions are prerational givens, for Bork never submits them to the searching critical questioning characteristic of rationalism.

The thesis that Bork attempts to defend is the view that judges should apply the law, not make it—and that hence, constitutional decision making requires neutrality. In 1971, that position was typically prerationalist. Bork, however, advances this thesis in a rationalist manner. The arguments he advances in favor of this thesis are searching, rationalist arguments. He views law as a text and acknowledges the demands of principle, coherence, and consistency in the construction of not only the text of law but also his own attempted contribution to that text. Bork appears to experience coherence and consistency as requirements of his own intellectual position. He acknowledges as well a need to justify each step in the argument and all its implications in a consistent and coherent manner. But if Bork's argument is rationalist in form, it is at least in part inspired by modernist doubts about the possibility of achieving philosophical consensus and by modernist suspicions about the distortions of institutional power.

123. Bork, supra note 67.
125. See Bork, supra note 67, at 1-2.
126. See Shiffrin, supra note 124, at 1232-34.
127. See Bork, supra note 67, at 2-3.
128. This doubt is much more visible in Bork's later writings. See, e.g., Bork, Styles in Constitutional Theory, 26 S. Tex. L.J. 383, 394 (1985) (arguing that legal scholars not bound by an absolute reference to the framers' intent could use abstract moral philosophy to justify tyranny).
129. See Bork, supra note 67, at 2-3 (noting that noninterpretivist constitutional scholars displace text, history, structure, and precedent with their own moral philosophy) (citing R. DAHL, A Preface to Democratic Theory 4-33 (1956)).
Thus, even on the plane of form alone, Bork’s arguments present a juxtaposition of cognitive frameworks: prerationalist visions of the Constitution’s structure, rationalist modes of argument, modernist visions of the basic institutional context. If we wanted to, we could try to embarrass Bork’s argument by pointing out the incommensurable character of his various cognitive orientations and the contingent character of his particular juxtaposition. But Bork’s situation is hardly unique. On the contrary: such shifts in cognitive orientation are the rule, not the exception. Sometimes, the shifts are even deliberate, as when one cognitive orientation leads to the assumption of another.

Stanley Fish’s arguments (despite themselves) provide an excellent example. Almost regardless of context, Stanley Fish is always already arguing that a given position depends on and yet denies the existence of a set of theoretical unmentionables. In Fish’s case the theoretical unmentionable is a pretheoretical, pre-positional, and inarticulable set of assumptions, procedures, goals, and beliefs that sometimes goes by the name of “interpretive communities.” As a result of this contradictory denial of and dependence on theoretical unmentionables, the given position is by turns incoherent, useless, impossible, or nonexistent.

The latest given position to bite the dust in this way is liberalism. Here (as elsewhere) the structure of Fish’s arguments involves some deft shifts in cognitive orientation. The argument begins with Fish declaring: “[L]iberalism is informed by a faith (a word deliberately chosen) in reason as a faculty that operates independently of any particular world view.” Now, on the prerational level, this statement is undeniably true. On a rationalist level, however, you will notice that Fish is already planning problems for liberalism, inasmuch as he grounds reason in faith when the two are usually opposed—at least within the rationalist world view. Indeed, life will be nasty, brutish, and short for liberalism if it has to go through Fish’s text under the name “faith in reason.” Fish will confirm this later, but if you have the postmodernist sensitivity for the tricks of language, you can start laughing now, because the game is already over. Fish has already created a language game that makes liberalism (or anything else he wants to put in its syntactical place)

130. For a brief discussion of Fish’s theoretical unmentionables, see Schlag, supra note 58, at 42.
131. See Fish, supra note 22, at 1782.
132. See id. at 1797.
133. See id. at 1787-94.
135. See id. at 997-1001.
136. Id. at 997.
137. See id. at 997-98.
impossible. Consider Fish's sentence again and ask: is it ever performa-
tively possible to have "faith (a word deliberately chosen) in . . . [any-
thing] . . . that operates independently of any particular world view?" Of
course not—not unless you want to maintain (rather absurdly) that faith
can operate independently of any particular world view. This, of course,
is precisely what Fish thinks liberalism absurdly does maintain and why
he believes that liberalism is impossible. Indeed, he tells you so in the
bottom line: "Liberalism, however, defines itself . . . by its not being the
program of any particular group or party—and therefore . . . one can
only conclude, and conclude nonparadoxically, that liberalism doesn't
exist.”

Now, if Fish is to be persuasive in his argument, the cognitive shifts
are not supposed to occur so quickly. (Indeed, one is not supposed to
deduce an entire Fish argument from a single Fish sentence.) So let me
reconstruct the argument at its more persuasive normal speed:

"[L]iberalism is informed by a faith (a word deliberately chosen) in
reason as a faculty that operates independently of any particular
world view." This premise is undeniably true from aprerational-
ist perspective. "The one thing liberalism cannot do is put reason
inside the battle where it would have to contend with other adjudi-
cative principles and where it could not succeed merely by invok-
ing itself because its own status would be what was at issue." This
argument, perfectly valid from a rationalist perspective, estab-
lishes that a decision procedure such as liberalism cannot question
itself without running into contradiction.

But what if reason or rationality itself rests on belief? . . . This
is in fact my view of the matter . . . . It is not that reasons can never
be given or that they are, when given, incapable of settling dis-
putes, but that the force they exert and their status as reasons de-
pends on the already-in-place institution of distinctions that
themselves rest on a basis no firmer (no less subject to dispute)
than the particulars they presently order.

138. Id. at 1000-01.
139. Id. at 990.
140. Id. at 997.

This argument depends on a sharp opposition, such as inside/outside, between reason on
the one hand and faith on the other. Such sharp-edged vacuum boundaries are characteristic of
rationalism and its insistence on maintaining a certain preoccupation with textual aesthetics. Absent
such a sharp reason/unreason distinction, there is no contradiction (and no necessary loss of author-
ity) in reason (or liberalism) acknowledging itself to be a system of belief. Fish's argument does not
follow once one introduces the modernist or postmodernist recognition that argument can (and
should) be circular and reflexive. See, e.g., A. Kojève, INTRODUCTION TO THE READING
OF HEGEL: LECTURES ON THE PHENOMENOLOGY OF SPIRIT 191-95, 212-15 (1958) (describing the
circular nature of Hegel's dialectic); J. Lyotard, supra note 63, at 60 (noting the reflexive character
of postmodern science).

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circular nature of Hegel's dialectic); J. Lyotard, supra note 63, at 60 (noting the reflexive character
of postmodern science).

142. Fish, supra note 134, at 997-98. By making this assertion, Fish has just asked the question
he said liberalism could not ask. If one wanted to defend liberalism with Fish moves, one could
Note how an essentially rationalist argument has led to this modernist view of reason as embedded in the already-in-place institution of distinctions. "In short, what is and is not a reason will always be a matter of faith. . . ."143 Here Fish picks up the prerationalist vote—as his rationalist argument in favor of a modernist position ironically redeems the prerationalist commitment to faith. Or does it? Wait—I think there is a postmodernist ending to all this! Yes, yes, here it is: "Liberalism, however, defines itself . . . by its not being the program of any particular group or party—and therefore . . . one can only conclude, and conclude nonparadoxically, that liberalism doesn't exist."144 Of course it doesn't exist. We knew that from the start. Hell, Fish defined liberalism so that it couldn't exist. This has all been one huge game in the prison house of language.145

This reconstruction abbreviates, if anything, the cognitive possibilities within Fish's arguments. The point is that Fish's argumentation can be understood as (and indeed counts upon) a series of cognitive shifts to persuade the reader. Ironically, Fish persuades his reader, because consonant with Fish's interpretive community thesis, the reader will always read into the argument what she finds there.146

In derogation of Fish's thesis, however, this persuasion can only occur because Fish has ever so cleverly laid the groundwork for the shifts. Indeed, one of Fish's classic rhetorical devices is to tell a story before he gets to the rationalist argument.147 Once you get to the argument, you have already assumed the stance of the story as the prerational perspective from which to interpret the argument. In order for Fish, however, to make this connection between a prerational perspective and a rationalist argument (and he does it so well), the two cognitive orientations must be related.148 And they are. The various cognitive orientations are mutu-

simply say that Fish's question is already outside the ground rules of liberalism and thus privileges some perspective external to liberalism. Such external critiques are, of course, always possible, but the one thing an external critique cannot do is show that liberalism is internally contradictory. (Note that I am not suggesting that this argument is persuasive.)

143. Id. at 998.
144. Id. at 1000-01.
145. The expression is borrowed from F. JAMESON, THE PRISON-HOUSE OF LANGUAGE (1972) (deriving its title from unattributed quote to Nietzsche: "We have to cease to think if we refuse to do it in the prison-house of language; for we cannot reach further than the doubt which asks whether the limit we see is really a limit").
146. See Schlag, supra note 58, at 51.
147. See, e.g., Fish, supra note 22, at 1773-75.
148. Indeed, the sharp boundaries that Fish typically inscribes between theory and practice, text and interpretive community, and now reason and belief lead him to view practice, interpretive communities, and belief systems as impervious to theoretical examination. His interpretive communities are thus always oddly flat, dominated by unknowable prerationalist assumptions and incapable of self-reflection. In order to maintain this picture, however, Fish has to maintain sharp lines between prerationalism on the one hand and rationalism and postrationalism on the other.
ally referential. But that is neither new nor surprising. As John Stuart Mill observed long ago, it is quite possible, for instance, to cling to rationalist ideas in a prerational manner:

> [A]ssuming that the true opinion abides in the mind, but abides as a prejudice, a belief independent of, and proof against, argument—this is not the way in which truth ought to be held by a rational being. This is not knowing the truth. Truth, thus held, is but one superstition the more, accidentally clinging to the words which enunciate a truth.

To go further, one might say that it is possible to adhere to rationalism itself in a prerational manner, or to adhere to prerationalism in a rational manner, or to modernism in a rational manner, and so on. The structure of this Article illustrates the point. The beginning, Part I, has a prerationalist cast—a series of examples meant to demonstrate the existence of dissonant cognitive orientations. Part II displays the classic rationalist model-building strategy. Part III develops a classic modernist impeachment of rationalist model building and argues—as it is doing now—that the actual workings of the cognitive orientations are far messier than the rationalist account suggests.

Indeed, while it is theoretically accurate to say that one can adhere to rationalism in a prerational manner, to modernism in a rationalist manner, and so on, the actual juxtapositions of various cognitive orientations are unlikely to occur in such an abstract way. Far more likely, they occur (as in Bork's article) in a local way. In other words, one adheres to this particular facet of rationalism in a prerational manner, or to this particular bit of modernism in a rationalist manner. And so on.

The existence of connections among the various cognitive orientations allows for shifts among them. Even as you read this Article, there

149. For some common rhetorical connections, or rather, convergences among the various cognitive orientations, see infra text accompanying notes 192-95.


151. See supra notes 123-29 and accompanying text.

152. Recent work in cognitive psychology echoes the notion that connections between cognitive orientations are typically local. The traditional model of consciousness assumes that a conscious state is simply the conscious equivalent of a preconscious structure. Recent work, however, rejects the identity position and instead describes consciousness as a situation or moment-specific construction of preconscious structures. According to this view, conscious states are thus responses to the requirements of the moment—constructive acts of fitting perceptual hypotheses to their sources. See G. Mandler, supra note 99, at 57-58; R. Thatcher & E. John, Foundations of Cognitive Processes 294-304 (1977); Marcel, Conscious and Unconscious Perception: An Approach to the Relations Between Phenomenal Experience and Perceptual Processes, 15 Cognitive Psychology 238, 245 (1983).
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are certain statements you take on faith. Other statements, however, trigger that critical response seeking out logical contradictions, ambiguous concepts, overlapping oppositions, illegitimate vacuum boundaries, and the like. With still other statements, you wonder about the sort of life, academic experience, or whatever that (apparently) leads me to write these things. Finally, I know there are some of you out there who are just laughing—laughing your heads off. But even the interruption of laughter has a point. And the point is that the various cognitive orientations are connected with the others.

How you conceptualize these connections is a different question—one that has a great deal to do with your present cognitive orientation. Hard-core rationalism, for instance, would suggest that changes in cognitive orientation are directed by rational thought itself. Hard-core prerationalism, by contrast, would insist that all shifts originate in the theoretical unmentionables of some prerational given: intuition, instinct, craft, or the sacred text. Modernism would adopt the same line, but would add that reason reflecting on (its) experience can illuminate the structure and content of the prerational. Modernism would hold that there are standardized relations among the various cognitive orientations. Postmodernism, by contrast, multiplies the number as well as the character of possible connections.

153. This rationalist model of consciousness as ultimately self-directing is dominant in legal thought. See supra notes 107 & 123.

154. This view tracks Stanley Fish's point about interpretive communities. For Fish, all professional activity is always already situated in "interpretive communities," whose constitution can never be articulated except from the vantage point of other "interpretive communities." Therefore, some prerational, inarticulable background underlies all human thought. See supra text accompanying notes 130-34. That Fish's arguments track the prerational picture is most evident from his article explaining how change occurs. See Fish, Change, 14 TAMKANG REV. 277 (1983) (asserting that change occurs within an interpretive community because interpretive communities are always already changing and are thus always already open in always already determined ways to cross-fertilization from other interpretive communities).

155. This claim of standardized relations would be consonant with the claims of dialectics. See, e.g., F. JAMESON, MARXISM AND FORM 45-46 (1971) (noting that the comparative structure of a dialectical thought process includes, for example, both the cognitive process of performing a math problem and the process of thinking about "the way the mind felt while performing the mathematical transaction" as compared with other mental operations). The traditional view of consciousness in cognitive psychology holds that conscious states are merely the conscious equivalent of some preconscious states. The traditional view thus holds that conscious states "emerge," "break through," "cross a threshold," and so forth. See G. MANDLER, supra note 99, at 57-58. This way of conceiving the relation between conscious and the preconscious coincides with the modernist tendencies to standardize the relations between reason and the underside: for instance, superstructure and base (in Marxist terms), truth and will to power (in Nietzschean terms), and ego and id (in Freudian terms).

156. See G. DELEUZE & F. GUATTARI, supra note 63, at 42 (describing the structure of "desiring machines" in terms of hiatuses, ruptures, short circuits, reassemblies, and so forth). This picture of volatility, characteristic of postmodernist accounts, corresponds to more recent works in cognitive psychology that view conscious states as creations of preconscious schemas responding to a specific environment. See G. MANDLER, supra note 99, at 57-58.
Each of these accounts of cognitive shifts provides the background for understanding how each of the cognitive orientations treats dissonance among the various cognitive orientations. In other words, these various pictures of cognitive activity provide the background for understanding the techniques of dissonance reduction.

Prerationalism does not recognize cognitive dissonance except as unconscionable departures from the prerational given of intuition, craft, or the sacred text. Everything is always already embodied in the prerational given: thought is always a series of intuitions, practical activities, unfoldings of the sacred text. And if it is not something of this sort, then it is an unconscionable departure from these origins.

Rationalism recognizes cognitive dissonance, but does so in terms of individualized intellectual error. Even simple legal propositions implicate a wide variety of assumptions about such issues as form, substance, normativity, epistemology, ontology, and interpretation. Accordingly, cognitive shifts occur because one forgets, for instance, to question the epistemological basis for a certain position; thus, the position lapses into prerationalism in the epistemological sector. Another time, one might overlook the performative significance of a normative premise and thus default into prerationalism in the normative sector.

The modernist rejects the philosophical idealism inherent in attributing the frequency of cognitive shifts to individual intellectual limitations. The modernist might argue instead that the sectorization of legal discourse has a political economy of its own. Explicit attention to one sector is likely to bring about cognitive deficits in other sectors. For instance, postrationalist normative legal theory can be extraordinarily naive (indeed, prerationalist) in its understanding of institutional politics and individual human behavior. Likewise, rationalist law and economics can be downright prerationalist in its understanding (or rather, denial) of the symbolic or interpretive aspects of human affairs. Typically, difficulties that a given cognitive framework creates in one sector tend to be compensated by the adoption of another cognitive framework in a different sector. For instance, formalists have an extraordinarily critical attitude toward discretionary judicial power, a perception often

158. As some commentators have observed, for instance, the strength of a principle or a right is inversely related to its scope or its reach. See, e.g., R. Dworkin, Taking Rights Seriously 261 (1977); Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 276 (1981).
160. See Schlag, supra note 53, at 967-70.
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fueled by the characteristically rationalist distrust of the unconstrained personality.\textsuperscript{161} Thus, for formalists, there is a deficit in the character of judges. Formalists typically replenish that deficit by an extraordinary faith in the potential of doctrine (that is, mere words) to encode justice.\textsuperscript{162} In this way, a prerationalist faith in language overcomes the deficit that the rationalist critique of courts creates. The realist typically occupies the opposite position. Exhibiting a modernist's distrust of language, the realist insists on freeing judges from the arbitrariness of doctrine.\textsuperscript{163} This view creates a deficit in the written law, and realists typically surmount this deficit with a prerationalist faith in the judge as the jurisprudential near-equivalent of the noble savage.\textsuperscript{164}

The holistic systematicness of such a modernist account would likely be unacceptable to the postmodernist. The postmodernist would certainly not hesitate to point out the incoherence of both the formalist and the realist position. The formalist position suffers in that it is always the judge who writes the law. If the judge cannot be trusted to apply her own judgment, it follows that she cannot be trusted to encode her judgment into formalist doctrine. If language cannot be trusted, neither can the judicial self: that self is in the prison house of language along with everyone else. Thus, for the postmodernist, there can be no central conceptual economy among sectors—in part because the sectors cannot be stabilized. The sectorization of the legal field consumes the very attempt to rationalize and stabilize the discourse.\textsuperscript{165} The various sectors are not related in simple linear fashion, but rather through a multiplicity of different relations, including contradiction, antagonism, reinforcement, and repetition.

There is a modernist moral to all these understandings of cognitive dissonance: the various accounts of cognitive shifts are all rationalizations. They are rationalizations in the sense that they explain dissonance, and they are rationalizations in the sense that they normalize the experience of cognitive dissonance. In normalizing the experience of cognitive dissonance, each orientation insulates itself from change. Thus, even though dissonance is a frequent phenomenon in legal thought, the experience of dissonance is not. The reason is simple. The more pervasively we


\textsuperscript{162.} See, e.g., id. at 158 (suggesting that separation of powers and first amendment doctrine have resisted judicial distortion precisely because "linguistic skepticism" has never dominated judicial interpretation).

\textsuperscript{163.} See J. FRANK, supra note 3, at 248-52.

\textsuperscript{164.} See id.

\textsuperscript{165.} See Schlag, supra note 53, at 934-36.
(as individuals and as a community) are constituted by dissonance, the less capable any of us are to recognize it as such. To put it on the plane of the self, the dissonant personality has become the normal personality. To put it on the plane of law, dissonant legal arguments—such as those of Bork, Dworkin, and Fish—have become the normal arguments. In sum, we stop experiencing dissonance as dissonant. In a curious and yet characteristic manner, then, the modernist understanding of dissonance serves to normalize it—in the same way that modernism tends by turn to assert, bemoan, and ultimately normalize the universality of alienation, estrangement, and contingency. But this brings us to postmodernism.

IV. Fragmentation

There is something rather ironic about recent developments in this Article. I started out with seemingly startling claims of cognitive dissonance in legal discourse. And now, after a quick tour of the received prerationalist wisdom, a few sharp encounters with the critical edge of rationalism, and a plunge into the troubling underworld of modernism, cognitive dissonance turns out to be normal—even comfortable.

Postmodernism is familiar with this pattern—the normalizing tendencies of rationalist and modernist accounts. The pattern is fairly old. John Stuart Mill (as rationalist) worried that reason and the search for truth might become a prejudice:

We often hear the teachers of all creeds lamenting the difficulty of keeping up in the minds of believers a lively apprehension of the truth . . . . But when it has come to be . . . received passively, not actively—when the mind is no longer compelled, in the same degree as at first, to exercise its vital powers on the questions which its belief presents to it, there is a progressive tendency to forget all of the belief except the formularies, or to give it a dull and torpid assent, as if accepting it on trust dispensed with the necessity of realising it in consciousness, or testing it by personal experience, until it almost ceases to connect itself at all with the inner life of the human

166. See supra notes 123-29 and accompanying text.
167. See supra notes 16-20 & 38-42 and accompanying text.
168. See supra notes 22-27 & 133-51 and accompanying text.
169. For works exploring the normalizing tendency of modernist thought, see Boyle, Modernist Social Theory: Roberto Unger’s Passion, 98 HARV. L. REV. 1066, 1081 (1985), and Frug, Argument as Character, supra note 87, at 877-81, both of which describe the “tragic modernist” reaction to modernism.

This observation, of course, is a postmodernist insight.

170. Arguably, the attempt to resist this pattern is what gives postmodernism its seemingly strained appearance. See supra notes 62 & 88.
171. J.S. MILL, supra note 150; see supra text accompanying note 150.
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*being.*

Hegel (as modernist) was so concerned that thinking itself would lapse into recitations of results and outcomes that he almost refused to write a preface to the *Phenomenology*:

In the case of a philosophical work it seems not only superfluous, but, in view of the nature of philosophy, even inappropriate and misleading to begin, as writers usually do in a preface, by explaining the end the author had in mind. . . . [T]his cannot be accepted as the form and manner in which to expound philosophical truth. . . . For the real subject-matter is not exhausted in its purpose, but in working the matter out . . . .

This tendency of thought to solidify into opaque substances that can be carved and dissected, as if they were things in the world, has even become the central problem for dialectics:

*[T]t is inevitable that every theory about the world, in its very moment of formation, tends to become an object for the mind and to be itself invested with all the prestige and permanency of a real thing in its own right, thus effacing the very dialectical process from which it emerged: and it is this optical illusion of the substantiality of thought itself which negative dialectics is designed to dispel.*

Derrida (as postmodernist) constantly worries that others will come to see his concepts, such as *différance* or dissemination, as precisely that: concepts, or even some sort of modernist totalizing constructs:

Since it can no longer simply be subsumed by the generality of *logical* contradiction, *différance* (the process of differentiation) permits a differentiated accounting for heterogeneous modes of conflictuality, or, if you will, for contradictions. *If I have more often spoken of conflicts of force than of contradiction, this is first of all due to a critical wariness as concerns the Hegelian concept of contradiction (Widerspruch), which, in addition, as its name indicates, is constructed in such a way as to permit its resolution within dialectical discourse, in the immanence of a concept capable of its own exteriority, capable of maintaining what is outside it right next to it. To reduce différance to difference is to stay far behind in this debate.*

Duncan Kennedy shares these worries as well:

*I've recanted the fundamental contradiction, and also altruism versus individualism. . . . The very impulse that makes me just profoundly suspicious of the fundamental contradiction and profoundly suspicious of individualism and altruism at the mo-

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172. *Id.* at 35 (emphasis added).
173. G. Hegel, supra note 73, at 67-69 (emphasis added).
174. F. Jameson, supra note 155, at 56-57 (emphasis added).
175. J. Derrida, supra note 87, at 101 n.13 (emphasis added).
ment, that tendency in my own work and thinking about things, makes me feel that the critique of rights has sort of had it too. It's now in danger of becoming a cluster of pods, and it's in real danger of having exactly the same fetishized character as the contradiction analysis, or the individualism and altruism analysis.\textsuperscript{176}

Nonetheless, despite all these precautions and worries, the patterns return: rationalism lapses into prerationalism, and modernism lapses into rationalism—and they all lose their critical edge. What Lenin did to Marx, Posner does to Coase, and somebody does to Duncan Kennedy. And it happens ever faster. So there is a lot to worry about. The patterns are there and hard to dismiss: postmodernism tends to crystallize into a modernist (mis)understanding; modernism usually precipitates in rationalist solutions; rationalism degenerates into prerationalist prejudice.

All of this is perhaps obvious. What is less obvious, however, are the intellectual implications of these patterns. On the one hand, the drive to avoid reification at all costs through systematic self-negation is a form of intellectual and political paralysis. It is in any event \textit{déjà vu}: several authors have noted, for instance, that Adorno's negative dialectics—his unwillingness to let any totality stand or any positive claim survive his own textual treatment—led to a form of political and intellectual irrelevance.\textsuperscript{177} On the other hand, the failure to resist the transformations of thought into dead matter is an intellectual and political self-betrayal.

Finding a way between these two dead ends is obviously problematic. A couple of things seem evident, however. First, as thought and theory become accepted and realized, they lose their potency, their critical edge. Mill, for instance, rarely inspires anyone to the intellectual barricades these days. One might say that in the realization (some would say betrayal) of Mill's insights, his ideas have lost their edge. This prompts the next point: if one wants to stay in the same intellectual or political place, the best thing to do is move. The categories and processes of thought themselves must be periodically replaced. To put it crudely (but graphically), the thought in Mill's \textit{On Liberty} may well be more faithfully expressed for a late twentieth century reader in Horkheimer's

\begin{footnotes}
\footnotetext{176. Gabel & Kennedy, \textit{supra} note 17, at 36 (emphasis added).
\footnotetext{177. "Adorno ensured perhaps too successfully that reason did not become 'instrumental.' For instrumental reason preserved a moment of 'use-value' which negative dialectics had to abandon. The result was that as opposites, they too converged: instrumental reason lost sights of rational goals, ceased to be a means and became an end in itself; but negative dialectics abrogated political utility and thus became an end in itself as well." M. Jay, \textit{supra} note 11, at 274 (quoting S. Buck-Morss, \textsc{The Origin of Negative Dialectics: Theodor W. Adorno, Walter Benjamin, and the Frankfurt Institute} 189 (1977)).}
\end{footnotes}
Eclipse of Reason than in Mill's own work.\textsuperscript{178}

Indeed, one of the implications of the existence of the various cognitive orientations is that it is extremely difficult to be understood in the way one wants or hopes to be. Given this cognitive fragmentation of the audience, there is virtually no chance that a message will be understood in the same way by each of the various constituent groups. The possibilities for the communication of "truth" in law or legal discourse thus range from dismal to zero—at least so long as one clings to a prerationalist or a rationalist conception of truth. Indeed, the significance of any given text is bound to differ depending on the cognitive framework on the receiving end.

In their own ways, each of the four cognitive orientations is aware of this problem. But they identify its magnitude, source, and resolution quite differently. Indeed, a series of stock rhetorical responses have already emerged to deal with the problem. I do not mean to imply that these are the only responses or the only ones possible. Nor do I mean to imply that there is a secure link between cognitive orientation and rhetorical response. I propose only to give a rough sketch here.

Prerationalists, for instance, often blame rationalism and postrationalism for ripping asunder the common texts that make the community of meaning possible. Accordingly, prerationalism typically issues pleas for a return to the canon—be it the intent of the framers, the craft of the lawyer, the common-law method of reasoning, or the major literary texts of western civilization.\textsuperscript{179}

Rationalists, by contrast, tend to see audience fragmentation as the result of intellectual error, inadequate articulation of fundamental premises, or isolated distortions of the conversation. Accordingly, rationalists insist on clarity, precision, and, in general, more and better conversation.\textsuperscript{180} Most of all, rationalists insist on returning to fundamental assumptions and first principles.

These rationalist demands lead to the privileging of theory and to the attempt to recover community in theoretical consensus. For the rationalist, community is consensus, and we recover consensus by way of abstraction: in politics, by discussing "the citizen" and "liberty" and "self-determination"; in legal discourse, by articulating and elaborating

\textsuperscript{178} See M. HORKHEIMER, supra note 70. Lionel Trilling identified the same problem in noting the contradiction between the canonical use of the "great books" in American universities and the subversive character of those very books. See L. TRILLING, BEYOND CULTURE 11-12 (1965).

\textsuperscript{179} See, e.g., Teachout, supra note 88, at 774 (criticizing the rejection of traditional wisdom).

\textsuperscript{180} Indeed, the currently fashionable "conversation of mankind" theme strikes me as oddly rationalist in its images of and hopes for dialogue, even though it generally issues from ostensibly postrationalist corners.
normative ideals such as fairness, neutrality, and equality; and in theory, by articulating universals that ground truth, epistemology, or human nature. Once abstract community is recovered, we need only realize the abstraction in practice.

This tendency to look for and stabilize intellectual common ground in order to establish consensus is what gives rationalism (despite even contrary philosophical intentions) its foundationalist character. As an example, John Stick recently claimed that most legal academics have rejected foundationalism and Cartesian thought in favor of some more pragmatic form of reasoning.\textsuperscript{181} From there, however, Stick argued that because we have nearly all rejected mechanical jurisprudence in favor of some more pragmatic approach, we share a common ground from which to engage in political argument.\textsuperscript{182} Ironically, this last stance succeeds in reintroducing the very foundationalism that Stick seeks to banish. Thus, even when rationalists purport to reject foundationalism, they tend to betray their own philosophical position by the rhetorical attempt to universalize some intellectual common ground.

The major rhetorical strategy of modernists is to adopt the universalizing tendency of rationalists but to carry it even further so as to decenter the self and its particular cognitive framework. Starting with Hegel, who depicted western thought and philosophy as the dialectical unfolding of Geist,\textsuperscript{183} modernists have attempted to construct totalizations that allow the construction of common meaning. Modernists attempt to shift from the presentation of ideas to the demonstration of experience.\textsuperscript{184} Even Hegel, who is often (incorrectly) dismissed as a philosophical idealist, attempted not merely to construct totalizations but to actually give the reader the experience of these totalizations at work. This is certainly true as well (though in different ways) of Freud and Wittgenstein (less so of Marx).

Postmodernists continue the modernist project of demonstration—indeed, they go further than modernists in violating the standards of good form. If intellectual work should be thought-provoking, postmodernists emphasize provocation over protocol.\textsuperscript{185} In contrast to

\textsuperscript{181} See Stick, supra note 44, at 345-58.
\textsuperscript{182} See id. at 399-400.
\textsuperscript{183} See generally G. Hegel, PHENOMENOLOGY OF SPIRIT (A.V. Miller trans. 1979).
\textsuperscript{184} I doubt that this distinction meaningfully contrasts modernists and the actual intellectual figures of the Enlightenment: when DesCartes' Meditations first hit the book stores, these meditations surely were not just ideas or mere arguments, but an experience in their own right. See R. Descartes, MEDITATIONS (L. Lafleur trans. 1950) (1641).
\textsuperscript{185} Just read the first line or the first paragraph or the first chapter in G. Deleuze & F. Guattari, supra note 63; see also M. Foucault, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 3-69 (A. Sheridan trans. 1977) (recounting in excruciating detail the torture under prior
the modernists, however, the postmodernists drop totalizing ambitions. Postmodernists find what little commonality remains in difference, discontinuity, and disjuncture. Those postmodernist terms that look to a rationalist or a modernist suspiciously like totalizations—"différance" (Derrida),186 "negative dialectics" (Adorno),187 "interpretive communities" (Fish)188—are, for postmodernists, detotalizations.189 In good part, then, postmodernism reconciles itself to (and is not chagrined by) the idea that it is not addressing a universal audience.190

In sum, it is possible to describe four major rhetorical responses to the audience fragmentation problem. Prerationalism demands the return to sacred texts and established customs. Rationalism insists upon clarity, precision, the correction of intellectual error, and the constant search for the right abstract universals. Modernism attempts to create a community of meaning by replicating the experience of totalizing constructs. And postmodernism abandons the search for common ground altogether, following instead the ironic twists and turns of difference, discontinuity, and disjuncture.191

Given this picture of the fragmented audience, it remains extremely difficult to communicate the same or even a similar message to the whole. In turn, this difficulty exists both at the constative and the performative level. This conclusion yields some unsettling (some might say disastrous) implications for those discourses (such as legal scholarship) in which participants consider truth and objectivity to be significant values.

But despair is appropriate only if one somehow felt entitled to a discourse system that guarantees communicative transparency in the first place. This assumption, which enshrines undistorted communication as

regimes). Of course, shock value is not a universal trait of postmodernist works. See, e.g., J. Lyotard, supra note 63 (conventional presentation).
186. See J. Derrida, supra note 87.
188. See S. Fish, Is There a Text in This Class?: The Authority of Interpretive Communities (1980).
189. See, e.g., F. Jameson, supra note 155, at 58 (describing Adorno's "negative dialectics" as an antisytematic systematization).
190. See Van Reijen & Veerman, An Interview with Jean François Lyotard, 5 Theory Culture & Society 277, 301-02 (1988) (noting that with the disappearance of the grand meta-narratives, the intellectual cannot speak in the name of an unquestionable universality); see also M. Foucault, supra note 63, at 126 (suggesting that the intellectual (presumably in France) has ceased to be the spokesman for the universal and has instead become a "‘specific’ intellectual" working on local-professional matters). See generally G. Deleuze, supra note 63, at 91-92 (noting that the stratification of intellectual thought prevents philosophers from seeing beyond their own conceptions of reality).
191. See, e.g., G. Deleuze, supra note 63, at 23-25 (noting the joy and laughter in Foucault's descriptions).
the norm, is characteristic of rationalism. Once one recognizes the problem of audience fragmentation, such a singular cognitive orientation is no longer rhetorically plausible. Nor is it rhetorically plausible (for most speakers) to seek transparent understanding. Instead, the rhetorical field emerges as a second-best world.

A number of interesting rhetorical intersections among the four cognitive frameworks can be located. These intersections often describe the space in which dissonant agreements occur. But for the reasons just stated, my description of these intersections is necessarily vague.

(1) Both postmodernism and prerationalism are opposed to the universalist pretensions of reason, and in this sense they oppose both rationalism and modernism. Postmodernism will sometimes seek to vindicate prerationalist insights against the regimes of rationalist and modernist truth.192

(2) Rationalism and postmodernism unite in their distaste for the totalizing drives of modernism. Both rationalism and postmodernism are suspicious of the political implications of totalizing theory.193

(3) Prerationalism and modernism unite in their condemnation of the devaluation of experience and practice that a thoroughgoing rationalism demands. Both can at times see rationalism as a corrosive force that steers us toward nihilism.194

(4) Rationalism and modernism unite in the self-conscious critical stance they take toward prerationalism and postmodernism. Rationalism and modernism congratulate themselves for their commitment to reason. Both rationalism and modernism see emancipatory possibilities in the exercise of reason and thus distrust the rejection of reason by prerationalism and postmodernism.195 In fact, from the rationalist perspective, postmodernism is virtually indistinguishable from prerationalism.

(5) Both modernism and postmodernism strongly oppose philosophical idealism and the location of reason in the individual ego.196

192. At least, this is one way of reading Foucault. See M. FOUCAULT, supra note 63, at 81-84.
193. See id. at 84-85 (questioning the disempowering effects of constituting Marxism or psychoanalysis as a science).
194. The apotheosis of a unity between modernism and prerationalism finds its expression in Nietzsche, who mythologizes prerationalist antiquity in attempting to destroy rationalism from the modernist vantage point. See F. NIETZSCHE, THUS SPOKE ZARATHUSTRA: A BOOK FOR EVERYONE AND NOONE (R. Hollingdale trans. 1961).
195. See, e.g., J. HABERMAS, The Normative Content of Modernity, in The Philosophical Discourse of Modernity, supra note 80, at 336, 337-38 (criticizing the radical critiques of reason by Adorno, Heidegger, Derrida, and Foucault as undialectical rejections of subjectivity given to conflating the "emancipatory-reconciling" with the "repressive-alienating" aspects of reason).
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(6) Prerationalism and rationalism unite in privileging the self as the origin of judgment. (Prerationalism actually privileges the sacred text, but in our legal culture the sacred texts usually privilege the self.)

(7) All cognitive orientations (when pressed) are in agreement that proper form is very important.

Summed up in the chart on the following page, these propositions suggest that all sorts of bizarre rhetorical alliances and cognitive traffic are possible. Things will become even more complicated once one considers the politics of cognition.

V. Conclusion

So, you might ask, what's the point? Actually, there are several points. And some of them are not even points at all.

Perhaps that last observation is the place to start: the typical supposition within the legal community that intellectual endeavor can and must converge in "points" or "solutions" or "ideas"—or "conclusions"—has a real tendency to kill thought. When the metamorphosis from thought to conclusion is complete, thought is ensconced in a safe objectified form—distinct from the thinker and always ready for rapid professional deployment. This tendency to reduce thought to conclusions—to mere ideas—is, of course, characteristic of rationalism. And much of this Article has been an attempt to show that this very way of conceptualizing thought (or anything else) often results in serious misunderstanding. This rationalist misunderstanding has a systematic character—one which is thus intelligible. Indeed, the systematic character of rationalist misunderstanding turns out to be the very technique by which rationalism sustains itself as a viable cognitive orientation.

Rationalism sustains itself by producing three simultaneous and related effects: the affirmation of the rationalist aesthetic of thought as universal, the establishment of the individualist self, and the metamorphic degradation of modernist and postmodernist challenges. These effects remain invisible from the rationalist perspective. Indeed, to speak of the effects of rationalism is already to frame an inquiry that threatens the rationalist perspective. Such an inquiry is threatening precisely because it suggests that rationalism (in its production of effects) is not just a way of thinking about the world, but a way of being in the world. Rationalism, of course does not understand itself to be a form of being, but rather a form of thought—or rather the form thought. The very posing of the question about effects is thus an impudent intimation that rationalism is not how it understands itself to be—and hence (contrary to its self-image) that it is not in control of its own situation.
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<th>opposes the universalist pretensions of reason</th>
<th>opposes totalizing ambitions</th>
<th>valorizes experience</th>
<th>maintains the emancipatory character of reason</th>
<th>opposes philosophical idealism</th>
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Now, as this Article has shown, rationalism is hardly defenseless against such challenges. For instance, consider how rationalism might deal with the challenges posed in the previous paragraph—consider how it might deal with an inquiry into "the effects of rationalism" or with the implicit suggestion that rationalism is not merely "a form of thought" but "a form of being." The first rationalist move would be to stabilize the troubling tension between being and thinking opened up by these challenges. This can be accomplished by focusing upon the meaning of the above paragraph. Such a strategy, of course, is eminently defensible (in rationalist terms) because it really is true that the meaning of the question above is unclear. Indeed, what does the phrase "effects of rationalism" or the phrase "form of being" mean? Both phrases seem utterly lacking in specificity. Hence, it seems eminently reasonable to begin inquiry by focusing upon the meaning of the paragraph above. And no doubt the best way to be clear about the meaning of the last paragraph is to lay out its possible claims as precisely as possible. Once the meaning of those claims are clear, it will then be possible to determine whether the claims are true or false.

Now, notice what has just happened. In some senses, it is quite ironic. The challenge to rationalism above—that it produces effects and that it is a form of being—has just reduced to a series of claims. In turn those claims have been referred to rationalist thought itself to determine whether they are true or false. In effect then, rationalism has just resituated the troubling problem about the relation of thought and being as one that can be resolved within thought itself—namely, within rationalist thought—a form of thought that sees itself as untroubled by the relation of thought to being. So in the very act of purporting to answer the challenge, in the very act of seeking out the meaning of the challenge, rationalism has just reestablished itself as the universal and privileged form of thought. In the turn to interpretation and in the reduction of challenges to stable claims, rationalism constitutes the individualist self as the searcher for meaning and as the arbiter of the truth and falsity of statements. In this way, the individualist self is established—insulated from any formal or performative threat that the challenge above might have posed to that self or to its thinking processes. And simultaneously, by suppressing and denying the form and the performative dimension of the challenge (all in the guise of deciphering its meaning), rationalism defuses whatever threat the modernist or postmodernist challenge might have posed. The challenge is now just another idea, just another proposition—in the same way that dialectics is just another form of logic and deconstruction is just another methodology and postmodernism is just
another category. In sum, then, the very way in which rationalism understands the challenge above reproduces the three effects I mentioned earlier: the affirmation of the rationalist aesthetic of thought as universal, the establishment of the individualist self, and the metamorphic degradation of modernist and postmodernist challenges.

Much of this Article has sought to demonstrate the ways in which modernism and postmodernism become subsumed and thus degraded by rationalist form. The very dominance of these tendencies, of course, poses a problem for this very Article—namely, how to communicate this thought (and others) in a way that avoids the rationalist homogenization. Some form had to be found that would be intelligible and yet resistant to rationalist degradation. At the beginning of this Article, I argued against situating the problem in the fields of hermeneutics or epistemology because in legal scholarship, these fields are already contaminated by rationalist form. Indeed, the structure and problematics of these fields is dominated by the rationalist normative interest in how we should interpret or how our knowledge or lack thereof can ground (or unground) normative practice. In turn, this rationalist normative motivation has already reproduced within the fields of epistemology and hermeneutics the threefold effects of rationalism mentioned above: the affirmation of the rationalist aesthetic of thought as universal, the establishment of the individualist self, and the metamorphic degradation of modernist and postmodernist challenges.

So instead of situating the inquiry in the fields of epistemology or hermeneutics, I situated the inquiry in the field of cognition. Since cognition is a foreign territory for legal thinkers and one not obviously within the control of the individual thinker, describing the field in this way displaces (at least temporarily) the rationalist ego and resists (to some extent) the imperialism of rationalist form. In contrast to the current practice of epistemology and hermeneutics in legal scholarship, cognition does not immediately refer problematic questions about the relation of being and thought to thought itself. But this advantage has its limits. The objection to situating the problem of formal differences in “cognitive orientations” in the field of “cognition” is that this description of the field still tends to privilege thought over being. Thus, for instance, I have described the four cognitive orientations presented here largely in ideational terms. That, of course, is due to the skewing effect of defining the field as “cognition.” Much would no doubt be gained by broadening

197. There is, of course, another problem—namely, how does one account for the asserted fact that rationalism can at times be avoided or circumvented? What are the enabling conditions for the avoidance of rationalism? And so on.
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the inquiry to describe the various "cognitive orientations" as professional practices rather than principally as ideational frameworks. But even such a broader conceptualization would itself be skewed and exclusionary. Indeed, any sort of stable specification of the field is bound to skew the analysis. The very conceptualization of the [whatever] as a "field"—results in imposing a metaphoric stability on the inquiry—a stability which however abstract nonetheless tends to homogenize the differences among the various "cognitive orientations." And so it is important to displace and trouble such stabilities—much as I am doing now, and much as I have done throughout this Article.

Still, the imperialism of rationalism dies hard. And even in the midst of claims impeaching rationalism, it can reestablish itself as the very form within which those claims are stated. This, of course, would have undesirable effects for the very enterprise this Article is trying to advance. Another way in which this Article has sought to resist rationalist misunderstanding is by making forthright use of the demonstrative and the experiential rather than simply the explanatory or the descriptive. So at various times, this Article attempts to create experiences that will at once reveal and resist prerationalist, rationalist, or even modernist assumptions of universalist stances.

For instance, consider how a thoroughly rationalist reading of this Article might have proceeded. Such a reading would undoubtedly have begun by attempting to pin down the meanings of the dominant theoretical terms (prerationalism, rationalism, modernism, and postmodernism) as soon as possible. Such a strategy here, however, would likely have resulted in missing the metamorphoses of the four theoretical terms within the text. At the beginning, the four terms were mere labels for various patterns of cognitive behavior. Then they became structured models of cognitive frameworks—virtual ideal types. Then these cognitive models collapsed as it became clear that other orientations could supply the mediation between one cognitive orientation and any possible instantiation of that orientation. Next, the thought emerged that any piece of legal thought might itself be seen as a specific and unique combination of the various cognitive modes. And now, here in the conclusion, it appears that the very description of the "field" as one of "cognition" is itself skewed—thus yielding the sense that the various cognitive modes can be apprehended in a manner that is probably best described as ob-

198. The interesting thing is not that it does skew the analysis—but rather how it skews the analysis.
199. See Winter, supra note 58 (describing cognitive implications of the metaphorical character of legal reasoning).
lique. Now, it is hardly a point of these metamorphoses to show that the cognitive models or orientations I have set up are vacuous. On the contrary, the demonstration seeks to show that their value is largely a function of the re-cognition that they operate within a variety of "fields" that have themselves not been stabilized in any definitive manner.

Now, one question that arises with regard to all of this is: why does any of it matter? Why does it matter that there are various cognitive orientations within the legal community? Why does it matter that modernism and postmodernism are systematically subsumed within rationalist form? Why do any of these things matter? Actually, there are significant implications. One of them is demonstrated by the very content of this Article—there is virtually no mention here of judge-made decisional law. One reason for that is that there are very few examples of undegraded modernism in judge-made decisional law. (And that's to say nothing of postmodernism). On the contrary, the cognitive orientations that dominate judge-made law are largely prerationalism and rationalism. Now, in one sense, this can seem very amusing: law apparently is one field in which twentieth century thought can routinely encounter the thought of the eighteenth and lose . . . frequently. But in another sense, this is not amusing at all—the blunting of modernism and postmodernism means that it is eighteenth century conceptions—conceptions of responsibility, of agency, of harm, of language and meaning itself—that continue to rule the decisions of a late twentieth century technological society. Such a state of affairs is at once an intellectual embarrassment and a form of violence.

Now, of course, to many people, things will not seem this way at all. So let me close with an account of the current situation that informs this (controversial) conclusion. The account that I am about to quote is an account of what has been called the postmodern condition. One of the ironic and valuable aspects of this account is that it understands (at least potentially) the extent to which the current situation is constructed by cognitive orientations that are not postmodern—that might be, for instance, prerationalist or rationalist or something else altogether. As a further irony, this is an account given by a commentator who is himself somewhat ambivalent about the value of postmodernist thought and culture. The account goes like this:

200. Speaking of oblique: there is a serious question as to the status of many of the footnotes in this text. Are these citations to rationalists, modernists, and postmodernists to be understood as supporting authority? Are they abbreviated notations for well-known supporting arguments? Or are they to be understood as instantiations of the various cognitive frameworks? Or yet again, are they to be seen as oblique signs standing in (and very inadequately so) for the various cognitive frameworks?
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Suppose we were to begin with a crude distinction of "social nature" and "social culture", in which the latter were conceived in its narrow sense as representation rather than in the broad sense as symbol. Given this, the cultural history of the West (and not only the West) could be captured by a process in which the totality of "social facts" comes to be comprised of an increasingly greater proportion of "cultural" facts and an increasingly smaller proportion of "natural" facts. At a certain juncture (the onset of modernism?) in such a chronology, cultural facts would accumulate to a point at which they could no longer be considered solely as representations, and the whole problem of their proper materiality and hence character as representations would have to be taken seriously. This would be the time also of the fullest differentiation and autonomization of cultural facts. At some later point in time in this scenario (especially with the mechanical and then electronic production and reproduction of representations), cultural facts would become so pervasive that they would come to challenge "natural facts" for hegemony, and would even to some extent constitute the norm. What would now be problematized is, not as in modernism, the character of representations, but the character of reality itself.

201. Lash, Discourse or Figure? Postmodernism as a "Regime of Signification", 5 THEORY, CULTURE & SOCIETY 311, 333 (1988).

There is one more thing to consider—a certain tension or contradiction within this Article. On the one hand, the Article claims that various cognitive orientations are incommensurable. On the other hand, the Article seems to track the classic progression of rationalism turning on prerationalism, modernism turning on rationalism, postmodernism turning on modernism. The question arises then: how can the Article assert both the incommensurability of various cognitive frameworks and also affirm a progression among these various frameworks?

The answer I would like to give goes like this: I first made the claim of incommensurability in the youth of this Article—in the introduction where prerationalism (in the form of concrete examples) was all the rage. See supra text accompanying note 43. That was no accident: from a prerationalist perspective, the various cognitive orientations do indeed seem to be incommensurable. (A random prerationalist stroll through the various panel discussions held yearly at the AALS convention will confirm this point.) As one moves from prerationalism towards postmodernism, however, the cognitive maps offered become increasingly complex and increasingly specified—until, at some point, it becomes possible to reject the flat prerationalist claim of incommensurability. Indeed, that claim begins to seem like a naive assertion rendered possible only by prerationalism's lack of awareness of the structured character of the various cognitive orientations that are discussed later. So the naive claim of incommensurability must be rejected. But that does not mean that all claims of incommensurability must be rejected. On the contrary, the very progression traced in this Article entails a more encompassing understanding of incommensurability itself. So at the end of the progression, one is not left with the conclusion that progression has replaced incommensurability. (That would be the prerationalist or rationalist understanding of the matter.) Instead, one is left with the thought that there has been a progression in the understanding of incommensurability.

Now here's the kicker. Once the end of the progression is reached, the last cognitive orientation, postmodernism, sends you back to all the others. For even though, postmodernism is at the end of the progression (at least as it has been described in this Article), postmodernism does not make the mistake of thinking itself to be a universal—a positive synthesis of all prior cognitive modes. On the contrary, it recognizes the degree of fragmentation and incommensurability that characterizes the community. And it is precisely because it does not lay claim to universality—precisely because it does recognize cognitive incommensurability, that its understanding of the present situation is more compelling. So not only has there been a progression in the understanding of
incommensurability, but there has also been a progression in the understanding of progression itself. Hence, when postmodernism appears on the scene, progression is conceived in terms that would hardly qualify as progression within a rationalist (or even a modernist) orientation. Referring to postmodern science, for instance, Lyotard notes, "It is changing the meaning of the word knowledge, while expressing how such a change can take place. It is producing not the known, but the unknown." J. Lyotard, supra note 63, at 60. Now, my guess is that this development is probably not the sort of development that qualifies as progress within a rationalist (or even a modernist) understanding of the term.

Still, the objection dies hard. Here it is again: it is simply not possible—so the argument goes—to claim both that the cognitive frameworks are incommensurable and that there is a progression among them. Indeed, where would one stand to make such a claim? The short answer is somewhere near the end of a text like this one. The longer answer is that the question above, the one which hopes to be a rhetorical question (i.e., a killer argument), issues from a particular cognitive orientation—namely, rationalism. And for rationalism, the question really does announce a serious problem—because within rationalism, an assertion of incommensurability and progression really is a tension or a contradiction. But this tension or contradiction, as I have suggested above, is a function of the rationalist conceptualization of the two concepts—it is a function of the attempt to maintain the meanings of incommensurability and progression at once constant and determining throughout the text—regardless of what happens.

So from a rationalist perspective, the objection remains a very real problem. On the other hand, rationalism has already been shown to be suspect—it is a cognitive framework whose claims to universal status have already been severely shaken. These statements, of course, will probably not persuade the rationalist. But then again—which way does that cut? Is it evidence that the rationalist objection is right—or is it evidence that rationalism is rather limited as a stock cognitive mode?

So—yes, there is a progression. At the same time, however, it is important not to make too much of this progression. Reaching the end of this progression does not imply that the individual subject has now assumed full control over his or her own cognitive orientations and can simply choose between them as a free agent. It is only a rationalist understanding of the progression (or of postmodernism) that would authorize and celebrate such an ego-centered conclusion. And excepting such rationalist understandings, postmodernism rarely flatters the individual ego in this way. On the contrary. Zavarzadeh & Morton, Theory Pedagogy Politics: The Crisis of “The Subject” in the Humanities, 15 BOUNDARY 1-11 (1987) (describing postmodernist critiques of the unified autonomous individual subject).

There is another reason it is important not to make too much of this progression. Given that significant segments of the legal community remain entrenched in some of the earlier cognitive orientations, it is often not possible to communicate from the end of the progression. In fact, this entire Article exemplifies that very thought. At the very least, I expect that this is something that will not be lost on the person who bravely picked up this Article and boldly began reading the conclusion first.