Stalking the Wild Lacuna: Communication, Cognition and Contingency

Collin O'Connor Udell*

I. Introduction

There is a moment, a lacuna,[1] that hangs in space and time. Faced with it, an individual records sensations and events, organizes and categorizes phenomena, assigns meaning. In that moment, abhorring a vacuum, we rush to fill the void, to shape and to take control of our world. If we are naive, we reify that which we construct.

In this Article, we will stalk lacunae. We will see that communication, to the extent it takes place, rests on assignment of meaning colored instantaneously by the contextually triggered self, the selection of words and the framing of cognitions. Part II of this Article explores the mechanics of this phenomenon, focusing on theories of self, language, cognition and hermeneutics. Part III examines its operation in social relations, using as examples two recent bodies of legal scholarship—critical white studies and intersectionality/anti-essentialism theory—and two cases that were pending before the U.S. Supreme Court in the 1997 Term: *Taxman v. Board of Education of Piscataway*[2] (now settled) and *Miller v. Christopher*.[3] Finally, Part IV addresses ramifications for jurisprudence and, specifically, for the judicial role.

---

* J.D., University of Connecticut, 1998; Editor-in-Chief, Connecticut Law Review, 1997-98. I dedicate this Article to the memory of my father, Joseph Edward O'Connor, whose keen intellect, ready wit, and love of language remain my deepest inspiration.

1. A lacuna is "[a]n empty space or a missing part; a gap." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1006 (3d ed. 1996).

2. 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 1551 (1997), *cert. dismissed*, 118 S. Ct. 595 (1997).

3. 96 F.3d 1467 (D.C. Cir. 1996), *cert. granted*, 117 S. Ct. 1551 (1997), *cert. limited*, 117 S. Ct. 1689 (1997).

II. Get It?

One can never really answer this question in the affirmative with complete assurance. One could hardly function, however, if one sat around waiting for communicative closure. So we settle for near misses, for exhibitions of expected reactions; we interpret the rejoinders received. It is a complex, charming, kaleidoscopic enterprise and, in a reductive sense, the only real entertainment around. How do we do it?

A. Multiple Selves: Who's in Charge Now?

With the advent of postmodernism, complexity has become the order of the day. Discontented with unitary, essentialist depictions of race, gender, and other identity categories, postmodernists confront and validate fragmentation and contradiction.[4] Some theorists are now suggesting that the core of our identity—the self—is far less integrated and seamless than we imagine.[5]

Professor powell, for example, asserts that we are not each unitary, stable selves, one self to one body; rather, we are each comprised of multiple selves that shift and change in response to stimuli.[6] Indeed, "given the shifting crossroads each individual experiences . . . the self is constructed by a 'multiplicity of fluid identities defined and acting situationally.'"[7] This is a radical notion, given our cultural adherence to rationalism.[8] Even the terms "individual," "self," "person," "I," "you," always applied in the singular to "one" human, demonstrate the deep attachment to the one-body/one-self paradigm.

---

4. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990) (arguing that we must recognize differences between women to strengthen the feminist movement).

5. *See, e.g.*, Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 20 (1995) (writing about the "multiple voices" with which we speak); Berta Esperanza Hernandez-Truyol, *Borders (En)gendered: Normativities, Latinas, and a Latcrit Paradigm*, 72 N.Y.U. L. REV. 882, 925 (1997) (describing the multidimensional identity of latina/os); john a. powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481, 1483-84 (1997) (describing identity as fragmented and decentered).

6. *See* powell, *supra* note 5, at 1483-84.

7. *Id.* at 1497 (citing Susan Stanford Friedman, *Beyond White and Other: Rationality and Narratives of Race in Feminist Discourse*, *in* SIGNS 1, 7 (1995)).

8. I use the term "rationalism" here to describe the cognitive framework that places ego-centered reason at the helm. *See* Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1197 n.7 (1989) [hereinafter Schlag, *Missing Pieces*].

Yet the multiple-self concept seems intuitively right. Begin by listening to the narratives of African-Americans who recount experiencing different identities when in the company of African-Americans than of whites.[9] Then recall the different selves you have been. In another time, I was devoted to music and art. My dress, language, values, friends and taste were different than they are today. On occasion, when I am triggered by particularly good music or a riveting painting, that self resurfaces. She suddenly wants to ditch the tweeds and pull the funky black dress from the back of the closet. Then I walk into a law school classroom, and she submerges.

Old selves return like old friends, triggered by smell, by neighborhoods, by the senses, even by a particularly strong memory. If they were really gone, displaced by the current unitary self, how could they resurface so easily? I believe they linger under the surface, waiting to appear when bidden, perhaps only as a trace of fleeting nostalgia, but they are there. It is probably only because I am white that I am aware of my various selves in an exclusively linear, temporal fashion. If I were a person of color, I might, for example, feel the need to conform to white norms in the workplace, and feel free to relax into another self when at home. The regular moving in and out of various selves within the course of one day heightens awareness of the postmodernist conception of the self.[10]

But is it only the behavior that alters, behavior consciously chosen by the unitary self? For a moment that seems more likely; the lockstep of the rationalist paradigm is seductive. But surely, on reflection, the sensation of another self surfacing is more than

---

9. *See, e.g.*, Judy Scales-Trent, *Notes of a White Black Woman*, *in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 475, 478-81 (Richard Delgado & Jean Stefancic eds., 1997) [hereinafter CRITICAL WHITE STUDIES] (relating stories of people whose identities changed as they moved from one culture or role to another); Gregory Williams, *Learning How to Be Niggers*, *in* CRITICAL WHITE STUDIES, *supra*, at 458-66 (telling the author's story of learning as a boy that he was part African-American and of experiencing different identities); powell, *supra* note 5, at 1491-92 (describing African-Americans whose sense of identity changed with the racial context). I join Barbara Flagg here in defining "white" as a person of "European descent who . . . has no known trace of African or other non-European ancestry." Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 953 n.1 (1993) [hereinafter Flagg, *"Was Blind, But Now I See"*].

10. Despite my assertion of multiple selves, now I must lapse into the singular to communicate within the conventions of English. The way language shapes our conceptions will be the subject of the next section. *See infra* notes 17-33 and accompanying text.

behavior; it is emotion, impulse; it need not be acted on. Sometimes one stands still when it happens, overcome.[11]

So if, indeed, we are "a welter of partial, sometimes contradictory, or even antithetical selves,"[12] how have we, as a culture, come to accept the unitary self as the "prior" for all subsequent computations?[13] Given that white heterosexual Christian males have been culturally accepted regardless of what context they occupied, the sense of moving in and out of selves must have been infrequent for them, leading them to postulate the unitary self.[14] Language evolved to support and re-create that conception.[15] And in true Cartesian either/or, right/wrong form, the concept of multiple selves in one personality became confined to the context of a psychological disorder.[16] Indeed, at the outset of the discussion, the reader may have initially conflated multiple personality disorder (now known as dissociative identity disorder) with the existence of multiple selves. I did. One could see such resistance as further evidence of the tenacity of the rationalist paradigm, fueled by the discomfort of accepting the postmodernist vision of the world as complex, replete with tensions, contradictions and general untidiness.

B. The Language: "Taming the Wild Profusion of Existing Things"

Few things delight more than reading Foucault's description of "animals" as defined in a Chinese encyclopedia:

---

11. *See* Scales-Trent, *supra* note 9, at 479 ("Sometimes you can change identities while you are doing absolutely nothing at all.").

12. Harris, *supra* note 4, at 584.

13. *See* Robert Birmingham, *Proving Miracles and the First Amendment*, 5 GEO. MASON L. REV. 45, 51, 68-69 (1996) ("Prior probabilities [in the context of Bayes Theorem] notoriously lack sufficient justification. We have no basis, other than the principle of indifference, to assign one value rather than another."); Wayne Eastman, *Ideology and Formality: The Eternal Golden Snarl*, 29 CONN. L. REV. 849, 865 (1997) ("Bayesian priors are entangled with ideology . . . ."); *see also* Thomas D. Lyon & Jonathan J. Koehler, *The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases*, 82 CORNELL L. REV. 48-49 (1996) (stating that "much . . . debate has concerned the feasibility of identifying prior[s]"). Bayes Theorem is a mathematical theory of probability which uses prior probabilities (priors) in determining the probability of an event's occurrence. *See* Lyon & Koehler, *supra*, at 49.

14. *See* powell, *supra* note 5, at 1487-90, 1493.

15. As powell puts it, "[t]he unitary self is an illusion that the dominant White male is able to maintain because of his central situating in modern discourse." powell, *supra* note 5, at 1492 n.49; *see infra* notes 17-33 and accompanying text (discussing how language shapes our views of the world).

16. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) 484-87 (Am. Psychiatric Ass'n 1994).

> This book first arose out of a passage in Borges, out of the laughter that shattered, as I read the passage, all the familiar landmarks of my thought—*our* thought, the thought that bears the stamp of our age and our geography—breaking up all the ordered surfaces and all the planes with which we are accustomed to tame the wild profusion of existing things, and continuing long afterwards to disturb and threaten with collapse our age-old distinction between the Same and the Other. This passage quotes a "certain Chinese encyclopaedia" in which it is written that "animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that from a long way off look like flies." In the wonderment of this taxonomy, the thing we apprehend in one great leap, the thing that . . . is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that*.[17]

This passage highlights the contingency of categories employed across cultures and across time. The more parochial the reader, the more she experiences the categorization imposed upon the world's *désordre* by her language as implacable, impenetrable, beyond cavil. Indeed, "the most alienated and uncomprehending relationship one can have with a language is usually the one native speakers have with their own."[18] The structural grid of the mother tongue slices, dices and synthesizes the natural world for our consumption lest we be overwhelmed by the cascade of sensations that is life. In our most illiberal moments, we imagine that the grid itself is neutral, that we ourselves are "impartial recorders of [our] world."[19]

But language serves two functions—intake and outflow. The outflow function serves to communicate our concepts to another; we are generally aware of this on a conscious level. The intake function "is itself the shaper of ideas, the program and guide for the individual's mental activity, for his analysis of impressions."[20] Theorists assert that language thus embraces the power to determine what is considered normal and abnormal in a culture.[21] Whorf's "linguistic relativity principle" postulated that

---

17. MICHEL FOUCAULT, THE ORDER OF THINGS xv (Vintage Books 1973) (1970).

18. Richard Hyland, *Babel: A She'ur*, 11 CARDOZO L. REV. 1585, 1607 (1990).

19. Dale Spender, *Extracts from* Man Made Language, *in* THE FEMINIST CRITIQUE OF LANGUAGE 102, 103 (Deborah Cameron ed., 1990).

20. BENJAMIN LEE WHORF, *Science and Linguistics*, *in* LANGUAGE, THOUGHT, AND REALITY 207, 212 (John B. Carroll ed., 1956).

21. *See, e.g.*, powell, *supra* note 5, at 1482 n.3 (citing FOUCAULT, *supra* note 17).

"users of markedly different grammars are pointed by their grammars toward different types of observations and different evaluations of externally similar acts of observation, and hence are not equivalent as observers but must arrive at somewhat different views of the world."[22] Absent expansion of experience that would throw the provincial nature of our conceptions into bold relief, we regard our view of the world as uncontestable, as a "transparent"[23] baseline, as "part of the background of experience of which we tend to remain unconscious."[24] By way of example, Whorf discusses a hypothetical people who could only see in shades of blue, noting that their language would contain no color terms.[25]

And so, "every language is a vast pattern-system, different from others, in which are culturally ordained the forms and categories by which the personality not only communicates, but also analyzes nature, notices or neglects types of relationship and phenomena, channels his reasoning, and builds the house of his consciousness."[26] And because such pattern-systems inhere in the de-

---

22. BENJAMIN LEE WHORF, *Linguistics as an Exact Science, in* LANGUAGE, THOUGHT, AND REALITY, *supra* note 20, at 220, 221; *see also* WILLARD VAN ORMAN QUINE, WORD AND OBJECT 51-53 (1960) (asserting the inscrutability of reference). The Sapir/Whorfian Hypothesis, as it is sometimes called, has adherents and critics. For a nonbeliever's critique, see STEVEN PINKER, THE LANGUAGE INSTINCT 57-63 (1994). Others qualify the hypothesis, stating that "[l]anguages differ not so much as to what *can* be said in them, but rather as to what is *relatively easy* to say." Charles F. Hocket, *Chinese versus English: An Exploration of the Whorfian Theses, in* LANGUAGE IN CULTURE 106, 122 (Harry Hoijer ed., 1954), *cited in* Richard Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599, 606 n.52 (1986). But Whorf is readily cited by believers in the legal academy for the proposition that "language . . . structure[s] our perceptions of reality." *See, e.g.*, J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1151 n.72 (1991) (book review) (citing WHORF, *supra* note 20).

23. *See infra* note 117 and accompanying text (defining transparency).

24. WHORF, *supra* note 20, at 209. For a vastly entertaining and effective demonstration of the lack of gender neutrality in English, see William Satire (alias Douglas Hofstadter), *A person paper on purity in language, in* THE FEMINIST CRITIQUE OF LANGUAGE, *supra* note 19, at 187.

25. *See* WHORF, *supra* note 20, at 209.

26. BENJAMIN LEE WHORF, *Language, Mind, and Reality, in* LANGUAGE, THOUGHT, AND REALITY, *supra* note 20, at 246, 252. Dale Spender relayed an illustration of this phenomenon as follows:

> In many . . . experiments Witkin and his colleagues found that females were more likely to see the stimulus and surrounding field as a whole while males were more likely to separate the stimulus from its context.
>
> Witkin of course was obliged to name this phenomenon and he did so in accordance with the principles already encoded in the language. He took the existing patterns of male as positive and female as negative, and objectively devised his labels. He named the behaviour of males as *field independence*, thereby perpetuating and strengthening the image of male supremacy; he named the female behaviour as *field dependence* and thereby perpetuated and strengthened the image of female inferiority.

sire to escape chaos, their structure is replete with categorizations and bipolar oppositions (good/evil, friend/foe, right/wrong, male/female, white/black, sick/healthy, individual/collective, subject/object, normal/abnormal, positive/negative).[27] That amputations must take place in order to jam phenomena into one or another category is the cost of doing business for the human psyche.[28] Deconstructionists have encouraged us to fight the imperious urge of schemata abstraction, advising us instead to collapse binary oppositions to reveal the authentic, if tension-laden, natural world—the world of events and phenomena as they exist outside the realm of our own limited perception.[29] We fight this, of course; some scholars believe we were built to fight it, that the survival of the prehistoric human turned, in large part, on her ability to categorize.[30]

So we have seen that differences between cultures are inextricably linked to their language—implicating both the functions of intake and outflow. This cross-cultural contingency is amplified by the postmodern view of "New Historicism," which asserts that the image of a unified, coherent culture is as mythical as the inde-

---

> . . . . There is nothing inherently dependent or independent in seeing something as a whole, or dividing it into parts. Witkin has coined names which are consistent with the patriarchal order and in the process he has extended and reinforced that order.
>
> There are alternatives. With my particular bias I could well have named this same behaviour as positive for females and negative for males. I could have described the female response as *context awareness* and the male response as *context blindness*, and though these names would be just as valid . . . they would no doubt have been seen as *political* precisely because they do not adhere to the strict (sexist) rules by which the names of our language have traditionally been coined.

Spender, *supra* note 19, at 108-09.

27. *See* Heiner Flohr, *Biological Bases of Social Prejudices*, *in* THE SOCIOBIOLOGY OF ETHNOCENTRISM: EVOLUTIONARY DIMENSIONS OF XENOPHOBIA, DISCRIMINATION, RACISM, AND NATIONALISM 190, 195 (Vernon Reynolds et al. eds., 1987) (1986); J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L. J. 743, 748 (1987) [hereinafter *Deconstructive Practice*]; Hyland, *supra* note 18, at 1608.

28. *See* JOHN R. ANDERSON, COGNITIVE PSYCHOLOGY AND ITS IMPLICATIONS 158 (1980). As Lawrence puts it, "we must categorize in order to cope." Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 337 (1987).

29. *See, e.g.*, Balkin, *supra* note 27, at 743 (citing JACQUES DERRIDA, DISSEMINATION (B. Johnson trans., 1981); JACQUES DERRIDA, MARGINS OF PHILOSOPHY (1982); JACQUES DERRIDA, OF GRAMMATOLOGY (1976); JACQUES DERRIDA, POSITIONS (1981); JACQUES DERRIDA, SPEECH AND PHENOMENA (1973); JACQUES DERRIDA, SPURS (1979); JACQUES DERRIDA, WRITING AND DIFFERENCE (1978)); *infra* note 71 and accompanying text (quoting Gary Peller's description of how social conventions of representing the word are presented as factual rather than provisional).

30. *See* Flohr, *supra* note 27, at 190, 195.

pendent, language-free formation of concepts.[31] All cultures are composed of "groups [that] struggle for discursive power just as they struggle for political dominance"; "multiple, conflicting, polyphonous contexts" are the rule rather than the exception.[32] That this hypothesis would resonate with Americans seems obvious; subcultures abound, each with different slang, different values, different socioeconomic realities and opportunities. Linguistic relativity may exist within the confines of a single country and even a single language.[33]

C. Cognition: Dissonance and Dichotomies

1. A Taxonomy

The dissonance that exists between cognitive frameworks is not limited to that caused by differing linguistic structures. It is a commonplace that authors draft manuscripts steeped in vastly disparate perspectives despite a shared language. Pierre Schlag has schematized such perspectives as follows:

> 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. Rationalism is cognitively upsetting, because it constantly calls the world into question and asks for the redemption and justification of descriptive and normative claims. 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. Postmodernism continues the modernist project, but drops the polite, theoretical conversation.[34]

Specifically, prerationalism evinces unquestioning obedience to a sacred text, tradition or convention.[35] Such texts are permeated with demands for return to whatever authority has been can-

---

31. *See* William W. Fisher, III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1072 (1997).

32. *Id.*

33. The recent controversy regarding the teaching of Ebonics (Black English) is illustrative. *See* Charles Smith, *Racism and Community Planning: Building Equity or Waiting for Explosions*, 8 STAN. L. & POL'Y REV. 61, 61 (1997). Linguists Robert C. Williams and Dr. Geneva Smitherman assert that Ebonics is "a legitimate language system featuring highly complex grammar and syntax that can be identified as originating from Africa and the Caribbean." Mary Maxwell Thomas, *The African American Male: Communication Gap Converts Justice into "Just Us" System*, 13 HARV. BLACKLETTER J. 1, 11 n.58 (1997).

34. Schlag, *Missing Pieces*, *supra* note 8, at 1208.

35. *See id.* at 1209.

onized: the intent of the framers, established customs or the common-law method of reasoning.[36] "'Creativity' is a dirty word"; things are accepted as given with no questions asked.[37]

Rationalism, ruler of the legal realm, rests on ego-centered reason.[38] The individual self, privileged as objective and neutral, searches for abstract universals and adjudicates normative inquiries.[39] "As long as the self has proper training, makes no intellectual errors, and tries its damnedest to overcome its own prejudices and environmental bias, it is intellectually authorized to adjudicate normative legal questions on its own."[40] Any attempt to dethrone the individual self as the ultimate arbiter of reality is fiercely resisted.[41] Adherents to the rationalist framework exhibit an addiction to normative recommendations spawned by an unflappable belief that reason governs and that the best argument always wins.[42]

The voice of modernism, critiquing the circularity of rationalism, is found in legal realism, critical legal studies and feminist jurisprudence.[43] Modernism's impeachment of detached, ego-centered reason rests on the revelation that initial entitlements and foundational concepts, such as property and due process, are not neutral, objective, logically compelled baselines; rather, they are the fruits of institutional privileging.[44] And so, "modernists . . . adopt the universalizing tendency of rationalists but . . . carry it even further so as to decenter the self and its particular cognitive framework."[45] This universalizing tendency implicitly continues the rationalist project of searching for abstract universals and con-

---

36. *See id.* at 1210, 1241.
37. *Id.* at 1210.
38. *See id.*
39. *See id.* at 1213.
40. *Id.*
41. *See id.*
42. *See id.* at 1211.
43. *See id.* at 1216.
44. *See id.* at 1216 n.4; *see also* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 478-79, 493 (1923) ("The channels into which industry shall flow, then, as well as the apportionment of the community's wealth, depend upon coercive arrangements. . . . The arrangements are susceptible of great alternation by governmental bodies . . . ."); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815-17 (1935) ("The vicious circle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected.").
45. Schlag, *Missing Pieces*, *supra* note 8, at 1240.

structing common meaning.[46]

Finally, postmodernism perseveres in the modernist enterprise but abandons even the facade of universalism, seeking instead to highlight ruptures and to focus on "difference, discontinuity, and disjuncture."[47] For example, postmodernism has readily embraced anti-essentialism, which honors a plurality of voices rather than a single voice for women or people of color.[48] In short, postmodernism seeks to restore to the natural world those pieces that were amputated in rationalism's rush to jam reality into neat, razor-sharp, Cartesian boxes.

As Schlag points out, this taxonomy of cognitive frameworks (pre-rationalism, rationalism, modernism and postmodernism) itself reeks of rationalist sensibilities.[49] Yet, his presentation of our cognitive vocabulary emphasizes that slippage between frameworks—utilizing different frameworks in rapid succession within one narrative—is a frequent occurrence, and that one experiencing such slippage will be unable to stand outside these events and objectively evaluate them because "the ego is already within its own cognitive orientation of the moment."[50] Further, the dissonance that results from incongruity between the cognitions of the author and the reader is both far less and far more prevalent than what might be expected.[51]

The dissonance is far less prevalent because rationalism is the "Pacman" of legal discourse, the hegemonic voice that empowers the reader to employ objective reason in evaluating neutral rules of law in order to rationally adjudicate the truth value of a text.[52] When presented with another mode of cognition, rationalism gobbles it up and attempts to digest and integrate it by promulgating a "solution" to a normative inquiry.[53] For example, rationalism swallows modernism and produces a version of pragmatism that embraces the "received description and understanding of the world;"[54] skepticism which repudiates the deeper de-centering of the self endemic to modernist inquiry;[55] and mod-

46. *See id.*

47. *Id.* at 1241.

48. *See infra* notes 141-143 and accompanying text (discussing anti-essentialism).

49. *See* Schlag, *Missing Pieces, supra* note 8, at 1220.

50. *Id.* at 1221.

51. *See id.* at 1222.

52. *See id.* at 1227.

53. *See id.*

54. *Id.* at 1224.

55. *See id.* at 1225.

eling which transmogrifies the modernist vision into discrete, manageable sectors of jurisprudence (e.g., law as literature or law as economics).[56] This reframing of modernist cognitions into rationalist forms eliminates the threatening and crucial moment where the self is dethroned as ultimate authority.

Rationalism similarly gulps down and neutralizes prerationalism[57] and postmodernism.[58] In this way, rationalism has won control of legal discourse, particularly within the context of judicial opinions but also within the legal academy.[59]

When a rationalist reader does confront a non-rationalist text, she may not experience cognitive dissonance since, in her view, the text is readily assimilable, translatable, fodder for the individual self seated on her throne. But, in fact, authors and readers readily slip in and out of cognitive frameworks depending on the needs of the moment, resulting in far more dissonance than one might expect.[60] For example, Justice Scalia's frequent prerationalist pleas for a return to "tradition"[61] are liberally sprinkled among rationalist invocations of the neutral rule of law.[62] Schlag's article itself consciously slips between frameworks: first asserting a prerationalist canon that dissonant cognitive frameworks exist; next building a four-tiered rationalist model of the frameworks; then impeaching the taxonomy and, in the modernist tradition, revealing its inadequacies;[63] and finally, conducting a postmodernist inquiry into incommensurable audience fragmentation and its implications for delivering a message to an audience as a whole.[64]

---

56. *See id.* at 1226.

57. For example, rationalists might characterize framers' intent "as just another silly animism." *Id.* at 1227.

58. Schlag quips: "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?" *Id.* at 1227.

59. *See id.*

60. *See id.* at 1228.

61. *See, e.g.*, United States v. Virginia, 116 S. Ct. 2264, 2291-93 (1996) (Scalia, J., dissenting) (arguing that tradition supports the value of single sex military education provided by the government); Romer v. Evans, 116 S. Ct. 1620, 1629, 1633 (1996) (Scalia, J., dissenting) (arguing that the preservation of "traditional sexual mores" as attempted by a Colorado amendment is not prohibited by any principle in the Constitution or judicial history).

62. *See, e.g., Virginia*, 116 S. Ct. at 2294 ("It is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades."); *Romer*, 116 S. Ct. at 1629, 1631 (arguing that the holding of *Bowers v. Hardwick* is "unassailable, except by those who think that the Constitution changes to suit current fashions").

63. *See* Schlag, *Missing Pieces*, *supra* note 8, at 1232.

64. *See id.* at 1241.

When readers do sense cognitive dissonance, reactions vary. Prerationalists term it an "unconscionable departure[ ] . . . from the sacred text;" rationalists encode it as "individualized intellectual error."[65] Modernists compensate for cognitive deficits in one area by increasing the cognitive ballast in another area—maintaining the integrity of the system. For example, "the realist insists on freeing judges from the arbitrariness of doctrine. 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."[66] Postmodernists, on the other hand, repudiate such a stabilized, holistic account and embrace the dissonance.[67]

As cognitive dissonance proliferates, "[w]hat Lenin did to Marx, Posner does to Coase, and somebody does to Duncan Kennedy. And it happens ever faster . . . [P]ostmodernism tends to crystallize into a modernist (mis)understanding; modernism usually precipitates in rationalist solutions; rationalism degenerates into prerationalist prejudice."[68] The possibility of truly communicating with one's audience recedes.[69]

2. The Subject/Object Dichotomy

Peller has strongly critiqued rationalism and modernism, extending the principle of linguistic relativity[70] to the evolution of conceptual frameworks. In his view:

> [T]he interpretive constructs of an ideology abstract from the thick texture of the world to provide a structure that determines which particular aspects of the world are seen as meaningful, and finally which aspects are seen. When particular representational categories for dividing up the world are reified and achieve a hegemony in a particular community, description is taken as fact rather than "mere" opinion or ideology. In such a context, the social conventions for representing the world are viewed as flowing from the way the

65. *Id.* at 1234.

66. *Id.* at 1235.

67. *See id.*

68. *Id.* at 1238.

69. Note that this concern about (mis)reading is inherently rationalist and intentionalist in nature, presupposing that it is important that an individual author communicate her views to the individual reader, and that a text has a fixed and determinate meaning that can be communicated. *See* Thomas C. Grey, *The Hermeneutics File*, 58 S. CAL. L. REV. 211, 226 (1985); *see also infra* notes 90-91 and accompanying text (contrasting the intentionalist approach with that of hermeneutists who believe that interpretation is inherently indeterminate).

70. *See supra* note 22 and accompanying text (discussing Whorf's principle of linguistic relativity).

> world really is. Their contingent and provisional status is suppressed. Fiction is presented as truth.[71]

In this way, legal reasoning, like any ideology, is intrinsically political inasmuch as it silences other modes of discourse.[72] Rationality, such as it is, represents merely the sensation that one proposition should follow another because "particular metaphors for categorizing likeness and difference in the world have become frozen, or institutionalized as common sense."[73]

Peller uses the following sentence as an illustration: "the alternative to disintegrating violence is the establishment of regularized and peaceable methods of decision."[74] This sentence is predicated upon the peace/violence dichotomy and the order/disorder dichotomy. In other words, "law, order, institutionalization, and peace" are placed in opposition to "nonlaw, disorder, noninstitutionalization, and violence." Although this paradigm may initially seem palatable, it implicitly excludes the reality that disorder can be peaceful (e.g., Vietnam War protests) and that order can be violent (e.g., the Nazi regime). It therefore privileges subordination and denigrates insubordination.[75]

Peller's most penetrating insight is that the dichotomies embraced by the formalists (public/private, free will/coercion) and by the realists (facts/values, is/ought) were both the progeny of a metaphor embedded in human perception: the subject/object dichotomy.[76] This metaphor is grounded on the metaphysical assumption that reality can be divided between subjective experience (inside the "I") and objective experience (outside the "I"). The formalists privileged the subjective; rationalism empowered the "individual," and doctrines such as freedom of contract rested on such privileging. Legal realism flipped the equation, privileging the objective, demonstrating that it was the public world that constituted the private.[77] The subject/object dichotomy has also given rise to the politics (subjective)/law (objective) distinction, a distinction that is readily collapsed "once the inevitably contingent and indeterminate character of the representation of social events [is] revealed."[78] Other offspring include the familiar oppositions of

---

71. Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1181 (1985).
72. *See id.* at 1153.
73. *Id.* at 1156.
74. *Id.* at 1184.
75. *See id.*
76. *See id.* at 1154.
77. *See id.* at 1248-49.
78. *Id.* at 1239.

man/nature, mind/body, thought/experience, theory/practice, form/substance and reason/will.[79] In contemporary jurisprudence, critical legal theorists privilege the subjective (all is indeterminate), while law and economics scholars privilege the objective (claiming its methods are "neutral").[80]

All of these constructs are predicated on the myth that the observed and the observer are segregable. Even the paradigmatic image of the scientist as objective observer has been exploded by quantum mechanics: the observer necessarily alters that which she observes.[81] The subject/object dichotomy is an illusion because there is no private, inner realm where the self encounters herself without the mediation of the social constructs and categories of the objective world, internalized via the intake function of her language. Similarly, there is no pure, objective, outer world that we experience that exists outside of our presence, our actions and conceptions.[82]

In general, the subject/object dichotomy "exteriorizes" all "otherness" because humans cannot experience themselves "in Nature"; rather, they experience Nature as external, objective and independent.[83] The body (irrational, like nature, and externally observable, at least in part) is exteriorized from the mind (rational, unobservable). The reason/desire dichotomy follows easily.[84] And so we construct, flipping the paradigm occasionally,[85] but missing the point:

> The myth of the subject/object metaphor is the projection of some place . . . that is outside social inscription. But there is no point beyond social inscription, no law separate from politics, no knowledge separate from power, no reason separate from imagination, no things underneath mere words, and no free subjects separate from social language.[86]

---

79. *See id.* at 1264.

80. *See id.* at 1267.

81. *See* HILARY PUTNAM, 1 MATHEMATICS, MATTER AND METHOD: PHILOSOPHICAL PAPERS 134 (1975) (quoting Von Neuman's axiomatization of quantum mechanics: "a measurement throws a system discontinuously into a new state"); *see also* STEPHEN HAWKING, A BRIEF HISTORY OF TIME: FROM THE BIG BANG TO BLACK HOLES 54 (1988). For an accessible account of the application of quantum mechanics to jurisprudence, see Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 5, 17-19 (1989).

82. *See* Peller, *supra* note 71, at 1268-69.

83. *See id.* at 1276.

84. *See id.* at 1276-77.

85. *See supra* note 77 and accompanying text.

86. Peller, *supra* note 71, at 1290.

Applying Peller's insights to Schlag's taxonomy, it seems clear that rationalism and modernism engage in the subject/object dichotomy—rationalism privileging the subjective, and modernism privileging the objective.[87] Prerationalism privileges the subjective to the point where it extinguishes the objective: the sacred text is assigned ultimate authority by the subjective reader, and acceptance of the canon as a "given" is assumed. Postmodernism, at first blush, may have seemed to evade the subject/object distinction. But in its quest to honor the plurality of voices and to highlight conflict, has it simply made way for the existence of multiple, coexisting, and conflicting subject/object distinctions? All the voices are in the room now; there is a cacophony. But are they really saying anything different? Or does postmodernism merely focus on the phenomenon that no one is being silenced and that the resulting din, while uncomfortable, is a more authentic representation of reality than that which we have constructed to date?

D. Meaning: "Light[ing] Up the Thick Darkness of the Language"[88]

We have looked at the contingency of the self, of language as it constructs and communicates our perception of what is real, of our conceptual frameworks themselves. Now, brimming over with all of this indeterminacy, we confront a text, which cheerfully awaits our interpretation. What now?

Some hermeneutists[89] essentially assert that as the reader bends to pore over a text, her brimming indeterminacies pour all over the page. The intake function of language mediates, slices and encodes. Categories are accessed; boxes fill. Contrary to intentionalists, who assert that "the only plausible object of interpretation is the author's intended meaning,"[90] these hermeneutists assert that the author's intent is only one, but not necessarily the best, interpretation of many possible readings of a text.[91] These differing perspectives engender another debate about how meaning is extracted from language.

---

87. *See supra* note 77 and accompanying text.

88. WHORF, *Introduction*, *in* LANGUAGE, THOUGHT, AND REALITY, *supra* note 20, at 1, 26.

89. A "hermeneutist" is "one versed in hermeneutics" which is "the science of interpretation . . . ." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 851 (1966).

90. Steven Knapp & Walter Benn Michaels, *Intention, Identity, and the Constitution: A Response to David Hoy*, *in* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 187, 187 (Gregory Leyh ed., 1992) [hereinafter LEGAL HERMENEUTICS].

91. *See* David Couzens Hoy, *Intentions and the Law: Defending Hermeneutics*, *in* LEGAL HERMENEUTICS, *supra* note 90, at 173, 180.

Intentionalists separate the moment of extraction into two events: (1) figuring out what the language means; and (2) applying it to the present facts.[92] This sounds familiar: it is another version of the subject/object distinction—the theory/practice dichotomy.[93] Hermeneutics, according to David Cousins Hoy, collapses the dichotomy by declaring that "understanding is not a separate moment from interpretive application . . . understanding is always already interpretation" because it is "always conditioned by the context in which it occurs," and because those contextual features that the reader highlights as the foreground and those she relegates to the background are part of the extraction of meaning from a text.[94] Perry extends this deconstruction by noting that not only is "meaning always already . . . application (Hoy's point) but also that application is always (further) specification of meaning."[95]

Lest one take away from this the idea that all meaning is indeterminate, save a term like "Big Mac,"[96] whose meaning is, given the proper context, quite determinate, Stanley Fish takes on the indeterminacy/determinacy dichotomy:

> It may be that at a *general* level interpretation and language are radically indeterminate because every interpretation (decision, specification of meaning) rests on a ground that is itself interpretive and therefore challengeable; but since life is lived not at the general level but in local contexts that are stabilized (if only temporarily) by assumptions already and invisibly in place, the inherent indeterminacy of interpretation is without the practical consequences both feared and hoped for it.[97]

In other words, one can always deconstruct a judicial decision, but people "act on it, [are] influence[d] in their calculations by it, cite it, invoke it, believe in it."[98] This is true in large part because we demand that a "rule of law" emerge from our judicial opinions; we require a privileged reading in this context.[99] Fish's claim seems to be that, whether or not there is dissonance created

---

92. *See id.* at 173-74.

93. *See id.* at 174.

94. *Id.*

95. Michael J. Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa), in* LEGAL HERMENEUTICS, *supra* note 90, at 241, 248

96. *See* Pierre Schlag, *Authorizing Interpretation,* 30 CONN. L. REV. 1065, 1070 (Spring 1998).

97. Stanley Fish, *Play of Surfaces: Theory and the Law, in* LEGAL HERMENEUTICS, *supra* note 90, at 297, 307.

98. *Id.* at 308.

99. *See* Thomas Morawetz, *Law and Literature, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 450, 457 (Dennis Patterson ed., 1996).

by our various readings of the "rule of law," our *behavior* with regard to it constructs its determinacy. Judicial opinions are therefore always indeterminate and determinate at the same time. When viewed from afar, all texts are indeterminate; but from the short range, the local context, where interpretation is "experienced and practiced," texts are necessarily determinate.[100]

So although Fish deconstructs the indeterminacy/determinacy dichotomy, he seems almost simultaneously to bifurcate the two once again and to privilege determinacy by asserting that "theory doesn't matter" and that "a situation-specific determinacy provides all the stability one needs."[101] Is he not restating the interpretation/application dichotomy? Is this not another rendition of the subject/object distinction? The subjective, indeterminate, interpretive reading is opposed to the objective, determinate, moment of application. The subjective indeterminacy of theory is denigrated; objective, situation-specific determinacy occurs where law is really lived out. It appears that Fish fell prey to the realist's fate: instead of collapsing the subject/object distinction, he merely flipped it and privileged the objective sector.

Others join Fish in his assertion that the indeterminacy quandary is overrated. Owen Fiss accepts that multiple readings are possible, but he believes the freedom of the reader to create meaning is "constrained by rules that derive their authority from an interpretive community that is itself held together by the commitment to the rule of law."[102] Hoy asserts that a reader cannot interpret a text arbitrarily, because "[c]ontext will still constrain the possible alternatives, and variations or shifts between possible contexts will be constrained by factors such as suitability, purpose, and plausibility."[103] The moment of interpretation and application may be one and the same, but constraints still exist. As Fish explains: "[i]nterpreters are constrained by their tacit awareness of what is possible and not possible to do, what is and is not a rea-

100. *See* Fish, *supra* note 97, at 308. In other words, when a judge reaches a concrete result based on her reading of a judicial opinion, she provides the text with a determinate meaning in that context, and yet at the same time, absent the necessity of reaching such a result, the text is inherently indeterminate.

101. *Id.* Robert Weisberg has noted Fish's tendency to "typically retreat[ ] into complacent assumptions that indeterminacy does not exist at the institutional level at which it would be most dangerous." Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1, 44 n.150 (1988).

102. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 740, 762 (1982).

103. David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, *in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 319, 330 (Sanford Levinson & Steven Mailloux eds., 1988).

sonable thing to say, and what will and will not be heard as evidence in a given enterprise . . . ."[104]

Still, the modes of prerationalist and rationalist judicial interpretation, these "rules" which are relied upon so heavily to constrain misreadings of, for example, a statutory text, are easily impeached. By the 1990s, this recital could bore us to tears. The textualist approach is eminently assailable because plain meaning, insofar as it exists, is a function of interpretive assumptions rather than anything inherent in the words on the page.[105] The intentionalist project is derailed as soon as one asks for the identity of the author(s) of legislation—Congress? Those who voted? Staff persons who actually drafted the bill? Were all their intentions the same? Did the individuals involved each have the same intent from moment to moment?[106] These questions pervade even without addressing the hermeneutical problems revolving around the reader. If the reader tries to determine intent by examining the context of the statute, she will:

> [R]un up against the problem that any given context is open to further description. Context does not exist somewhere. Context is constructed by the interpreter according to her calculus of relevance and irrelevance. A particular description of the context involves screening the text through representational terms used by the interpreter. It is an effect of the interpreter's differentiation of what outside the work counts and what doesn't. Accordingly, context is the result of the interpreter's activity rather than the ground for it.[107]

The notion of precedent as meaningful constraint is equally assailable; fields of precedent are eminently manipulable by a judge who has (consciously or unconsciously) determined "how I want to come out."[108] So the realists urged judges to decide cases based on the current sociolegal context, invoking the tired debate

---

104. Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, *in* THE POLITICS OF INTERPRETATION 271, 281 (W.J.T. Mitchell ed., 1983); *see supra* note 96.

105. *See* Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065, 1071 (1993); *see also supra* notes 20-24 and accompanying text.

106. *See id.*

107. Peller, *supra* note 71, at 1172-73.

108. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 519 (1986). The scope of manipulable precedent is the locus of much debate. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 119-20, 150 (1961) (describing law's "core of certainty and . . . penumbra of doubt," and relegating the "rule-sceptic" to the "fringe"); Kennedy, *supra*, at 549-50 (describing most cases as manipulable but acknowledging the normative pull of precedent); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 408-14 (1985) (locating most cases in the penumbra with only a few residing in the core).

about separation of powers and result-oriented, activist judging. To escape these jurisprudential ruts, we must look to:

> [T]he hope of transforming theories of [ ] interpretation from a strained recital of increasingly unbelievable fictions (the plain meaning rule, the intent of the legislature, the superior wisdom of the judge) into an open-ended, pragmatic inquiry that employs a melange of methodologies in a tentative search for a shifting and contingent truth.[109]

As a discipline, hermeneutics itself bears traces of rationalist foundations: the very question "how should we interpret texts" betrays a normative orientation which neutralizes postmodernist ambitions.[110] While hermeneutics may empower each reader to interpret on her own terms, seated on her throne, employing ego-centered reason, the challenge of transcending the subject-object distinction remains like an unscaled peak in the distance. Does it not beckon?

III. Social Relations: In the Academy and in the Courtroom

How do we move from prerationalist to postmodernist conceptions and beyond in the realm of judicial opinions and legal scholarship? How do we collapse the subject/object dichotomy and apply such ideas in the courtroom and classroom? That there is a critical need to do so is the subject of this section, which examines two areas of jurisprudence in contemporary legal scholarship: critical white studies and intersectionality theory; and two cases that were pending before the United States Supreme Court in the 1997 Term: *Taxman v. Board of Education of Piscataway*[111] (now settled) and *Miller v. Christopher*.[112] All are illustrative of the arbitrary, political and contingent nature of the "rule of law," and all demonstrate how definitions of identity, the language grid, cognitive frameworks and assignment of meaning have constructed a legal world of rights and entitlements that sometimes intersects poorly with reality.

A. Critical White Studies: Discerning Transparency

Critical white studies is a body of literature emerging from critical race studies, which, in turn, was engendered by the leftist

---

109. Campos, *supra* note 105, at 1073.

110. *See* Schlag, *Missing Pieces*, *supra* note 8, at 1246.

111. 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997), *cert. dismissed*, 118 S. Ct. 595 (1997) (dismissal due to settlement of the case).

112. 96 F.3d 1467 (D.C. Cir. 1996), *cert. granted*, 117 S. Ct. 1551 (1997), *cert. limited*, 117 S. Ct. 1689 (1997).

critical legal studies movement.[113] Critical white studies seeks an "antiracist white identity"[114] and examines how law, culture and language construct white privilege.[115] Barbara Flagg, one of the movement's most prolific scholars,[116] argues that a crucial feature of white identity is transparency: "the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific."[117] Because such norms and behaviors are experienced as neutral, assimilation is required of people of color even as diversity and plurality are invoked as desirable values.[118]

It is in this way that institutional, structural racism is maintained, ensuring that whites are systematically advantaged, and that cultural racism, "the usually unstated assumption that white culture is superior to all others," is practiced.[119] Pat Cain has recounted transparency at work: when asked to use three adjectives to describe themselves, white women never include the adjective "white," whereas women of color invariably include their "race" as one of the three adjectives.[120] Another anecdotal but readily credible example: when Flagg's life partner mentioned to a white friend that Flagg was teaching a course in critical race theory, the response was one of surprise—"but isn't she white?"—as if white is not a racial category.[121]

Institutional and cultural discrimination take place when transparently white norms are imposed upon non-whites as neutral codes of conduct.[122] Take, as a hypothetical, a person of color who chooses to change her name, to dress and to speak in a way

---

113. *See* Richard Delgado & Jean Stefancic, *Introduction* to CRITICAL WHITE STUDIES, *supra* note 9, at xviii.

114. Barbara J. Flagg, *Changing the Rules: Some Preliminary Thoughts on Doctrinal Reform, Indeterminacy, and Whiteness*, 11 BERKELEY WOMEN'S L.J. 250, 250 (1996) [hereinafter Flagg, *Changing the Rules*].

115. *See* Delgado & Stefancic, *supra* note 113, at xviii.

116. For some of Flagg's scholarly works, see Flagg, *Changing the Rules*, *supra* note 114; Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995) [hereinafter Flagg, *Fashioning a Title VII Remedy*]; Flagg, *"Was Blind, But Now I See,"* *supra* note 9.

117. Flagg, *"Was Blind, But Now I See,"* *supra* note 9, at 957.

118. *See id.*

119. *Id.* at 959.

120. *See* Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 208 (1989-1990).

121. *See* Flagg, *"Was Blind, But Now I See,"* *supra* note 9, at 970.

122. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379 (1988) ("The white norm continues in an unspoken form as a statement of the positive social norm, legitimating the continuing domination of those who do not meet it.").

that reflects her heritage. If, because of these qualities, she is not viewed by white management as "promotion material," she has been subjected to an arbitrary, contingent world view that, nonetheless, may be experienced by white management as neutral, well-reasoned and "colorblind."[123]

Professor powell describes the phenomenon of transparency as a "smooth fit between societal norms of Whiteness and the constructed identity of Whites [that] creates an illusion of coherence and racial invisibility or neutrality—of 'normality.'"[124] Critical scholars have long sought to make the invisible visible: success has been described as noticing the fishbowl after one has looked at goldfish all of one's life.[125]

All of this tracks nicely with the rationalist paradigm, which exalts the "my way or the highway" presentation of transparent white norms rather than the postmodernist validation of multiple voices and ways of being. To the extent white norms are noticed at all, they are justified as the result of a neutral, reasoned approach to the world. When white norms are experienced as transparent, we resemble Whorf's breed of people who could only see in shades of blue and thus lacked color terms in their language.[126]

Flagg concedes that critical legal studies embraces the indeterminacy thesis more than critical race or critical white studies does; the latter two tend to prescribe doctrinal reform and so evince some faith that a rationalist structure could work.[127] As befits a rationalist (with postmodernist aims—the dissonance is palpable), Flagg engages in a series of normative suggestions as to how to focus on the fishbowl. She suggests that a white person should:

> [1] make explicit the whiteness of transparently white norms by labeling herself and her community's existing standards as

---

123. *See* Flagg, *Fashioning a Title VII Remedy*, *supra* note 116, at 2010-12. powell has pointed out that on a macro level:

> What is ignored in [the] cultural analysis of the inner city . . . is the explicit role that the White majority and the government itself have played in creating and maintaining this racialized space, in creating a society where good neighborhoods are defined as White neighborhoods and in defining positive individual characteristics as White characteristics. White flight . . . has been fueled by racist fears and facilitated by a host of government policies . . . .

john a. powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. J. 99, 111 (1997).

124. powell, *supra* note 5, at 1493.

125. *See id.* at 1482 n.5 (citing TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 13-16 (1992)).

126. *See supra* note 25 and accompanying text.

127. *See* Flagg, *Changing the Rules*, *supra* note 114, at 250-51.

> white whenever possible[;]
>
> [2] examine the goals her decisionmaking processes are designed to serve, to see whether they too are effectively white-specific and, if so, whether they can be reconceptualized in a more racially inclusive manner[;]
>
> [3] deliberately select rules of decision that do not advantage whites . . . [and] adopt culturally diverse strategies for accomplishing her purposes[;][128]

and

> [4] consciously employ privilege to the advantage of those who are not in a position of privilege—in this instance, nonwhites. For example, [a] white[ ] in a position to do so might appoint as judges only people of color. Analogously, [a] white[ ] who ha[s] input into the process of doctrinal formation can advocate legal rules that might effect greater racial justice.[129]

Let us take these as noble, moral suggestions. Still, questions remain. Can we reach a postmodernist world that honors multiple perspectives by employing a normative, rationalist program? Can we get there from here, especially that way? Is this a case of rationalism munching up postmodernism, or is it the only moral way to address the issue, to seek solutions? Is it immoral to abdicate the search for solutions in the face of inequity? Is the question about morality intrinsically rationalist inasmuch as it presupposes an individual selfadjudicating the answer to the question?

B. Intersectionality Theory: The Whole Is More Than the Sum of the Parts

Scientists, as well as critical race scholars, have launched an eviscerating attack on the Cartesian constructs of racial categories.[130] A belief in "race," based on observation of phenotypic dif-

---

128. Flagg, *"Was Blind, But Now I See," supra* note 9, at 991-92.

129. Flagg, *Changing the Rules, supra* note 114, at 257.

130. Scientists now generally concur that "[t]he term 'race' is a social construct." C. Loring Brace, *Region Does Not Mean "Race"—Reality Versus Convention in Forensic Anthropology*, 40 J. FORENSIC SCI. 171, 174 (1995). The use of the term "Asian" or "Mongoloid" to characterize the morphometrically differing peoples of China, Korea, Japan and regions to the south is extremely misleading. "White" or "Caucasian" cannot accurately collapse the disparate genetic backgrounds of peoples from Scandinavia to Iran and through South Asia. "Black" or "Negroid" are likewise inherently inadequate descriptions of populations from the "tropics of the Old World, from Africa through India to Australia," whose only common bond is the production of melanin. *Id.* at 171. Whites and blacks have greater genetic variation within their respective "races" than between them. For example, the Spaniard and North African are more genetically similar than the Spaniard and the Swede. *See* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 12

ferences, has been equated by one scientist to a belief in Greek and Roman deities based on observation of the planets carrying their names.[131] "[T]here is no question that we see phenotypic diversity, but . . . it is invalid to conclude that this diversity constitutes a reality called 'race.'"[132]

Still, the terms "black" and "white" remain culturally powerful concepts, despite the cajoling of science. One commentator has posited that, from the earliest days of slavery, "black" was constructed in opposition to "white."[133] Indeed, whites projected upon black slaves "the terror of European outcasts, their dread of failure, powerlessness, Nature without limits, natal loneliness, internal aggression."[134] Blackness and whiteness retain cultural resilience because they are maintained in opposition to "the other"; neither construct can survive alone.[135]

The boxes fill, but as usual, much of reality is lopped off in the process. For example, racial categories render invisible the fact that seventy-five to ninety percent of the "black" population is multiracial but is classified as black.[136] "Virtually all latinos and Filipinos" and "the majority of" native americans and Hawaiians are multiracial, and a "significant" proportion of white-identified individuals are multiracial as well.[137] The number of multiracial Americans is increasing: in 1970, the number of children living in

---

(1994). Further, populations that look alike may be genetically quite different (Philippine or Malay Negritos and African Pygmies or Bushmen), and those that appear different may be genetically quite similar (Europeans and Northern Indians). *See* Masatoshi Nei & Arun K. Roychoudhury, *Genetic Relationship and Evolution of Human Races*, *in* 14 EVOLUTIONARY BIOLOGY 1, 43 (Max K. Hecht et al. eds., 1982) (examining the genic variation within and between several races). As Livingstone said three decades ago: "There are no races, there are only clines." Frank B. Livingstone, *On the Non-Existence of Human Races*, 3 CURRENT ANTHROPOLOGY 279 (1962).

131. *See* Kenneth A. R. Kennedy, *But Professor, Why Teach Race Identification if Races Don't Exist?*, 40 J. FORENSIC SCI. 797, 799 (1995).

132. *Id.*

133. *See* Toni Morrison, *Playing in the Dark: Whiteness and the Literary Imagination*, *in* CRITICAL WHITE STUDIES, *supra* note 9, at 79, 81.

134. *Id.*

135. *See* powell, *supra* note 5, at 1512-13 (explaining that one is defined by excluding the other).

136. *See* Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 964 (1995). Indeed, as Trina Grillo has pointed out, many famous "black" leaders have, in fact, been multiracial: for example, Booker T. Washington, Frederick Douglass and W.E.B. DuBois. *See* Grillo, *supra* note 5, at 25 n.36.

137. Ramirez, *supra* note 136, at 968. While I have capitalized terms like "Hawaiian" or "Filipino" because they describe people from discrete geographic regions, I have not capitalized terms like "white," "black," or "latino" because such terms conflate the identity of groups from many geographic areas.

families with one white parent and one black, asian or native american parent was less than 400,000.[138] That number had tripled by 1990 to 1.5 million children, without counting children of single or divorced parents.[139] Still, the resilience of racial categorization is tenacious: in October 1997, the U.S. Government decided not to include a "multiracial" category in the next census, suggesting instead that multiracial Americans list themselves in "as many racial categories as apply."[140]

Intersectionality theory takes the resistance to essentialist categorization one step further by asserting that individuals contain many intersecting traits, and that simply adding together the traits does not adequately describe the experience of such intersections.[141] For example, the discrimination experienced by women of color cannot be quantified by adding together the experience of racial discrimination and of gender discrimination.[142] Indeed, feminists of color have long complained that feminism has all too frequently relegated the experience of black women to the background:

> I call this the "nuance theory" approach to the problem of essentialism: by being sensitive to the notion that different women have different experiences, generalizations can be offered about "all women" while qualifying statements, often in footnotes, supplement the general account with the subtle nuances of experience that "different" women add to the mix. . . . The problem with nuance theory is that by defining black women as "different," white women quietly become the norm . . . .[143]

Transparency is at work again. To escape from the tyranny of categories and to validate that all identity exists along a continuum[144] is a truly postmodernist vision. And lest the continuum appear too linear, we must remember that the message of the intersectionality and the anti-essentialism critique is to "define com-

---

138. *See* Ramirez, *supra* note 136, at 967.

139. *See id.*

140. *See Government Rejects Multiracial Category for Census* (visited Oct. 29, 1997) <http://www.cnn.com/US/971...s.race.ap/index.html>. For an interesting discussion of the movement for a multiracial category, see Grillo, *supra* note 5, at 25.

141. *See* powell, *supra* note 5, at 1511.

142. *See* Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (noting that "the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately"); Grillo, *supra* note 5, at 18.

143. Harris, *supra* note 4, at 595.

144. *See* Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207, 210 (1996).

plex experiences as closely to their full complexity as possible and that we not ignore voices at the margin."[145]

Intersectionality appears to be supporting a move from rationalism to postmodernism in the arena of race and gender identity. Yet the same tension exists with regard to the efficacy of using normative recommendations, such as the command to honor complexity, to reach a postmodernist goal. The suspicion remains that, even if achieved, postmodernism may simply constitute a move to a multiplicity of subject/object distinctions. Is this enough? Does it get us where we want to go?

C. *Constructing Cartesian Dichotomies:* Taxman v. Board of Education of Piscataway[146]

I offer a truncated discussion of two cases that were pending before the U.S. Supreme Court in the 1997 term, not for the purposes of conducting a full, casenote-like analysis, but to illustrate the contingent, political nature of the rule of law, and of transparency at work. *Taxman* settled before the Supreme Court could decide the case;[147] however, the Third Circuit opinion merits further examination as an example of how malleable legal analysis can be. As the Third Circuit's *Taxman* dissent noted, "[i]n the law . . . it is often how the question is framed that determines the answer that is received."[148] From the rationalist perspective, the question is framed, and the neutral rule of law is then applied by an objective court, guided by ego-centered reason. This is the discourse of most judicial opinions;[149] even its critics wonder if it could be otherwise.[150]

The Board of Education of Piscataway, New Jersey developed an affirmative action policy in 1975 which specified that "'when

145. Grillo, *supra* note 5, at 22.

146. 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997), *and cert. dismissed*, 118 S. Ct. 595 (1997) (dismissal due to settlement of the case).

147. *See* Julian E. Barnes, *Rights Groups Choose to Settle*, U.S. NEWS & WORLD REP., Dec. 1, 1997, at 41 (reporting that "the board of education retreated when civil rights groups agreed to pay 70 percent of the $433,500 settlement offered Sharon Taxman, a white teacher laid off in 1989 so a black teacher could keep her job").

148. *Taxman*, 91 F.3d at 1567 (Sloviter, C.J., dissenting).

149. *See* Schlag, *Missing Pieces*, *supra* note 8, at 1248 (stating that "the cognitive orientations that dominate judge-made law are largely prerationalism and rationalism").

150. *See* Pierre Schlag, Address at the *1997 Day, Berry & Howard Visiting Scholar Speech*, University of Connecticut School of Law (Oct. 24, 1997) (responding to question from audience by stating that he was not sure it was appropriate for judges to be more candid regarding the moral normative commitment underlying the moment of decision).

candidates appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended.'"[151] The purpose of the policy, as indicated in a document added to the policy in 1983, is to "'ensure [ ] equal employment opportunity . . . and prohibit [ ] discrimination in employment because of . . . race,'" not to remedy results of prior discrimination or underrepresentation of people of color within the school system.[152] In 1989, the Board needed to lay off one teacher in the Business Department of Piscataway High School.[153] Sharon Taxman (white) and Debra Williams (black), two teachers in the department, had equal seniority because both began work on the same day in 1980.[154]

In the past, the Board had broken similar ties by drawing lots or using other random procedures, but they had never been faced with a tie between persons of different races.[155] Accordingly, the superintendent recommended that the affirmative action plan be invoked because the two teachers "'were tied in seniority, were equally qualified, and because Ms. Williams was the only Black teacher in the Business Education Department.'"[156] The Board followed the superintendent's recommendation, terminating Ms. Taxman in the interest of cultural diversity.[157]

Taxman filed a charge with the Equal Employment Opportunity Commission, and the United States filed a Title VII suit in the United States District Court for the District of New Jersey (Taxman intervened).[158] The district court granted partial summary judgment for the United States and Taxman, but trial proceeded regarding damages.[159] In the meantime, Taxman was rehired by the Board; she was eventually awarded damages in the amount of $134,014.62 for "backpay, fringe benefits, and prejudgment interest."[160] A jury awarded her an additional $10,000 for emotional suffering under the New Jersey antidiscrimination statute.[161] The Board appealed to the Third Circuit (regarding the

151. *Taxman*, 91 F.3d at 1550 (quoting the Board's affirmative action policy).
152. *Id.* (quoting the Board's 1983 affirmative action policy)
153. *See id.* at 1551.
154. *See id.*
155. *See id.*
156. *See id.* (quoting the superintendent's recommendation).
157. *See id.* at 1552 (noting that the President of the Board cited cultural diversity as the reason for retaining Ms. Williams and for terminating Ms. Taxman).
158. *See id.*
159. *See id.*
160. *Id.*
161. *See id.*

granting of summary judgment as to liability), and Taxman cross-appealed (regarding the dismissal of her claim for punitive damages).[162]

1. The Third Circuit's Majority Opinion

The majority opinion, penned by Judge Mansmann, framed the question as "whether Title VII permits an employer with a racially balanced work force to grant a non-remedial racial preference in order to promote 'racial diversity.'"[163] The majority answered the question in the negative.[164] The court supported its decision by constructing a remedial/non-remedial dichotomy, citing *United Steelworkers v. Weber*[165] for the proposition that Congress, in enacting Title VII, did not intend to "forbid all voluntary race-conscious preferences," and that an affirmative action plan whose purpose "mirror[ed] those of the statute" and that "did not 'unnecessarily trammel the interests of the [white] employees'" was permissible.[166] The majority then examined *Johnson v. Transportation Agency*,[167] a gender affirmative action case, stating that "a plan designed to eliminate work force imbalances in traditionally segregated job categories" satisfied *Weber's* first prong of mirroring the purpose of Title VII.[168] Prong two, refraining from unnecessary trammeling of the rights of male employees, was met in *Johnson* because the protected category was considered a "'plus' factor, only one of several criteria" used in making the employment decision.[169]

Turning to the facts before it, the Third Circuit equated "mirroring the purpose of Title VII" with constructing a remedial/nonremedial dichotomy. To accomplish this, one must move from identifying the purpose of Title VII as ending discrimination, to the narrower purpose of merely remedying segregation/underrepresentation, to the final move of disenfranchising plans to end discrimination based on a quest for diversity (which address institutional and cultural discrimination) rather than on remedying past injustices. These moves, although presented by

162. *See id.*
163. *Id.* at 1549-50.
164. *See id.* at 1550.
165. 443 U.S. 193 (1979).
166. *Taxman*, 91 F.3d at 1554-55 (citations omitted).
167. 480 U.S. 616 (1987).
168. *Taxman*, 91 F.3d at 1556.
169. *See id.* (citing *Johnson*, 480 U.S. at 638-40).

the majority as consecutive, reasoned and compelled conclusions, are far from compulsory.

The court bolstered the narrowing of the "purpose of Title VII" to remedial rather than pro-diversity motives by citing to legislative intent. Aside from the serious hermeneutical difficulties we encounter when we construct meaning from comments made during congressional debate,[170] the quotations themselves are hardly an indispensable predicate to the court's conclusion. For example, Senator Humphrey is quoted as speaking of the country's need to "assist those who have 'been excluded from the American dream for so long.'"[171] Because there was only one black teacher in the Business Department,[172] it is hard to see how retaining her flew in the face of such intent. Further, no language was quoted from the Congressional Record to indicate that, even if remedial intent was the primary focus of the legislation, permissible plans must be cabined to those plans that have *only* a remedial focus. This is an inference that the judiciary has made on its own. It is comparable to the legislature saying "peaches are good fruit," and the judiciary interpreting that language to mean, "we must eat only peaches."

2. The Dissent

The "straightforward statutory interpretation"[173] employed by the majority met with a rigorous and cogent dissent, authored by Chief Judge Sloviter. She opened by noting the importance of framing the question correctly, asserting that a "broad legal referendum on affirmative action policies" was not mandated by the presentation of the case.[174] Rather, she would have formulated the question as follows:

> [W]hether Title VII requires a New Jersey school or school board, which is faced with deciding which of two equally qualified teachers should be laid off, to make its decision through a coin toss or lottery, a solution that could be expected of the state's gaming tables, or whether Title VII permits the school board to factor into the decision its bona fide belief, based on its experience with secondary schools, that students derive

170. *See supra* note 106 and accompanying text (discussing hermeneutics and legislative intent).

171. *Taxman*, 91 F.3d at 1557 (citation omitted).

172. *See id.* at 1551. In fact, there were no other teachers of color at all in the Business Department. *See id.*

173. *Id.* at 1557.

174. *Id.* at 1567 (Sloviter, C.J., dissenting).

> education benefit by having a Black faculty member in an otherwise all-White department.[175]

The dissent next attacked the majority's peaches inference, urging that "it does not follow as a matter of logic" that because the remedial plans in *Weber*[176] and *Johnson*[177] were upheld as permissible, "every affirmative action plan that pursues some purpose other than correcting a manifest imbalance or remedying past discrimination will run afoul of Title VII."[178] Sloviter then quoted *Weber* as explicitly declining to delimit the outer bounds of affirmative action policies: to wit, "[w]e need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans."[179] Further, the dissent urged, the *Johnson* majority opinion engaged in no line-drawing; Stevens' concurrence in *Johnson* explicitly repudiated any such activity ("I write . . . to . . . emphasize that the opinion does not establish the permissible outer limits of voluntary [affirmative action] programs");[180] and while O'Connor's concurrence argued for such limits, "her vote was the sixth in favor of the majority's holding and therefore not crucial to the outcome of the case. It follows that her narrow reading should not be read as constituting the view of the Court."[181]

3. Reflections on *Taxman*

What is the peaches inference[182] all about? It should look, or at least feel, familiar. The majority, in constructing the remedial/nonremedial distinction, engaged in yet another subject/object dichotomy, presented as an objective, neutral, compelled decision based on the rule of law. How so? Where is the fishbowl in this case? A better way to get a handle on the operation of transparence in *Taxman* (and in most contexts) is to ask oneself what is most visible.

The most easily identified, most visible form of discrimination (other than blatant, racist acts) is segregation.[183] If there are no people of color in the room, there is a problem. This is a determination based on what is outside the "I," on the objective world.

---

175. *Id.*
176. United Steelworkers v. Weber, 443 U.S. 193 (1979).
177. Johnson v. Transportation Agency, 480 U.S. 616 (1987).
178. *Taxman*, 91 F.3d at 1570.
179. *Id.* (quoting *Weber*, 443 U.S. at 208).
180. *Id.* (quoting *Johnson*, 480 U.S. at 642).
181. *Id.*
182. *See supra* page 128.
183. Segregation is, of course, also a blatant, racist act, writ large.

Remedial affirmative action plans thus attack objective problems of discrimination, those that are easily identified.

Once segregation is dealt with, what kinds of discrimination are left? This is where institutional and cultural racism come into play, transparencies, forms of discrimination that are inside the "I,"— the subjective sector.[184] "Nonremedial" affirmative action plans target these issues by asserting that diversity, multiculturalism, and the like are valuable experiences for humans. Such plans are, in fact, remedial—but they remedy subjective forms of discrimination. For example, increased contact can make the invisible visible, can counteract the unconscious assumption that, with regard to norms, "white is right."

But the majority cabined its understanding of the term "remedial" to the objective realm. It constructed remedial, visible (segregation-based), nontransparent, permissible plans in opposition to diversity-driven, invisible, transparent, impermissible plans. Put another way, it bifurcated the remedial (objective) from the diversity-driven (subjective) and privileged the objective sector.[185] As we have seen, this is an exceedingly easy move to make, whether one engages in prerationalist appeals to a sacred text (carefully constructed legislative intent, in this case),[186] or in rationalist apologetics for a neutral rule of law (carefully constructed readings of *Weber* and *Johnson*).[187] The regnant jurisprudence of transparency rolls on, seemingly "compelled" to churn out new versions of the subject/object dichotomy wherever it goes. What would the Supreme Court have done? It seems impossible that they would done anything substantively different.

Note that, in another possible world,[188] affirmative action might be conceptualized differently. Whites tend to unconsciously operate under the assumption that jobs, *a priori*, belong to whites, and that affirmative action seeks to bring people of color "up to speed" by offering them some of those jobs.[189] In other words, as

184. *See supra* text accompanying notes 117-119 (discussing "transparency" as a crucial aspect of white identity and racism).

185. *See supra* note 165-166 and accompanying text (recounting the *Taxman* court's discussion of permissible affirmative action plans).

186. *See supra* note 105 and accompanying text (discussing hermeneutics and legislative intent).

187. *See supra* notes 165-168 and accompanying text (recounting the *Taxman* court's reading of *Weber* and *Johnson*).

188. *See* ALAN ROSS ANDERSON ET AL., 2 ENTAILMENT: THE LOGIC OF RELEVANCE AND NECESSITY 142-43 (1992); Saul A. Kripke, *A Completeness Theorem in Modal Logic*, 24 J. SYMBOLIC LOGIC 1, 1-14 (1959).

189. *See* Eric Foner, *Hiring Quotas for White Males Only*, *in* CRITICAL WHITE STUDIES, *supra* note 9, at 24, 25. Foner explains that "[n]onwhites (and women)

uncomfortable as it may be to explicitly reveal the cognitive baseline, affirmative action operates to "give" some of the white jobs to people of color.

Imagine, instead, a world where jobs were divided according to population. A certain percentage of jobs at every level were held for whites, a certain percentage were held for blacks, a certain percentage held for latinos, for asians, native americans and so on. Yes, we are talking quotas, but try not to throw the manuscript down in horror. We are only talking possible worlds here; we are making believe. Now, just experience the idea that whites held all the jobs in this possible world because they took the ones that belonged to the other races. Now that affirmative action plans require them to relinquish some of these jobs, they are not giving "white" jobs away. Instead, blacks, latinos, asians, native americans and others are reclaiming jobs that were already theirs, that belonged to them before the whites took possession. Do we not think about affirmative action differently in this context? If we do, explore the reasons why.

I am not, by the way, suggesting that this is an appropriate or inappropriate vision of affirmative action. Among other things, rigid divisions according to race tend to revitalize the construction of race, something that most agree is a problematic way to solve racial discrimination.[190] And whether or not quotas are advisable, as a temporary measure, is a question I will not address here. Rather, this is an illustration of how baseline assumptions can change our experience of phenomena. It is similar to Marilyn Frye's article about inviting heterosexuals to experience their heterosexuality as a conscious choice instead of the assumed orientation,[191] or Flagg's attempt to get whites to identify their norms as

---

who obtain such jobs are still widely viewed as interlopers, depriving white men of positions or promotions to which they are historically entitled." *Id.* at 25.

190. *See* Linz Audain, *Critical Cultural Law & Economics, the Culture of Deindividualization, the Paradox of Blackness*, 70 IND. L.J. 709, 729, 731 (1995). She writes:

> [T]o assert the very idea of race itself, is racist. This is because once the possibility of a construct of race arises, the formation of beliefs with respect to that construct is inevitable . . . .
>
> . . . .
>
> . . . To use race to fight racism is to validate the proposition that psychological traits can be successfully associated with this mythical and arbitrary construct of race, ... By perpetuating an idea of race, and in particular the black race, we are unwitting accomplices in perpetuating the existence of the very evil we seek to destroy. This is the paradox of blackness[ ] . . . .

Id. at 129-131.

191. *See* Marilyn Frye, *A Lesbian Perspective on Women's Studies*, *in* LESBIAN STUDIES 194, 196-97 (Margaret Cruikshank ed., 1982).

explicitly white,[192] or powell's attempt to get the salad dressing offered in opposition to vegetarian dressing as "meateater's dressing," not "regular."[193] These are all efforts to release reality from Cartesian cubes, and these efforts are resisted because people fear that the "the wild profusion of existing things,"[194] once liberated, will engulf them.[195] This is particularly so when the language grid, the conceptual dichotomies, the transparencies favor the groups in power, as, *a fortiori*, they must.

D. Circular Stereotypes: Miller v. Christopher[196]

The Supreme Court heard another "transparency" case in the 1997 term: *Miller v. Christopher*. Although gender transparency (regarding male norms) has been the subject of much attention ever since *Reed v. Reed*,[197] the first case in which the Court explicitly held a statute was unconstitutional because it discriminated between individuals on the basis of gender, parenting is an area in which gender-linked role imposition is particularly intransigent. To the traditionalist, anatomy is destiny,[198] and women, because they may give birth and may breastfeed, are automatically rendered superior parents, outdistancing fathers in their bond to their children.[199]

Although most of us can readily think of exceptions to this inference (birth and breastfeeding makes one the better parent), this stereotype has been frozen into the rule of law, hearkening back to a time when women, *sans* birth control, had no choice whether to become parents—hence they had better be the experts since they were biologically locked into decades of childbearing.[200] The construction of the subject/object dichotomy of male/breadwinner/outside world in opposition to female/motherhood/home took hold as a result of the industrial revolution.[201] We are living with vestiges of it still.

---

192. *See supra* notes 128-129 and accompanying text.

193. Grillo, *supra* note 5, at 20 (recounting powell's experience).

194. FOUCAULT, *supra* note 17, at xv.

195. *See supra* note 17-19 and accompanying text (exploring Foucault's critique of the contingency of linguistic categories).

196. 96 F.3d 1467 (D.C. Cir. 1996), *cert. granted*, 117 S. Ct. 1551 (1997), and *cert. limited by* 117 S. Ct. 1689 (1997).

197. 404 U.S. 71 (1971).

198. *See* SIGMUND FREUD, *The Passing of the Oedipus Complex, in* 2 COLLECTED PAPERS 269, 274 (1924).

199. *See, e.g., Miller*, 96 F.3d at 1472.

200. *See* Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & L. 147, 151 (1996).

201. *See id.*

One such vestige surfaced in *Miller v. Christopher*, wherein the D.C. Circuit held that it is a rational presumption that a mother will have a stronger connection to her child born out of wedlock than will the father, because a "mother is far less likely to ignore the child she has carried in her womb than is the natural father."[202] This statement occurred against the backdrop of a case considering the question whether the distinction in 8 U.S.C. § 1409 between "illegitimate" children of U.S. mothers and "illegitimate" children of U.S. fathers violates equal protection.[203]

This equal protection challenge was brought by Lorelyn Penero Miller, born in the Philippines in 1970, "illegitimate" child of Luz Penero, a Filipino woman, and Charlie R. Murray, a U.S. citizen who was stationed in the Philippines.[204] After she turned twenty-one, Ms. Miller applied for registration as a U.S. citizen but was denied because she did not meet the requirements of 8 U.S.C. § 1409(a), a provision of the Immigration and Naturalization Act of 1952.[205] Ms. Miller obtained a Voluntary Paternity Decree, establishing that Mr. Miller was her father, and sought judicial review in the United States District Court for the Eastern District of Texas.[206] The case was transferred to the United States Court for the District of Columbia, which dismissed the claim for lack of standing, whereupon Ms. Miller appealed.[207]

1. The D.C. Circuit Court's Majority Opinion

Leaving aside other issues in the case,[208] let us examine the rationale behind the D.C. Circuit Court's upholding of the gender-linked language in 8 U.S.C. § 1409. The court relied on the 1977

---

202. *Miller*, 96 F.3d at 1472.

203. *See id.* at 1469.

204. *See id.* at 1468.

205. *See id.* Section 1409(a) provides that a child will be deemed a U.S. citizen if:

> (1) a blood relationship between the person and the father is established by clear and convincing evidence; (2) the father had the nationality of the United States at the time of the person's birth; (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years; and (4) while the person is under the age of 18 years—(A) the person is legitimated under the law of the person's residence or domicile, (B) the father acknowledges paternity of the person in writing under oath, or (C) the paternity of the person is established by adjudication of a competent court.

8 U.S.C. § 1409(a) (1994).

206. *See Miller*, 96 F.3d at 1468-69.

207. *See id.* at 1469.

208. One could, for example, readily deconstruct the "illegitimate/legitimate" child dichotomy. In the interest of brevity, I will not do so here.

Supreme Court case of *Fiallo v. Bell*[209] as dispositive, quoting its description of Congress' special concern with the mother/illegitimate child relationship as opposed to the father/illegitimate child relationship and its directive that "it [was] not the judicial role in cases of this sort to probe and test the justifications for the legislative decision."[210] Further, despite explicitly highlighting the fact that DNA technology has now removed many obstacles to proof of paternity which might have justified differential treatment twenty years ago, the D.C. Circuit found "it entirely reasonable for Congress to require special evidence of such ties between an illegitimate child and its father."[211] The Court continued, "[T]he putative father [of an illegitimate child] often goes his way unconscious of the birth of the child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother."[212]

The D.C. Circuit closed by declining to address the argument that was made both in 1977 and in 1997—that the statute was "based on an overbroad and outdated stereotype concerning the relationship of unwed fathers and their illegitimate children,"[213] suggesting that such an argument should be directed to the legislature rather than the judiciary.[214]

2. The Concurrence

Circuit Judge Patricia Wald reluctantly concurred, basing her decision not on the merits of the majority's stance but on what she saw as the inexorable command of *stare decisis*.[215] She took strong issue with the majority's presumption of closer ties between a mother and illegitimate child than between such a child and her father. Judge Wald agreed that

> traditionally mothers more frequently have assumed primary responsibility for illegitimate children, although it is a subject of some debate whether this phenomenon is traceable as much to socialization and sexism as to biological necessity. But there is a world of difference between noting that men and women often fill different roles in society and using these different roles as the justification for imposing inflexible legal restrictions on one sex and not the other.[216]

209. 430 U.S. 787 (1977).
210. *Miller*, 96 F.3d at 1472 (quoting *Fiallo*, 430 U.S. at 799).
211. *Id.*
212. *Id.* (quoting Parham v. Hughes, 441 U.S. 347, 355 (1979)).
213. *Miller*, 96 F.3d at 1472 (quoting *Fiallo*, 430 U.S. at 799 n.9).
214. *See id.*
215. *See id.* at 1477 (Wald, J., concurring).
216. *Id.* at 1475.

Criticizing the notion that mother/child ties should be privileged over father/child ties as discriminatory and based on archaic stereotypes,[217] Judge Wald characterized *Fiallo*'s instruction that such concerns should be addressed to Congress as showing "somewhat cavalier disdain."[218] She closed her concurrence by asserting that because *Fiallo* is Supreme Court precedent directly on point, she had no choice but to follow it.[219] However, she added that it is a "precedent whose time has come and gone; it should be changed by Congress or the Supreme Court."[220]

3. Reflections on *Miller*

What is happening here? The majority entrenched the bifurcation of the descriptive and the normative by privileging the Is and subjugating the Ought. Evincing a prerationalist faith in tradition, it held that what is happening (or, more accurately, what used to happen) is a reason for it to continue to happen. Because mothers used to be or, arguably, still are the "primary parent," they should therefore continue to be so, and courts should define legal rights and entitlements accordingly. Around the circle we go, privileging the status quo, empowering the empowered, and contributing to the devolution rather than the evolution of legal doctrine.

Circular reasoning is one of the paramount moves of a jurisprudence that rests on transparent, uncontestable baselines. No neutral, logically compelled rules of law are in operation here. Instead, once again, the subject/object categories are constructed: the external, objective, most visible manifestations of parenting (breastfeeding, pregnancy, delivery—functions that can only be performed by women) are deemed paradigmatic and thus privileged over the more subjective aspects of the job (less visible functions that implicate psychological and emotional concerns—performed equally well by men and women).

Using Schlag's taxonomy,[221] we can easily identify the majority as engaging in prerationalist and rationalist cognitive moves, and the concurrence reads like a rationalist doing a modernist cri-

217. *See id.* Judge Wald cited a line of U.S. Supreme Court cases that refused to accept discriminatory classifications based on archaic stereotypes. *See id.* (citing J.E.B. v. Alabama ex rel., 511 U.S. 127 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Duren v. Missouri, 439 U.S. 357 (1979)).

218. *Miller*, 96 F.3d at 1476-77.

219. *See id.* at 1477.

220. *Id.*

221 *See supra* Part II.C.1 (explaining Schlag's taxonomy).

tique. Dissonance in Judge Wald's concurrence occurs when, despite her trenchant presentation of the shortcomings of the majority's reasoning, she is relegated to signaling fiercely to the Supreme Court that they should do what she ostensibly cannot.[222]

Will they take her up on it? After *United States v. Virginia*,[223] the chances are better that they will. After approximately twenty-five years of feminist jurisprudence, driven in large part by now-Supreme Court Justice Ruth Bader Ginsburg,[224] it is easier for us to see male norms as visible and contingent than it is for us to identify still-transparent white norms. Parenting is one of the last traditionalist hold-outs; the "maternal instinct" as a cultural directive has had great resilience. The lesson from *Miller* is that when one identifies an argument stating that what has been is the *reason* why something should be, it is time to get suspicious and start looking for the transparency. The invisible will manifest, like the image on a developing photograph, if we begin by focusing on what is visible and then think about what is missing. It is in this way that we stalk the wild lacuna.

IV. Another Vision

A. Normativity: Moral Imperative or Rationalist Imperialism?

As I was formulating ideas for this Article, I was walking down an urban street, dodging traffic, and discussing my thesis with an old friend. Towards the end of our conversation, he exclaimed, "Just be sure you tell people what to do about it!" Ideas were there, and accordingly, normativity was not so very far behind.

Normativity has taken some knocks of late. Campos has criticized it as "relentlessly reductive . . . inherently unbelievable . . . [and] boring."[225] He questions "the normative mania that grips legal scholarship" and recommends "engag[ing] in a wholehearted search for the infinitely textured truth, rather than surrendering to those professional incentives that demand we produce an unreal brand of advocacy festooned with pretentious footnotes. Some-

222. *See Miller*, 96 F.3d at 1477.

223. 116 S. Ct. 2264 (1996) (holding that the males-only admission rule of Virginia Military Institute was violative of equal protection).

224. *See* Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 14 WOMEN'S RTS. L. REP. 335 (1992) (discussing Ruth Bader Ginsburg's contributions to feminist jurisprudence).

225. Campos, *supra* note 105, at 1094-95.

times, as Gertrude Stein reminded us, to question our questions may be the beginning of wisdom."[226]

What shall we do; what do you propose; what's the solution, the plan of attack? These are questions that dominate the discourse; indeed, it is extraordinarily uncomfortable, if not impossible, to write an article without addressing them. Schlag has accused normative prescription of reducing "world views, attitudes, demonstrations, provocations, and thought itself, to norms,"[227] of assuming that the author and reader are somehow outside the issue being discussed, neutral observers, not organic, effect-producing participants in the inquiry.[228] Normativity has no sense of quantum mechanics.

And yet even Schlag, so critical of normativity in the legal academy when it surfaces as part (or the *raison d'etre*) of theory, cannot restrain himself from validating normativity on an individual level in the judiciary. In discussing constitutional interpretation, he writes:

> The question of what interpretation to follow in constitutional law is answered in a series of ungrounded and non-rational moments of moral or political or aesthetic commitment. The moments are framed within often well-elaborated jurisprudential frameworks. The frameworks are themselves selected in ungrounded, non-rational moments of commitment. . . . [T]here is never any answer to a question of constitutional interpretation *other than to do the right thing*.[229]

Prescribing that a judge "do the right thing" is as normative as it gets—but on a micro level. It is a postmodernist vision of judging—the judge should obey his own moral, political or aesthetic compass rather than an "objective, neutral rule of law." But the *should* betrays the inescapably normative nature of the vision; only the scope of the prescription differs.

We have seen that critical white studies does not shrink from normative recommendations, nor does critical race theory.[230] Even critical legal studies, in propagating its indeterminacy thesis, at least implicitly recommends that we all relinquish the idea that the "neutral rule of law" is anything more than a thinly disguised discourse of power. Perhaps the best we can do is to embrace a

---

226. *Id.* at 1095.

227. Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 178 (1990).

228. *See id.* at 177.

229. Schlag, *Authorizing Interpretation*, *supra* note 96, at 1090 (emphasis added).

230. *See supra* notes 127-129 and accompanying text.

postmodernist norm that validates a full recounting of the textured and variegated experiences of individuals. The goal would be to amputate as little of others' reality as possible in constructing our own.

Martha Minow has compiled a list of unstated assumptions that hinder us from attaining this happy condition; most of these are snapshots of our prior discussion:

> First, we often assume that "differences" are intrinsic, rather than viewing them as expressions of comparisons between people. We are all different from one another in innumerable ways. Each of these differences is an implicit comparison we draw. And the comparisons themselves depend upon and reconfirm socially constructed meanings about what traits should matter for purposes of comparison.
>
> Second, typically we adopt an unstated point of reference when assessing others. From the point of reference of this norm, we determine who is different and who is normal. . . . The unstated point of comparison is not neutral, but particular, and not inevitable, but only seemingly so when left unstated . . . .
>
> Third, we treat the perspective of the person doing the seeing or judging as objective, rather than as subjective. Although a person's perspective does not collapse into his or her demographic characteristics, no one is free from perspective, and no one can see fully from another's point of view.
>
> Fourth, we assume that the perspectives of those being judged are either irrelevant or are already taken into account through the perspective of the judge. That is, we regard a person's self-conception or world view as unimportant to our treatment of that person.
>
> Finally, there is an assumption that the existing social and economic arrangements are natural and neutral. We presume that individuals are free to form their own preferences and act upon them. In this view, any departure from the status quo risks non-neutrality and interference with free choice.[231]

To relinquish these assumptions is to embrace a reality that is infinitely more complex and nuanced than could ever be dreamt of in a rationalist philosophy.[232] But one person's nuanced complexity is another person's Cartesian Anxiety—"the position that *either* there is objective truth *or* anything goes."[233] Fear of the "wild profusion of existing things"[234] dies hard.

---

231. Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 32-33 (1987).

232. *See* WILLIAM SHAKESPEARE, HAMLET act 1, sc.5.

233. Schlag, *Missing Pieces*, *supra* note 8, at 1205 n.51; *see* RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 16-20 (1983).

234. FOUCAULT, *supra* note 17, at xv; *see supra* Part II.B.

The point is that we should (whoops, another normative recommendation) embrace the tension that exists between those who declare that normativity strangles theoretical discourse and the reality that normative judgments are an intrinsic part of how our species functions. We need not construct an either/or dichotomy; for instance, we can assert that normativity itself may be inescapable, but that some versions may be less noxious than others. Or that it may be more useful in some contexts than in others. Indeed, when faced with some atrocities, it may be immoral to refrain from making normative prescriptions.

In making any of these assertions, we are once again privileging ego-centered reason (in adjudicating which forms or contexts are more appropriate), but to do otherwise is to engage in the fiction that one can get through a day merely describing phenomena. If that were the case, we would spend the day standing in front of the closet describing its contents rather than, as we do each morning, making a normative judgment about what we should wear to a given occasion and moving on. It is good exercise to try to do without normativity; it opens one up to diverse descriptions of reality and discourages premature analytical streamlining.[235] But complete abstention seems impossible.

B. Postmodernist Judging: Embracing Complexity

So I shall indulge in some forbidden normative prescriptions. Some of these may seem farfetched, but my point is to suggest new paradigms of judging. What would it mean to collapse the subject/object distinction as a judge? What would such an opinion look like? Can we imagine it? It is all well and good for academics to debate about such a project, but in the courtroom, where concrete decisions affect real people, can this project be lived out? Is it possible for a judge to release a postmodernist opinion,[236] or any opinion that does not conform to the rationalist prototype?

---

235. That is, slicing and dicing phenomena to fit into one's hypothesis.

236. Levinson contends that Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952), is one such opinion. *See* Sanford Levinson, *The Rhetoric of the Judicial Opinion*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 187, 202 (Peter Brooks & Paul Gerwitz eds., 1996) [hereinafter LAW'S STORIES]. Jackson's concurrence begins:

> While an interval of detached reflection may temper teachings of [ ] experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction . . . . A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems . . . as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern

The problem is this: we are aware that dissonance exists between what judges say and what they do. They may make decisions on modernist or postmodernist bases, but their opinions are replete with prerationalist or rationalist parlance (such as "it is well settled that . . ." or "we are compelled to decide that . . .").[237] As Schlag says:

> [I]n 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 . . . eighteenth century conceptions—conceptions of responsibility, of agency, of harm, of language and meaning itself . . . 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.[238]

Although the legal academy has been wrestling with such questions, the judiciary itself does not appear to be concerned. Indeed, it is becoming evident that most judges, whether for lack of time or interest, are not listening to legal academics, that the "judge who conscientiously reads relevant academic literature is an aberration."[239] Such a state of affairs entrenches the hegemony of rationalism in judicial opinions.

A number of suggestions have been made that would enable judges to move towards honoring multiple perspectives and escaping the tyranny of categorization and transparency. Opportunities to do so are not lacking, as demonstrated by the advent of *Taxman* and *Miller* before the Supreme Court this Term.[240] Following Flagg's lead, we can ask that judges "work to make explicit the unacknowledged whiteness of facially neutral criteria of decision and . . . adopt strategies that counteract the influence of unrecognized white norms."[241] This project can be adapted to target

---

> materials, must be divined from conditions almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest question in the most narrow way.

Youngstown Sheet & Tube, 343 U.S. at 634-35 (Jackson, J., concurring). This account seems more modernist than postmodernist; it lists the inadequacies of the sources for a "neutral" rule of law but nowhere displaces the individual judge as the locus of ego-centered adjudication.

237. *See* Thomas Morawetz, *Law's Essence: Lawyers as Tellers of Tales*, 29 CONN. L. REV. 899, 916 (1997) (reviewing LAW'S STORIES, *supra* note 236).

238. Schlag, *Missing Pieces*, *supra* note 8, at 1248.

239. Pierre Schlag, *Writing for Judges*, 63 U. COLO. L. REV. 419, 421 (1992).

240. *See supra* notes 151-220 and accompanying text.

241. Flagg, *"Was Blind, But Now I See,"* *supra* note 9, at 957.

transparent rules of law that offend gender neutrality (and to validate the experience of members in other protected categories as well).

In essence, a postmodernist judge should make it difficult for the rule of law to ignore the real lives of the disempowered.[242] Judge Wald, in her concurrence in *Miller*,[243] did so by highlighting the dissonance between the twenty-year-old precedent invoked by the majority and the ideals of gender equality driving current jurisprudence. Although she encased her decision in classic rationalist form, it is hard to envision a judicial opinion that would not place its author securely in the role of individual adjudicator, the ultimate arbiter of reality. Such a role is the indispensable predicate upon which the authority of the judiciary rests. How unsettling it would be to encounter an opinion such as that drafted by Jeremy Paul, who was invited to pose as a judge and write a "critical legal studies" opinion for a law review article. After listing a counterrule for every rule invoked, Paul writes:

> I have no story to persuade the affected parties that they should listen to me because I am merely following the law. I acknowledge that being a judge often requires me to make up the law as I go along and that there is nothing I can do about this . . . . I take no refuge in any of the more familiar attempts to justify my vote in the face of my inability to defend it by reference to universal principles. . . . I vote then to reverse the convictions. You may still ask why, and I answer that, alas, there is no more for me to say . . . . You may disagree and offer your own reasons in support of a different outcome. Fate has it, however, that I am the judge.[244]

And even this account, like Justice Jackson's *Youngstown* concurrence,[245] does not challenge the institutional role of the judge as the final, individual arbiter of the dispute. I find myself unable to envision what an opinion that so dethroned the judge would look like. "This is my opinion. Now, the text is liberated, so feel free to read it any way you like." Maybe my imagination has been irrevocably degraded by the rationalist hegemony in legal discourse, but this barrier seems impenetrable. (Is it?)

One strategy to expand the cognitive vocabulary of the judiciary would be to transform it into a truly diverse body. I am talking about obtaining adequate representation of individuals from

---

242. *See* Grillo, *supra* note 5, at 28.

243. *See supra* notes 215-220 and accompanying text.

244. Jeremy Paul, *The Case of the Speluncean Explorers: Contemporary Proceedings*, 61 GEO. WASH. L. REV. 1754, 1806-07 (1993).

245. *See* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

all protected categories (race, gender, physically challenged, religion, age, and so on), *and* I am also talking about a paradigm shift in the notion of what makes a good judge. Today's judicial appointees must be unsullied in any way with real life, or they can expect a rough time with Congress. We want our judges pure, fast-tracked through private schools, ivy league colleges and law schools.[246]

While many judges of this ilk are unquestionably well suited to the task, I wonder about those we are excluding. People who have made mistakes, who have overcome personal difficulties, who have learned powerful lessons that might allow them to empathize more with the parties before them are *per se* excluded by our demand for immaculate *curriculum vitae*. I am not suggesting any new, less rigorous, bright line rules for selecting judges; I am suggesting that breadth of experience is a valuable attribute, and may counteract—in fact may be attainable *only as a result of*—lessons learned earlier in one's life. Diversity of experience is what should be sought. If current conduct (say, within the last eight to ten years) is beyond reproach, perhaps anything occurring before that should be subject to a balancing test rather than a (*de facto*) bright line rule of exclusion.

Some say transformation of the judiciary is impeded by a prerationalist worship of *stare decisis* for its own sake, privileging the past. This so burdens the law's evolution that, as Schlag has noted, the language and concepts of judicial opinions sometimes lag entire centuries behind the times.[247] This has led some theorists to suggest that "judges should do and should make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable *for its own sake*."[248] While such judges might find the past useful as a guide or as fuel for rhetoric, they should not regard continuity with the past as an obligation that trumps all other concerns.[249]

Instead, postmodernist judges should engage in reflection,

246. The Republicans' recent blockade of federal judicial appointments has rested on rhetoric decrying judicial activism, and has provoked criticism even from Chief Justice William H. Rehnquist. *See Clinton to Nominate 10 Judges Next Week; Reno Urges Congress to Act*, WASH. POST, Jan. 23, 1998, at A25. Such rhetoric may mask desires that federal judges conform to a particular political party's agenda—desires that, if realized, would defeat the project of creating a diverse judiciary.

247. *See supra* note 238 and accompanying text.

248. Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 413 (1990) (quoting Dworkin's description of pragmatism with favor) (emphasis added).

249. *See id.* at 413-14.

"imagining what life would be like were one to decide one way rather than another, and [should] engag[e] in discussions with people whose opinions one values."[250] In order to insure that the full complexity of the contexts before them are considered, judges should engage in balancing tests that utilize multiple variables rather than apply bright-line rules that may dispose of a case by imposing inflexible categories or by reifying transparent baseline assumptions.[251] Staying alert for institutional bias,[252] a judge pursuing a postmodernist project needs a "willingness to expose [herself] to unfamiliar and unsettling life-forms and experiences"[253] in order to sympathize with the parties before her, or—in a macro context—to sympathize with the populations that will be affected by her decision. Only through exposure to views of the world that are foreign to her can she come to the realization that, for a lifetime, perhaps she has been seeing only in shades of blue.[254]

C. *Quantum Judging: Transcending the Subject/Object Distinction*

Can we go further? The subject/object distinction is still in play. The judge is still individually and firmly in charge. She may sympathize, but sympathy implicates her separateness from the parties before her, her detached, objective position. Can we get her to empathize rather than sympathize? How far into the realities of the parties (or affected population) may she journey?

We are doing a "possible world" thing here once again, just for fun.[255] Assuming the judge cannot do a Vulcan mind meld,[256]

---

250. John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 111 (1995).

251. This is not to say that Cartesian tyranny and transparencies cannot interfere with postmodernist adjudication when balancing tests are used. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1777 (1976).

252. For example, challenging the disparity in the Sentencing Guidelines for those found guilty of possession of crack (primarily people of color) and possession of cocaine (primarily whites). *See generally* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1139-40 (1997) ("The sentencing guidelines' discrepant treatment of crack and powder cocaine had a predictably disproportionate racial impact.").

253. FRED R. DALLMAYR, TWILIGHT OF SUBJECTIVITY: CONTRIBUTIONS TO A POST-INDIVIDUALIST THEORY OF POLITICS 289 (1981).

254. *See supra* note 25 and accompanying text.

255. *See supra* note 188 and accompanying text.

256. A useful and much coveted tool of Mr. Spock in Star Trek. For non-Trekkies: Spock would place his hand on the other person's forehead, close his

cannot engage in astral projection,[257] what would it mean for her to transcend the subject/object distinction, to feel where the parties are rather than just sympathize with them? Such a judge might say to herself, "I cannot cloak myself in a neutral rule of law. I am an integral part of the reality of the parties before me and of the people my decision will affect. I will be changing their reality no matter what I decide, or even if I choose not to decide (e.g., deny certiorari, abstain, etc.)." In a quantum sense, our realities are one reality, inextricably intertwined. This is quantum judging, seeing oneself as part of Nature rather than at the helm, knowing that one's mere presence has always already inexorably altered the reality that one shares with pertinent populations.

According to Schlag, one then seeks to "do the right thing."[258] Alluding to his taxonomy, he writes that "[o]nce the end of the progression is reached, the last cognitive orientation, postmodernism, sends you back to all the others."[259] But "[g]iven 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."[260] But let us try.

Instead of sending us back to previous stages, are we not somewhere new? New, at least, to Westerners. Zen Buddhism, for example, teaches that the individual has two selves: the lesser self (the ego, limited to the individual, burdened with the consciousness of separateness), and the greater self (encompassing the entire universe, including all beings and all creation).[261] The lower self must be transcended so that one can awaken to one's unity with all beings and with nature.[262] This sounds suspiciously like transcending the subject/object dichotomy.[263] Zen Buddhists train

---

eyes, and use his special Vulcan powers so that their minds would meld.

257. Defined, by a skeptic, as "[t]he separation of a person's consciousness from his or her body, allowing the person to travel short or vast distances without taking the body along." Robert T. Carroll, Ph.D., *The Skeptic's Dictionary* (visited Jan. 31, 1998) <http://wheel.ucdavis.edu/%7Ebtcarrol/skeptic/astralpr.html>.

258. Schlag, *Authorizing Interpretation*, *supra* note 96, at 1090.

259. Schlag, *Missing Pieces*, *supra* note 8, at 1249 n.201.

260. *Id.* at 1250 n.201.

261. *See* ROBERT FRAGER & JAMES FADIMAN, PERSONALITY AND PERSONAL GROWTH 466-67 (2d ed. 1984).

262. *See id.* at 467.

263. Indeed, "the world view inherent in Hinduism, Buddhism, and Taoism . . . sees through the 'rigid self . . . and replaces the sense of isolation with a sense of connectedness. It is no longer 'I' against 'you' or 'it.' It is 'we' in a play of relation and interaction.'" Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1957 (1997) (quoting ROBERT A.F. THURMAN, TIBET: ITS BUDDHISM AND ITS ART 24 (1991) and reviewing THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)).

to transcend ego orientation but do not seek to eliminate the lesser self. Zen Buddhism embraces both the real and the ideal, recognizing the tension between the two, yet viewing training *as* enlightenment rather than envisioning enlightenment as an unattainable goal.[264]

Others have explored the relevance of Buddhist thought to legal theory.[265] Like them, I am not an advocate for Buddhism, but I find its treatment of the subject/object distinction intriguing. Postmodernism does, in fact, send us back to all the other cognitive frameworks, as Schlag claims, because in order to comprehend this quantum, quasi-Buddhist notion of judging, we must engage in some prerationalism—unquestioning faith in the existence of the jurisprudential equivalent of lesser and greater selves, and in the possibility of crudely applying the principles of quantum mechanics to judging. We have, indeed, come full circle.

But is this quantum/quasi-Buddhist judge a gunman writ large?[266] If she abandons the rule of law entirely in favor of transcendence, what happens to consistency in decision making? When confronted with the constructed opposition of consistency versus empathy, the answer, as always, is to understand that the two values are in tension but should both be honored—that they should exist in a relationship of *differance*.[267] As a judge decides

---

264. *See* FRAGER & FADIMAN, *supra* note 261, at 466-69.

265. *See, e.g.*, REBECCA REDWOOD FRENCH, THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET (1995) (examining Tibetan "legal cosmology"); powell, *supra* note 5, at 1505-08 (discussing Buddhist perspective on issues of identity).

266. *See* H.L.A. HART, *supra* note 108, at 7. Others have asserted a relationship between quantum mechanics and Buddhism, to wit:

> All that exists by itself is an unbroken wholeness that presents itself to us as webs (more patterns) of relations. Individual entities are idealizations, which are correlations made by us . . . . [T]he physical world, according to quantum mechanics is ". . . not a structure built out of independently existing unanalyzable entities, but rather a web of relationships between elements whose meanings arise wholly from their relationships to the whole." The new physics sounds very much like old eastern mysticism.

Trimble, *supra* note 263, at 1956-57 (quoting GARY ZUKAV, THE DANCING WU LI MASTERS: AN OVERVIEW OF THE NEW PHYSICS 72 (Bantam ed. 1988) and HENRY STAPP, S-MATRIX INTERPRETATION OF QUANTUM THEORY (Lawrence Berkely Laboratory preprint 1970, revised version *reprinted in* 3 PHYSICAL REVIEW D 1303 (1971))) (alteration in original). Not surprisingly, this relationship has not been enthusiastically embraced by the scientific community. *See* ROBERT P. CREASE & CHARLES C. MANN, THE SECOND CREATION: MAKERS OF THE REVOLUTION IN TWENTIETH-CENTURY PHYSICS 67 (1986).

267. *See* JACQUES DERRIDA, SPEECH AND PHENOMENA 129-60 (1973); *Deconstructive Practice*, *supra* note 27, at 751-52 (citing JACQUES DERRIDA, MARGINS OF PHILOSOPHY 3 (1982)). Buddhism addresses this tension by instructing that the rule of law is "a product of troubled times and should be tolerated rather than admired," and that rules should be obeyed until one is "enlightened enough to do the

the case before her and feels compelled, due to empathy, to compromise consistency and amend the rule of law, she should be sure to give specific reasons why she is doing so. The very requirement of giving reasons will constrain untethered inconsistency to some extent; preservation of judicial capital will check extreme decision making, as it does today.[268] Like the realists, I may be slipping into the "judge as noble savage" fiction.[269] But if we have given the judge the singular power to adjudicate, and thus transcend the subject/object distinction, must we not also place the burden of this vision on her shoulders?

IV. Conclusion

Clearly, we could not get much more abstract. Perhaps, like Buddhists, we can strive for the ideal of transcendence while working in the material world. Perhaps, like quantum theorists, we can embrace the notion that we exist in Nature, one of many, that we cannot absent ourselves from our presence in the world. Perhaps we can believe in the contingent nature of our language, our assignment of meaning, our cognitive frameworks, our theories of self. We can work to expose ourselves to as many perspectives as possible so that our experience of the world, as judges, as academics, as readers of texts will not be tragically parochial, unicolored, filled with transparent assumptions. We can resist Cartesian Anxiety and suspect categories wherever we find them. We can track our normative impulses and try to prevent them from strangling inquiry. (If this paragraph gets much more normative, we'd have to wonder.)

Turning, therefore, to the purely descriptive, I recount the

---

right thing instinctively." Andrew Huxley, *Golden Yoke, Silken Texts*, 106 YALE L.J. 1885, 1910 (1997) (reviewing FRENCH, *supra* note 265, and R.P. PEERENBOOM, LAW AND MORALITY IN ANCIENT CHINA: THE SILK MANUSCRIPTS OF HUANG-LAO (1993)). Application of the rule of law is far from rigid, since rules "merely give a first approximation to the truth," and "true wisdom comes from recognizing when among the infinite variety of situations the rule should be abandoned." *Id.* at 1910-11 (quoting Steven Collins, *The Lion's Roar on the Wheel-Turning King: A Response to Andrew Huxley's* The Buddha and the Social Contract, 24 J. INDIAN PHIL. 421, 431 (1996)). I do not assert that these ideas are realizable in Western culture. Using balancing tests that validate both consistency and empathy may be the best we can do.

268. *See* Kennedy, *supra* note 108, at 527-30.

269. *See supra* note 66 and accompanying text. Note that I am not making the prerationalist or rationalist assertion that invocations of plain language, legislative intent, or precedent should constrain extreme decision making; rather, the reasons I request resonate with those requested by the realists—those responsive to the sociolegal context surrounding the case. *See supra* note 109 and accompanying text.

last two lines of a recently discovered poem,[270] which I believe sum up not only the quandary facing the reader of texts, but also that facing the child learning her mother tongue, the theorist taming the profusion of events, the judge seeking reasons for her decision:

> But take care. Traps are here. Words mean.
> I mean. You, reading, want[271]

The stalking done, we face the lacuna in its wild and primitive state, and discover this:

It is in the wanting that interpretation, life, and the law begin.

270. The document was either a poem or a will. *See* Grey, *supra* note 69, at 216.
271. *Id.*