THE RETURN OF THE SELF, OR WHATEVER HAPPENED TO POSTMODERN JURISPRUDENCE?

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ABSTRACT

Postmodern jurisprudence was all the rage in the 1990s. Two of the most renowned postmodernists, Stanley Fish and Pierre Schlag, both persistently criticized mainstream legal scholars for believing they were modernist selves—independent, sovereign, and autonomous agents who could remake the social and legal world merely by writing a law review article. Then Fish and Schlag turned on each other. Each attacked the other for making the same mistake: harboring a modernist self. I revisit this skirmish for two reasons. First, it helps explain the current moribund state of postmodern jurisprudence. If two of the leading postmodernists could not avoid embedding a self in their respective writings, then what was the point of criticizing mainstream legal scholars for doing the same? Second, an understanding of this conflict between Fish and Schlag can help suggest a path forward for postmodernism. Since 2000, when Fish published his attack against Schlag, feminist theorists have developed intertwined concepts of a relational self and relational autonomy. These feminist concepts provide a springboard for launching postmodern jurisprudence into new territory.

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INTRODUCTION

Many years ago, Stanley Fish and Pierre Schlag attacked each other's scholarship. Ironically, these two leading postmodern jurisprudents accused the other of making the same mistake.[1] Schlag went first, denouncing Fish's scholarship as harboring a modernist self.[2] Subsequently, Fish turned around and similarly criticized Schlag's scholarship.[3]

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1. For a history of American jurisprudence, including a discussion of the postmodern era, see STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE (2000) [hereinafter Feldman, VOYAGE].

2. Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987) [hereinafter Schlag, *Fish v. Zapp*]. Schlag's other writings include the following: PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998); PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND (1996) [hereinafter SCHLAG, LAYING]; Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803 (2009) [hereinafter Schlag, *Spam*]; Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195 (2009); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002); Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997) [hereinafter Schlag, *Phrenology*]; Pierre Schlag, *Writing For Judges*, 63 U. COLO. L. REV. 419 (1992) [hereinafter Schlag, *Writing*]; Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991) [hereinafter Schlag, *The Problem*]; Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991) [hereinafter Schlag, *Normativity*]; Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990) [hereinafter Schlag, *Nowhere*]; Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (1989) [hereinafter Schlag, *Missing Pieces*].

3. Stanley Fish, *Theory Minimalism*, 37 San Diego L. Rev. 761 (2000) [hereinafter Fish, *Minimalism*]. Fish's other writings include the following: STANLEY FISH, THINK AGAIN (2015); STANLEY FISH, THE TROUBLE WITH PRINCIPLE (1999) [hereinafter FISH, PRINCIPLE]; STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO (1994); STANLEY FISH,

I revisit this skirmish for two reasons. First, it helps explain the current moribund state of postmodern jurisprudence. Second, it suggests a path forward in revitalizing postmodern theory. Postmodernism cannot be easily defined. As numerous commentators have observed, however, it can most readily be characterized in opposition to modernism.[4] If modernism demands that knowledge be based on firm foundations, that language be representational of the external world, and that society be constituted by bounded atom-like individuals, then postmodernism is anti-foundational, anti-representational, and anti-individualist.[5] More affirmatively, postmodernists tend to study the operation of power in society and its institutions, particularly the way power works through language or discourse.[6]

To understand modernism as a counterpoint to postmodernism, consider the children's book, *Harold and the Purple Crayon*.[7] Harold is a small boy with a round head, wispy strands of hair, and plain white sleeper-pajamas. Wherever he goes, Harold carries a purple crayon, and with that crayon, he literally makes his world. If Harold wants to stroll down "a long straight path,"[8] he draws a line and walks along it. When Harold falls into the sea, he draws a boat and sets sail. When Harold tires of sailing, he draws land and steps ashore. In the end, when Harold grows

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DOING WHAT COMES NATURALLY (1989) [hereinafter FISH, NATURALLY]; Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987) [hereinafter Fish, *Dennis Martinez*]; Stanley Fish, *Change*, 86 SOUTH ATLANTIC Q. 423 (1987) [hereinafter Fish, *Change*]; Stanley Fish, *Consequences*, 11 CRITICAL INQUIRY 433 (1985) [hereinafter Fish, *Consequences*]; Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984) [hereinafter Fish, *Fiss*]; Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, 9 CRITICAL INQUIRY 201 (1982) [hereinafter Fish, *Chain Gang*]; Stanley Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982); STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 1 (1980) [hereinafter FISH, CLASS]; Stanley Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, 4 CRITICAL INQUIRY 625 (1978).

4. NANCEY MURPHY, ANGLO-AMERICAN POSTMODERNITY 1 (1997); Dennis Patterson, *Introduction*, *in* POSTMODERNISM AND LAW, at xi, xii–xiv (1994).

5. Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 262–79 (1992); Peter C. Schanck, *Understanding Postmodern Thought and its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2508–09 (1992).

6. Michel Foucault, The History of Sexuality 81–102 (Robert Hurley trans., 1978); Michel Foucault, Discipline and Punish 26–31 (Alan Sheridan trans., 1977) [hereinafter Foucault, Discipline]; *see* Steven Best & Douglas Kellner, The Postmodern Turn 255–60 (1997) (identifying four postmodern themes); Feldman, Voyage, *supra* note 1, at 37–45, 137–87 (characterizing postmodernism in accord with eight overlapping themes).

7. CROCKETT JOHNSON, HAROLD AND THE PURPLE CRAYON (1955). This book is not paginated, so I do not cite to specific page numbers.

8. *Id*.

sleepy, he makes his bed. He climbs in and draws up the covers. Warm and cozy, Harold drifts off to sleep.

Harold exemplifies the modernist self, a "legislator-in-chief."[9] He is an independent and autonomous agent exercising sovereign control over himself and his world. His enormous power to choose and act is not dependent on or limited by social relationships.[10] He is completely self-reliant.

As postmodernists, neither Fish nor Schlag would like Harold. In fact, they devoted much of their respective careers to criticizing traditional legal scholars for believing that they and their readers were little Harolds. Traditional legal scholars, Fish and Schlag argued, acted like modernist selves, as if they could change the legal and social world as easily as Harold could draw a picture. Traditional legal scholars wrote reams of articles and books, sketching elaborate theories, articulating precise principles, and recommending judicial outcomes. These scholars believed their writings actually produced positive social and legal change, yet they were mistaken, as Fish and Schlag repeatedly declared. To be sure, these scholars generated more theories, principles, and recommendations, but rather than changing the world for the better, these scholars and their earnest writings merely reassured themselves that they and their readers were modernist selves.[11]

Given that Fish and Schlag agreed on so much, why did they ultimately turn on each other? As I explain, one cannot write jurisprudential scholarship without revealing a self, despite best efforts. Even so, scholarship over the last fifteen years demonstrates that Fish and Schlag too quickly attached certain assumptions to the concept of the self. Recent scholarship has sketched a relational self that can exercise a degree of autonomy without declaring its independent sovereignty. Indeed, in the year 2000, when Fish published his attack on Schlag, feminist theorists published an anthology articulating a concept of a relational self and exploring its implications for autonomy.[12] This volume, entitled *Relational Autonomy*, initiated an outburst of scholarly activity elaborating on the

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9. *See* Zygmunt Bauman & Rein Raud, Practices of Selfhood 3 (2015).

10. *Id*. at 1–3; *See also* PHILIP CUSHMAN, CONSTRUCTING THE SELF, CONSTRUCTING AMERICA 30–33 (1995); CHARLES TAYLOR, SOURCES OF THE SELF 143–98 (1989).

11. Fish's and Schlag's arguments will be elaborated in the text. *See, e.g.*, Schlag, *Nowhere*, *supra* note 2; Fish, *Dennis Martinez*, *supra* note 3.

12. RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTOMONY, AGENCY, AND THE SOCIAL SELF (Catriona Mackenzie & Natalie Stoljar eds., 2000). Of course, some feminist theorists had previously discussed issues related to women's agency and autonomy. *E.g.*, Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

concepts of the relational self and relational autonomy.[13] In this Article, I draw on this recent feminist scholarship to explain how this relational self can resuscitate postmodern jurisprudence more generally.[14]

Part I of this Article sets forth the main critical positions of Fish and Schlag. Part II examines how Fish and Schlag turned their respective critical gazes on each other. Part III explains the concept of the relational or postmodern self, and Part IV briefly explores some implications of this reconceived self.

I. FISH AND SCHLAG CRITICIZE TRADITIONAL LEGAL SCHOLARSHIP

A. Fish and Interpretive Practices

For at least four centuries, starting in the 1600s, modernist (western) metaphysics sharply split an independent and autonomous self from an external and objective world.[15] To have knowledge, the self somehow needed to bridge the gap between itself and the objects of the external world.[16] If the self could not bridge the gap either by directly accessing or mirroring in consciousness the objective world, then the self would be doomed to relativism, nihilism, and solipsism. Consequently, when it came to hermeneutics—the understanding and interpretation of a text—the self supposedly would need to directly access the objective meaning of the text. The textual meaning, that is, was an object that could be known, but only if one could apply a method or technique to overcome one's preexisting prejudices that otherwise would obscure the true meaning of the text. For instance, some constitutional theorists—now referred to as old originalists—insisted that in order to understand the objective meaning of a constitutional provision, a judge would need to ascertain the framers'

13. *See* Paul Benson, *Feminist Commitments and Relational Autonomy*, *in* AUTONOMY, OPPRESSION, AND GENDER 87, 87 (Andrea Veltman & Mark Piper eds., 2014) (emphasizing the importance of the *Relational Autonomy* volume). Some helpful books published subsequently include the following (listed chronologically): MARILYN FRIEDMAN, AUTONOMY, GENDER, POLITICS (2003); JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY AND LAW (2011); THE POLITICS OF RECOGNITION AND SOCIAL JUSTICE: TRANSFORMING SUBJECTIVITIES AND NEW FORMS OF RESISTANCE (Maria Pallotta-Chiarolli & Bob Pease eds., 2014); AUTONOMY, OPPRESSION, AND GENDER (Andrea Veltman & Mark Piper eds., 2014); PERSONAL AUTONOMY AND SOCIAL OPPRESSION: PHILOSOPHICAL PERSPECTIVES (Marina A.L. Oshana ed., 2015).

14. *See* Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 278 (2008) (underscoring that recent feminist scholarship is often disregarded).

15. *See* Feldman, VOYAGE, *supra* note 1, at 15–28 (discussing the development of modernist metaphysics).

16. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

intentions when they originally wrote that provision.[17] Any judge who failed to follow this or some other ostensibly methodical or mechanical process for ascertaining objective constitutional meaning would necessarily become an unconstrained "rogue judge."[18] From this modernist perspective, interpretation presents us with an either/or: Either we access objective textual meaning, or we freely impose on the text whatever meaning we subjectively prefer.

Typical of postmodernists, Fish sought to dissolve the dilemma of this either/or.[19] According to Fish, neither "the independent or uninterpreted text"—that is, objectivity—nor "the independent and freely interpreting reader"—that is, free-floating subjectivity—is possible.[20] Objectivity is impossible, because we always are already interpreting. Neither the text, the author's (such as the constitutional framers') intentions, nor anything else is accessible as brute data or, in other words, as an uninterpreted objective source of meaning.[21] Yet subjectivity also is impossible, because the individual interpreter or reader is never unconstrained—never free merely to impose her personally preferred meanings on the text. The interpreter, Fish explained, always is constrained by the practices of her "interpretive community,"[22] which impart "assumed distinctions,

17. Focusing on the original public meaning is referred to as 'new originalism,' while focusing on framers' intentions is 'old originalism.' Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283, 284–86 (2014). For examples of old originalism, see RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). For illustrations of new originalism, see ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997); ROBERT BORK, THE TEMPTING OF AMERICA 6, 143–44 (1990).

18. J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1141 (1991).

19. Fish argued that his interpretivist approach resolved "a question that had long seemed crucial to literary studies. What is the source of interpretive authority: the text or the reader?" Fish, *Change*, *supra* note 3, at 423; *see* Feldman, VOYAGE, *supra* note 1, at 29–39 (explaining the postmodern rejection of the modernist either/or of epistemological foundationalism).

20. Fish, *Chain Gang*, *supra* note 3, at 211–12.

21. "[T]here is no such thing as literal meaning, if by literal meaning one means a meaning that is perspicuous no matter what the context and no matter what is in the speaker's or hearer's mind, a meaning that because it is prior to interpretation can serve as a constraint on interpretation." FISH, NATURALLY, *supra* note 3, at 4.

22. Fish wrote:

> At this point it looks as if the text is about to be dislodged as a center of authority in favor of the reader whose interpretive strategies make it; but I forestall this conclusion by arguing that the strategies in question are not his in the sense that would make him an independent agent. Rather, they proceed not from him but from the interpretive community of which he is a member; they are, in effect, community property, and insofar as they at once enable and limit the operations of his consciousness, he is too.… [I]t is interpretive communities, rather than either the text or the reader, that produce meanings and are responsible for the emergence of formal features. Interpretive communities are made up of those who share interpretive strategies not for reading but for writing texts, for constituting their properties. In other words

categories of understanding, and stipulations of relevance and irrelevance."[23] Thus, for the same reason that objectivity is impossible—because we always are already interpreting—unconstrained subjectivity likewise is impossible. No interpreter ever stands prior to or outside of interpretive practices, which always and necessarily limit one's interpretation of any text, including the Constitution. In short, the practices of an interpretive community simultaneously enable and limit textual understanding: An interpretive community organizes the world for its members by relating phenomena "to the interests and goals that make the community what it is."[24]

Once we accept Fish's conceptualization of textual interpretation, then the notion of specifying some method or mechanical process for ascertaining objective meaning, such as discovering the framers' intentions, becomes vacuous.[25] There is no pure objective meaning and no free-floating subjective interpreter, so no method can possibly bridge an ostensible gap between the two (because the gap does not exist). Fish therefore criticized numerous jurisprudents, including Ronald Dworkin, who sought to explain why and how legal interpretation and judicial decision making are objective.[26] A judge cannot follow the law by mechanically ascertaining the meaning of a legal rule, as embodied in the Constitution or some other legal text, and then applying that rule to the instant case. To the contrary, Fish explained:

> The very ability to formulate a [judicial] decision in terms that would be recognizably legal depends on one's having internalized the norms, categorical distinctions, and evidentiary criteria that make up one's understanding of what the law is. That understanding is developed in the course of an educational experience whose materials are the unfolding succession of cases, holdings, dissents,

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> these strategies exist prior to the act of reading and therefore determine the shape of what is read rather than, as is usually assumed, the other way around.

FISH, CLASS, *supra* note 3, at 13–14.

23. Fish, *Change*, *supra* note 3, at 423–24.

24. *Id*. at 433. "[T]here has never been nor ever will be anyone who could survey interpretive possibilities from a vantage point that was not itself already interpretive." Fish, *Dennis Martinez*, *supra* note 3, at 1795.

25. Fish, *Consequences*, *supra* note 3, at 437.

26. Fish, *Chain Gang*, *supra* note 3 (criticizing Dworkin); *see* Ronald Dworkin, *Law as Interpretation, in The Politics of Interpretation* 249 (William J.T. Mitchell ed., 1983) (explaining law as interpretation). Owen Fiss had attempted to appropriate Fish's ideas on interpretation to help explain the constraints imposed on judges. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) (relying on Stanley Fish to develop views on law and interpretation). Fish thought that Fiss had seriously misunderstood his ideas. Fish, *Fiss*, *supra* note 2.

> legislative actions, etc., that are the stuff of law school instruction and of the later instruction one receives in a clerkship or as a junior associate.[27]

Fish furthered his criticism of legal scholarship by arguing that *theory* has no consequences. He defined theory as "an abstract or algorithmic formulation that guides or governs practice from a position outside any particular conception of practice."[28] A theory "is something a practitioner consults when he wishes to perform correctly, with the term 'correctly' here understood as meaning independently of his preconceptions, biases, or personal preferences."[29] If one accepts Fish's notion of textual interpretation—if we are always and already interpreting—then his denigration of theory necessarily follows (assuming one also accepts his definition of theory). If a theory must give "explicit instructions that [leave] no room for interpretive decisions,"[30] or require an individual to "[surrender] his judgment … in order to reach conclusions that in no way depend on his education, or point of view, or cultural situation,"[31] then theory becomes impossible. Nothing—and that includes theory—can be outside of or prior to interpretation. And that is exactly Fish's point: Theory must fail. Pushing his argument to an extreme conclusion, Fish declared that theory "is entirely irrelevant to the practice it purports to critique and reform."[32]

Most important for legal scholarship, then, Fish argued that theories of adjudication have nothing to do with the practice of adjudication. "[J]udging or doing judging is one thing and giving accounts or theories of judging is another…."[33] Regardless of what theories we advocate—whether originalist or natural law or anything else—judges do the same

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27. FISH, NATURALLY, *supra* note 3, at 360.
28. Fish, *Dennis Martinez*, *supra* note 3, at 1779.
29. *Id*. For a similar definition of theory, see Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723, 723–24 (1982). According to Fish, the theoretical project is an effort to govern social practices in two ways:

> (1) [I]t is an attempt to *guide* practice from a position above or outside it[,] and (2) it is an attempt to *reform* practice by neutralizing interest, by substituting for the parochial perspective of some local or partisan point of view the perspective of a general rationality to which the individual subordinates his contextually conditioned opinions and beliefs.

Fish, *Consequences*, *supra* note 3, at 437 (emphasis in original).
30. Fish, *Consequences*, *supra* note 3, at 434.
31. *Id*. at 437.
32. Fish, *Dennis Martinez*, *supra* note 3, at 1797.
33. *Id*. at 1779.

thing: They judge.[34] The ability or know-how for judging a case arises solely from participating in the interpretive community of the law or, in other words, from being embedded in the practice of adjudication. The "account one has of adjudication is logically independent of one's ability to engage in it."[35] Indeed, Fish added, whether one is convinced by Fish's own theoretical account of the practices of interpretation and adjudication is irrelevant to those practices because, after all, theory—even Fish's theory—has no consequences for practice.[36] The critical point of Fish's argument was clear: All of the legal theory being published in law journals and books was inconsequential. Legal scholars write theory to govern or seriously influence judicial practices, but theory is irrelevant to practice. "The point is, finally, a simple one," Fish explained, "there is no relationship between the level on which high-theory debates usually occur and the level on which you are asked to sort through the complexities of a real life situation and determine a course of action."[37]

Fish subsequently extended his argument to *principle*. Principles, as defined by Fish, are "abstractions like fairness, impartiality, mutual respect, and reasonableness [that supposedly] can be defined in ways not hostage to any partisan agenda."[38] Legal scholars articulate and invoke principles to argue for certain conclusions or judicial decisions; supposedly, the preferred conclusions or decisions issue neutrally from the principles rather than from some partisan political or cultural stance.[39] The problem, according to Fish, is that principles cannot do any argumentative work—cannot support any substantive conclusion—unless bolstered by "some currently unexamined assumptions about the way life is or should be, and it is those assumptions, contestable in fact but at the moment not

34. Even if a *judge* claims to follow a theory, explaining that theory in her judicial opinions, Fish argued that at most the judge is offering a post-hoc account of why the case was decided as it was. The judge's opinion, in other words, does not explain how the judge arrived at the decision or how the decision was generated. *Id*. at 1790. Fish's account of judicial decision making resembled that given by the American legal realist, Joseph Hutcheson. Joseph C. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). For a discussion of realism, see Feldman, VOYAGE, *supra* note 1, at 108–15.

35. Fish, *Fiss*, *supra* note 3, at 1347.

36. *Id*.; FISH, CLASS, *supra* note 3, at 370.

37. Fish, *Minimalism*, *supra* note 3, at 763.

38. FISH, PRINCIPLE, *supra* note 3, at 2.

39. For instance, Christopher Eisgruber and Lawrence Sager maintained that the religion clauses embody a broad principle of "equal regard," which "demands that the interests and concerns of every member of the political community should be treated equally, that no person or group should be treated as unworthy or otherwise subordinated to an inferior status." Christopher L. Eisgruber & Lawrence G. Sager, *Equal Regard*, *in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 200, 203 (Stephen M. Feldman ed., 2000).

contested or even acknowledged, that will really be generating the conclusions that are supposedly being generated by the logic of principle."[40] In short, the "trouble with principle is … that it does not exist[.]"[41] But, of course, Fish added that this conclusion has no consequences for our actual practices. For instance, the recognition that no principle underlies the First Amendment does not lead to any particular normative interpretation of the First Amendment.[42] So, in the end, if we are to make decisions and take actions—and we all apparently do so—we cannot turn to theory or rely on principles for guidance. We can only draw on our beliefs, politics, and know-how. "I am as usual offering no recommendation (you can't coherently recommend an inevitability)," Fish admitted.[43] "[I am] just pointing out … that when all is said and done there is nowhere to go except to the goals and desires that already possess you, and nothing to do but try as hard as you can to implement them in the world."[44]

B. Schlag and Normative Legal Thought

Schlag similarly criticized legal scholarship. Most legal scholarship produced during the past century, according to Schlag, should be categorized as normative. When confronted with some specified legal or social problem, legal scholars typically respond by analyzing a series of cases, statutes, or both that seem relevant to the problem. Then the author concludes with a normative recommendation that will supposedly resolve the problem. For instance, the Supreme Court should adopt a new or modified doctrinal framework, or Congress should enact or amend a statute. To a great extent, normative law review articles read like glorified appellate briefs. They present the issues, discuss the facts, parse the cases, and recommend conclusions.[45] For many law professors, such a normative recommendation is the sine qua non of "serious scholarship."[46]

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40. FISH, PRINCIPLE, *supra* note 3, at 3.

41. *Id*. at 2.

42. *Id*. at 116–17; *see* Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, *in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 383 (Stephen M. Feldman ed., 2000) (explaining how there is no principle of religious freedom).

43. FISH, PRINCIPLE, *supra* note 3, at 8.

44. *Id*. at 8–9.

45. *Cf*. Francis J. Mootz, *Desperately Seeking Science*, 17 WASH. U. L.Q. 1009, 1012 (1995) (observing that "[n]ormative legal scholarship often amounts to glorified advocacy briefs").

46. Arthur Austin, *The Postmodern Infiltration of Legal Scholarship*, 98 MICH. L. REV. 1504, 1507 (2000) (reviewing PAUL W. KAHN, THE CULTURAL STUDY OF LAW (1999), & JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE (1999)).

Schlag repeatedly and unmercifully condemned such normative legal scholarship. Normative scholars believe that their scholarly recommendations influence legal and political decision makers, including especially judges. But normative writing, Schlag declared, does not achieve its desired effect. For the most part, judges and other decision makers do not care about the recommendations of legal scholars.[47] Most law review articles are published stillborn: they are never read by their intended audience. Schlag wrote: "Normative legal thought can no longer be seen to govern, regulate or even describe human activity."[48]

Although normative legal thought does not achieve its self-proclaimed goals, it nonetheless has harmful consequences.[49] Normative legal thought constructs and reconstructs a social reality revolving around the modernist self—Schlag's preferred term is the "relatively autonomous self."[50] This modernist self "concedes that it is socially and rhetorically constituted yet maintains its own autonomy to decide just how autonomous it may or may not be."[51] That is, the relatively autonomous self is a subject or self who admits that it is socially constrained, to a degree, but who nonetheless remains a sovereign center of power that can readily transform the world—merely because it chooses to do so. By suggesting to both readers and writers over and over again that they are free to choose and to implement whatever values, whatever legal and social changes, they find most appealing, normative legal scholarship helps induce legal scholars to believe that they truly have such enormous social powers—but, according to Schlag, they do not:[52]

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47. Schlag, *Writing*, *supra* note 2, at 421; Schlag, *The Problem*, *supra* note 2, at 1738; Schlag, *Normativity*, *supra* note 2, at 871–72. For years, judges and other legal scholars have been noting the growing gap between practitioners and law professors. Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295 (2000); Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or, Why, and To Whom, Do I Write the Things I Do?)*, 63 U. COLO. L. REV. 389 (1992); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

48. Schlag, *Nowhere*, *supra* note 2, at 185–86.

49. "[T]he claim is not that normative legal thought is without effect, but that the politics of normative legal thought are not what normative legal thought imagines them to be: its politics are in the process, the practice of its construction, and the form of its dissemination." Schlag, *Normativity*, *supra* note 2, at 909.

50. *See, e.g.*, Schlag, *Fish v. Zapp*, *supra* note 2, at 39 (referring to the "relatively autonomous self").

51. Schlag, *Normativity*, *supra* note 2, at 895 n.248.

52. *Id*. at 841–52. Schlag wrote:

> Each and every social, legal, and political event is immediately represented as an event calling for a value-based choice. You are free to choose between this and that. But, of course, you are not free. You are not free because you are constantly required to reenact the motions of the prescripted, already organized configuration of the individual being as chooser. You

> [Normative legal thought] becomes the mode of discourse by which bureaucratic institutions and practices re-present themselves as subject to the rational ethical-moral control of autonomous individuals (*when indeed they are not*), just as normative legal thought constructs us (you and me) to think and act as if we were at the center—in charge, so to speak—of our own normative legal thought (*when indeed we are not*).[53]

Schlag aimed to reduce or even to eliminate the production of normative legal scholarship. Naturally, he could not simply recommend to his readers that they stop writing normative scholarship. Doing so would be, from Schlag's perspective, ineffectual. Moreover, if Schlag had overtly recommended such a change, he too would have been guilty of reconstructing the modernist self. He would have been encouraging his readers to assume they could change the world merely by declaring their value choices and implementing them. So instead, Schlag wrote deconstructively: He sought to uncover and disrupt the illegitimate assumptions that tacitly undergird normative legal scholarship—assumptions that ordinarily go unrecognized and unexamined.[54] Schlag, like other postmodern deconstructionists, brought background assumptions to the forefront so that they could be scrutinized and critiqued. He was most concerned, of course, with the assumption that we are modernist selves who can readily transform the world. Hence, Schlag wanted his deconstructive attack to induce readers to doubt their being or existence as such selves.[55] If they were to do so, Schlag believed, then they would

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> have to, you already are constructed and channeled as a choosing being. Not only is this social construction of the self extraordinarily oppressive—but it often turns out to be absurd as well. Much of its absurdity can be seen in the normative visions that routinely issue from the legal academy urging us to adopt this utopian program or that one—as if somehow our choices (I like decentralized socialism, you like conservative pastoral politics, she likes liberal cultural pluralism) had any direct, self-identical effect on the construction of our social or political scene. The critical insistence on making political value choices is utterly captive to a conventional and nostalgic description of the political field—a description and definition of the field that is guaranteed to yield political disablement and disempowerment. To tell people that they are already empowered to make political value choices is, in effect, to bolster the dominant culture's representation that we are free-choosing beings and to strengthen the forces that lead to our own repeated, compelled affirmation of (meaningless) choices.

Schlag, *The Problem*, *supra* note 2, at 1700–01 (footnotes omitted).

53. Schlag, *Nowhere*, *supra* note 2, at 185 (emphasis in original).

54. *See, e.g.*, Schlag, *Phrenology*, *supra* note 2 (seeking to deconstruct normative legal scholarship, particularly Langdellian scholarship, by comparing it to the now-disreputable science of phrenology). For a critique of Schlag's *Phrenology* article, *see* Stephen M. Feldman, *Playing With the Pieces: Postmodernism in the Lawyer's Toolbox*, 85 VA. L. REV. 151, 164–76 (1999).

55. Schlag explained that most American legal thinkers have focused on "either law's relation to its own internal requirements (formalism) or law's relation to its object (legal realism)." SCHLAG,

likely stop writing normative legal scholarship—because they would recognize that it is irrelevant to legal and judicial practices.

II. FISH AND SCHLAG ATTACK EACH OTHER: THE PERSISTENT MODERNIST SELF

Schlag's criticism of Fish was straightforward: A little Harold with a purple crayon—a modernist self—lurks within Fish's central concept of an interpretive community.[56] According to Schlag, Fish left ambiguous the meaning or content of interpretive communities. Interpretive communities, as described by Fish, perform a function similar to that of Thomas Kuhn's paradigms or Hans-Georg Gadamer's traditions.[57] That is, interpretive communities, like paradigms or traditions, provide us with the background that is needed for interpretation and understanding to get off the ground. Yet, Fish did not attempt to closely specify the precise definition of an interpretive community. As Schlag phrased it, Fish's interpretive communities are "theoretical unmentionables" that are left "relatively empty and unstructured."[58]

Schlag argued that Fish's failure to define concretely the contours of interpretive communities was not mere happenstance. If Fish had specifically defined interpretive communities, then the process of interpretation might have appeared too mechanistic, and humans might have seemed doomed to some form of determinism—where external and objective forces predetermine or dictate human actions, perceptions, and even thoughts. In other words, Schlag argued that Fish ambiguously rendered the concept of an interpretive community to avoid a Fishian form of a determined self.[59] Schlag pounced, declaring that Fish's nebulous notion of an interpretive community "leaves the self as the final adjudicator of its own acts…."[60] Fish, in short, had smuggled the modernist self into his interpretive schema. For Schlag, this was a fatal mistake. Fish's notion of the self, as construed by Schlag, always retains

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LAYING, *supra* note 2, at 163. He instead sought to focus on a "third relation…one between law and the subjects who invoke its name." *Id*.

56. Schlag criticized Fish in Schlag, *Fish v. Zapp*, *supra* note 2.

57. HANS-GEORG GADAMER, TRUTH AND METHOD 282–84 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 43–51 (2d ed. 1970).

58. Schlag, *Fish v. Zapp*, *supra* note 2, at 42.

59. *Id*. at 44–45.

60. *Id*. at 45.

autonomy because it does "not feel closeted by an overly determined objectivity."[61]

Schlag argued further that Fish's imprecision leaves a lacuna within the process of interpretation. Because interpretive communities are not closely defined, the elements of the process of interpretation also cannot be specifically delineated. Ultimately and inevitably, then, the modernist self provides the necessary substance and direction:

> The self knows that there is something irreducible about the act of interpretation that simply cannot be made articulate and that in any case could not be captured by anything so systematic, so universal, or so univocal as a theory. The self knows that interpretation is a social practice and that there will always be something about practice that cannot be reduced to rules, theory, or reason.[62]

According to Schlag, when interpretation cannot be reduced to a method or mechanical process, when practices cannot be governed by theories, when adjudication cannot be determined by principles, we find the relatively autonomous self pulling the levers and hitting the buttons.[63] Of course, Fish nonetheless was booming, "Pay no attention to the self behind the curtain!"[64]

Turning the tables, Fish similarly criticized Schlag. Schlag's goal, recall, was to reduce or eliminate the production of normative legal scholarship. To do so, he deconstructed such scholarship by uncovering its ostensibly illegitimate assumption or foundation: the modernist self. According to Fish, though, Schlag *mistakenly* believed that his deconstructive attack on legal scholarship could actually change the world. As Fish read Schlag, Schlag wanted legal scholars to become more "'self-conscious or self-critical.'"[65] If legal scholars were to acquire "the requisite critical self-consciousness,"[66] then they (we) presumably would refrain from writing normative articles. After all, if legal scholars realized

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61. *Id*. Adam Thurschwell provided an interesting alternative perspective. He argued that while the concepts such as Gadamer's tradition or Fish's interpretive community help us to grasp or understand the social construction of reality—our being-in-the-world—we should not attempt to reify or reduce any actual tradition or interpretive community (or even the concepts themselves) into a single linguistic formulation or a fixed object. Adam Thurschwell, *Reading the Law*, *in* THE RHETORIC OF LAW 275, 312–17 (Austin Sarat & Thomas R. Kearns eds., 1994).

62. Schlag, *Fish v. Zapp*, *supra* note 2, at 44.

63. *Id*. at 39–40.

64. In the movie, *The Wizard of Oz*, the Wizard, when he is discovered, says, "Pay no attention to that man behind the curtain." THE WIZARD OF OZ (Metro-Goldwyn-Mayer Studios Inc. 1939).

65. Fish, *Minimalism*, *supra* note 3, at 769 (quoting Schlag, *Normativity*, *supra* note 2, at 852).

66. Fish, *Minimalism*, *supra* note 3, at 770.

that they and their readers were not modernist selves, then why would they continue writing a form of scholarship that assumed otherwise? In sum, Schlag wanted to disturb his readers sufficiently so that they became more self-reflexive, thereby doubting their existence as modernist selves, and ultimately ceasing to write normative legal scholarship.

Fish argued, though, that Schlag's deconstructive writings were merely a form of theory. Even if Schlag was more imaginative or obscure than most theorists, his theory-writing was, in the end, no more effective than any other theory. Fish explained,

> Rhetorical/deconstructive legal thought produces nothing, for, like normative legal thought, it is not a practice, but an account of a practice. Just as normative legal thought cannot confer on the practices of which it is an account, the qualities it prizes (stability, neutrality, and so on), neither can rhetorical/deconstructive legal thought confer on the practice of which it is an account the qualities *it* prizes (indeterminacy, dispersal, de-centeredness, and so on).[67]

So, according to Fish, deconstructive legal thought cannot disturb or change the practice of legal scholarship. The form and quantity of normative legal scholarship will go unchanged. In fact, Fish added, normative legal thought could not possibly become more self-aware of its own rhetoricity—which Schlag quested after—because then "it would no longer be normative legal thought[.]"[68] Instead, "it would be some form of thought—sociological or anthropological in nature—that took normative legal thought as its object[.]"[69]

Fish, in effect, criticized Schlag for assuming that his readers could be liberated once they recognized that normative legal scholarship is grounded on unrealistic assumptions. Put in other words, Fish castigated Schlag for assuming that *his* readers were modernist selves empowered to change their world, *if only* they would listen to Schlag.[70] Schlag wrote as if his readers were little Harolds, waiting with their purple crayons, anxious to redraw the world of legal scholarship. Even though Schlag did not overtly recommend social and legal changes, as normative legal scholars do, Schlag nonetheless counted on a clandestine modernist self to be a

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67. *Id*. at 771 (emphasis in original).
68. *Id*. at 769.
69. *Id*.
70. *See* Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With an Emphasis on the* Teague *Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046, 1097 (1994) (criticizing Schlag for writing about trial lawyers as if they were relatively autonomous selves).

center of power and control. Thus, Fish concluded, however right Schlag might be in his depiction of social reality and legal scholarship, his argument "goes nowhere, issues in nothing, is of no consequence whatsoever."[71] Schlag addressed a reader who does not exist. Deconstructive legal thought, theory, and scholarship—like all legal thought, theory, and scholarship—is totally distinct from the practices they describe and seek to influence.[72]

III. FEMINIST THEORY AND THE RELATIONAL (POSTMODERN) SELF

A. The Problem of the Socially Constructed Self

Fish and Schlag criticized each other for making the same mistake. That mistake could be traced directly to a central and common postmodern theme. Namely, both Fish and Schlag uncovered and elaborated the social construction of the subject or self. In contrast with modernist depictions of the self as an independent and autonomous agent exercising sovereign control, postmodernists emphasize that social forces and relations constitute the self (or the experience of a self).[73] For instance, Michel Foucault described how power permeates society and produces disciplined and normalized selves (and bodies).[74] Power constructs us as "subjects."[75] Jacques Derrida emphasized the connection between language and the constitution of the self. The self or subject is not "what it *says* it is. The subject is not some meta-linguistic substance or identity, some pure *cogito* of self-presence; it is always inscribed in language."[76]

Fish and Schlag both subscribed to this view of the subject or self. Fish emphasized that the individual self is always and already situated in an

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71. Fish, *Minimalism*, *supra* note 3, at 772.

72. "Theorists like Schlag may be right when they describe the law and everything in it as 'socially constructed,' but the rightness of the description does no work. It does not lead to an alteration in practice." *Id*. at 771.

73. HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 120 (2d ed. 1983); David Couzens Hoy, *Introduction*, *in* FOUCAULT: A CRITICAL READER 1, 4-5 (David Couzens Hoy ed., 1986).

74. FOUCAULT, DISCIPLINE, *supra* note 6, at 30–31, 182–83, 193; Michel Foucault, *Why Study Power: The Question of the Subject*, *reprinted in* HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208, 208, 212 (2d ed. 1983).

75. Michel Foucault, *Two Lectures*, *in* POWER/KNOWLEDGE 78, 97 (Colin Gordon ed., Colin Gordon, Leo Marshall, John Mepham & Kate Soper trans., 1980); *see* Marcelo Hoffman, *Disciplinary Power*, *in* MICHEL FOUCAULT: KEY CONCEPTS 27, 33–34 (Dianna Taylor ed., 2011) (explaining Foucault's concept of disciplinary power).

76. Jacques Derrida, *Deconstruction and the Other*, *in* DIALOGUES WITH CONTEMPORARY CONTINENTAL THINKERS 107, 125 (Richard Kearney ed., 1984) (emphasis in original).

interpretive community. There is no 'escape from' or 'prior to' this situated existence.[77] Meanwhile, Schlag stressed that culture constitutes the individual's perceptions of herself. The culture of the legal community, including legal scholarship, constructs and reconstructs our perceptions that we—scholars and readers—are modernist (relatively autonomous) selves who can exercise control over the social and legal world.[78] The problem for Fish and Schlag was that if one is underscoring the social construction of the subject, then harboring a modernist self within one's scholarship might be a tad embarrassing. Hence, Schlag attacked Fish on this point, and vice versa. Although each explored the ramifications of the social construction of the subject, they both retained some remnant of the self in their writings.

Regardless, important lessons can be gleaned from this confrontation between Fish and Schlag. If renowned postmodernists like Fish and Schlag both sheltered selves in their writings, then who can avoid doing so? Nobody, as Derrida himself suggested. Derrida steadfastly deconstructed the modernist self (specifically, in his terms, Derrida focused on the so-called "metaphysics of presence"),[79] but he admitted that his very arguments unavoidably reinscribe or recreate the self. "There is no sense in doing without the concepts of metaphysics [including the modernist self] in order to shake metaphysics[,]" Derrida wrote.[80] "We have no language—no syntax and no lexicon—which is foreign to this history; we can pronounce not a single destructive proposition which has not already had to slip into the form, the logic, and the implicit postulations of precisely what it seeks to contest."[81] In other words, we are all little Harolds dragging around our purple crayons. To be sure, *I* certainly have not avoided this trap (of) myself.

Three interrelated implications flow from this realization. First, when Fish and Schlag criticized others for acting like little Harolds, they were shooting at easy targets: Of course, legal scholars could be unmasked as modernist selves. I do not mean to suggest that Fish's and Schlag's critiques of legal scholarship were, at the time, obvious or not worthwhile. For several years, Fish and Schlag were among our most imaginative and interesting jurisprudential scholars. After all, before Fish and Schlag,

77. Fish, *Chang*e, *supra* note 3, at 423–24, 433.

78. Schlag, *Normativity*, *supra* note 2, at 841–52.

79. JACQUES DERRIDA, OF GRAMMATOLOGY 50 (Gayatri Chakravorty Spivak trans., 1976).

80. Jacques Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences*, *in* WRITING AND DIFFERENCE 278, 280 (Alan Bass trans., 1978).

81. *Id*. at 280–81.

nobody would have written in a law review: 'Of course, legal scholars could be unmasked as modernist selves.'

Second, to a great degree, Fish and Schlag wasted their time attacking each other, but perhaps they did not know what else to do. They had both thoroughly denounced traditional legal scholarship, so it would have been hypocritical for either one to write normative articles advocating for a theory or principle. What to do next?[82] Well, let's attack another postmodernist. But their respective attacks accomplished little beyond allowing each scholar to add a publication to his CV. Nobody in the legal academy should have been less surprised than Fish and Schlag to learn that each one harbored a Harold in his scholarship.

Third, Fish and Schlag's confrontation, arising from their invocations of the socially constructed subject and their attacks on the modernist self, sheds light on the current moribund state of postmodern jurisprudence. In the American legal system, a dismissal of the self is unlikely to be well-received.[83] Given our Constitution, with its emphasis on individual rights such as free expression and religious freedom, scholarship denigrating the self, autonomy, and agency will probably fall on deaf ears. To a great degree, David Gray Carlson accurately assessed the reception to Schlag's criticisms of legal scholarship and the modernist self: "The legal academy refuses [even] to duel with Pierre Schlag."[84] When Schlag grandiosely declared that his scholarship threatened the academy with catastrophe, nobody shook in their boots.[85] Instead, Schlag sounded unfortunately shrill. The legal scholars who paid the most attention to Schlag's writings were other postmodernists, like Fish, and we know his reaction.

Perhaps, given this disconnect between postmodern and mainstream legal scholarship, it is unsurprising that postmodernism is rarely discussed in contemporary law reviews, especially flagship reviews.[86] The 1990s

82. Schlag would eventually arrive at one answer to this question. He would solemnly declare that legal scholarship is "dead." Schlag, *Spam*, *supra* note 2, at 804.

83. Nedelsky, *supra* note 13, at 42 (emphasizing the "iconic value" of autonomy in American culture); SHERRY TURKLE, LIFE ON THE SCREEN 15 (1995) (arguing that everyday life encourages us to view ourselves as autonomous intentional agents).

84. David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908, 1953 (1999) (reviewing PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998) & PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND (1996)).

85. At various times, Schlag pronounced that his writings were "threatening," Schlag, *Missing Pieces*, *supra* note 2, at 1243; made the reader "feel assaulted," Schlag, *Normativity*, *supra* note 2, at 893; and engendered "intellectual and cultural catastrophe." Schlag, *Nowhere*, *supra* note 2, at 190.

86. By a flagship review, I mean a law school's general student-edited review, as opposed to secondary journals. For example, the *William & Mary Law Review* is a flagship journal, while the *William & Mary Bill of Rights Journal* is a secondary journal.

were the halcyon days for publishing articles about postmodernism. For instance, a Westlaw search for postmodernism and its derivatives and synonyms (such as postmodern, postmodernity, postmodernist, post-modern, pomo, post-structuralism, and so on) in the 'Law Reviews & Journals' database revealed that from 1982 to 1986, flagship journals published only three articles referring to postmodernism in the title. From 1987 to 1991, the number jumped to eighteen. Then the number skyrocketed: thirty-five from 1992 to 1996, and thirty-nine from 1997 to 2001.[87] After 2001, the numbers declined, at first gradually, then precipitously. From 2002 to 2006, twenty-six articles were published, but from 2007 to 2011, the number dropped to eleven. From 2012 to the present, flagship journals published only two such articles. Predictably, then, recent publications have commented on the passing or death of postmodernism.[88] One might reasonably conclude that postmodern jurisprudence stalled during the naughts and never restarted.

B. Feminist Theory

Many modernist critics insist that the postmodern notion of the socially constructed self inevitably leads to determinism (entailing, among other things, a self bereft of free will). These critics argue that either the self retains some inherent degree of independence and sovereign control or the self disappears into a conglomeration of causal factors. A socially constructed subject or self loses all vestige of autonomy.[89] To clarify this critique, it helps to recognize that postmodernists divide into two groups: extreme and moderate.[90] Extreme postmodernists, on the one hand, are

87. During these times, there were nearly as many articles published in secondary journals. Additional articles were published with the word, deconstruction, and its derivatives in the title. For example, from 1992 to 1996, thirty-six articles were published in secondary journals, and sixteen articles were published with the word deconstruction in the title.

88. JOSH TOTH, THE PASSING OF POSTMODERNISM: A SPECTROANALYSIS OF THE CONTEMPORARY (2010); Adam G. Todd, *Neither Dead nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 BAYLOR L. REV. 893, 894 (2006); Timotheus Vermeulen & Robin van den Akker, *Notes on Metamodernism*, 2 J. OF AESTHETICS & CULTURE (2010) http://www.aestheticsandculture.net/index.php/jac/article/view/5677; *see* Stephen M. Feldman, *An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship*, 54 VAND. L. REV. 2351 (2001) (defending postmodernism).

89. *See* Dianna Taylor, *Introduction: Power, Freedom and Subjectivity*, *in* MICHEL FOUCAULT: KEY CONCEPTS 1, 2 (Dianna Taylor ed., 2011) (describing this criticism of Foucault).

90. *See* STEVEN BEST & DOUGLAS KELLNER, POSTMODERN THEORY 256–57 (1991) (distinguishing extreme from reconstructive postmodernism); Stephen M. Feldman, *The Problem of Critique: Triangulating Habermas, Derrida, and Gadamer Within Metamodernism*, 4 CONTEMP. POL. THEORY 296, 299–304 (2005) [hereinafter Feldman, *The Problem*] (distinguishing antimodernism from metamodernism).

anti-modernists: They reject modernist concepts such as truth, knowledge, and freedom. Moderate postmodernists, on the other hand, tend to repudiate modernist notions of these concepts, but often reformulate the concepts in accord with postmodern themes.[91] For example, a moderate postmodernist might invoke the notion of knowledge but refuse to characterize it as being objective—that is, grounded on the brute data of an external objective world.[92] Nonetheless the modernist critique, that the postmodern notion of the socially constructed self inevitably leads to determinism, might be valid for extreme postmodernists. Such postmodernists argue that "there is 'really' no subject, no consciousness, no freedom, just an 'interplay of forces' and our 'selves' nothing but the tentative juncture of these forces."[93]

Because extreme postmodernism and the social construction of the self appear to end in determinism, many feminists initially rejected postmodernism.[94] Feminism aims for social transformation to relieve women from oppression and subjugation.[95] Such political change, it would seem, requires individual agency and autonomy, as well as the possibility of social critique. If women lack the autonomy necessary to criticize and change current social and cultural structures, then women would appear locked into patriarchy.[96]

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91. *See* Richard J. Bernstein, *Foucault: Critique as a Philosophic Ethos*, *in* THE NEW CONSTELLATION 142, 154-55 (1991) (arguing Foucault does not herald the death of the subject, truth, or freedom).

92. *See* Best & Kellner, *supra* note 6, at 258 (arguing for a postmodern reconstruction of epistemological concepts); Kuhn, *supra* note 57, at 15, 24, 125–26, 135 (arguing paradigms shape fact observations, and questioning the accessibility of brute data in science); Feldman, *The Problem*, *supra* note 90, at 301–03 (arguing for truth and understanding without objectivity).

93. ROBERT C. SOLOMON & KATHLEEN M. HIGGINS, A SHORT HISTORY OF PHILOSOPHY 303 (1996); *see* DOUGLAS KELLNER, MEDIA CULTURE 233 (2003) (summarizing the postmodern attack on the modernist self). "In the extreme version of postmodernism, the determinants of class and race and age and group and religion and sexual orientation and role and mood and context constitute us in a changing pattern from moment to moment. From their varied intersection springs up a postmodern self. 'I' am merely the place where these things happen." James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489, 521 (1991).

94. Martha Minow, *Incomplete Correspondence: An Unsent Letter to Mary Joe Frug*, 105 HARV. L. REV. 1096, 1104 (1992) (questioning the political implications of postmodernism); *see* Christine Di Stefano, *Dilemmas of Difference: Feminism, Modernity, and Postmodernism*, *in* FEMINISM/POSTMODERNISM 63 (Linda J. Nicholson ed., 1990) (questioning connections between feminism and postmodernism).

95. *See, e.g.*, Tracy E. Higgins, *Why Feminists Can't (or Shouldn't) Be Liberals*, 72 FORDHAM L. REV. 1629, 1629 (2004) (discussing connections between liberalism and women's subordination); Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Refigured*, *in* RELATIONAL AUTONOMY 3, 3–4 (2000) (discussing the need to understand oppression and subjection); Cynthia Willett et al., *Feminist Perspectives on the Self*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., fall 2015 ed.) (emphasizing subordination of women's selfhood).

96. *See, e.g.*, ELIZABETH FOX-GENOVESE, FEMINISM WITHOUT ILLUSIONS 153–59, 220–21

Yet other feminists recognized close affinities between postmodernism and feminist theory.[97] Most important, feminists discerned that the modernist conception of the self was unrealistic, that the autonomous and sovereign agent, independent of and unconstrained by social relationships, disregarded women's experiences. Groundbreaking work in psychology set the stage for this breakthrough. Nancy Chodorow argued that individuals develop a sense of self only in relation to others. More specifically, young girls and boys connect with and react to their primary caregivers, usually mothers.[98] Carol Gilligan extended this insight by showing that girls develop a different voice from boys, a different sense of morality—an ethic of care—because of their existential connection to others.[99] Feminist political, social, and jurisprudential theorists built on this basic insight, that the self is relational rather than atomistic, that "human beings are created in and through relations with other human beings."[100]

(1991) (rejecting postmodernism as threat to feminism); Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59 (1989) (arguing that women have a self contrary to postmodern arguments).

97. Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 169–70 (2010) (recognizing the emergence of an explicitly postmodern feminism); *see, e.g.*, Nancy Fraser & Linda J. Nicholson, *Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism*, *in* FEMINISM/POSTMODERNISM 19 (Linda J. Nicholson ed., 1990) (attempting to integrate feminism and postmodernism). The most renowned postmodern feminist is Judith Butler. JUDITH BUTLER, GENDER TROUBLE (1990). Like other postmodernists, feminist postmodernists do not necessarily announce that they are postmodern. Regardless, I would include, among others, the following: Amy Allen, Julie E. Cohen, Drucilla Cornell, Tracy E. Higgins, Margaret A. McLaren, and Dianna Taylor. AMY ALLEN, THE POLITICS OF OUR SELVES (2008); JULIE E. COHEN, CONFIGURING THE NETWORKED SELF (2012); DRUCILLA CORNELL, BEYOND ACCOMMODATION (New ed. 1999); Tracy E. Higgins, *"By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536 (1995); Margaret A. McLaren, *Foucault and Feminism: Power, Resistance, Freedom*, *in* FEMINISM AND THE FINAL FOUCAULT 214 (Dianna Taylor & Karen Vintges eds., 2004); Dianna Taylor, *Practices of the Self*, *in* MICHEL FOUCAULT: KEY CONCEPTS 173 (Dianna Taylor ed., 2011).

98. NANCY CHODOROW, THE REPRODUCTION OF MOTHERING (1978); *see* Marilyn Friedman, *Autonomy and Social Relationships: Rethinking the Feminist Critique*, *in* FEMINISTS RETHINK THE SELF 40, 43 (Diana Tietjens Meyers ed., 1997) [hereinafter Friedman, *Relationships*] (summarizing Chodorow's argument).

99. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); *see* NEL NODDINGS, CARING: A RELATIONAL APPROACH TO ETHICS AND MORAL EDUCATION (2d ed. 2013) (advocating for ethic of care from philosophical standpoint).

100. Jane Flax, *Political Philosophy and the Patriarchal Unconscious: A Psychoanalytic Perspective on Epistemology and Metaphysics*, *in*, DISCOVERING REALITY 245, 250 (Sandra Harding & Merrill B. Hintikka eds., 1983); *see, e.g.*, Susan J. Brison, *Outliving Oneself: Trauma, Memory, and Personal Identity*, *in* FEMINISTS RETHINK THE SELF 12 (Diana Tietjens Meyers ed., 1997) (arguing for a relational self); Friedman, *Relationships*, *supra* note 98, at 40–47 (building concept of autonomy on relational self); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987) (building on different voice theory), Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (same). Communitarians also criticized the modernist individual or self. ALASDAIR

An overlap with postmodernism crystallized. Postmodernists like Foucault asserted that power constructs us as subjects or selves, while feminists argued that we develop and are sustained through relationships. Regardless of the precise terminology, the positions resonated: The self is a social creature.[101] The socially constructed self is a relational self, and vice versa.[102] While Chodorow had focused on mothering as caregiving, other feminist theorists extended their analyses to additional social relationships. In Jennifer Nedelsky's words, our relational selves "are constituted, yet not determined, by the *web of nested relations* within which we live."[103] She elaborated,

> [E]ach individual is in basic ways constituted by networks of relationships of which they are a part—networks that range from intimate relations with parents, friends, or lovers to relations between student and teacher, welfare recipient and caseworker, citizen and state, to being participants in a global economy, migrants in a world of gross economic inequality, inhabitants of a world shaped by global warming.[104]

Other feminists, who were not only women but also racial minorities or members of other peripheral groups, pushed this insight about the multiplicity of nested relations while giving it a different twist. They emphasized that our selves develop at the intersection of multiple cultural and social forces.[105] Selves or "identities are formed within the context of social relationships and shaped by a complex of intersecting social

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MACINTYRE, AFTER VIRTUE (3d ed. 2007); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (2d ed. 1998).

101. Friedman, *Relationships*, *supra* note 98, at 42 (emphasizing social nature of self); *see* Amy Allen, *Foucault, Feminism, and the Self: The Politics of Personal Transformation*, *in* FEMINISM AND THE FINAL FOUCAULT 235 (Dianna Taylor & Karen Vintges eds., 2004) [hereinafter Allen, *Transformation*] (discussing the connection between Foucault and the feminist relational self); McLaren, *supra* note 97, at 215–19 (linking feminism with Foucauldian postmodernism). As McLaren points out, Foucault also viewed power as being relational. McLaren, *supra* note 97, at 219.

102. Nancy J. Hirschmann, *Autonomy? Or Freedom? A Return to Psycholanalytic Theory*, *in* AUTONOMY, OPPRESSION, AND GENDER 61, 73 (Andrea Veltman & Mark Piper eds., 2014) ("our desires and preferences are socially constructed").

103. Nedelsky, *supra* note 13, at 45 (emphasis added).

104. *Id*. at 19.

105. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); *see* John A. Powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481 (1997) (discussing an intersectional self).

determinants, such as race, class, gender, and ethnicity."[106] Feminists thus were acutely aware that not all relationships are equivalent. Some are more empowering, some are more oppressive, and perhaps all are partly both.[107] As Nancy J. Hirschmann explained, "because [social and relational] contexts are importantly shaped by patriarchy, sexism, racism, classism, and heterosexism, social construction is not simply innocent or neutral[.]"[108] Furthermore, social conditions and relations can impose constraints on individuals at the unconscious level. The constraints are, in a sense, absorbed as part of one's personality.[109] Judith Butler emphasized how power operates at a deep psychic level by shaping our fantasies and desires.[110] For example, a woman might embody notions of femininity even if they are debilitating.[111]

The ambivalence of the social construction of the self—the potential space between the empowering and oppressive effects of social relations—led feminists to emphasize the concept of autonomy. As feminists perceived, the modernist critique of the postmodern social construction of the self—that it necessarily leads to determinism—arises from the modernist world view itself. Modernism revolves around subject-object metaphysics, around the sharp separation of the free and independent self from the objective world.[112] From this modernist perspective, if the individual is not free in the modernist sense, then the individual is necessarily determined. Autonomy, from the modernist perspective, requires an independent and atomistic self. But we do not have to accept this modernist paradigm with its dichotomy of free will versus

106. Mackenzie & Stoljar, *supra* note 95, at 4; *see* Hirschmann, *supra* note 102, at 73 (emphasizing the intersection of "gender, sexuality, race, and class").

107. Friedman, *Relationships*, *supra* note 98, at 55–56. Butler begins *The Psychic Life of Power* by pointing out that even "subjection is paradoxical." JUDITH BUTLER, THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION 1 (1997).

108. Hirschmann, *supra* note 102, at 73.

109. *Id*. ("cultural norms and social practices can produce desires within women that arbitrarily limit their abilities to engage in the world"); *see* CATRIONA MACKENZIE, *Three Dimensions of Autonomy: A Relational Analysis*, *in* AUTONOMY, OPPRESSION, AND GENDER 15, 22–23 (Andrea Veltman & Mark Piper eds., 2014) (arguing that certain social conditions unjustly limit self-determination).

110. BUTLER, *supra* note 107, at 9, 78; *see* Allen, *supra* note 97, at 72–95, 173–74, 183 (explaining, criticizing, and extending Butler's argument).

111. *Compare* Natalie Stoljar, *Autonomy and the Feminist Intuition*, *in* RELATIONAL AUTONOMY 94, 95 (Catriona Mackenzie & Natalie Stoljar eds., 2000) (claiming "that preferences influenced by oppressive norms of femininity cannot be autonomous"), *with* Friedman, *supra* note 13, at 24–25 (arguing that women living within conditions of oppression can still exercise some degree of autonomy).

112. *See* RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1983).

determinism.[113] To the contrary, the concept of the relational self prompted numerous feminists to reconceive autonomy from a relational perspective. Once feminists repudiated the modernist self, they did not need to follow the modernist argument from social construction to a logical end in determinism. Having escaped the trap of modern subject-object metaphysics, feminists maintained that autonomy should not be equated with self-sufficiency and independence.[114]

From the feminist perspective, autonomy develops only in and through relationships.[115] What does this mean? The creation or construction of the relational self is an ongoing process.[116] An individual does not reach the age of three or five or whatever and suddenly become static, frozen in development. Instead, one's self is always and already emerging. In other words, the relational self is an emergent self, and the process of emergence is always relational.[117] According to Nedelsky, "Human beings are in a constant process of becoming, in interaction with the many layers of relationship in which they are embedded."[118] The crux of autonomy, then, is a capacity to participate in this ongoing process of self-creation.[119]

This autonomy is itself relational. Our relationships can facilitate the development of a capacity for self-creation and self-determination.[120] Most obviously, the parent-child relationship can foster in the child a capacity for autonomous reflection and action.[121] Autonomy, then, is not only harmonious with but also arises from "human connections, including those manifested in love, friendship, appropriate care, and even loyalty and devotion."[122] Nedelsky extended this point to underscore that autonomy is

113. Butler argues against allowing "feminist discourse on cultural construction [to remain] trapped within the unnecessary binarism of free will and determinism. Construction is not opposed to agency; it is the necessary scene of agency, the very terms in which agency is articulated and becomes culturally intelligible." Butler, *supra* note 97, at 187; *see* BAUMAN & RAUD, *supra* note 9, at 102 (rejecting opposition between "determination and self-creation").

114. Friedman, *Relationships*, *supra* note 98, at 41.

115. Some mainstream philosophers have also articulated a relational autonomy. *E.g.*, GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988); *see* Friedman, *supra* note 13, at 87–91 (discussing mainstream philosophers).

116. BAUMAN & RAUD, *supra* note 9, at 132–33; Nedelsky, *supra* note 13, at 50; Edward McGushin, *Foucault's Theory and Practice of Subjectivity*, *in* MICHEL FOUCAULT: KEY CONCEPTS 127, 141 (Dianna Taylor ed., 2011). The "subject is never fully constituted." Judith Butler, *Contingent Foundations*, *in* FEMINIST CONTENTIONS 35, 47 (1995).

117. KENNETH J. GERGEN, RELATIONAL BEING xv (2009).

118. Nedelsky, *supra* note 13, at 38.

119. *Id*. at 45.

120. Friedman, *supra* note 13, at 4–7, 19–21.

121. Nedelsky, *supra* note 13, at 19.

122. Andrea Veltman & Mark Piper, *Introduction* to AUTONOMY, OPPRESSION, AND GENDER 1, 4 (Andrea Veltman & Mark Piper eds., 2014).

relational through-and-through. "As we act (usually partially) autonomously, we are always in interaction with the relationships (intimate and social–structural) that enable our autonomy. Relations are then constitutive of autonomy rather than conditions for it."[123] An individual can exercise autonomy in isolation no more than she can communicate without a linguistic community of other individuals.[124]

The social construction of the relational self is always both limiting and enabling.[125] For example, a nurturing parental relationship is primarily enabling, while a racist or sexist relationship is primarily limiting. The relational self can distinguish between the limiting and enabling effects of social forces to the degree it is autonomous. To be clear, we never completely escape social forces, the power of relationships.[126] Yet, we can learn to create ourselves, to resist unwanted relations, to fight oppression—but only because of the tools we acquire and sustain in our social context, in our relationships.[127] We can navigate power the way a surfer rides a wave. Irresistible power can overwhelm us at any moment, but with the proper training, we retain the possibility of affecting our course in a meaningful fashion.[128] This metaphor breaks down, though, if we imagine a sole surfer. We are never surfing alone because autonomy is a relational capacity or competency, "a mode of interacting with others."[129] As Marilyn Friedman summarized relational autonomy, "persons are fundamentally social beings who develop the competency for autonomy through social interaction with other persons. These developments take place in a context of values, meanings, and modes of self-reflection that cannot exist except as constituted by social practices."[130]

What about Harold and his purple crayon? We now know that Harold had a far richer life than initial appearances suggested. For his age, Harold is an outstanding artist, but he has been lucky. His mother and father are

123. Nedelsky, *supra* note 13, at 46.

124. *See id*. at 55 (comparing autonomy to speaking a language). "[A]gency is not an attribute of a subject or something that someone has, but is rather a relationship that is enacted in the world." Maria Pallotta-Chiarolli & Bob Pease, *Recognition, Resistance and Reconstruction*, *in* THE POLITICS OF RECOGNITION AND SOCIAL JUSTICE 1, 5 (Maria Pallotta-Chiarolli & Bob Pease eds. 2014).

125. Cushman, *supra* note 10, at 350; Linda Barclay, *Autonomy and the Social Self*, *in* RELATIONAL AUTONOMY 52, 56-57 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

126. Allen, *supra* note 97, at 179.

127. McLaren, *supra* note 97, at 215–18.

128. Taylor, *supra* note 89 at 4 (discussing Foucault and "the practice of navigating power").

129. Nedelsky, *supra* note 13, at 55.

130. Marilyn Friedman, *Autonomy, Social Disruption, and Women*, *in* RELATIONAL AUTONOMY 35, 40 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

wealthy enough to buy him a purple crayon. Moreover, his mother is a graphic designer who draws with Harold every day. His father praises Harold's drawings and tapes them on the refrigerator. The family lives in a small but vibrant city in the United States. That city has an excellent pre-school, which Harold attends. Harold also enjoys kicking a ball around the backyard with his friend, Frances. Harold wants to play on a soccer team with Frances, but Harold's parents believe that organized sports are overly competitive. They refuse to sign him up for the neighborhood mini-soccer league. Over time, Harold begins to think of himself as an artist. He joins the Art Club in high school. He frequently marvels at the beauty of the world and envisions pictures that he could paint. Later in life, Frances plays college soccer, while Harold becomes a professional artist.

Harold, quite clearly, developed as an individual, as a self, within a web of relationships, including his mother, his father, his friend, his school, his city, and so on. Those relationships simultaneously enabled and constrained Harold. He developed a capacity for artistic expression, for autonomous self-creation, and he eventually became a successful artist, but he never played soccer. As an artist, Harold experienced a high degree of satisfaction. He had internalized an identity as an artist, so he was happy to make money doing what he loved. Yet, like many people he knew, Harold had mixed feelings about his parents. He frequently wished they had encouraged him to play team sports.

IV. CONCLUSION: IMPLICATIONS FOR POSTMODERN JURISPRUDENCE

The recognition of a relational self and relational autonomy has at least two significant implications. First, social critique is possible. If we have the capacity to distinguish limiting from enabling social forces and relations, then we also have the capacity to criticize our society and culture. Although there is no escape from relationships of power, that means only "that there is no Archimedean point, no point wholly outside power relations from which our critique of power can be launched or our transformative vision of a better future can be articulated."[131] But if one repudiates modernist subject-object metaphysics, then the lack of an Archimedean point should be neither surprising nor problematic.[132] As feminist philosopher Amy Allen emphasized, "we can envision subjects as

131. Allen, *supra* note 97, at 177; *see* Butler, *supra* note 116, at 39 (arguing that the recognition of power is "the very precondition of a politically engaged critique").

132. *See* Bernstein, *supra* note 112, at 16–20 (explaining importance of Archimedean point to modernist philosophy).

both socially and culturally constructed in and through relations of power and subjection and capable of critique and of critically directed self-constitution and social transformation."[133] According to Allen, the feminist concept of the relational self suggests that "mutual, reciprocal, communicative social interactions are necessary for the formation, sustenance, and repair of the self."[134] Consequently, if a set of social relationships and interactions are not mutual and reciprocal, if one individual or entity manipulates or deceives another for the former's benefit, then we can reasonably denounce the relationship as unjust or destructive to autonomy.[135] Unquestionably, many individuals, struggling to develop capacities for autonomy and social critique, confront far greater obstacles than did our friend Harold. But for Harold or anyone else, the repudiation of modernism and the recognition of the relational (postmodern) self can facilitate autonomy and social critique. If we do not understand that the self is relational, if we insist that autonomy requires independence, separation, and self-sufficiency, then critique might never get off the ground. Isolation does not produce social change.

Second, if we have the capability for social critique, as I suggest, then we should rethink many jurisprudential concepts, particularly in constitutional law.[136] For example, we should stop conceiving of constitutional rights as protecting atomistic individuals from state power. Instead, we should envision rights as facilitating constructive and creative relationships and protecting against destructive or distorting relationships. This perspective might sometimes engender limits on government, but might also encourage government restrictions on private entities, like corporations, which can manipulate individuals and diminish their autonomy.[137]

In short, we now can see the possibility of postmodern social critique and jurisprudence. Such a possibility does not mean that we enjoy a sovereign power to remake the world, like a modernist Harold. Rather, we are empowered to criticize, to act autonomously, and to work with others to change the world. To be sure, change is not as easy as writing a law review article. Progressive political and social change is difficult, partly

133. Allen, *supra* note 97, at 177.

134. Allen, *Transformation*, *supra* note 101, at 240.

135. Allen, *supra* note 97, at 177–79. Allen developed her critical theory by synthesizing Foucault, Jürgen Habermas, Butler, and Seyla Benhabib. *Id.* at 1–10.

136. *See* Nedelsky, *supra* note 13, at 38 (arguing to integrate relational concepts into legal system).

137. *See id*. at 98 (arguing to protect "constructive relationships"); *id*. at 118 (arguing against focusing on "mythic independence" from the state).

because many individuals do not welcome such change. But we should not be deceived: Change is possible.