POSTMODERN ECONOMIC ANALYSIS OF LAW: EXTENDING THE PRAGMATIC VISIONS OF RICHARD A. POSNER

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Economic analysis of law (EAL)[1] was born in the early 1960s with the publication of two seminal articles: one by Ronald Coase, the other by Guido Calabresi.[2] But it is with the 1973 publication of Judge Richard Posner's *Economic Analysis of Law*[3] that EAL began to have a dramatic

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[1] Hereinafter the term "EAL" will refer to the Chicago school approach to interdisciplinary work in law & economics. The use of an ampersand will indicate interdisciplinary work generally. For a concise, noncritical statement of the various approaches to law & economics see NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW (1997) (comparing and contrasting the Chicago school, the New Haven school, public choice theory, modern civic republicanism, institutional law & economics, neoinstitutional law & economics, and Marxian legal theory).

[2] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 19 (3rd ed. 1986) (dating the birth of EAL with Coase and Calabresi). *See generally* Ronald Coase, *The Problems of Social Cost*, 3 J.L. & ECON. 1 (1960) (exploring the economic logic of nuisance law); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) (assessing the economic logic of tort law). For further discussion of the early history of EAL at Chicago see MERCURO & MEDEMA, *supra* note 1, at 51-56. *See also* Ronald Coase, *Law and Economics at Chicago*, 36 J.L. & ECON. 239 (1993).

[3] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1st ed. 1973). Posner's textbook entered a fifth edition in 1998.

impact on legal education and scholarship.[4] Posner's central thesis was that judicial opinions do and/or should display an economic logic.[5]

Before the ink had dried on Posner's jurisprudential thesis, critics emerged.[6] Some labeled EAL as the unwelcome ghost of Langdellian formalism, long since buried, and properly so.[7] Others linked EAL to a discredited version of philosophical utilitarianism.[8] Still others denounced EAL as insensitive if not overtly hostile to natural rights.[9] In fact, a whole school of thought, Critical Legal Studies (CLS), arose, at least in part, as an attack on the perceived short-comings of the method and values of EAL.[10]

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[4] For an early assessment of the impact of EAL on legal education see Symposium, *The Place of Economics in Legal Education*, 33 J. LEGAL ED. 183 (1983). The impact of EAL on legal scholarship is assessed in William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385 (1993).

[5] *See* POSNER, *supra* note 2, at 21 (distinguishing normative from positive claims for EAL); *see also* Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 288-91 (1979) (providing a clear and concise statement of the efficiency hypothesis).

[6] The first edition of Posner's ECONOMIC ANALYSIS OF LAW was widely reviewed. *See, e.g.*, James M. Buchanan, *Good Economics—Bad Law*, 60 VA. L. REV. 483 (1974); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's "Economic Analysis of Law,"* 87 HARV. L. REV. 1655 (1974).

[7] *See, e.g.*, GRANT GILMORE, THE AGES OF AMERICAN LAW 107-08 (1977); Morton J. Horwitz, *Law and Economics: Science Or Politics?*, 8 HOFSTRA L. REV. 905 (1980); Leff, *supra* note 6; Gary Minda, *The Lawyer-Economist at Chicago: Richard Posner and the Economic Analysis of Law*, 39 OHIO ST. L.J. 439 (1978).

[8] *See, e.g.*, Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization* 8 HOFSTRA L. REV. 509 (1980) (discussing EAL in light of two forms of utilitarianism and arguing that neither provides an adequate grounding in justice); Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 74-75 (1979). For examples of the dismissive treatment of utilitarianism by modern philosophers see Bernard Williams, *A Critique of Utilitarianism*, *in* UTILITARIANISM FOR AND AGAINST 77 (J.J.C. Smart & Bernard Williams eds., 1967).

[9] *See, e.g.*, Buchanan, *supra* note 6 (arguing that EAL is inconsistent with libertarian values); Richard A. Epstein, *The Next Generation of Legal Scholarship?*, 30 STAN. L. REV. 635 (1978) (same).

[10] More precisely, CLS provides a critique of liberal ideology generally. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 1-14 (1987). On the relationship between EAL and CLS, Professor Kelman writes: "[S]ince a fair number of CLS writers attacked Law and Economics writing, either in detail or in passing, CLS is often viewed by outsiders unfamiliar with the range of CLS as predominantly an anti-Law and Economics group." *Id.* at 114 (footnotes omitted). He explains that EAL "is the best worked-out, most consummated liberal ideology of the sort that CLS has tried both to understand and critique." *Id.* He then provides citations to sixteen representative CLS critiques of EAL. *Id.* at 114 nn.1-2.

Throughout the 1970s and 1980s Posner patiently defended the jurisprudential foundations of EAL.[11] Responding to the label of conceptual formalism, he reminded his critics that EAL was empirically grounded in the world of fact.[12] He carefully explained how his notion of "wealth maximization," though related to utilitarianism, avoided many of the latter's excesses and pitfalls.[13] In answering the criticism that a myopic pursuit of efficiency would smother civil liberties, Posner repeatedly pointed out that efficiency was only one norm that could be trumped by other norms.[14] Notwithstanding these defenses, hostility to EAL persisted.[15]

With the publication of two recent books, *The Problems of Jurisprudence*[16] and *Overcoming Law*,[17] Judge Posner's defense of EAL has taken a new turn. If none of the foundations of EAL are immune from attack, that is okay, because at its heart EAL has no foundations.[18]

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[11] *See, e.g.,* Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981); Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975) (addressing and dismissing a series of eight criticisms directed at EAL generally: method too imprecise; based on discredited utilitarianism; people are not rational maximizers; tautological; conservative political bias; undervalues liberty; ignores distributive justice; not based on justice).

[12] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13-14 (2d ed. 1977) ("[E]conomic theory has been shown to have surprising predictive power with respect to the behavior of criminals, prosecutors, common law judges, and other legal system participants.").

[13] *See* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) (listing the "monstrosities" associated with utilitarian ethics and explaining how wealth maximization tames each); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication* 8 HOFSTRA L. REV. 487 (1980) (supplementing utilitarian justifications for efficiency with arguments based on consent).

[14] *See, e.g.,* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 363 (1981) ("The fact that much of racial discrimination may be efficient does not mean that it is or should be lawful."); Richard A. Posner, *Wealth Maximization Revisited, 2* NOTRE DAME J.L. ETHICS & PUB. POL'Y 85, 100-01 (1985) (observing that even if slavery, torture, and/or lynching were efficient, community norms would justifiably prohibit such practices).

[15] *See, e.g.,* Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 599-604 (1980) (arguing that Posner's wealth maximization principle does not save EAL from standard anti-utilitarian attacks); Robin Paul Malloy, *Invisible Hand Or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 36 KAN. L. REV. 209 (1988) (reasserting the classical liberal critique that EAL is hostile to natural rights); Jules L. Coleman, *The Normative Basis of Economic Analysis: a Critical Review of Richard Posner's "The Economics of Justice"*, 34 STAN. L. REV. 1105 (1982) (book review) (rejecting the notion that EAL can be grounded on consent).

[16] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990) [hereinafter POSNER, JURISPRUDENCE].

[17] RICHARD A. POSNER, OVERCOMING LAW (1995) [hereinafter POSNER, OVERCOMING].

[18] *See infra* notes 109-24 and accompanying text.

EAL, properly conceived, is part of the postmodern world.[19] Embracing a branch of postmodernism, legal pragmatism, Posner's new defense eschews foundationalism in favor of a jurisprudence steeped in empiricism, sensitive to context, and devoutly skeptical.[20]

Exploring this "postmodern" vision of EAL provides the subject matter of this article. At first blush, the juxtaposition of postmodernism and EAL seems odd, if not paradoxical. EAL has generally been conceived as a distinctively *modern* attempt to render law objective.[21] Economic efficiency, wealth maximization, and similar economic concepts have been offered as a means of "solving" legal dilemmas with reference to well defined external criteria. By contrast, *postmodernism*, including CLS, legal pragmatism, radical race theory and the like, stands for the proposition that such overarching principles cannot exist.[22] Life is too fluid, values change, and social consensus is context dependent. Postmoderns are skeptical of any unifying theory of justice, economic or otherwise. In this light, the questions become what would a postmodern EAL look like? And is such a conception useful?

This article proceeds in three parts. Part I distinguishes "modern" from "postmodern" jurisprudence and identifies the origins of the modern/postmodern divide in the early-twentieth century realist revolt against legal formalism. This revolt gave birth to postmodern legal thought *and* provided the intellectual antecedents of a modern EAL; hence, it provides insights into the potential wedding of the two. Part I concludes with a survey of contemporary legal thought, distinguishing two branches of postmodernism, the radical and the pragmatic. Part II examines Posner's recent embrace of legal pragmatism and considers the implications of pragmatism for the practice of EAL. Part III offers an extension. A notion of a "postmodern economics" is developed and spliced to the postmodern legal visions offered by Posner. Postmodern thought has implications for economic as well as legal thought, and a truly postmodern EAL would apply postmodern insights to both disciplines. Part III applies these insights to three contract law doctrines. These applications help clarify what is meant by postmodern EAL, and illustrate the power of a fully postmodern EAL to illuminate law.

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[19] For a working definition of postmodernism see *infra* notes 23-32 and accompanying text.

[20] *See infra* notes 125-40 and accompanying text.

[21] *See infra* text following note 60.

[22] *See infra* notes 61-73 and accompanying text.

DISTINGUISHING MODERN FROM POSTMODERN JURISPRUDENCE

The twin terms "modern" and "postmodern" are used in a variety of disciplines.[23] In law, the notion of "modernism" maps to a single defining characteristic.[24] Modern jurisprudence views law as an *objective* endeavor. It insists that there are demonstrably correct and incorrect answers to legal questions judged with reference to objective criteria.[25]

Legal modernism, properly conceived, has historical roots in the Age of Enlightenment.[26] Enlightenment philosophers believed that there was a natural order to the Cosmos, and man aided solely by reason could discover that order and bring man-made law into harmony with it. Adherence to this objective criterion gave law its legitimacy. Through time, alternative objective criteria have suggested themselves. For example, the seventeenth-century chronicler, William Blackstone, sought to ground law in the natural order revealed in the customs of the Anglo-Saxon people.[27] Jeremy Bentham offered utilitarian social policy as a grounding.[28] And Christopher Columbus Langdell sought to ground law with reference to formalistic reasoning techniques.[29] Each of these attempts was distinctively modern. Each asserted that law was an objective endeavor, complete with correct and incorrect answers to legal questions.

The notion of "postmodernism," by contrast, suggests something that comes after or stands opposed to the modern. Chronologically, postmodernism originates in the legal realist movement of the 1920s;[30] hence, it *comes after* or postdates the modern attempts at grounding offered by Blackstone, Bentham, and Langdell. Substantively, postmodernism *stands opposed* to the notion of objectivity in law,

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[23] *See generally* LYNNE Z. CHENEY, TELLING THE TRUTH 16 (1995) (defining "postmodern" as the term is used in sociology); RICHARD RULAND & MALCOLM BRADBURY, FROM PURITANISM TO POSTMODERNISM: A HISTORY OF AMERICAN LITERATURE ix-xxi, 386-93 (1991) (distinguishing modern from postmodern literature); David Luban, *Legal Modernism*, 84 MICH. L. REV. 1686 (1986) (comparing the uses of the term modernism in law with that used in the fine arts).

[24] The notions of "modern" and "postmodern" developed herein largely conform to those offered in GARY MINDA, POSTMODERN LEGAL MOVEMENTS 2-6 (1995) (distinguishing "modern" from "postmodern" jurisprudence).

[25] *See id.* at 5 (equating "legal modernism" with the proposition that a "lone author could discover *right answers* for even the most difficult and controversial problems in the law").

[26] *See* Dennis Patterson, *Postmodernism / Feminism / Law*, 77 CORNELL L. REV. 254, 258 (1992).

[27] *See generally* Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569, 572-89 (1976) (describing the jurisprudential views and methods of William Blackstone).

[28] *Id.* at 589-97 (describing the jurisprudence views and methods of Jeremy Bentham).

[29] *See infra* notes 33-39 and accompanying text.

[30] *See infra* notes 61-73 and accompanying text.

insisting instead that law has no foundations, no external referents.[31] This rejection of legal objectivity is postmodernism's defining characteristic.[32] In a postmodern world, adjudication takes on an existential quality, with judges grappling to answer concrete legal queries with no sure guide, or alternatively, imposing their own social and cultural biases in rendering judgement. Neither natural law, consensus social policy, legal reasoning techniques, nor any other external referent can answer legal inquiries. Judges are on their own.

The Birth of Postmodern Legal Thought

Postmodern legal thought originated in the realist "revolt" against legal formalism.[33] The formalist movement was perhaps the quintessential *modern* attempt to render law objective. The central figure was Christopher Columbus Langdell, dean of the Harvard Law School in the late-nineteenth century.[34] Langdell sought to free law both from the metaphysical inquiry required of natural law reasoning and from the value judgments incumbent in implementing utilitarian social policy.[35] His goal was to construct a grand theory of law that would provide objective answers to any legal inquiry.

Langdell's formalism had three central characteristics.[36] First, Langdell insisted that law was *autonomous*. Answers to legal questions could and should be answered with sole reference to legal material: precedents, statutes, legislative records, constitutional texts, and the

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[31] For useful introductions to postmodern thought see generally Stephen Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship*, 88 NW. U. L. REV. 1046 (1994); Peter C. Schanck, *Understanding Postmodern Thought*, 65 S. CAL. L. REV. 2505 (1992).

[32] There is some irony in attaching a single "defining characteristic" to an allusive term such as "postmodern." The felt need for precise definitions is a distinctively "modern" affect of the mind. *See generally* Pierre Schlag, *Normative and No Where to Go*, 43 STAN. L. REV. 167, 174 (1990) (observing that contemporary intellectuals, including postmoderns, have no language other than modern).

[33] The story of combat between the Langdellian formalists and the legal realists has been told many times. *See, e.g.*, NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 9-64 (1995) (characterizing the movement away from formalist thought as slow and hesitant rather than as a "revolt"); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1977); MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 11-18 (1949) (finding a parallel revolt against claims of objective certainty in several disciplines including but not limited to law).

[34] *See generally* Thomas C. Grey, *Langdell's Orthodoxy*, 45 PITT. L. REV. 1 (1983).

[35] *See* POSNER, JURISPRUDENCE, *supra* note 16, at 14 (suggesting that Langdell stepped "into the breach" created by the simultaneous disenchantment with the eighteenth century natural law reasoning of Blackstone and the utilitarian moral philosophy of Bentham).

[36] *See* Grey, *supra* note 34, at 7-10.

like.[37] Second, legal reasoning was *conceptual*, rather than empirical.[38] Judicial precedents provided observations, or data, from which legal principles could be inferred. Once these principles were identified, correct answers to legal questions could be deduced.[39] And third, Langdell conceived of the law as totally *objective*. There were correct and incorrect answers to legal questions which commanded unanimous support. To Langdell, these correct answers could be deduced through rational inquiry into an autonomous body of legal materials.

The realist movement of the 1920s and 1930s challenged this Langdellian vision of the law. Though the realists ultimately divided on the issue of legal *objectivity*,[40] they were united in condemning the first two prongs of formalism: *autonomy* and *conceptualism*. Conceptual reasoning from a supposedly autonomous body of law did not, and could not, render legal decisions objective.

Felix S. Cohen's 1935 article, *Transcendental Nonsense and the Functional Approach*,[41] provides an apt example of the realist critique of Langdellian orthodoxy. Cohen advanced his argument around a series of concrete legal disputes. In the first, a court was asked to determine whether a corporation chartered in Pennsylvania could be sued in New York.[42] For Cohen, like all realists, the dispute should turn on empirical factors such as balancing the difficulties faced by injured plaintiffs forced to sue in a foreign court against the hardships to corporations having to defend in multiple jurisdictions.[43] This call for empirical grounding was a central theme of legal realism.[44] The orthodox court made no empirical inquiries. Instead, viewing the law as an autonomous body of precedents, it asked itself: "Where is this corporation? Was this corporation *really* . . . in two places at once?"[45]

Cohen likened such conceptual inquiries to asking: "How many angels can stand on the point of a needle?"[46] Just as no one had ever seen an angel, no one had ever seen a corporation. To suggest that a corporation was a "thing" that could move from state to state was mere

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[37] *Id.*

[38] One hallmark that unites all formalists is that legal reasoning remains independent of the world of fact. Logical reasoning focussed exclusively on legal texts was all that was needed. *See* POSNER, JURISPRUDENCE, *supra* note 16, at 10.

[39] *See id.* at 15. *See also* Grey, *supra* note 34, at 7-8.

[40] *See infra* note 56 and accompanying text.

[41] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

[42] *Id.* at 809-12 (analyzing Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917)).

[43] *Id.* at 810.

[44] *See* Duxbury, *supra* note 33, at 93-97.

[45] Cohen, *supra* note 41, at 810.

[46] *Id.*

"transcendental nonsense."[47] Limiting a search for justice to a conceptual search of a supposedly autonomous body of precedent was doomed to failure. Perhaps precedents establishing standing were initially grounded in ethical principles and empirical policies. But it was those principles and policies, not the linguistic formulation of legal concepts, that must guide law.[48]

Cohen's analysis also demonstrated a persistent circularity in conceptual reasoning. In his second case, a court questioned whether an unincorporated labor union had standing to be sued.[49] The orthodox court answered that the union could be sued because it was a person.[50] Of course, the reverse was true as well, a union was a person because it could be sued. The reasoning offered was circular. The unanalyzed premise, the union was a person, contained the conclusion, it could be sued.[51] Again, the court offered no inquiry into the empirical consequences of allowing and not allowing suit.[52]

For Cohen, these illustrations were no mere anomalies; they were endemic to the orthodox approach to law. He wrote:

> It would be tedious to prolong our survey; in every field of law we should find the same habit of ignoring practical questions of value or of positive fact and taking refuge in "legal problems" which can always be answered by manipulating legal concepts. . . . Corporate entity, property rights, fair value, and due process are such concepts. So too are title, contract, conspiracy, malice, [and] proximate cause. . . . Legal

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[47] Cohen wrote: "[S]ome of us have seen corporate funds, corporate transactions (just as some of us have seen angelic deeds, countenances, etc.). But this does not give us the right to hypostatize, to "thingify," the corporation, and to assume that it travels about form State to State as mortal men." *Id.* at 811. He continued: "Yet it is exactly in these terms of *transcendental nonsense* that the Court of Appeals approached the question of whether the Susquehanna Coal Company could be sued in the New York State." *Id.* (emphasis added).

[48] Cohen wrote: "When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devises for formulating decisions reached on other grounds, the author...is apt to forget...the social ideals by which the law is to be judged." *Id.* at 812.

[49] *Id.* at 813-14 (analyzing United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344 (1922)).

[50] *Id.* at 813.

[51] *Id.*

[52] *Id.* Cohen's final two examples revealed a circularity in the court's concept of private property. In the first, a court protected a trade name because that name had economic value. *Id.* at 814-17. Of course, the trade name, like all forms of property, had economic value only because the court is willing to protect it. The court's reasoning was circular. In the second example, a series of courts set utility rates based on the "fair value" of a given utility's assets. *Id.* at 817-18. The value of those assets, in turn, depended on the anticipated profit flows which were a function of the utility rate. The courts, again, were apparently immune to the circularity of their reasoning.

> arguments couched in these terms are necessarily circular, since these terms are themselves creations of law.[53]

To avoided circularity, one must ground a legal concept such as "property" in the empirical world of fact and ethical policy. For example, one could label something as "property" when such a label generated good results. This was not circular. But any attempt to render a fundamental legal concept meaningful solely in terms of other internally defined concepts was utter "nonsense."[54]

Cohen provided a bibliographic note identifying his contemporaries who sympathized with and advanced similar critiques. The list included such luminaries as Oliver Wendell Holmes Jr., Roscoe Pound, and Jerome Frank.[55] Yet these same scholars differed on what comes next. Did the above critique imply that law was radically indeterminate, or could claims to legal objectivity be preserved? Was law objective or was it not? In answering these queries, Cohen's allies divided into two camps: the progressives realists who responded "yes," law is an objective inquiry; and the radical realists who offered a qualified "no," law is radically indeterminate.[56] It is from the progressives that we get modern EAL; the radicals begot contemporary postmodernism.

Progressive Realism and the Antecedents of Modern EAL

The less radically inclined, or progressive, realists refused to believe that law was mere politics. Instead, they turned to the empirical social sciences as a means of salvaging law's claim to objectivity.[57] Although a judge could not find objectivity through a conceptual appeal to an

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[53] *Id.* at 820 (emphasis deleted).

[54] Other Realists offered similar observations. For example, in a series of important and insightful articles Robert Lee Hale demonstrated the circularity of freedom of contract doctrine both in the common law and in the constitutional realm of substantive due process. *See generally* Robert Lee Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Robert Lee Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 33 POL. SCI. Q. 470 (1923); Robert Lee Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935). Only empirical inquiry, painfully absent in orthodox thought, could break the circularity of formalist reasoning.

[55] The complete list read: "Holmes, Gray, Pound, Brooks Adams, M. R. Cohen, T. R. Powell, Cook, Oliphant, Moore, Radin, Yntema, Frank, and other leaders." Cohen, *supra* note 41, at 821 n.82.

[56] *See* MINDA, *supra* note 24, at 28-33 (identifying two "camps" of realism: radical and progressive); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152, 1219-26 (1985) (distinguishing two "strands" of legal realism: one rejecting the notion of objectivity, the other embracing it).

[57] *See* DUXBURY, *supra* note 33, at 96-97.

autonomous body of legal materials, he or she could find objectivity outside of the law with due recourse to empirical science.[58] Hence, the progressives remained staunchly in the modern camp.[59] Their faith in social sciences, in turn, rested on two central premises or assumptions. First, it assumed that a social consensus could be reached regarding the instrumental ends that law should seek.[60] And second, it assumed that the social sciences themselves were objectively grounded, rather than mere social constructs subject to the same debilitating critiques to which formal legal thought had been exposed.

Traditional EAL has a direct and obvious lineage to progressive realism. In fact, EAL is best conceived as a subset, or particular case, of progressivism. Like progressivism, EAL assumes that a social consensus regarding judicial ends is possible. In EAL the central norm is economic efficiency, or alternatively, wealth maximization. To the true believer, efficiency is portrayed as a norm to which no one could object. After all, who could be against efficiency? Like progressivism, EAL also has an almost blind faith in the techniques and central concepts of the social sciences. In particular, true believers in EAL assume that the fundamental concepts used by economists, such as free markets, free competition, utility curves, opportunity costs, and the like, are grounded to an external reality. Such concepts are not just abstract and theoretical concepts defined only with reference to one another; but rather, such concepts are empirically verifiable as corresponding to real things. Armed with these two assumptions (social consensus on ends and an unbiased analytical framework), a practitioner of EAL is free to envision a brave new world, fully objective and empirically verifiable.

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[58] *See, e.g.,* Karl Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1253 ("[O]nly policy considerations can justify *interpreting* the relevant body of precedent in one way or another."). *See generally* John Henry Schegel, *American Legal Realism and Empirical Social Science,* 28 BUFFALO L. REV. 459 (1979) (discussing the role of empirical science within the works of leading progressive realists).

[59] The later works of the leading spokesperson from the realist camp, Karl Llewellyn, typifies this progressive strand. *See* MINDA, *supra* note 24, at 29-31 (suggesting that Llewellyn and other progressive realists drew upon the works of Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo in fashioning an instrumental, or policy oriented view of law); PELLER, *supra* note 56, at 1241-42 (identifying Llewellyn with the progressive strand). *See generally* TWINING, *supra* note 33, at 375-87 (discussing the relationship between progressive legal realism and the sociological jurisprudence of Roscoe Pound).

[60] Although legal realism is normally associated with a form of legal positivism, there is no reason that a realists could not have natural law sympathies. This is particularly true if the instrumental ends of the realist had a natural law grounding. *See generally* POSNER, JURISPRUDENCE, *supra* note 16, at 10-11.

Radical Realism and the Emergence of Postmodern Thought

The radical realists, and contemporary postmoderns, were/are far less sanguine.[61] Again, Cohen, firmly in the radical camp, provides an apt illustration.[62] In the first half of his article, Cohen debunked Langdellian orthodoxy; in the second, he addressed what comes next. Here he offered his "functional approach" to jurisprudence. Cohen's functionalism asked two questions: (1) How *do* judges decide cases?; and (2) How *should* judges decide cases?[63]

Citing Holmes, Cohen embraced the notion that law was merely a prediction of what courts will do.[64] Displaying the radical temperament, Cohen answered that to predict judicial outcomes, the analyst must look *not* to the social sciences and consensus social policy; but rather, first and foremost to the identity of the judge, including his or her prejudices, ethical values, and psychological makeup. He wrote:

> We know, in a general way, that dominant economic forces play a part in judicial decision, that judges usually reflect the attitudes of their own income class on social questions, that their views on law are molded to a certain extent by their past legal experience as counsel for special interests, and that the impact of counsel's skill and eloquence is a cumulative force which slowly hammers the law into forms desired by those who can best afford to hire legal skill and eloquence.[65]

Hence, as far as current practice is concerned, law was no more than raw power, rationalized and concealed.[66] This radical temperament, a temperament bent on exposing concealed power structures, remains a hallmark of contemporary postmodern thought.

But what of the second question? Was it possible to ground law to what it "ought" to be? It is here that we find in Cohen, the root of the modern/postmodern divide. He answered "no." Cohen argued that the

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[61] Gary Peller cautions that the two strands of realism are not necessarily associated with particular realists—in "most realist work both strands are evident." Peller, *supra* note 56, at 1226. Notwithstanding this caution, Peller relies exclusively on the works of Felix Cohen and Robert Lee Hale, and to a lesser extent, John Dawson and Walter Wheeler Cook, in discussing the critical strand. *Id.* at 1219-40. A similar list of prominent radicals is identified by Minda. *See* MINDA, *supra* note 24, at 29.

[62] *See* Cohen *supra* note 41.

[63] *Id.* at 824.

[64] *Id.* at 835.

[65] *Id.* at 845.

[66] Jerome Frank, like Cohen, argued that to predict a given decision (*ala* Holmes) one needs to inquire into the social and psychological biases of the individual judge. *See generally* JEROME FRANK, LAW AND THE MODERN MIND (1930) (incorporating the tools of psychoanalysis in understanding law).

"ought" in law could only be found with reference to the *empirical consequences* of legal decisions. But judges had no information regarding those consequences.[67] Appellate courts did not even know if their opinions were being followed at the trial level.[68] More importantly, they had no reliable way of predicting the empirical consequences of their decisions.[69] Perhaps empirical social science could help, but again, Cohen, always the radical, was skeptical. He revealed little faith in social science techniques.

The problem with social science was that it proceeded on the assumption that one could separate fact from value. Yet facts and values were intertwined. Cohen wrote: "The prospect of determining the consequences of a given rule of law appears to be an infinite task, and is indeed an infinite task unless we approach it with some discriminating criteria of what consequences are *important*."[70] He observed that "[c]ontemporary realists have . . . denied absolutely that absolute standards of importance can exist."[71] Absent a coherent theory of value the quest for objectivity was doomed. Cohen continued: "[T]he collection of social facts without a selective criterion of human values produces a horrible wilderness of useless statistics."[72]

Hence, it is in the realist revolt against legal formalism that we find both the historical antecedents of EAL (in the works of the progressive realists) and the birth of postmodern legal thought (in the works of the radical realists). Our analysis of Cohen also clarifies the fundamental tensions that must be addressed in any attempt to construct a postmodern approach to EAL.[73] Advocates of EAL, like their progressive predecessors, tend to display a moderate temper, arguing that law is more than a mere exercise in concealed force. They also have faith in social science to render legal policy decisions objective. Postmoderns, by contrast, tend to see power structures at every turn, and to view social science skeptically. From the postmodern perspective, social science itself may be a social construct designed to support power elites. In sum, any "postmodern" approach to EAL must not only tread lightly on the notion of jurisprudential certitude, but also include a strong dose of skepticism regarding social science certitude as well.

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[67] Cohen, *supra* note 41, at 846.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 848.
[71] *Id.*
[72] *Id.* at 849.
[73] The analysis also reveals certain "red herrings" that should not be chased. Both EAL and postmodernism denounce formalistic appeals to legal autonomy and to conceptualism.

Surveying the Contemporary Jurisprudential Landscape

Notwithstanding the cogent insights offered by Cohen and other radical realists, most twentieth-century scholars remained, and still remain, in the modern camp.[74] With the onset of World War II the radical branch of realism lost favor,[75] largely displaced in the 1940s by the progressive movement.[76] In the 1950s, the "legal process school" sought to combine the best of Langdellian formalism with the social science insights of the progressives, and thereby preserve law's claim to objectivity.[77] The 1960s witnessed the advance of rights theorists, a form of objectivity rooted in natural law.[78] In the 1970s, Posner and adherents of EAL, assuming that the economic discipline was objectively grounded, sought to salvage law's objectivity by splicing law to economics.[79] Ronald Dworkin's chain novel metaphor through which he searches for the "best answers" to legal questions similarly places him in the modern camp.[80] There has even been a revival of interest in tempered versions of Langdellian formalism.[81]

Standing opposed to this panoply of attempts to render law objective are the contemporary postmoderns. Who then are the contemporary

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[74] Judge Posner observes that "most lawyers, judges, and law professors still believe that demonstrably correct rather than merely plausible or reasonable answers to most legal questions, even very difficult and contentious ones, can be found — and it is imperative that they be found." POSNER, OVERCOMING, *supra* note 17, at 20.

[75] "[T]he radical perspective lost out to progressive legal realism as World War II broke out and America embraced more traditional and apolitical ideologies." MINDA, *supra* note 24, at 29. The radical strand of Realism was identified, perhaps unjustly, with legal nihilism. Peller, *supra* note 56, at 1222. Nihilism suggests ethical relativism, perhaps intolerable in world at war against Nazi Germany and Imperial Japan.

[76] Progressive realism remains a potent force in contemporary thought. Gary Minda observes: "Most law teachers today regard themselves as legal realists. This is because most legal academics associate legal realism with the work of progressive realism." MINDA, *supra* note 24, at 32.

[77] *See id.* at 33-43 (discussing the central features of legal process jurisprudence); Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REFORM 4 (1988) (same).

[78] Examples of natural law methodology include attempts to resurrect libertarianism, *see, e.g.*, RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1988) (arguing that property rights are fundamental), and John Rawls' social contract methodology, *see generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

[79] *See* Robin Paul Malloy, *Toward a New Discourse of Law & Economics*, 42 SYRACUSE L. REV. 27, 41 (1991) (noting that EAL substitutes "a new discourse of economic analysis for the discredited discourse of law as an autonomous discipline"); Pierre Schlag, *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1653-57 (1990).

[80] *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986).

[81] *See, e.g.*, Michael Corrado, *The Place of Formalism in Legal Theory*, 70 N.C. L. REV. 1545 (1992); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

postmoderns? In short, postmodern legal analysts are those who champion the more radical version of the realist attack on the notion of legal objectivity. They are the intellectual heirs of Felix S. Cohen.

Arriving as a legal movement in the late 1970s and 1980s,[82] postmodernism is now a significant force on the jurisprudential landscape. Contemporary postmodernism can be usefully divided into two branches: radical postmodernism and legal pragmatism. Each branch embraces the notion of radical indeterminacy in the law. The differences in the two lie in the temperaments generated by this embrace. Each branch is addressed in turn.[83]

Radical Postmodernism

The notion of postmodern jurisprudence is generally, and quite rightly, associated with the most radical branches of the academy: CLS,[84] radical feminism,[85] critical race theory,[86] and the deconstructionist arm of the law and literature movement.[87] Each asserts that law lacks foundations, is radically indeterminate. Each also displays a radical temper, seeking to uncover hidden and oppressive power structures. Mark Kelman provides a useful paradigm by describing the analytical techniques employed by many scholars in the CLS camp.[88]

Professor Kelman outlines a four step procedure.[89] First, the "critic" demonstrates that the law is replete with a host of "fundamental contradictions."[90] For example, in one context the law will hold that "rules" are to be preferred to "standards"; yet, in other contexts one

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[82] Professor Minda observes that the radical "strand of legal realism was largely forgotten as modern scholars during the 1950s developed new conceptual theories of law. It wasn't until the late 1970s that radical realist thought resurfaced." MINDA, *supra* note 24, at 31.

[83] Since our ultimate aim is to explore the implications of a *pragmatic* EAL, a detailed discussion of radical postmodernism is beyond the scope of analysis. The brief discussion of the radical branch that follows is designed to put the pragmatic branch in context.

[84] For a useful overview of CLS see generally Mark Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986).

[85] *See generally*, Linda J. Lacey, *Introducing Feminist Jurisprudence*, 25 TULSA L.J. 775 (1990).

[86] *See generally* Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

[87] For discussions of deconstructive methods generally see J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); and Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985). *See also* Kenneth L. Schneyer, *The Culture of Risk: Deconstructing Mutual Mistake*, 34 AM. BUS. L.J. 429 (1997) (employing deconstructive methods).

[88] MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 3-5 (1987).

[89] Kelman observes that this "standard four-part critical method has been used again and again, whether consciously of not." *Id.* at 3.

[90] *Id.* (using the term "critic" as shorthand for a critical legal studies scholar).

finds an equally potent set of precedents that holds that standards are to be preferred to rules.[91] Similarly, one can find precedents that hold that value can only be measured with reference to the subjective wills of the parties; yet, other precedents employ a more objective or external notion of value.[92] Assumptions of free will underlie some legal authorities, while contradictory notions of determinism guide others.[93] Critics argue that each of these pairs of contradictory impulses provide "rhetorical arguments that both resolve cases in opposite, incompatible ways and correspond to distinct visions of human nature."[94] Second, the critic demonstrates that an appeal to either pole of each contradiction is available in any case. In Kelman's words: "[T]he contradictions [are] utterly pervasive in legal controversy."[95] Third, the critic "show[s] that mainstream thought invariably treats one term in each set of contradictory impulses as *privileged*."[96] The privileged pole is assumed to control any given controversy, and an appeal to the competing pole is viewed as an exception requiring special justification.[97] Fourth, Critics note that the privileged poles "describe the program of remarkably right-wing, quasilibertarian order."[98]

In terms of the above, the "right-wing, quasilibertarian order" would assume that rules were preferred to standards, that objective notions of value were nonsensical, and that human nature was guided by principles of free will. Adherents of CLS have repeatedly argued that traditional EAL is the quintessential version of such an agenda. They point out that orthodox economists implicitly, if not explicitly, accept the privileged poles as axiomatic, and hence, suppress discussion of alternative agendas.[99]

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[91] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710-11 (1976) (illustrating this same point).

[92] KELMAN, *supra* note 88, at 3.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 4.

[97] *Id.*

[98] *Id.*

[99] Consider, for example, the CLS view of unconscionability. A judge has the authority to refuse to enforce an otherwise clear and unambiguous contract if that judge feels that the contract was "unconscionable" at the time it was made. A judge who prefers rules, subjective notions of value, and free will is likely to find little or no need for unconscionability review. The parties' agreement establishes the fairness of the exchange and any judicial interference will introduce unjustified uncertainty into the contractual process. On the other hand, if the judge views the agreement itself as a predetermined outcome given the disparities in bargaining power, then unconscionability review emerges as a legitimate means of assuring a modicum of objective equality in the division of the exchange surplus. The CLS point, of course, is not to take sides on the unconscionability issue, but to demonstrate that either approach to unconscionability is supported in the

The CLS critique outlined above resurrects that offered by Cohen and the radical realists. It also overlaps with the deconstructive techniques of the radical branch of the law and literature movement. Other postmoderns, such as radical feminists and critical race theorists, would sympathize with an agenda designed to uncover suppressed preferences as well. What links all these postmodern perspectives is a fundamental belief that law is not an objective endeavor; rather, law is infused with politics and inseparable from political and social biases.

Legal Pragmatism

The last decade has witnessed a dramatic surge of interest[100] in an alternative postmodern jurisprudence, legal pragmatism.[101] Like its radical cousins, legal pragmatism represents a hostility to abstract theory, to legal formalism, and to any form of legal foundationalism, be it grounded in claims of natural law or utilitarian social policy.[102] This characteristic places legal pragmatism squarely in the postmodern camp.[103] But legal pragmatism differs from its radical cousins in refusing to embrace a radical temperament.[104] Instead, a pragmatic

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law. The approach that is adopted in a given case depends, not on the legal authority cited, but on the political and social ideology of the given judge. *See* Kennedy, *supra* note 91.

[100] *See* Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 409-411 (1995) (recounting the recent growth of interest in legal pragmatism). Professor Smith writes: "[I]t seems only a slight exaggeration to suggest that a movement [legal pragmatism] which only five years ago included almost no one today appears to embrace virtually everyone." *Id.* at 411. On the revival of interest in pragmatic philosophy, see generally RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989); CORNELL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM (1989).

[101] *See generally* Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S.CAL. L. REV. 1569 (1990) (offering several distinct yet essentially similar conceptions of legal pragmatism).

[102] Legal pragmatism has close historical ties to the philosophical pragmatism of Charles Sanders Peirce, William James, and John Dewey. As such, legal pragmatism, like radical postmodernism, has roots in the realist revolt against formalism. *See generally* WHITE, *supra* note 33, at 11-21 (discussing the relationship between legal realism and philosophical pragmatism).

[103] *See* MINDA, *supra* note 24, at 230 (labelling legal pragmatism a "close cousin" of its more radical postmodernism relatives). *See generally* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S.CAL. L. REV. 1699 (1990) (exploring the parallels between legal pragmatism and feminist jurisprudence).

[104] *See* MINDA, *supra* note 24, at 229-30. Pragmatic postmodernism differs from radical postmodernism in that the former "is less concerned with exposing the contradictions of modern conceptual and normative thought than revealing instrumental, empirical, and epidemiological solutions for the problem at hand." *Id.* at 229.

jurisprudence is forward-looking and instrumental.[105] From a pragmatic perspective law can be justified as an attempt to generate reasonable results.[106]

The instrumental aspects of pragmatism direct one's attentions to the ends sought in the law. Pragmatists are skeptical of any grandiose and uncritical claim to truth. Hence, they would be reluctant to blindly proclaim any single norm as central to the legal endeavor. At best, a norm such as wealth maximization, egalitarianism, or the feministic ethic of care could channel an inquiry, but it must never close the discussion. The pragmatist would insist upon considering the norm in the context of the particular dispute and upon opening the dialogue to a large array of competing concerns.

Pragmatists are similarly skeptical of abstract theories and formal modes of conceptual discourse. Like all postmodern thinkers, they recognize that human thought is a product of experience. This is true not only of law but of social science as well. Neither a judge nor an economist approaches a given problem with a blank slate; but rather, he or she approaches any given problem with pre-conceived notions based on his or her personal and social experiences. These experiences shape the proposed theoretical descriptions of the problem, and shape the solutions proposed. Any practitioner who fails to recognize this truism engages in a form of *hubris* that threatens to supplant reliable scientific inquiry with the social biases of that practitioner.

The same skepticism would embody any proposed means designed to achieve the given ends. Pragmatic thought is dynamic, recognizing that means must adapt to changing contexts. Perhaps a legal precedent or an economic prescription originated as an appropriate response to a social problem, but through time that problem has transformed. Applying the same old solutions to the newly transformed problems would be an error, an error that may be all too common. Empirical social science is to be embraced, but skeptically. The pragmatist insists that the social science prescription be tested in the crucible of time with sole reference to empirically verifiable evidence.

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[105] *See* WEST, *supra* note 100, at 5 (characterizing pragmatism as "a future oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action").

[106] *See generally* Richard Rorty, CONSEQUENCES OF PRAGMATISM (1983) (identifying a distinctively pragmatic approach to policy questions); Michael L. Siegel, *Pragmatism Applied*, 22 HOFSTRA L. REV. 567 (1994) (discussing pragmatic attitudes and methods). *But see* Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1464-68 (1990) (book review) (arguing that neither Posner's nor Rorty's legal pragmatism, properly conceived, can offer any guidance on policy questions).

Perhaps legal pragmatism can best be summarized as an exhortation to skepticism.[107] It exhorts both the judge and the social scientist to be skeptical of their own systems of formal thought and the preconceptions that these systems conceal. It exhorts both the judge and the social scientist to focus on the likely empirical consequences of his or her decision, and to engage in a dialogue that will place the problem in new contexts. It reminds the practitioner that his or her values are not universally held, and exhorts him or her to consider the values of others. But it also offers hope. In a pragmatic world there is no need for grand theory; no need for foundations; no need for harmonious abstract reasoning; no need for right and wrong answers. But there is no need for despair either. A legal-decision maker can simultaneously embrace the radical indeterminism of postmodern thought and remain optimistic.

JUDGE POSNER'S PRAGMATIC VISION OF EAL

Richard Posner has recently emerged as possibly *the* leading scholarly proponent of legal pragmatism. His interest in pragmatism seems to roughly correspond to his appointment to the federal bench.[108] Facing the task of deciding concrete legal disputes, Judge Posner has openly and candidly shared his decision-making process in two remarkable books, *The Problems of Jurisprudence* and *Overcoming Law*. This section begins with an exploration and an embrace of Judge Posner's pragmatic jurisprudence. It then considers the implications of Posner's brand of pragmatism for the practice of EAL.

Embracing Posner's Pragmatic Jurisprudence

Posner structures *The Problems of Jurisprudence* as an attempt to find an objective grounding to law.[109] He begins his analysis by distinguishing three notions of objectivity: "ontological," "scientific," and "conversational."[110]

For law to be objective in the ontological sense, legal decisions must be grounded on, or derived from, a set of moral norms external to the law itself. Hence, natural law could conceivably provide a source of

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[107] *See* Smith, *supra* note 100, at 444-49.

[108] Judge Posner writes: "Since becoming a judge in 1981, I have, naturally, become fascinated by the issue of objectivity in adjudication." POSNER, JURISPRUDENCE, *supra* note 16, at vii.

[109] In his introduction to *Problems of Jurisprudence*, Posner writes: "[T]he questions that give structure to the book are whether, in what sense, and to what extent the law is a source of objective and determinate, rather than merely personal or political, answers to contentious questions." *Id.* at 31.

[110] *Id.* at 7.

ontological legal objectivity.[111] Posner's second notion of objectivity is less demanding, or "weaker," requiring only that legal decisions be replicable. He writes: "A decision is objective in this scientific [replicable] sense if different investigators, not sharing the same ideological or other preconceptions . . . would be bound to agree with it."[112] One could deny law an ontological grounding, yet maintain (like Langdell) that law could be made objective with reference to legal reasoning techniques applied to an autonomous body of legal precedents.[113] Posner's third and weakest notion of objectivity is "conversational." Here, objective means "merely reasonable—that is, not willful, not personal, not (narrowly) political, not utterly indeterminate though not determinate in the ontological or scientific sense, but amenable to and accompanied by persuasive though not necessarily convincing explanation."[114] In difficult cases, ones in which neither ontological nor scientific objectivity is possible, the best one can hope for is this weakest notion of objectivity.

Posner's notion of "conversational objectivity" gives us our first clue to his pragmatic leanings. He admits that most interesting legal questions involve situations in which there are no demonstrably correct or incorrect answers, at least not in the ontological or scientific senses.[115] Hence, he has one foot in the postmodern camp. Yet Posner refuses to believe that judging involves nothing more than the mere

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[111] In Parts II and IV of *The Problems of Jurisprudence,* Posner considers and ultimately rejects law's claim to ontological objectivity. His search for ontological norms takes him from corrective justice and wealth maximization, to the feminine ethic of care, radical communitarianism, egalitarianism, natural rights, and civic republicanism. He concludes that none of these approaches can salvage law's claim to objectivity. He writes: "The first two of these approaches, at least, have significant roles to play in channeling legal inquiry, but neither one (nor both together) can close the open area of judicial decision making all the way. The other approaches are vulnerable to disabling criticisms." *Id.* at 31.

[112] *Id.*

[113] In Parts I and III of the *Problems of Jurisprudence,* Posner addresses and dismisses grand schemes to render law objective through legal reasoning techniques applicable to the common law or through principles of statutory or constitutional interpretation. He writes: "[The] term "interpretation" is so elastic . . . that it often is a fig leaf covering judicial discretion rather than a guide to decision making. . . . We might do better to discard the term and concentrate instead on comparing the practical consequences of proposed applications of a legal text." *Id.* at 30-31.

[114] *Id.* at 7.

[115] In contrast to the CLS view, *see supra* notes 89-98 and accompanying text, Posner argues that there are "easy cases" in the law. He writes: "Not all legal questions are difficult, of course; and one of the points that I shall be emphasizing is that there really are easy legal questions—many of them." POSNER, JURISPRUDENCE, *supra* note 16, at 30-31. He notes that adherence to principles of legal interpretation render "most" legal texts "straightforward," and "readily decipherable." *Id.* at 30.

assertion of personal prejudices from the bench. Instead, he argues that judging involves the exercise of "practical reasoning"[116] aimed at achieving "reasonable" answers to contentious legal questions.[117] Law can provide a conversational objectivity, a sort of middle ground between the modern and postmodern worlds.[118] He is a skeptic, but not a cynic.

Posner's notion of conversational objectivity derives from his pragmatic conception of truth. He writes: "Pragmatists believe that truth is what free inquiry—unforced, undistorted, and uninterrupted—would eventually discover about the objects of inquiry."[119] The notion is that truth is unknowable, but it exists, and that the human condition involves a constant search for that truth. In this light, judging involves a sort of conversation with one's self, with the past, and with other judges. This conversation, or rhetoric, exhorts the pragmatic judge to be alert to his or her own preconceptions, to the preconceptions embodied in precedent and other received learning, and to be open to the views of others.

Posner's pragmatic philosophy sets the ground rules for this conversation.[120] That is, it determines which types of arguments are to be given the greatest rhetorical weight. First, Posner insists that arguments be *instrumental*, that is, forward looking and active.[121] The judge is to decide a legal dispute with reference to the likely consequences that his or her decision will have on future social conduct. Adherence to received precedent may have pragmatic value by providing a baseline of stability, but beyond that baseline, there is no

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[116] Posner describes practical reasoning as "a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, experience, intuition and induction." *Id.* at 73 (emphasis deleted).

[117] Posner sees reasonableness as the "judicial lodestar." He writes: "I can think of no better approach than for judges to conceive of their task, in every case, as that of striving to reach the most reasonable result." *Id.* at 130. He continues: "Bland as this recommendation may seem, it differs from both the orthodox legal view of the judge's task and the various natural law approaches by substituting the humble, fact-bound, policy-soaked, instrumental concept of "reasonableness" for both legal and moral rightness." *Id.* (footnote omitted).

[118] Judge Posner writes: "[O]nly if we are content to define "objective" in ... the "conversational" sense ... will we be able to locate, with respect to difficult legal questions, a middle ground between the [modern] natural lawyer's view and the [postmodern] legal nihilist's view." *Id.* at 7.

[119] *Id.* at 114 (citing the seminal statements of Charles Sanders Peirce).

[120] Posner's summarizes his version of pragmatism in the opening pages of *Overcoming Law*. *Supra* note 17, at 4-15.

[121] *Id.* at 4-5.

overriding policy reason to follow precedent.[122] Second, Posner's pragmatism is *antidogmatic*.[123] Pragmatism keeps the debate open regarding both the ends sought by law and the means designed to achieve those ends. It is skeptical of any grand theory, economic or otherwise, that claims a monopoly on truth. And finally, the most persuasive arguments will appeal to *empirical* evidence.[124] The pragmatic judge looks for evidence that a given policy decision will in fact lead to the intended ends. Semantic or metaphysical questions that have no factual consequences, have no meaning, and hence carry no rhetorical weight. If a precedent or policy is not working as intended, that precedent or policy must change.

Implications for EAL

Clearly the social sciences, including economics, must play an active role in any pragmatic approach to law. Without social science, the above propositions—that law be instrumental, antidogmatic, and empirically grounded—become essentially banal and vacuous. There is simply no way to disagree with the central proposition that one should be open to reasonable discourse. But if reasonableness means viewing the law as an incentive structure designed to channel human behavior, then economists could have much to say.

In his recent works, Posner admits that his newfound pragmatic jurisprudence "modifies some of [his] previously published views" on EAL.[125] But he has not abandoned EAL. Instead, assessing EAL on the basis of his three criteria— instrumentalism, antidogmaticism, and empiricalism—he believes that contemporary EAL fairs pretty well.

Turning first to instrumentalism, Posner writes: "[EAL] epitomizes the operation in law of the ethic of scientific inquiry, pragmatically understood. . . . [E]conomics is the instrumental science par excellence."[126] Posner points out that practitioners of EAL "construct and test models of human behavior for the purpose of predicting and (where appropriate) controlling that behavior."[127] Hence, EAL is by definition an instrumental activity. It views law as an incentive structure designed to achieve given ends.

Posner's second pragmatic criterion, antidogmatism, directs one's attention to the "ends" sought by EAL practitioners. Critics of EAL argue that the pursuit of "wealth maximization" too often blinds EAL

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[122] *See* POSNER, JURISPRUDENCE, *supra* note 16, at 259-60 (discussing legal stability as one among many practical concerns).

[123] *See* POSNER, OVERCOMING, *supra* note 17, at 5-7.

[124] *See id.* at 5-6.

[125] POSNER, JURISPRUDENCE, *supra* note 16, at 31.

[126] POSNER, OVERCOMING, *supra* note 17, at 15.

[127] *Id.* at 16.

adherents to alternative goals that might be sought.[128] To critics, wealth maximization is ideology not science, systematically exporting a libertarian slant to policy prescriptions.[129] Posner finds little merit in this attack, arguing that a sophisticated (pragmatic) EAL avoids dogmatism. The trick is to recognize that the usefulness of EAL depends on the context in which it is applied. He observes:

> The economic approach to law cannot be the whole content of legal pragmatism. The libertarian character of the approach makes it unsuitable to govern areas in which redistributive values command a political or moral consensus; and because the approach works well only when there is at least moderate agreement on ends, it cannot be used to answer the question whether, for example, abortion should be restricted.[130]

There are, however, areas where the sole pursuit of wealth maximization works well. He continues: "People who subscribe to different comprehensive doctrines may nevertheless be brought . . . to agree that something like our present system of tort law, plausibly conceived as wealth-maximizing in its basic orientation, is the appropriate system for regulating most accidents."[131] Hence, the usefulness of wealth maximization as a goal is context dependent, robust in tort law, but less useful when addressing distributional questions or questions involving fundamental rights. In tort law, Posner's pragmatic conversational objectivity generates a consensus; in the law of abortion it does not.

Even if one accepts that EAL is not dogmatic on ends, one can still question whether the economic models employed to predict or describe human behavior are dogmatic. Orthodox economics proceeds on the basis of certain central assumptions that are not open to empirical validation. People are assumed to be rational, calculative, and self-

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[128] EAL assumes that there is an initial distribution of rights (including but not limited to property rights) in society, and seeks to maximize the enjoyment of those rights by facilitating voluntary transaction between rights holders and by mimicking such exchanges when transaction costs preclude such private ordering. When all such transactions are exhausted, society has an efficient allocation of rights, presumably the ultimate goal of the law. The problem, of course, is that if the initial distribution of rights is unjust, there is no reason to suspect that the "efficient" allocation will be any more palatable. Further, EAL has no way to assess the justice of the initial distribution, it is simply assumed. *See* POSNER, JURISPRUDENCE, *supra* note 16, at 375 n.23 (citing several critics that have raised this point).

[129] Posner contests this assertion, in part, by pointing out that many practitioners of EAL have liberal politics and EAL has been used to promote many liberal economic policies such as social security, consumer protection legislation, and even a modicum of wealth redistribution. *See id.* at 435 n.16.

[130] POSNER, OVERCOMING, *supra* note 17, at 404.

[131] *Id.*

interested. Given these assumptions, hypotheses are generated as to how people will react to differing incentive structures. If the hypotheses prove false, the underlying assumptions of rational, calculative, and self-interested behavior are not abandoned; but rather, the economist cites an alternative explanation: perhaps the individual's utility function was misspecified, or the model omitted significant factors, or perhaps people were operating under limited information.[132] But the critical point in terms of dogmatism is that the underlying economic assumptions are never challenged.

Some see this orthodox economic method as an ideologically generated perversion of the scientific method. Posner does not. He observes that "[a]bstracting from particulars is an essential part of science; so in a sense all science, not just economic science, is formalist."[133] He attacks legal formalism, but embraces economic formalism.[134] The key for Posner is to strike a balance between the need for formal theory and insistence on empirical validation.[135] There is nothing wrong with always assuming that people are self-interested, calculative, and rational, so long as the ultimate goal is to test your hypothesis with empirical fact.

Yet, it is on Posner's third and final pragmatic criterion, empiricism, that EAL seems to suffer most. Reviewing the contemporary state of EAL practice, he observes that relatively "few statistical tests have been performed on the positive economic theory of law and that instead analysts have be largely content to make a qualitative assessment of wealth maximizing properties of the legal rules, doctrines and decisions being studied."[136] The explanation lies in the "tedium, expense, and sometimes impossibility of obtaining the data that the model implies are relevant."[137] Without empirical validation, EAL is reduced to a mere "default rule, or presumption—the right place to start, although not necessarily to end, in analyzing law from a positive standpoint."[138]

In sum, Posner views EAL as a pragmatic science, albeit an "immature one."[139] EAL usefully casts legal decision-making in

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[132] *See* POSNER, JURISPRUDENCE, *supra* note 16, at 364-65. "[I]t is distressingly easy to explain away empirical findings that appear to conflict with the basic theoretical assumptions and propositions of economics." *Id.* at 364. *See* discussion *infra* notes 169-89 and accompanying text.

[133] POSNER, JURISPRUDENCE, *supra* note 16, at 61.

[134] *See* POSNER, OVERCOMING, *supra* note 17, at 19.

[135] *See* POSNER, JURISPRUDENCE, *supra* note 16, at 362 (arguing that economic formalism differs from Langdellian formalism because the former is empirically verifiable, while the latter is not).

[136] *Id.* at 371.

[137] *Id.* at 364.

[138] *Id.* at 374.

[139] *Id.* at 63.

instrumental terms. It offers certain central concepts, such as wealth maximization, as plausible instrumental ends in some contexts.[140] And it pushes analysts to seek empirical validation. Although judicial decision-making cannot be strongly objective, it can be objective in a conversational sense.

EXTENDING THE VISION

In a recent book entitled *Postmodern Legal Movements*, Professor Gary Minda argues that Posner's embrace of legal pragmatism reflects a general sea change in EAL scholarship.[141] Surveying twenty-five years of EAL thought, Minda contends that a "second generation" of EAL has emerged. In his view, first generation EAL was distinctively modern, seeking correct answers to legal questions with sole reference to "a limited number of economic concepts."[142] Second generation scholars, by contrast, "have embraced the idea that truth, knowledge, and legal understanding can no longer be explained from an objective economic perspective."[143] Although this might be a bit of an overstatement, there does appear to be something afoot. The last decade or two has witnessed a splintering of thought in EAL circles, or perhaps more accurately, a growth in alternative approaches to economic analysis.[144] In this section, I consider what a fully postmodern EAL would look like. The central argument is that a fully postmodern EAL would bring the same skepticism to *economics* that Posner's legal pragmatism has brought to *jurisprudence*. That is, a postmodern economics would be instrumental, antidogmatic, and empirical.

Incorporating a Postmodern Economics

Economics, wrote Alfred Marshall, the University of Cambridge teacher whose celebrated textbook dominated economic pedagogy for some forty years, "is a study of mankind in the ordinary business of life."[145] Such a broad conception admits a wide field; not much can be

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[140] "[A]s a universal social norm wealth maximization is indeed unsatisfactory, but it is attractive or at least defensible when confined to the common law arena." *Id.* at 373.

[141] *See* MINDA, *supra* note 24, at 83-105. *See generally* Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071 (1996) (calling Minda's first generation scholarship "mainstream" EAL).

[142] MINDA, *supra* note 24, at 83.

[143] *Id.* at 85. Professor Minda cites Judge Posner's 1977 edition of *Economic Analysis of Law* as an example of first generation thought. *Id.* at 84. He then cites Posner's recent work in jurisprudence as evidencing an apparent embrace of second generation thought. *Id.* at 84 n.7.

[144] *See generally* MERCURO & MEDEMA, *supra* note 1 (comparing and contrasting various contemporary approaches to law & economics).

[145] ALFRED MARSHALL, 1 PRINCIPLES OF ECONOMICS 1 (8th ed., London, Macmillan 1920) (1890).

excluded as irrelevant. For practical purposes, however, economics can be defined with reference to the questions most commonly asked of the discipline. Particularly central have been: (1) the relative distribution of wealth and income; (2) the causes of economic growth; (3) the determination of prices of goods and factors of production; and (4) the structure of economic institutions—political, legal, social, and organizational.[146] Although these four questions have been asked throughout the history of economic thought, at different times, one or another question has held central stage.[147] In addition, as new methods of inquiry emerge, scholarship regarding each of these issues evolves, generally complementing, but sometimes replacing earlier learning.

A Postmodern Approach to Distributional Questions

Consider first the issue of the distribution of wealth and income. Orthodox, or "first generation," EAL draws a sharp distinction between issues of efficiency and distributional equity, typically arguing that EAL has relatively little to say with regard to the latter.[148] Yet, this need not be the case. Historically, distributional questions dominated economic thought from Aristotle through the Age of Enlightenment.[149] In ancient Greece, economics, or *ekonomia*, served as the "handmaiden of ethics," with distributional issues predominant.[150] Slavery was the primary institution of the Greek economy,[151] and economic thinkers not immune to its ethical implications, went to great lengths to justify its existence.[152] The Romans offered the concept of "dominion" over private property which enfranchised the possessor to use or abuse his property as he saw fit.[153] But the Roman era also ushered in Christianity. Jesus challenged the Jerusalem establishment—the moneychangers and

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[146] *See* JOHN KENNETH GALBRAITH, ECONOMICS IN PERSPECTIVE 5-8 (1987) (offering a similar taxonomy).

[147] *See id.*

[148] *See, e.g.,* WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS 6 (2d ed. 1988); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7-10 (1983).

[149] *See* ALEXANDER GRAY, THE DEVELOPMENT OF ECONOMIC DOCTRINE 14-17 (1948). *See generally* ROBERT B. EKELUND, JR. & ROBERT F. HEBERT, A HISTORY OF ECONOMIC THEORY AND METHOD 11-29 (2d. ed. 1983) (discussing early economic thought).

[150] *See* Gray, *supra* note 149, at 14.

[151] *See* M.I. FINLEY, ECONOMY AND SOCIETY IN ANCIENT GREECE 97 (Brent D. Shaw & Richard P. Saller eds.) (1982).

[152] Aristotle wrote: "The lower sort are by their nature slaves, and it is better for them as for all inferiors that they should be under the rule of a master.... Indeed the use of slaves and of tame animals is not very different." ARISTOTLE, POLITICS 10 (quoted in GALBRAITH, *supra* note 146, at 11 n.5).

[153] *See* Galbraith, *supra* note 146, at 18-19. *See generally* EKELUND & HEBERT, *supra* note 149, at 18-20.

usurers of the temple—and in the process sanctified poverty and legitimized distributional concerns.[154] During the middle ages, economic thought was generated by the clergy, whose primary focus was distributional fairness.[155]

Distributional concerns also played a central role in the economic thought of the early-twentieth century.[156] The growth of big business in the late-nineteenth century had led to a dramatic polarization of wealth and power in America. The workplace was often unsafe and unregulated markets drove wages to subsistence levels.[157] Economists responded with "material welfare economics."[158] Drawing on the notion of "diminishing marginal utility," economists argued that the value of the last dollar to a pauper was greater than that enjoyed by the billionaire. Hence, forced transfers between individuals could make society as a whole better off.[159] Such distributional arguments were used to support minimum wage laws, health and safety regulations, a progressive income tax, and a host of "New Deal" legislation.[160]

The important point is that a postmodern approach to EAL would open the inquiry to all possible instrumental ends sought—including distributional ends. It would keep the dialogue open and avoid dogmatism. Many economists today argue that interpersonal utility comparisons are not appropriate.[161] Contending that value is wholly subjective, they would deny the assertion that a pauper would value his last dollar more than the billionaire. Others of a libertarian ilk might argue that any scheme to redistribute wealth violates one's natural rights to private property. But a pragmatic approach to ends does not require unanimity of opinion, only consensus among people with common sense and good faith. In this light, one might suspect that many policy makers would find the arguments favoring redistribution of wealth palatable.

A postmodern EAL could have much to say on redistribution. One plausible place to start might be with John Rawls' "maximize the minimum" principle.[162] Rawls generally favors redistribution, but

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[154] *See* Galbraith, *supra* note 146, at 20-21.

[155] *See generally* EKELUND & HEBERT, *supra* note 146, at 20-29.

[156] For an excellent and detailed discussion of economic thought in the early twentieth century, see Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993 (1990).

[157] *Id.* at 999.

[158] *Id.* at 1000.

[159] *Id.* at 1002. The social welfare school "dominated economics in England and in America from the turn of the century until around 1930." *Id.* at 1000.

[160] *Id.* at 1002.

[161] *Id.* at 1035.

[162] *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

cautions that an overzealous push toward egalitarianism might so erode incentives to work that even the poorest members of society would be harmed by the redistributive scheme. Ideally, the optimum level of redistribution is an empirical question: how much redistribution would make the least-well-off person most happy? But it is also a question of ideology. Recall that most work in EAL is theoretical, not empirical. Without empirical validation one way or the other, the EAL prescription emerges as a "default rule."[163] The pragmatic question is what should that default rule be. Should the burden of proof rest on those who seek a modicum of redistribution, or with those who insist that any redistribution will so erode work incentives that we will all invariably be worse off?

A Postmodern Approach to Economic Growth

Adam Smith is often cited as the father of economic thought. Smith's primary concern was with the source of economic growth in society.[164] He began his famous treatise, *The Wealth of Nations*, by observing the practice of making pins.[165] He observed that an unspecialized "cottage" manufacturer could produce maybe twenty pins each day; yet, if specialized, a coordinated group of ten could produce "upwards of forty-eight thousand pins in a day."[166] From this, Smith induced that specialization was the key factor distinguishing rich from poor societies.[167] Specialization, in turn, required exchange—one cannot eat pins—so the role of the political economist was to propose institutions that would facilitate exchange.[168]

Much of what Adam Smith said more than two centuries ago has stood the test of time. His argument that an embrace of economic freedom generates economic bounty provides a simple and extremely powerful, maybe even seductive, rhetorical appeal. And much of what Smith said was right—specialization is a key to the source of wealth of nations. Yet, one thing has been lost to many of his followers—his method of analysis.

Smith was a product of the Age of Enlightenment. He believed that God had ordained a perfect universe, and that man's task was to

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[163] *See supra* notes 136-38 and accompanying text.

[164] *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Canned ed. 1904) (1776).

[165] *See id.* at 5-6.

[166] *Id.*

[167] Joseph Schumpeter observes that for Smith specialization was "practically the *only* factor in economic progress." JOSEPH SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 187 (1954) (emphasis added).

[168] *See* SMITH, *supra* note 164, at 61.

discover that perfection and bring man-made institutions in line with it. To this end his analytical technique was *inductive.*[169] He began by inducing general propositions from particular observations. From the practice of making pins he induced specialization. These general propositions then generated hypotheses that were tentatively held and tested in alternative contexts. For example, arguing that specialization benefitted from free exchange, he contended that monopolistic practices were bad for economic growth. He proposed dismantling the guild system, and reducing tariffs. The propositions would then be judged with references to the effects generated.

What I am describing here is the scientific method.[170] A truly postmodern economics would fully embrace science. Models of human behavior would be tentatively held, contextually dependent, and subject to invalidation.[171] Commercial life in all its varied forms would provide the initial body of evidence. One could observe practices in one location that seem to work well. Perhaps Hawaii's approach to medical care, Illinois's approach to work subsidies, Maryland's approach to consumer warranties, or Pennsylvania's approach to school vouchers seem to be generating good results. The specifics of the public policy could be studied in context and general propositions hypothesized and adapted to other contexts. The new contexts would then serve as testing grounds in which the economic propositions could be re-evaluated and modified in a constant stream of experimentation.

A Postmodern Approach to Price Theory

Orthodox economics proceeds on the assumption that people are rational, calculative, and self interested.[172] It assumes that people have preferences and choices, and that they make decisions so as to maximize their utility. Based on these assumptions it predicts human behavior. This analytical technique started in the early-nineteenth century with

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[169] *See* Daniel M. Hausman, *Economic Methodology in a Nutshell*, J. ECON. PERSP., Spring 1989, at 115-16 (advocating an inductive method and linking induction with the early classical approach of Smith and John Stuart Mill).

[170] *See generally* KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (2d ed. 1968) (providing the seminal statement that science proceeds by framing falsifiable hypotheses, and then trying to falsify them).

[171] *See generally* Mark Blaug, *Paradigms Versus Research Programs in the History of Economics, in* THE PHILOSOPHY OF ECONOMICS 360 (Daniel M. Hausman ed., 1984) (advocating an inductive method and admonishing mainstream economists for failure to follow the scientific method of hypothesis falsification).

[172] *See* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 3-14 (1976) (defining economics with reference to rational choice—any question that involves choice between alternatives is an economic question).

David Ricardo.[173] Whereas Smith was inductive, forming tentatively held hypotheses from a broad base of observation, Ricardo and the neoclassical economists that followed him, are deductive, deriving predictions of human behavior from a few seemingly self-evident propositions.[174] In neoclassical economics, these propositions are held *a priori*; they are *assumed* to be true and are not subject to empirical validation.[175] This distinguishes neoclassical economics from all other branches of science.[176] All other sciences, both natural (physics, biology, etc.) and social (sociology, anthropology, etc.), proceed from assumptions tentatively induced from observation.[177] Neoclassical economics is alone with mathematics and certain strands of analytic philosophy in rendering its central assumptions inviolate.[178]

The neoclassical method has its virtues. Nineteenth-century scholars used the method to displace previous muddled thought on the determination of relative market prices and the costs of the factors of production.[179] The key lay in the development of marginalist concepts. Consumers demanded alternative products so as to equate the marginal utility per dollar spent on each product, subject to their budget constraints.[180] Producers sought to equate marginal revenues, derived from the consumers' demand curves, with marginal costs, derived from factor markets in which laborers rationally chose between labor and leisure and holders of capital allocated their capital to firms who offered the highest returns. The world described by general equilibrium theory involves only four relatively straightforward equations set in terms of

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[173] The reference here is to Ricardo's *Principles of Political Economy and Taxation*, first published in 1817. For useful introductions to Ricardo's thought and enduring influence, see generally MARK BLAUG, RICARDIAN ECONOMICS (1958) and EKELUND AND HEBERT, *supra* note 149, at 124-44.

[174] *See* GALBRAITH, *supra* note 146, at 81.

[175] *See generally* MILTON FRIEDMAN, *The Methodology of Positive Economics, in* ESSAYS IN POSITIVE ECONOMICS 3, 15 (1953) (admitting that the central assumptions of mainstream economics are not falsifiable).

[176] *See* Frank H. Knight, *Anthropology and Economics*, 49 J. POL. ECON. 247, 253-54 (1941).

[177] *See id.*

[178] *See id.*

[179] *See* GALBRAITH, *supra* note 146, at 103-108. The seminal works were William Stanley Jevons' *Theory of Political Economy* (1871), Alfred Marshall's *Principles of Economics* (1890), and Leon Walras's *Elements of Pure Economics* (1874). Jevons is typically cited as the father marginal utility theory. *See generally* EKELUND & HEBERT, *supra* note 149, at 309-26. Marshall's name is linked to partial equilibrium analysis. *See generally id.* at 328-67 and sources cited therein. Walras developed general equilibrium analysis. *See generally id.* at 368-93.

[180] Note that neoclassical economics has nothing to say with regard to objective value; it's sole concern is with *relative* values, revealed in the preferences expressed by individuals.

differential calculus and matrix algebra.[181] The world described by these equations can best be described as a thing of aesthetic beauty. In such a world, resources are perfectly allocated to produce that basket of goods which is most demanded by sovereign consumers; productive efficiencies are exhausted as each firm operates at the minimum of its long-run-average-cost curve; and all firms receive a normal, or competitive, rate of return on their business activities. Graduate students of economics have been mastering the intricacies of equilibrium theory, largely intact, since the turn of the century.[182]

Neoclassical theory facilitates collaboration between scholars. Practioners speak the same language and employ the same basic models. But this collaboration comes at some cost. At times the *a priori* assumptions of the model seem inappropriate and overly cumbersome. Consider, for example, the problem of discrimination in the workplace. A number of empirical studies suggest that when comparing women and men with the same basic work qualifications, women receive on average a lower compensation.[183] Two neoclassical explanations suggest themselves. The first is to simply disbelieve the empirical studies. To a true believer of economic orthodoxy, it is inconceivable that firms pay women seventy cents for every dollar paid to men producing the same output. Competing firms would quickly bid away all women by offering them seventy-one cents, firing all men that they used to pay one dollar, and reaping huge profits. Hence, there must be something wrong with the empirical work.[184] The second solution, distressingly too common, is to play with utility curves.[185] The argument might be that people in

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[181] *See generally* JAMES M. HENDERSEN & RICHARD E. QUANDT, MICROECONOMIC THEORY: A MATHEMATICAL APPROACH 230-31 (3d ed. 1985) (setting forth the entirety of general equilibrium theory in two short paragraphs).

[182] A comparison of the first edition of Alfred Marshall's textbook published in 1890 with any contemporary text on microeconomic theory reveals little or no change to the basic model. This would of course be true since the model is merely a deduction from *a priori* assumptions that have not changed.

[183] *See, e.g.*, Emily Hoffnar & Michael Greene, *Gender Discrimination in the Public and Private Sectors*, 25 J. SOCIO-ECON. 105 (1996); Karl E. Reichardt & David L. Schroeder, *Salaries 1995*, 77 MGMT. ACCT. 20 (1996).

[184] The neoclassical economist would likely suggest that the empirical model is misspecified. Inspecting the notion of "same basic work qualifications" cited in the example, the neoclassicist might argue that it is costly for firms to determine work abilities *ex ante*; hence, gender discrimination is being used in a cost effective way to save on search costs. Other challenges suggest themselves as well.

[185] Virtually any behavior can be squared with utility analysis by adjusting one's assumptions about tastes after viewing behavior. *See* Cotter, *supra* note 141, at 2118. For example, if the mainstream economist observes ostensibly altruistic behavior, she can maintain the orthodox assumption that people are selfish and simply argue that this selfish person gets utility by sacrificing himself or herself for others. *See id.* (citing examples of just such analysis). Similarly one could argue that the prejudiced person is

charge of setting pay schedules simply prefer to employ men. That preference, which is as valid as any preference in the neoclassical world where utility functions are subjective and assumed, is reflected in the differing pay schedules. In such a world, firms are being quite rational, their behavior reflects an unwillingness to pay seventy-one cents for a woman worker when a man is available at one dollar.

The above illustrates two potential pitfalls incumbent in neoclassical methodology. First, one's orthodox training may blind one to reality. It may generate a dogmatic or ideological barrier to empirical fact. Perhaps some of the empirical work in the comparable pay literature is faulty, but perhaps some of it is not. And just because neoclassical theory suggests that gender discrimination is impossible, that does not make the phenomenon any less real. It may be that those who hire and set wages have outdated and incorrect notions about the efficacy of hiring women. In other words, they are prejudiced. But to model prejudice, one would have to modify one's behavioral assumptions.[186] The second problem concerns the notion of value. Price theory concerns itself solely with *relative* values, leaving issues of *objective* value to the fields of politics, aesthetics, or ethics.[187] Yet, without a notion of objective value, every current practice appears to be efficient, and neoclassical theory becomes a mere tautology.[188] Since economic value can only be known with reference to revealed preferences, the choices made by individuals will define those values, and any set of choices will appear as rational maximizing behavior. The reasoning is circular.[189]

Any postmodern approach to economics would account for these potential pitfalls. The *a priori* assumptions of human behavior would no longer be inviolate. They would be judged with reference to their

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rationally maximizing his or her utility becomes he or she enjoys discriminating.

[186] Perhaps the neoclassicist could model prejudice with reference to information asymmetries. The argument might be that it is costly to distinguish between members of a group; hence, it becomes cost effective to discriminate. The question is does this formulation really capture what is going on? And what advantages are there for stating prejudice in price theoretic terms when a more intuitive vocabulary is available? *See generally* Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 UCLA L. REV. 1309, 1314 n.23 (1986) (discussing the relevance of realistic behavioral assumptions).

[187] *See generally* Paul A. Samuelson, *Consumption Theory in Terms of Revealed Preferences*, 15 ECONOMICA 243 (1948) (developing the theory of revealed preferences); Cass R. Sustein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 794 n.48 (1994) (pointing out that the theory of revealed preferences says nothing about the underlying value of given behaviors nor the values of the individual actors).

[188] Compare this observation with Cohen's critique of Langdellian formalism. *See supra* notes 49-53 and accompanying text.

[189] *See* Amartya K. Sen, *Rational Fools, in* PHILOSOPHY AND ECONOMIC THEORY 87-91 (Frank Hahn & Martin Hollis eds., 1979) (discussing the tautological nature of much of mainstream economic analysis).

usefulness. If it is useful to assume rational maximizing behavior, then that assumption would be used. But if an alternative behavioral assumption appears to be warranted from observation, the alternative would be used and tested against the facts. The postmodern approach would also focus on objective notions of value. The analysis would begin with a discussion of the ends sought and the justification for those ends. Perhaps the ends would be equal opportunity, redistribution of wealth and power, or wealth maximization of a given distribution of rights. But the ends would have to be contextually dependent, non-dogmatic, and open to dialogue. Empirical analysis could only begin once these ends were justified.[190] In short, a postmodern economics would use neoclassical tools where justifiable, but would not be defined by nor confined by those tools.

A Postmodern Approach to Economic Institutions

The final substantive issue defining the economic discipline is the nature, structure, and functioning of economic institutions, including social, political, legal, and organizational. Although concern with economic institutions has always been central to economic inquiry, it was the particular focus of a group of "institutional economists" who dominated economic thinking in the first few decades of the twentieth century.[191] Leading figures included Thorstein Veblen, John R. Commons, and Clarence Ayres.[192] Institutional economists allied themselves with philosophical pragmatists and with the legal realists of the 1920s and 1930s in denouncing the excessive formalism that characterized late-nineteenth century thought.[193] In challenging both

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[190] Recall Felix Cohen's admonition that a social science void of any specification of what is important devolves into a "horrible wilderness of useless statistics." Cohen, *supra* note 72.

[191] *See generally* ALLAN G. GRUCHY, MODERN ECONOMIC THOUGHT: THE AMERICAN CONTRIBUTION (1947) (recounting the birth of institutional economics); ALLAN G. GRUCHY, THE RECONSTRUCTION OF ECONOMICS: AN ANALYSIS OF THE FUNDAMENTALS OF INSTITUTIONAL ECONOMICS (1987) (discussing the contemporary practice of institutionalism).

[192] Seminal works include: JOHN R. COMMONS, INSTITUTIONAL ECONOMICS (1934); JOHN R. COMMONS, THE LEGAL FOUNDATIONS OF CAPITALISM (1924); THORSTEIN VEBLEN, THEORY OF THE BUSINESS ENTERPRISE (1904); and CLARENCE E. AYRES, THE THEORY OF ECONOMIC PROGRESS (1944). The continuing tradition of institutional economics can be found in the *Journal of Economic Issues*.

[193] "Dewey, Holmes, and Veblen were the leaders of a campaign to mop up the remnants of formal logic, classical economics, and jurisprudence in America, and to emphasize that the life of science, economics, and law was not logic but experience in some streaming social sense." MORTON WHITE, *supra* note 33, at 11; *see also* HENRY W. SPIEGEL, THE GROWTH OF ECONOMIC THOUGHT 629 (1971) (describing institutionalism as part of the revolt against formalism that took place in law, history, and economics at the same time).

the methods employed by and the values incumbent in neoclassical economics, institutionalism provides one possible version of what a postmodern economics might look like.

Institutionalism is not wedded to an assumption of rational maximizing behavior. Instead, it employs a holistic approach to human behavior, drawing insights from anthropology, sociology, and psychology in making predictions on how people behave in economic contexts and in suggesting legal reforms.[194] For example, institutional theory typically views people as creatures of habit. Defining institutions as "widely followed habits of thought and the practices which prevail in any given period,"[195] a distinction is made between "technological" and "ceremonial" behavior.[196] Technological behavior is pragmatic and instrumental. As a changing environment poses new problems, human intelligence proposes a solution. The solution is tried, and if it works reasonably well, it is retained. Over time the retained behavior becomes habitual, or ceremonial, and can become misaligned as technology and society continue to change. What is needed is to look afresh at old behavior patterns so as to assure that they are continuing to generate good consequences.[197]

In determining whether a particular behavior pattern is technological, or simply ceremonial, one needs a theory of value.[198] Institutional economists argue that value can only be derived from reasonable dialogue grounded in particular contexts. One place to find economic value is from social practice, and institutional studies are typically immersed in the details of particular transaction types.[199] Another way to advance the dialogue regarding value is to study law.[200] Law is replete with the factual details surrounding economic disputes; hence, it gives notice of the pressure points within an economic system.

Once consensus is reached on both the problems posed and the values desired, the institutional economist is committed to testing his or her propositions against the facts. Economics is viewed as an

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[194] *See* MERCURO & MEDEMA, *supra* note 1, at 107 (citing Commons for the proposition that "[i]nstitutionalism requires an interdisciplinary approach calling on psychology, sociology, anthropology, and law to help understand the behavior of economic actors and thereby generate more accurate assumptions in describing their behavior").

[195] *Id.* at 102 (citing Veblen).

[196] *Id.* at 105 (citing Ayres).

[197] *See* WENDELL GORDON & JOHN ADAMS, ECONOMICS AS SOCIAL SCIENCE 17-24 (1989) (noting that technological behaviors quickly become outdated, or ceremonial, yet these same behaviors are resistant to change).

[198] *See id.* at 83-101 (discussing the institutional theory of "valuation").

[199] *See, e.g.*, JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915 (1964).

[200] The notion that law can inform economic theory is traced to John R. Commons. *See* MECURO & MEDEMA, *supra* note 1, at 112-14 (describing Commons' method).

experimental discipline. General propositions are induced from particular observations. The propositions generate hypotheses which are then tested against further observations. Both the ends sought and the means used to achieve those ends are constantly reevaluated in the light of advances in technology and changes in social norms.

The point here is *not* to discuss institutional economics in all its varied details. The point is that economics is and should be conceived of as a rich and diverse discipline. By defining economics with reference to subject matter, rather than by technique, a host of options is unveiled. A postmodern EAL is receptive to these options. If wealth maximization and rational economizing behavior adequately capture a social phenomenon, then a postmodern EAL would embrace those notions. But a postmodern EAL would also be open to alternative formulations, and skeptical of any proposition not supported by sound empirical work.

Illustrating a Postmodern EAL

We now turn to three illustrations of how a postmodern EAL could work. Each is drawn from contract law. Contract law is selected, in part, because it provides one venue in which orthodox practitioners have enjoyed marked success in explaining complex legal phenomena. This success, in turn, rests on two factors. First, there is a general consensus that distributional concerns should play a limited role in contract adjudication.[201] Second, the orthodox notion of rational economizing behavior seems particularly useful in describing market exchanges. These two factors suggest that the traditional approach to EAL should be particularly useful in contract settings. Therefore, if a postmodern approach to EAL successfully supplements orthodoxy in illuminating contract doctrine, it should prove equally potent in scenarios in which either distributional concerns predominate, such as in welfare reform or equal opportunity legislation, or in settings where a fundamental right, such as religious freedom or the right to privacy, predominates.

The three illustrations focus on issues presented by non-negotiable "form contracting."[202] Form contracting has become the predominant

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[201] The argument is that distributional concerns are better addressed through tax and transfer legislation than through the common law. *See* Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667-68 (1994); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980) (citing a general consensus among scholars of all political ilks that distributional concerns should play no role in contract adjudication).

[202] I have addressed each of these three doctrines elsewhere. The present article seeks to explain the jurisprudential method *implicit* in the previous work. *See generally* Daniel T. Ostas, *Predicting Unconscionability Decisions: An Economic Model and an Empirical Test*, 29 AM. BUS. L.J. 535 (1992) [hereinafter Ostas, *Unconscionability*]; Daniel T. Ostas

way of doing business in the twentieth century.[203] It has many advantages. Standardized forms reduce drafting costs, eliminating haggling over terms and the delays incumbent therein. Form contracts control the discretion of corporate agents and enhance central control. And by standardizing terms, form contracts reduce administration costs and facilitate business planning. Yet, because they remove the necessity for individual negotiation they also introduce problems, as one party, typically the non-drafting party, may argue that the terms printed on the signed form do not reflect the true understandings of the parties. In such scenarios, the courts must decide on the appropriate deference to pay to unambiguous, but pre-printed and non-negotiated, contractual language.

Postmodern EAL and Issues of Unequal Bargaining Power

Issues of unequal bargaining power most often arise in consumer transactions. A consumer makes a purchase and receives some sort of form agreement. Typical transactions would include: a standard form signed when being admitted to a hospital; standard terms mailed with a new credit card; some preprinted pages discussing warranties in a new car sale; or a membership agreement to a health club. Typical consumers do not read such documents carefully. If they did, they might not understand the "legalistic" language. If the consumer has questions on a contractual term, the corporate agent, perhaps a relatively untrained salesperson, may not understand the language nor have the power to alter it. The form is typically presented on a "take-it-or-leave-it" basis.

Certain types of clauses in consumer contracts have repeatedly generated confusion and litigation. Perhaps most notorious are warranty disclaimers, penalty clauses, choice of law or forum clauses, and exculpatory clauses.[204] Some of these notorious standard terms are

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& Frank P. Darr, *Redrafting U.C.C. Section 2-207: An Economic Prescription for the Battle of the Forms,* 73 DENV. U.L. REV. 403 (1996) [hereinafter Ostas & Darr, *Battle of Forms*]; Daniel T. Ostas & Frank P. Darr, *Understanding Commercial Impracticability: Tempering Efficiency with Community Fairness Norms*, 27 RUTGERS L.J. 343 (1996) [hereinafter Ostas & Darr, *Commercial Impracticability*]; Daniel T. Ostas & Burt A. Leete, *Economic Analysis of Law as a Guide to Post-Communist Legal Reforms: The Case of Hungarian Contract Law*, 32 AM BUS. L.J. 355 (1995) [hereinafter Ostas & Leete, *Post-Communist*].

[203] *See* David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) (estimating that standard forms are used in up to 99% of all contracts).

[204] *See* Ostas, *Unconscionability, supra* note 202, at 537-38.

per se unenforceable,[205] but most receive judicial attention on a case-by-case basis.

The unconscionability doctrine provides one avenue for judicial review. Section 2-302(1) of the Uniform Commercial Code provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract with the unconscionable clause, or it may so limit the application of any unconscionable clause to avoid any unconscionable result.[206]

Traditionally, unconscionability has been analyzed with reference to two issues: procedural unconscionability and substantive unconscionability.[207] The former focuses attention on the improprieties during contract negotiations; the latter looks for an imbalance in the distributional effects of exchange. As a general rule, a finding of unconscionability requires both a modicum of procedural impropriety, something akin to fraud, duress, or undue influence, and a substantive claim to resulting unfairness.[208]

Orthodox practitioners of EAL have been critical of the use of unconscionability by the courts. Consider for example the orthodox analysis offered by Michael Trebilcock.[209] He begins by assuming that unconscionability reflects a judicial concern with notions of unequal bargaining power.[210] Applying a traditional neoclassical framework, he then equates bargaining power with monopoly power.[211] Monopolists tend to restrict output and to raise price; hence, they distort the allocative efficiency generated by competitive pricing. Yet, a judge cannot cure the ill effects of monopoly power by declaring a particular contract clause unconscionable. If the court strikes one clause in a contract, the monopolist simply extracts its price-distorting rents by

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[205] *See, e.g.*, Uniform Commercial Code Section 2-719(3) (stating that a limitation for consequential damages for injury to the person in the case a sale of a consumer good is *per se* unenforceable).

[206] A similar provision appears in Section 208 of the RESTATEMENT (SECOND) OF CONTRACTS (1979).

[207] This framework appears to have originated with Professor Leff. *See generally* Arthur Allan Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

[208] *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 150 (4th ed. 1995).

[209] *See generally* Michael Trebilcock, *An Economic Approach to the Doctrine of Unconscionability, in* STUDIES IN CONTRACT LAW, 381 (Barry Reiter & John Swan eds., 1980).

[210] *See id* at 381.

[211] *See id.* at 392-403.

adjusting other terms of the contract. The result is akin to "squeezing putty,"[212] and the ill effects of monopoly power remain unaffected.

Posner sounds a complementary theme.[213] Posner appears to believe that there is at least a workable competition in most markets rendering issues of monopoly power moot. In a competitive context, if one firm offers an obnoxious term in its form contract, consumers will punish that firm, taking their business elsewhere.[214] Posner argues that these market pressures can eradicate unreasonable contract clauses even when only a minority of consumers understand the term and their options *ex ante*. Hence, competitive market pressures remove the need for much unconscionability review, and in those cases where competition is absent, Trebilcock's analysis shows that unconscionability review is relatively impotent.

It would seem that a postmodern EAL might be much more open to alternative visions of bargaining power, and less sanguine with regard to the power of competitive market pressures to generate an efficient outcome. The postmodern economist might begin by asking why anyone would sign a form contract without carefully inspecting its terms. The neoclassical answer might be that the parties are rationally economizing on information search costs. The more straightforward and less dogmatic answer would be that the consumer is *trusting* that the standard terms are customary in the given industry, and that the terms are not overly unreasonable in light of community notions of fair dealing. The nondrafting (non-reading) party might also be heard to say that he or she *trusted* that the courts would not enforce a totally unreasonable provision.

Trust is a notion that is difficult to model with traditional economic tools. But it exists nonetheless. An economy replete with trust would operate at lower costs than one in which trust were absent. Though the courts cannot force people to trust one another, they can reinforce the trust that exists. In this light, a violation of reasonable trust would appear unconscionable.

Postmodern EAL also would note that courts have employed the unconscionability doctrine for over two centuries. The doctrine is firmly imbedded in American contract jurisprudence. As part of that jurispru-

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[212] *Id.* at 404.

[213] Posner writes: "[D]oubts are raised by the vague term unconscionability. . . . Economic analysis reveals no grounds other then fraud, incapacity, and duress (the last narrowly defined) for allowing a party to repudiate the bargain he made in entering into the contract." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 104 (3d ed. 1986) (author's parenthesis; emphasis deleted).

[214] *See id.* at 102. "If one seller offers unattractive terms, a competing seller, wanting sales for himself, will offers more attractive terms. The process will continue until the terms are optimal." *Id.*

dence it helps to define the economist's abstract notion of a "market." Too often orthodox EAL proceeds on the assumption that a market pre-exists in nature without human or court intervention. Unconscionability review is then seen as an interference on that pre-existing market, and can only be justified if there is some sort of market "failure."[215] A postmodern EAL would eschew such metaphysics. It would insist that the notion of a market only has meaning with reference to its empirical manifestations. In every market the government is an implicit actor that provides fundamental legal foundations. The sovereign provides a set of property rights or entitlements protected by criminal law and civil tort sanctions. It also provides a set of contract laws or rules that enable the exchange of those entitlements. Unconscionability review provides an integral part of those contract laws. A market emerges as an exchange of entitlements that follows traditional notions of fair-dealing. An exchange that violates those notions, is a non-market exchange that requires special justification.

Ultimately, the postmodern approach to unconscionability will turn on the instrumental goal of cost reduction. The question will be whether an affirmative finding of unconscionability will increase or decrease these costs for future business actors. Transaction costs are of three types: (1) costs of negotiation, including information and search costs; (2) costs of performance, including inspection, transportation, and insurance costs; and (3) costs of performance, including dispute resolution costs.[216] Whether these costs increase or decrease with an expanded view of unconscionability would be an empirical question.

One way to get a handle on the empirical consequences of unconscionability review is to look at those types of clauses that have generated the most litigation. One such culprit is the "exculpatory clause" that seeks to excuse the drafting party from its tort liabilities owed to the non-drafting party. Tort liability is based on fault. It is customary to assume that if it is one party's fault that another party is injured, the party at fault must pay damages. Exculpatory clauses seek to reverse this notion. A postmodern EAL might disallow such a reversal in scenarios when fault is most clear, enforcing exculpatory clauses only when fault is slight and when the exculpatory clause is brought to the attention to the non-drafting party *ex ante*. It would not rely on some notion of a market failure for such a finding, nor assume that competitive market pressures would extricate all unreasonable activities from consumer transactions.

In sum, the postmodern approach to bargaining power would be empirical, drawing insights from the law itself in suggesting the

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[215] *See, e.g.,* Trebilcock, *supra* note 209, at 391.

[216] *See* Ostas & Leete, *Post-Communist, supra* note 202, at 366-69.

problem points in economic activities. It would be non-dogmatic, jettisoning notions of rational economizing behavior when sociological realities of trust and reliance on custom seem appropriate. And it would be instrumental, insisting that the role of contract law was to reduce wasteful contractual activities such as needless search and negotiation expenses, the hiring of lawyers, and the misallocation of costs of care and insurance.

Postmodern EAL and the "Battle of the Forms"

Form contracts are common in transactions between merchants as well. In the typical sale of goods, both the seller and the buyer may use a standardized form. Perhaps the sale begins with a brief telephone conversation in which the parties agree upon certain central terms, such as price, time of delivery, quantity, and subject matter. Following this brief conversation, the purchasing agent mails a purchase order which crosses in the mail with a similar document, perhaps an invoice, sent by his or her trading partner. Each form reflects the central terms of the telephone agreement. Each also contains additional "boilerplate" language. The problem, of course, is that neither party reads the other's boilerplate, yet each assumes that the exchange of forms establishes a binding agreement. In the typical case, the goods are sent, accepted, and paid for without incident. But if a problem arises, one discovers that the two forms contain conflicting boilerplate language, and the courts are left to sort out the terms of the contract.

U.C.C. Section 2-207 addresses this so-called "battle of the forms." Section 2-207(1) states the exchange of forms can at times establish an executory contract even when the boilerplate conflicts. Section 2-207(2) provides what the terms of that executory contract would be. And section 2-207(3) addresses situations in which the exchange of forms does not constitute an executory contract, but the parties nonetheless make delivery of the goods and that delivery is accepted. Unfortunately, implementation of the language of section 2-207 has proven problematic.[217] A drafting committee is currently considering reforms.[218]

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[217] Professors White and Summers devote 21 pages of their Hornbook to problems associated with section 2-207. *See* WHITE & SUMMERS, *supra* note 208, at 5-25. Finding the section fraught with difficulty, the authors' advise the businessperson "to buy insurance, or—as a last resort—have an extra martini every evening and do not capitalize the corporation too heavily." *Id.* at 24-25.

[218] The redrafting is sponsored by the Permanent Editorial Board for the United Commercial Code with the approval of the National Conference of Commissions on Uniform State laws and the American Law Institute. *See generally* Mark A. Roszkowski & John D. Wladis, *Revised U.C.C. Section 2-207: Analysis and Recommendations*, 49 BUS. LAW. 1065 (1994).

A postmodern EAL could have much to say with regard to reforming section 2-207. It would begin by asking the question of why parties would rely upon the exchange of unread forms. The answer again seems to point to the importance of trust. In an early empirical study, Professor Stewart Macaulay surveyed contractual practices among firms which used standard forms to conduct business-to-business sales.[219] He found that sales and purchasing agents employed by such firms seldom read their own forms, and even less seldom were involved in contract litigation. When problems arose, the parties simply worked to a mutually agreeable solution, possibly sharing in any loss resulting from the disruption so as to preserve the good will of their trading partner.[220] This suggests that practioners have found a way to preserve the cost savings associated with the use of standardized forms,[221] without generating debilitating litigation costs.

Of course, self-help and loss-splitting will not always resolve a dispute. Hence, the question arises as to how the courts should resolve a case in which forms conflict. A postmodern EAL would emphasize custom, including the standard gap-filling provisions provided by Article Two of the U.C.C.[222] Parties could reliably use standard forms to form executory agreements from which neither could renege. But the terms of that agreement would be terms on which the parties had expressly agreed plus standard terms provided from past dealings between the parties, usage of trade, industry customs, and the standard terms provided by the Code. Neither party should be allowed to sneak an uncustomary term into an agreement through the use of an unread form. If such a practice were allowed, parties might need to carefully inspect and negotiate all contracts, raising negotiation costs. If a party does not want customary language, then that party should not rely on an exchange of unread forms to form its agreement, but rather, it should individually negotiate the non-customary term with its trading partner. If there were sound economic reasons for the varying term, such negotiations should be relatively easy to consummate.

In sum, a postmodern EAL would be instrumental in seeking to use the law to reduce transactions costs. It would do this by preserving the use of standardized forms to regulate routine transactions. But it also would simplify the current legal provisions regarding the battle of the forms so as to reduce litigation costs, and remove the potential for

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[219] *See* Stewart Macaulay, *Non-Contractual Relations in Business*, 28 AM. SOC. REV. 55 (1963) (providing an early assessment). *See also* Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WISC. L. REV. 1 (updating the earlier work by Macaulay).

[220] *See* Macaulay, *supra* note 219.

[221] *See* text following note 203.

[222] *See* Ostas & Darr, *Battle of Forms, supra* note 202.

opportunistic conduct. It also would be empirically based, providing standard terms from current conduct and allowing parties to renegotiate standard terms that do not meet their needs. It also would be experimental. If business actors repeatedly negotiated away a given term, say a warranty provision in a given industry, then that standard term could be revisited by the courts and the default term modified to match current practice. In other words, one's postmodern economic model would be non-dogmatic, learning from business practice as revealed in judicial opinions.

Postmodern EAL and Contractual Excuses

Every contract has two components: express terms and implied terms. The express language provides the basic structure of the contract and the implied terms fill in the gaps. A recurring question in contract jurisprudence is what type of external event will excuse performance. As a general rule, if the parties address the particular external event expressly in their contract, then that express language will control. But what if the external event is not addressed *ex ante*? Will the act of God, the change in the law, the sudden shortage or surplus of goods, the discovery of unforeseen difficulties, or the death of a party excuse performance? The answer in the law is that it depends; sometimes external events do not excuse performance, sometimes they do.[223]

Richard Posner and Andrew Rosenfield have provided a traditional economic analysis of excuse doctrines.[224] They posit that the purpose of contracting is to allocate various risks between the parties. Disruptive events provide one sort of risk. If the parties have expressly allocated the risk *ex ante*, then that allocation controls. When they have not, then the courts are to infer the allocation "that the parties would probably have adopted explicitly had they negotiated over them."[225] Posner and Rosenfield argue that the parties would have allocated the risk to the

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[223] Implied excuses of this sort proceed under a number of rubrics: commercial impracticability, impossibility, frustration of purpose, mutual mistake. For citation to the extensive literature on implied excuses see Ostas & Darr, *Commercial Impracticability, supra* note 202, at 344 n.4. For an extended bibliography see Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471, 472-74 nn.4-9 (1985).

[224] *See* Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977). Posner and Rosenfield's model has been extended and modified by other practioners of orthodox EAL. *See, e.g.,* A Mitchell Polinsky, *Fixed Price Versus Spot Price Contracts: A Study in Risk Allocation*, 3 J.L. ECON & ORGANIZATION 27 (1987) (embellishing the approach with a discussion of relative risk aversion).

[225] Posner & Rosenfield, *supra* note 224, at 88.

party able to absorb the risk in the least costly fashion.[226] By efficiently assigning the risk, costs are reduced, and a greater exchange surplus remains to be divided by the parties. Both are made better off.

Posner and Rosenfield identified two types of costs associated with disruptive events: the costs of prevention and the costs of insurance.[227] In most cases, the external event such as a flood or the death of a party cannot be prevented; hence, insurance costs take center stage. Insurance costs are of two types: the costs of estimating the likelihood and severity of the potential loss and the costs of securing market insurance or self insuring through diversification.[228] The authors argue that the courts should determine excuse cases—discharging the promisor or holding him or her strictly liable—with an eye toward encouraging future transactors to assign insurance costs to the party who can take such insurance most cheaply.

As a matter of abstract economic logic, the efficient-insurer hypothesis makes some sense. But in its pragmatic implementation, it becomes problematic. In many, if not most, cases it is very difficult to determine which of the two parties could more efficiently take insurance.[229] At times, one party may appear to be better situated to estimate the likelihood and severity of potential losses while the other party may appear to be better able to diversify the risks.[230] At other times, a secondary market for insurance seems equally accessible to either party. In fact, the cases where one party is unambiguously more efficient at absorbing insurance costs appear to be the exception rather

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[226] *Id.* at 89.

[227] *Id.*

[228] *Id.* at 91-92.

[229] Posner and Rosenfield acknowledge this limitation. They write: "In many individual, and perhaps some classes of, cases economic analysis—at least of the casual sort employed by the judges and lawyers in contract cases—will fail to yield a definite answer, or even a guess, as to which party is the superior risk bearer." *Id.* at 110; *see also* Sheldon W. Halpren, *Application of the Doctrine of Commercial Impracticability: Searching for "the Wisdom of Solomon,"* 135 U. PA. L. REV. 1123, 1159 (1987) (raising the same observation).

[230] Posner and Rosenfield's first example illustrates the vagaries incumbent in the approach. A buyer agrees to purchase a specifically manufactured item for its plant. *See* Posner & Rosenfield, *supra* note 224, at 90. Prior to delivery the plant is destroyed by fire, putting the buyer out of business. *Id.* The buyer wishes to be excused from its purchase agreement. *Id.* The buyer was better situated to estimate the potential for the fire; the seller was more able to estimate the salvage value of the specifically manufactured machine. *Id.* at 93. Either party could have passed on the risk of fire to its customers through its pricing practices or have purchased fire insurance. *Id.* The authors speculate as to whether either business was publicly held, allowing the owners to diversify their risks through their stock portfolios. *Id.* In balance, the authors "are inclined to view [the seller] as the superior risk bearer and thus to discharge [the buyer]." *Id.*

than the rule. Hence, traditional EAL appears to have identified a factor in excuse cases, but that factor is not sufficiently robust to guide the courts.

A postmodern EAL would supplement the traditional approach. Postmodern EAL, like traditional EAL, would begin with a general embrace of the notion of "freedom of contract."[231] Parties have idiosyncratic knowledge regarding the best uses of their resources. This knowledge is disperse and difficult to communicate. To compound matters, individual preferences are subjective and vary through time. A judicial embrace of freedom of contract recognizes the idiosyncratic, subjective, and temporal qualities of information and preferences by summarily enforcing all express allocations of risk agreed to by the parties.[232] After all, parties do not agree to an exchange unless each believes that it is in his or her interest to do so. This potential for mutual gain through trade has been the primary lesson of economic theory since the time of Adam Smith.[233]

The principle of freedom of contract has two distinct subparts: freedom *to* contract and freedom *from* contract.[234] The former dictates that the courts should enforce any express allocation of risk. The latter provides that courts should not force a party to absorb a risk to which he or she did not assent. By insisting that each party acquire the assent of the other, the court assures that each must take into account the idiosyncratic preferences and knowledge of the other. In short, freedom of contract emerges as a communication device, enabling knowledge to be "encoded" in the workings of the price system.[235] Judicial *unwillingness* to enforce express language or judicial *willingness* to enforce non-consensual transfers distorts prices and introduces inefficiencies.

The interesting contract excuse cases involve scenarios in which the parties did not address the contingency *ex ante*, and the courts are now being asked to enforce a non-consensual allocation of costs *ex post*. Such non-consensual transfers threaten to introduce price distortions. The courts do not know how the parties would have adjusted the nominal

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[231] No one has been more articulate in explaining the economic justification for judicial respect for individual autonomy and freedom of contract than the Austrian economist Friedrich A. Hayek. *See generally* FRIEDRICH A. HAYEK, INDIVIDUALISM AND THE ECONOMIC ORDER (1948).

[232] *See generally* Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (focussing on the price mechanism as a means of coping with the dispersal of knowledge in society).

[233] *See* JOSEPH A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 187 (1954) (observing that for Adam Smith the potential for mutual gains from trade is "practically the only factor in economic progress").

[234] *See* Richard E. Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193 (1982) (developing the same dichotomy).

[235] *See* Hayek, *supra* note 232.

price term had the relevant risks been fully understood and negotiated. Such a non-consensual transfer can nonetheless be justified as an incentive to future business actors to bargain more effectively. The focus must be on *fault*.[236]

If fault is clear, then assigning the costs to the party at fault provides an economic incentive for future business actors to bargain more effectively. Fault comes in several varieties. Perhaps one party neglected to take cost-effective precautions that would have prevented the fire or similar disruptive event. Perhaps one of the parties had superior information regarding the risk and intentionally suppressed that information so as to mislead its trading partner.[237] Perhaps there was a generalized custom in the trade that one or both of the parties neglected to learn.[238] Or perhaps one of the parties could have efficiently taken insurance but failed to do so. Any of these forms of fault could guide the courts, and the traditional EAL focus on efficient-insurance taking becomes only one of several ways of deciding the case.

In most excuse cases, either the parties will have expressly addressed the contingency *ex ante* or the assessment of fault will be clear. But what is the court to do when the parties did not address the contingency, it is not anyone's fault that they did not, and neither party appears particularly more adept at absorbing the loss? The traditional EAL answer appears to be to hold the promisor strictly liable—no excuse.[239] By contrast, a postmodern EAL might suggest a loss sharing principle.[240] In situations where no one is at fault, either a complete

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[236] *See* Ostas & Darr, *Commercial Impracticability, supra* note 202, at 362-63.

[237] Employing an economic framework, Anthony Kronman distinguishes between information casually obtained at no expense, and information garnered through deliberate search. *See* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Laws of Contracts*, 7 J. LEGAL STUD. 1, 9-18 (1978); *see also* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 257-61 (1988) (offering a similar distinction between "productive" and "redistributive" information). The idea is that non-disclosure of information of the casual or redistributive kind generates needless misunderstandings, and cannot be defended on efficiency grounds. Hence, opportunistic non-disclosure of information provides one ground for assessing fault.

[238] *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 84 (3d ed. 1986) (discussing the need for judicial incentives for parties to master trade customs).

[239] *See, e.g.,* Posner & Rosenfield, *supra* note 224, at 83; Christopher J. Bruce, *An Economic Analysis of the Impossibility Doctrine*, 11 J. LEGAL STUD. 311, 322-23 (1982); Alan O. Sykes, *The Doctrine of Commercial Impracticability in a Second-Best World*, 19 J. LEGAL STUD. 43, 93-94 (1990); Michele J. White, *Contract Breach and Contract Discharge Due to Impossibility*, 17 J. LEGAL STUD. 353, 360-65 (1988).

[240] For advocates of loss sharing principles, shorn of the economic rationale, see generally Mary Joe Frug, *Recusing Impossibility Doctrine: A Post Modern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029. 1035-36 (1992) (rejecting the bi-polar alternatives of breach or discharge in favor a loss sharing principle); Robert A. Hillman, *An Analysis of the Cessation of Cessation of Contractual Relations*, 68 CORNELL L. REV.

discharge of the promisor or a finding of strict liability grants a windfall to one of the parties.[241] It also seems to introduce a price distortion, forcing a party to assume a cost to which he or she did not consent. If our goal is to infer what "the parties would probably have adopted explicitly had they negotiated,"[242] then perhaps the better approach might be to share the costs associated with all unforeseeable disruptions? Whether this would introduce too much uncertainty into the dispute resolution process and thereby increase litigation costs is an empirical question.

CONCLUSION

EAL evolved in the 1960s and 1970s from the progressive realism of the depression era. A chief virtue of EAL was its precision. Much of what the progressives had said was correct, but much of progressive thought lacked focus, lacked an agenda. EAL provided that focus by limiting its instrumental goals and by employing a distinct and consistent view of human behavior. Its power to illuminate common law doctrine is impressive. Yet that illumination has come at some cost. Many legal questions demand inquiry beyond wealth maximization, and competing models of human behavior promise to further enhance understanding. Judge Posner's recent writings reflect this expanded view of EAL. EAL is entering a pragmatic era.

Perhaps postmodern EAL is best conceived as a heuristic device. It directs the courts to consider the effects their rulings will have on human behavior and insists upon a comparative cost perspective. These two directives define the approach as economic and provide a set of core understandings that facilitates the collaborative advance of theory. Beyond these two defining characteristics, diversity of thought is embraced, not shunned. The analyst is free to craft alternative models of human behavior, to employ a culture specific analysis or to ignore the cultural context, or to advance goals that supplement or replace wealth maximization. The first illustration spliced ideas from alternative schools of economic thought in seeking to understand the issues associated with contractual bargaining power. The second demonstrated the importance of grounding EAL in the empirical world of business practice. The final illustration demonstrates that a postmodern EAL can usefully supplement, rather than replace, orthodox

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617 (1983) (arguing for a set of fairness norms upon which the courts may draw in dividing up the costs of a disruptive event); Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471 (1985) (outlining the appropriate times and means for a loss-sharing principle).

[241] *See* Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contractual Remedies*, 43 HASTINGS L.J. 1 (1991).

[242] *See supra* note 225.

economic approaches to contractual discharge. The lodestar throughout is whether postmodern insights can expand our understanding of legal and economic behavior in a useful way. There is reason to believe that they can.