

INTERDISCIPLINARY LEGAL SCHOLARSHIP IN SEARCH OF A PARADIGM

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A “mature” science, according to Thomas Kuhn, can afford to be uncritical.¹ It has finally answered to its practitioners’ satisfaction the fundamental, foundational questions of their field. It finally rests (“for a time,”² at least) on an established scientific achievement that epitomizes the accomplished, collective wisdom of an age and defines the terms, conditions, directions, and limits of further refining research. With this “paradigm”³ in place, researchers are spared the incessant and distracting reexamination of first principles, the extravagant costs of intellectual retooling; they can proceed with confidence, effectiveness, and efficiency to do what they do best: articulating and specifying the received paradigm in more depth and detail, extending and applying it to new

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1. See Thomas S. Kuhn, *Logic of Discovery or Psychology of Research?*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* 1, 6 (Imre Lakatos & Alan Musgrave eds., 1970) (arguing that “it is precisely the abandonment of critical discourse that marks the transition to a science”).

2. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10 (2d ed. 1970).

3. On the term “paradigm,” see Kuhn, *supra* note 1, at 16–19; Thomas S. Kuhn, *Reflections on My Critics*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE*, *supra* note 1, at 231, 271–72; Thomas S. Kuhn, *Second Thoughts on Paradigms*, in *THE STRUCTURE OF SCIENTIFIC THEORIES* 459 (Frederick Suppe ed., 2d ed. 1977); Margaret Masterman, *The Nature of a Paradigm*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE*, *supra* note 1, at 59, 61–66 (discussing Kuhn’s twenty-one senses of “paradigm”); cf. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 3, 34 n.108 (1984) (“[N]ormal science establishes a paradigm of rules governing questions that are interesting, evidence that would answer those questions, and answers that are acceptable.”).

areas of interest. Because a paradigm "provides rules that tell the practitioner of a mature specialty what both the world and his science are like," the practitioner "can concentrate with assurance upon the esoteric problems that these rules and existing knowledge define for him."⁴

Postmodern legal theory appropriates and assimilates Kuhn's insights in ways and to an extent that have not, I think, yet been fully recognized.⁵ In describing the development of legal scholarship in Kuhnian terms, I am thus merely elaborating assumptions integral to contemporary intellectual discourse.⁶ In particular, in-

4. KUHN, *supra* note 2, at 42; *see also id.* at 24 ("[R]estrictions, born from confidence in a paradigm, turn out to be essential to the development of science. By focusing attention upon a small range of relatively esoteric problems, the paradigm forces scientists to investigate some part of nature in a detail and depth that would otherwise be unimaginable."); *cf. id.* at 163-64:

[O]nce the reception of a common paradigm has freed the scientific community from the need constantly to re-examine its first principles, the members of that community can concentrate exclusively upon the subtlest and most esoteric of the phenomena that concern it. Inevitably, that does increase both the effectiveness and the efficiency with which the group as a whole solves new problems.

5. *See, e.g.*, Theodore Y. Blumoff, *The Third Best Choice: An Essay on Law and History*, 41 HASTINGS L.J. 537 (1990); Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771; Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Kenney Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203 (1985); Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199 (1984); Alex M. Johnson, Jr., *Scholarly Paradigms: A New Tradition Based on Context and Color*, 16 VT. L. REV. 913 (1992); Robert J. Lipkin, *Indeterminacy, Justification and Truth in Constitutional Theory*, 60 FORDHAM L. REV. 595 (1992); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Robert C.L. Moffat, *Judicial Decision as Paradigm: Case Studies of Morality and Law in Interaction*, 37 FLA. L. REV. 297 (1985); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988); Girardeau A. Spann, *Secret Rights*, 71 MINN. L. REV. 669 (1987); John Stick, *Literary Imperialism: Assessing the Results of Dworkin's Interpretive Turn in Law's Empire*, 34 UCLA L. REV. 371 (1986) (book review); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989); G. Edward White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649 (1984); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1443 (1990).

6. *See, e.g.*, STANLEY FISH, *Rhetoric, in DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 471, 486 (1989) ("*The Structure of Scientific Revolutions* is arguably the most frequently cited work in the humanities and social sciences in the past twenty-five years, and it is rhetorical through and through."); Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1813 (1990) ("[W]e have all read

terdisciplinary legal scholarship regularly proceeds on the assumption that it possesses a stable, accepted, and uncontroversial paradigm for further research—in other words, that it constitutes a “mature science.” But beneath the institutional trappings of interdisciplinary legal scholarship I detect not a scholarly tradition that has finally resolved to general acclaim all its basic, foundational, methodological problems, but rather one that has never really confronted them.⁷ As a result, the attempt to apply the supposed paradigm of interdisciplinary legal scholarship to its subject matter reveals significant “anomalies” in the application. In what follows I shall first analyze and discuss these anomalies and then consider in some detail a specific example of contemporary interdisciplinary legal scholarship.⁸

I. THE LOSS OF A PARADIGM

There was a time when legal scholarship indeed possessed a stable, mature paradigm. The research it guided, the “normal science” of late-nineteenth-century legal scholarship, was patterned on the work of the common law judge.⁹ It was “judicious,” in the

Kuhn, Hanson, Toulmin, and Feyerabend, and have thereby become suspicious of the term ‘scientific method.’”); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1539 n.93 (1991) (“The canned footnote here typically begins with T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1970), and continues according to the author’s taste and reading.”); G. Edward White, *The Text, Interpretation, and Critical Standards*, 60 TEX. L. REV. 569, 569 (1982) (depicting “the growing momentum in contemporary academic life of Kuhnian logic”); cf. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986) (arguing that “paradigm-shifting” legal theories, which are generally praised, should be abandoned in favor of “the more pedestrian activity of ‘normal science’”).

7. Cf. Masterman, *supra* note 3, at 75 (discussing the case “where ‘normal science’ prematurely sets in in some unjustified manner, by a set of fashion-following scientists starting to imitate one another without proper pre-examination of the paradigm (i.e. without the alleged insight that a certain paradigm is relevant to a particular field being a genuine insight”).

8. In a forthcoming work tentatively entitled “The Intellectual Origins of Tolerance and Freedom of Expression,” I shall reexamine in detail the applicability of Kuhn’s theory to fields such as law. For now, compare Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 670 n.162 (1990) (“My own sense is that the legal community, especially the legal academy, bears significant parallels to the scientific community as Kuhn describes it.”) with Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 964 n.39 (1988) (“Even if the controversy about scientific objectivity is resolved in the manner most favorable to [Kuhn], . . . it is a mistake to burden law with conclusions drawn from the scientist’s external—and therefore less secure—mode of cognition.”).

9. See Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reex-*

sense of being balanced, moderate, temperate, and pragmatic; it was largely descriptive, respectful of previous authority, and faithful to existing law; it recommended only modest improvements in the law. "[T]he proposal of some well-crafted incremental change in the law . . . is the hallmark of the excellent judge."¹⁰ The "paradigm" guiding this type of research was something like the following: "(1) state the problem; (2) propose a solution; (3) show how the common law, properly reinterpreted, affords the proposed solution."¹¹ Scholarship based on this paradigm, like the scholarship in a mature natural science, consisted mainly of brief articles devoted to doctrinal problem-solving—modest, incremental refinements of a shared, cumulative enterprise: "the common law."¹² The various *Restatement* projects of the early twentieth century proceeded smoothly under this paradigm as "highly cumulative enterprise[s], eminently successful in [their] aim, the steady extension of the scope and precision of scientific knowledge."¹³

aming the Assumptions of Interdisciplinary Legal Scholarship, 41 DUKE L.J. 191, 195-96 (1991); cf. KUHN, *supra* note 2, at 23 (noting that a paradigm, "like an accepted judicial decision in the common law[,] . . . is an object for further articulation and specification under new or more stringent conditions").

10. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 2439, 2442 (1987) [hereinafter *Bork Hearings*] (testimony of George L. Priest); cf. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 211-12 (1980) (noting that even up until the 1950s, "[c]ase analysis was the nub of an article: the scholar appeared as the balanced voice of reason").

11. Collier, *supra* note 9, at 199-200.

12. See *id.* at 197-99; A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981); J.C. Gray, *Methods of Legal Education*, 1 YALE L.J. 159, 159 (1892) ("We are all here firm believers in [the common law]. We desire that the students may be filled with its spirit."); cf. KUHN, *supra* note 2, at 20:

[The research reports of scientists] usually appear as brief articles addressed only to professional colleagues, . . . whose knowledge of a shared paradigm can be assumed and who prove to be the only ones able to read the papers addressed to them.

Today in the sciences, books are usually either texts or retrospective reflections upon one aspect or another of the scientific life. The scientist who writes one is more likely to find his professional reputation impaired than enhanced. Only in the earlier, pre-paradigm, stages of the development of the various sciences did the book ordinarily possess the same relation to professional achievement that it still retains in other creative fields. And only in those fields that still retain the book, with or without the article, as a vehicle for research communication are the lines of professionalization still so loosely drawn that the layman may hope to follow progress by reading the practitioners' original reports.

13. KUHN, *supra* note 2, at 52; cf. WILLIAM L. TWINING, KARL LLEWELLYN AND

By comparison, a glance at contemporary—particularly interdisciplinary—legal scholarship reveals a state of what might charitably be termed “pre-revolutionary” turmoil.¹⁴ Legal scholars today seem to be “competing much like . . . seventeenth and eighteenth century explorers seeking new discoveries: competing to promote new theories and new ideas around which fields of law will be reorganized,”¹⁵ and competing to write the longest, most theoretical, and most profoundly deconstructive monographs possible. With this palpable collapse of consensus, such that nothing can be assumed as common knowledge and taken for granted, foundations must be relaid completely for every argument.¹⁶ That may explain both “the current fascination with high theory” and the inordinate length of modern law review articles.¹⁷ “The proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, the recourse to philosophy and to debate over fundamentals, all these are symptoms of a transition from normal to extraordinary research.”¹⁸

Since contemporary interdisciplinary legal scholarship is manifestly not possessed of a stable, accepted, uncontroversial “paradigm,” I have had to construct one for it by inference, out of the sometimes contradictory flux of current debate and scholarly work. This implicit paradigm makes use of the following complementary assumptions, neither of which stands up to close scrutiny.

THE REALIST MOVEMENT 275 (1985):

The method [of the *Restatements*] is that of interstitial development of the law . . . since they only attempt to change in the absence of a consensus, and restrict themselves to choosing between alternatives that have already been adopted somewhere In short, the *Restatements* have been instruments of slow evolution rather than of a reformist approach.

14. See Collier, *supra* note 9, at 192–93; Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 928 (1990) (“The academy has a problem.”).

15. *Bork Hearings*, *supra* note 10, at 2440–41 (testimony of George L. Priest); see also *id.* at 2440 (“This style of scientific research and scholarship has been tremendously important in encouraging new ways of thought and is described familiarly in Thomas Kuhn’s *Structure of Scientific Revolutions*”).

16. Cf. KUHN, *supra* note 2, at 19–20 (“When the individual scientist can take a paradigm for granted, he need no longer, in his major works, attempt to build his field anew, starting from first principles and justifying the use of each concept introduced.”).

17. See WHITE, *supra* note 10, at 213–15; Francis A. Allen, *The Dolphin and the Peasant: Ill-Tempered, but Brief, Comments on Legal Scholarship*, in PROPERTY LAW AND LEGAL EDUCATION 183, 189 (Peter Hay & Michael Hoeflich eds., 1988).

18. KUHN, *supra* note 2, at 91.

(1) *Philosophy and humanistic theory can contribute to the authority of legal scholarship and (indirectly) judicial doctrine.*¹⁹ At some level this assumption is perhaps unobjectionable. There is probably no enterprise that could not occasionally benefit from a new and foreign theoretical perspective on its basic underlying assumptions and conceptual structure. But the "normal science" of legal scholarship cannot subsist on a steady diet of fundamental reexamination any more than the mature science of adjudication can; indeed, it is only the *repression* of fundamental preoccupations that allows these activities to proceed and progress at all efficiently.²⁰ Far from "contributing to the authority" of legal doctrine, a preoccupation with philosophy and humanistic theory could only contribute to the undermining of the limited and narrow agenda that adjudication, of necessity, pursues.²¹

What would it mean for the authority of judicial doctrine to derive from philosophy and humanistic theory? For one thing, it would mean the end of the actual institution of adjudication as we know it (which might not necessarily be a bad thing). That institution, firmly based on the doctrine of *stare decisis*, has never ceased

19. I intend with this formulation to include both "descriptive" and "prescriptive" (or normative) uses of interdisciplinary theory. Some legal scholars claim only that their use of nonlegal concepts and methods permits of a deeper, more accurate, or more telling description of the legal landscape; others see themselves simply as making suggestions of a nonlegal origin for the improvement and refinement of judicial decisionmaking and legal doctrine. But I doubt that this dichotomy can or needs to be maintained, or that these functions can so readily be separated. Often the best groundwork for a "prescription" is nothing other than an accurate "description" of the problem. And one of the most basic (even if not always explicit) motivations for, or justifications of, legal scholarship is the improvement of the law. See, e.g., Robert M. Hayden, *Social Theory and Legal Practice: Intuition, Discourse, and Legal Scholarship*, 83 NW. U. L. REV. 461 (1989) (noting that "the traditional goals of legal theory" are "to explain the existing law, to justify legal principles, to critique existing doctrine, and to prescribe the directions that law ought to take"); John F. Banzhaf III, *Rank Law Schools on Quality, Not Quantity*, NAT'L L.J., Aug. 31, 1992, at 10 ("Since the most realistic measure of any legal scholarship is its effect on the law, a far better ranking would be based upon how often faculty members are cited on the winning side in court opinions.").

20. Cf. KUHN, *supra* note 2, at 5 ("Normal science . . . often suppresses fundamental novelties because they are necessarily subversive of its basic commitments.").

21. Cf. *id.* at 88:

It is, I think, particularly in periods of acknowledged crisis that scientists have turned to philosophical analysis as a device for unlocking the riddles of their field. Scientists have not generally needed or wanted to be philosophers. Indeed, normal science usually holds creative philosophy at arm's length, and probably for good reasons But that is not to say that the search for assumptions (even for non-existent ones) cannot be an effective way to weaken the grip of a tradition upon the mind and to suggest the basis for a new one.

to value the "institutional authority" of established judicial precedent over the "intellectual authority"—however impressive—of autonomous, nonlegal argumentation.²² From a purely intellectual point of view, the very idea that prior decisions could have *any* weight in the balance is, as Holmes complained, "revolting."²³ No intellectual enterprise worthy of the name could tolerate such a degree of nonintellectual interference with its proceedings and results; nor could it countenance the ideas (propounded by distinguished jurists) that "[a] bad reason may often make good law"²⁴ and that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."²⁵

If we pursue this gloss of adjudication in a somewhat different direction we see why a second implicit assumption of interdisciplinary legal scholarship cannot be right either. (2) *Judicial opinions provide apt models for philosophical and humanistic theory.* This assumption, too, is objectionable only if one understands by the resulting "theory" something more than an empirical description or summary of "what judges do."²⁶ The problems of plausi-

22. See Charles W. Collier, *Intellectual Authority and Institutional Authority*, 42 J. LEGAL EDUC. 151 (1992); Collier, *supra* note 9, at 206-23; cf. generally Collier, *supra* note 5.

23. Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). And "[i]t is still more revolting if the grounds upon which [a rule of law] was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *Id.*

24. Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 163 (1930). "For that matter," asserts Goodhart, "it is precisely some of those cases which have been decided on incorrect premises or reasoning which have become the most important in the law." *Id.*; see, e.g., *In re Polemis*, 3 K.B. 560 (1921) (assuming that a reasonable man would not have anticipated that a plank falling into the hold of a ship filled with petrol vapor might cause an explosion); *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) (impliedly holding negligence of a contractor to be an immaterial fact); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 499-503 (2d ed. 1991) (critically examining the assumptions and reasoning of *Brown v. Board of Education*, 347 U.S. 483 (1954)); *id.* at 929-37 (similarly examining *Roe v. Wade*, 410 U.S. 113 (1973)). "Erroneous ideas . . . have played an enormous part in shaping the law," according to another commentator, because "[a]n idea, adopted by a court, is in a superior position to influence conduct and opinion in the community; judges, after all, are rulers. And the adoption of an idea by a court reflects the power structure in the community." EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 6 (1949).

25. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled by Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938) and *Helvering v. Mountain Prods. Corp.*, 303 U.S. 376 (1938). "This is commonly true," adds Justice Brandeis, "even where the error is a matter of serious concern, provided correction can be had by legislation." *Id.*

26. Cf. Collier, *supra* note 9, at 223-24 (noting the differences between the relation-

bility arise when theory is understood as an abstract articulation of the basic underlying assumptions and conceptual structure of law.

Some such problems were already suggested in the above discussion of the peculiarly "institutional" authority of the judiciary.²⁷ From a strictly "intellectual" (that is, not necessarily legal) point of view, can it be anything other than the wildest of coincidences if the ideas and opinions of Supreme Court Justices are of the slightest general interest? Consider the routes and criteria by which, in our highly politicized appointments process, such persons are selected for their positions in the first place.²⁸ Consider then how many competing viewpoints a majority opinion must appease in order to become law, so that it finally resembles a "bureaucratic" or (perhaps even worse) a "committee" project.²⁹ Consider also that judicial opinions today are mostly not even written by judges or Justices; they are "ghostwritten" by youthful apprentices called law clerks (a practice that in most scholarly contexts would seem bizarre).³⁰ Finally, consider the actual subject matter of adjudication, the relatively limited problems with which the judiciary deals, and the exceedingly narrow way in which issues must be framed for judicial determination.³¹ Together, these considerations function as rather severe "institutional" constraints on whatever theoretical ambitions and capacities the judiciary may harbor.

Legal reasoning in a caselaw regime has been well described as a process of "reasoning by example," and the judicial function as "[t]he determination of similarity or difference."³² Our courts have consistently—sometimes for good policy reasons—resisted the temptation to convert themselves into forums for the debate of theoretical legal fundamentals.³³ Even at the rarefied heights of, say, the Supreme Court, the questions a Justice faces are by nature much narrower and more mundane than those typically en-

ship of the "humanistic theory of what judges do" to "what judges do" and the relationship of the philosophy of science to what scientists do).

27. See *id.* at 215–23.

28. See *id.* at 225–28.

29. See *id.* at 228–29. For a broad-ranging meditation on the legal significance of "bureaucracy," see David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348 (1992).

30. See Collier, *supra* note 9, at 228–32.

31. See *id.* at 234–36.

32. LEVI, *supra* note 24, at 1–2.

33. See Collier, *supra* note 9, at 238–39.

countered in philosophy and humanistic theory. Even when formulated generally, judicial doctrine is relatively more empirical and "case-specific," relatively less the unified intellectual product of a creative mind. If one were seeking a model for "theory" (in any but the weakest sense³⁴), the actual judicial practice of even the Supreme Court would be a decidedly (and increasingly) inauspicious place to look.³⁵ The ideas and opinions of most Supreme Court Justices would not be of the slightest theoretical or philosophical significance, except for the fact (which from an intellectual point of view must be considered fortuitous) that they are the ideas and opinions of Supreme Court Justices. It is only the institutional position of these officials that makes their work product seem comparable in authority to the "primary sources" of other disciplines.³⁶

In summary, the "paradigm" implicitly embraced by interdisciplinary legal theory cannot consistently make use of the assumptions that "philosophy and humanistic theory can contribute to the authority of legal scholarship and (indirectly) judicial doctrine" and that "judicial opinions provide apt models for philosophical and humanistic theory." Nevertheless, these considerations have not prevented a growing number of interdisciplinary legal scholars from basing extensive research programs on just such assumptions. The consequences may perhaps best be illustrated by reference to a case study, which forms the subject of the following Part.

II. CONTINENTAL PHILOSOPHY AT THE BAR OF THE SUPREME COURT

Sheldon Nahmod's *Section 1983 Discourse: The Move From Constitution to Tort*³⁷ provides an interesting and revealing example of contemporary interdisciplinary legal scholarship. An analysis of this piece will illuminate many of the issues discussed above.

34. See *supra* text accompanying notes 26-27.

35. See Collier, *supra* note 9, at 239-44 (discussing the Court's use and abuse of precedent).

36. See *id.* at 219-23; cf. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 814 (1989) ("From a certain philosophical perspective, Holmes' pragmatist theory of law is . . . essentially banal. At its most abstract level it concludes in truisms.").

37. 77 GEO. L.J. 1719 (1989); see also Collier, *supra* note 9, at 204-05 (discussing Nahmod's article).

The article starts off unremarkably enough with "An Overview of § 1983 Discourse."³⁸ Section 1983, it seems, contains language reminiscent of both constitutional law ("under color of [law]" and "to the deprivation of any rights, privileges, or immunities secured by the Constitution") and tort law ("subjects, or causes to be subjected" and "shall be liable to the party injured in an action at law").³⁹ Previously, courts emphasized the constitutional aspect; more recently—in nothing less than "a deliberate and strategic exercise of judicial power by the Supreme Court"⁴⁰—the torts aspect has been emphasized, to the distinct disadvantage of plaintiffs. Nahmod employs various familiar metaphors to describe this transition: what was once in the "background" has moved to the "foreground,"⁴¹ what was once "central" has been rendered "marginal."⁴² But these are merely metaphors, and Nahmod seems unsatisfied with this sort of explanation. (Apparently, the corresponding transition from the liberal Warren Court to the conservative Rehnquist Court is too obvious to merit mention.⁴³) He seeks something deeper, something less obvious, something more theoretical or "philosophical."

A stunning transformation awaits the reader who turns the page to Nahmod's second section, entitled "Language and Discourse."⁴⁴ Whereas previously the article dealt exclusively with mundane legal cases involving misplaced hobby kits, pillows left on staircases, and the like, here it introduces subsections on Nietzsche, Saussure, Derrida, and Foucault. As Nahmod explains, these philosophers are part of a program to "evaluate discourse at a theoretical level."⁴⁵

One detects immediately a weighty new tone, suggestive of immense possibilities. "Nietzsche is the originator of the idea that

38. Nahmod, *supra* note 37, at 1721–31.

39. 42 U.S.C. § 1983 (1988); *cf.* Nahmod, *supra* note 37, at 1721 n.10, 1736.

40. Nahmod, *supra* note 37, at 1720.

41. *See id.* at 1719.

42. *See id.* at 1736, 1738.

43. Another ready explanation seems to be lurking in Nahmod's observation that "[t]o signal its view that many § 1983 suits waste time and resources, the Court has chosen to review § 1983 cases brought by prisoners—in particular, ostensibly trivial cases involving lost hobby-kit materials and injuries resulting from pillows left on prison stairs." *Id.* at 1744. To me this suggests that the Court can manipulate or control not so much its "discourse" as its *docket*.

44. *Id.* at 1731–38.

45. *Id.* at 1731.

the world is aesthetically self-creating,"⁴⁶ begins Nahmod—and at that level of generality, who could disagree? Given that Nietzsche originated this idea, it would presumably be presumptuous if not precarious to assert the opposite: "No, the world is *not* aesthetically self-creating." Besides, it is hard to imagine how one would support either proposition. In any event, such propositions are not being argued for; they are citations to authority—in this case the authority of Nietzsche, who is after all a European philosopher of considerable renown. It is as though the Supreme Court asked the parties in a case to brief the issue, "whether the world is aesthetically self-creating," and Nietzsche is listed in the petitioner's "Table of Authorities."

Nahmod's analysis of language proceeds with the following pronouncements: "Nietzsche believed that language does not express objective reality. Language tells us little, if anything, about things as they actually are. Words do not adequately express the reality of the objects they purport to describe."⁴⁷ Given these staggering deficiencies of language, one might have expected Nahmod's article to end at this point. Instead, it continues on to a discussion of structural linguistics, which "as formulated by Ferdinand de Saussure, provides *valuable insights* into the Supreme Court's § 1983 jurisprudence."⁴⁸

The first such insight is another citation to authority: "Saussure believes that language is a system of signs."⁴⁹ Further insights quickly converge on the imponderable:

Because we require language in order to think—that is, we do not think the natural world but only its expression in language—it is these signs that frame and shape all knowledge. We see what our language permits us to see. Something does not exist for us unless there is a word for it.⁵⁰

46. *Id.* at 1731 n.80. Nahmod's support for this proposition comes from ALLAN MEGILL, *PROPHETS OF EXTREMITY: NIETZSCHE, HEIDEGGER, FOUCAULT, DERRIDA* 29–33 (1985).

47. Nahmod, *supra* note 37, at 1732 (footnotes omitted).

48. *Id.* at 1733 (emphasis added).

49. *Id.* at 1732 n.83. Nahmod's support for this proposition comes from TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 96 (1983).

50. Nahmod, *supra* note 37, at 1733. Nahmod's support for these propositions comes from John Sturrock, *Introduction to STRUCTURALISM AND SINCE: FROM LÉVI-STRAUSS TO DERRIDA* 2, 5–9 (John Sturrock ed., 1979) [hereinafter *STRUCTURALISM AND SINCE*].

For those still pondering the possible relevance of such insights to the Supreme Court's § 1983 jurisprudence, the following subsection promises welcome relief: "*Specifically relevant* to my analysis of the Supreme Court's § 1983 jurisprudence are Jacques Derrida and Michel Foucault."⁵¹

Derrida's relevance seems to lie in his strategy of "discover[ing] and invert[ing] the 'margins' of the text being criticized."⁵² Derrida apparently pursues this strategy zealously: he "is willing to make use of anything marginal."⁵³ Once something marginal has been located, "[h]e will then, against the author's intention, develop these margins to show the text's contradictory meanings and the ways in which any argument has the seeds of its opposing argument."⁵⁴ This sentence in Nahmod's text is followed immediately by a new paragraph, which begins: "This deconstruction of margins helps us to understand the relative ease of the previously described shift in emphasis from constitutional rhetoric to tort rhetoric in the Supreme Court's § 1983 case law."⁵⁵ I am not sure what "help"—beyond the original metaphor of the "central" and the "marginal"—has been provided, except perhaps a new, more obscure metaphor: arguments are pods containing the "seeds" of their opposing arguments.

One last chance at illumination is provided by Michel Foucault, who thankfully "both criticizes and transcends" Derrida.⁵⁶ "Foucault maintains that at any point in history there exists a set of power relationships that establish the conditions of discourse."⁵⁷ Following Foucault's lead, Nahmod poses but does not answer "significant questions regarding the legitimacy of discourse: who owns it and how is it controlled?"⁵⁸ A hint is presumably implied in Foucault's attempt to show that "every rule or norm is arbitrary,"⁵⁹ but Nahmod does not pursue the point; he

51. Nahmod, *supra* note 37, at 1734 (emphasis added).

52. *Id.* at 1735.

53. *Id.*

54. *Id.*

55. *Id.* at 1736.

56. *Id.*

57. *Id.* at 1737. Nahmod's support for this proposition comes from Hayden White, *Michel Foucault*, in *STRUCTURALISM AND SINCE*, *supra* note 50, at 81; the reader is advised by Nahmod to "see also" an interview with Foucault.

58. Nahmod, *supra* note 37, at 1738.

59. *Id.* Nahmod's support for this proposition comes from White, *supra* note 57, at

observes merely that Foucault's strategy "is wedded to an activist ideal of change, but there is nothing coherent about it beyond that."⁶⁰ Yet even in the face of this apparently bleak diagnosis, Nahmod remains serenely undeterred:

[I]t is not necessary to accept Foucault's nihilism to recognize the power of his approach to the nature of discourse. *As applied* to the move from constitutional rhetoric to tort rhetoric in the Supreme Court's § 1983 jurisprudence, Foucault's approach suggests at the very least that *an event of deep significance has occurred*.⁶¹

On this happy and suitably portentous note, the section on "Language and Discourse" ends.

The reader seeking a more tangible "application" of these rather exotic European philosophers' theories to normal legal problems will be disappointed by Nahmod's third and final section, "The Implications of Tort Rhetoric."⁶² Nietzsche has *spurlos verschwunden*; Saussure, Derrida, and Foucault have disappeared *sans laisser de traces*. Neither their ideas nor even their names are mentioned again—implicitly or explicitly—in the remainder of the article.⁶³ Instead, Nahmod returns to the exact same sort of narrowly "legal" style and standard doctrinal analysis that characterized his first section.

But this about-face should not really be surprising. The "citation" of philosophers and their nonlegal theories is primarily an attempt to import greater intellectual authority to an area of law that seems to lack or need it. It is not an attempt to engage these philosophical theories on their own terms or according to the nonlegal canons of discussion and professional criteria proper to them. And given the irreducibly "institutional" structure of authority in law, where intellectual capital has never been the coin of the realm anyway, the attempt is doubly misguided.⁶⁴

I do not deny that the startling propositions I have plucked from Nahmod's article might yet be integrated into an intelligible

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60. Nahmod, *supra* note 37, at 1738.

61. *Id.* (emphasis added).

62. *Id.* at 1738-50.

63. The only possible exceptions to this are three mentions of the words "marginal" and "marginalize" (a term of Derrida's). *Id.* at 1738, 1742, 1750.

64. *See supra* text accompanying notes 20-36.

and intellectually defensible theory of "language and discourse," which might conceivably be usefully applied to legal discourse. I deny only that Nahmod has accomplished, or even seriously attempted, either task.⁶⁵ In any event, such a project would necessarily look very different from the one examined here.⁶⁶

The desire to enliven an area of law that might otherwise seem pedestrian is understandable. In our unsettled scholarly world, where no accepted paradigm guides "normal" legal research, an undeniable "anxiety of influence" accompanies the legal scholar's poignant realization that credit is no longer given for the elaboration of the obvious or for modest "doctrinal tinkering" in the nineteenth-century style.⁶⁷ It hardly seems fair, when creative scholars in other disciplines are exploring such interesting and intellectually exciting new theories, that these cannot somehow be used in a legal context too. "The trouble is, as so often in philosophy, it is hard to improve intelligibility while retaining the excitement."⁶⁸

65. Furthermore, I am not at all convinced that Nahmod needs "grand theory" to explain the transformations in legal doctrine that he describes. In addition to the (perhaps all too obvious) explanations suggested *supra* at note 43 and accompanying text, compare LEVI, *supra* note 24, at 6:

It is true that similarity is seen in terms of a word, and inability to find a ready word to express similarity or difference may prevent change in the law. The words which have been found in the past are much spoken of, have acquired a dignity of their own, and to a considerable measure control results. As Judge Cardozo suggested in speaking of metaphors, the word starts out to free thought and ends by enslaving it.

66. See, e.g., Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992) (applying realist semantics to philosophy of law).

67. See Allen, *supra* note 17, at 192-94 (bemoaning "the pursuit of the elegant generalization" and "[t]he languishing of knowledge-based scholarship"); Collier, *supra* note 9, at 202-03, 271-73; cf. Gerald Graff, *Point of View*, CHRON. HIGHER EDUC., Oct. 21, 1992, at A56:

[I]f today's academy is *over*-anything, it is overgeneralized rather than overspecialized, reserving its greatest rewards for scholars who make large, sweeping theoretical and interdisciplinary claims. As a result, excessive pressure falls on younger scholars to produce the Big Synthesis before they may be ready to do so, while worthy but modestly defined topics go unappreciated.

See generally GERALD GRAFF, *BEYOND THE CULTURE WARS* (1992).

68. DONALD DAVIDSON, *On the Very Idea of a Conceptual Scheme*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 183, 183 (1984).