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Book Review: *Postmodern Legal Movements: Law and Jurisprudence at Century's End* by Gary Minda

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POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END. By *Gary Minda.* New York: New York University Press. 1995. Pp. xii, 350. Cloth, $36; paper, $18.95.

American legal scholarship of the past thirty years has been characterized by nothing so much as *fragmentation.* The accelerating evolution of contemporary scholarship has brought about forays into all manner of cognate disciplines, has elicited considerable criticism,[1] and, for some scholars, has reflected an extreme disaffection with traditional techniques of law teaching and analysis.[2] This latter condition has come to be known by some as the "postmodern" condition (p. 2). In *Postmodern Legal Movements,* Gary Minda[3] attempts nothing less than to capture the whole sweep of American jurisprudence. In so doing, he purports to explain this postmodern condition as it exists in the legal academy.[4]

Postmodern Legal Movements does two things. First, the bulk of the book provides an overview of American jurisprudence, from Christopher Columbus Langdell to the present. This overview is necessary because, in order to understand "postmodern forms of jurisprudence, we must first explore what came before postmodernism, that is, modernism" (p. 5). Second, the relatively short latter portion of the book presents an argument about the current state of American legal scholarship and its future. Minda's picture of contemporary legal thought is that of a paradigm shift in the making. As he explains it:

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1. Judge Edwards, for example, complains that law schools "should be . . . producing scholarship that judges, legislators, and practitioners can use. . . . But many law schools — especially the so-called 'elite' ones — have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy." Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession,* 91 MICH. L. REV. 34, 34 (1992). *See generally* sources cited *infra* note 22.

2. One scholar recently described this disaffection thus:

> So complete is this marginalization that even a legal theory as peculiar as Ronald Dworkin's — a theory that claims, among other things, that there are such entities as legal "principles" that are neither positive legal rules nor autonomous moral norms, and that always generate a single correct legal answer in "hard" cases — is treated with a symptomatic combination of respectful attention and fundamental indifference by an academic discourse whose real interests obviously are elsewhere.

Paul F. Campos, *The Chaotic Pseudotext,* 94 MICH. L. REV. 2178, 2180 n.4 (1996).

3. Professor of Law, Brooklyn Law School.

4. Postmodernists will already have objected to my use of the term *postmodern* — for to use it to describe a school or a style of scholarship or, indeed, to draw sharp distinctions between it and modernism seems to be a hopelessly modernist pursuit. Unfortunately, in order to discuss the matter at all, one must use some term as an admittedly simplistic shorthand for the postmodern phenomenon; otherwise, sensible discussion of the matter is simply impossible. Furthermore, it would be difficult to raise this argument in defense of Minda's book, for it too is couched in modernist language and argument. *See infra* section II.B.

> [T]he mainstream or modern view has broken into a diverse body of jurisprudential theories and perspectives. The current state of law and modern jurisprudence has become like a delta just before a river empties into the sea. The mighty river that was once modern jurisprudence has broken down into separate rivulets as it merges into a larger and different body of water. [p. 257]

Postmodern Legal Movements will prove useful to those in search of a basic introduction to the standard account of American legal thought.[5] Minda is well read in jurisprudence, and his book provides a comprehensive overview of legal philosophy as it has developed in this country during the twentieth century.

As an argument about the direction of legal thought, however, the book suffers from certain problems. It has a strong tendency to overgeneralization and is at times ideologically one-sided. Furthermore, the book's more fundamental arguments — about the nature of the postmodern phenomenon, its causes, and its future — seem unduly conclusory. This book is a *lumper,* as it were, not a *splitter;* its tendency to compartmentalize intellectual trends seems Procrustean and simplistic.

These criticisms lead to a more general one. Minda is quite sympathetic to the postmodern view,[6] and yet his book seems unduly categorical and rigid — vices, if anything, of *modernism* (as Minda uses the term). Thus, the irony of *Postmodern Legal Movements* is that the book seems itself to be a modernist work. This may be no serious criticism in itself,[7] but one is left to wonder why a scholar so critical of modernist scholarship has taken on such a modernist project.

Part I of this Notice discusses Minda's historical treatment. It sets out in abbreviated fashion the story as Minda has told it, in order to set the stage for his more central arguments. Part I also briefly examines the book's deeper claims and considers Minda's view that modern jurisprudence is at a critical point, verging on an inexorable turn to postmodernism. Part II takes a more critical view, assessing the problems and ironies mentioned above.

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5. Be forewarned, however, that this book is sometimes hard to read. For example: "[Legal scholars] continue to practice Langdellian formalism as the rhetoric of the transcendental object or subject in which the legal subject-interpreter is eclipsed, even while they strive to be normative." P. 59. Or try this one: "This quasi-scientific perspective presumes that lawyers can discover a relatively stable basis for justifying legal results by universalizing legal propositions abstracted from hypothetical examples structured by behavioral assumptions about economic motivations of homogeneous individuals." Pp. 100-1.

6. Minda finds postmodernism to be "the basis for satisfaction, hope, and new intellectual inquiry" and believes that "the time has come to seriously consider the transformative changes now unfolding in American legal thought," because postmodernism has "hasten[ed] the death, not of jurisprudence, but of the particular methods that modern legal scholars have employed in thinking about their subject[s]." Pp. 256-57.

7. *See infra* text accompanying notes 50-53.

I. THE THREAD OF LEGAL HISTORY

A. *Early Trends*

Minda first lays out a lengthy exegesis of what he calls "modern" jurisprudence.[8] He does so because definitions of *postmodernism* are usually given in relational terms — postmodernism is everything that is not modernism.[9] *Modernism,* in turn, seems to be basically everything that we have known as jurisprudence until the present time; only in the past few decades have we begun to explore postmodern modes of legal thought.[10]

The first four chapters set out a fairly traditional account of the history of American legal philosophy.[11] Minda locates the beginning of modern jurisprudence in the 1871 publication of Langdell's *A Selection of Cases on the Law of Contracts.*[12] Langdell is for Minda the source of considerable evil in American legal thought — he was the father, or at least a chief proponent, of American "formalism."[13] The evil of formalism was that it ignored the cultural context in which law exists. As later thinkers understood, formal-

8. The following summary of jurisprudential history is taken solely from the book and is intended only to reflect the story as Minda has told it. Any criticism will be made in the accompanying notes.

9. *See, e.g.,* Dale Jamieson, *The Poverty of Postmodernist Theory,* 62 U. COLO. L. REV. 577, 577 (1991).

10. As Jamieson notes, the relational definition is basically uninformative because legal scholars do not agree on what *modern* means. *See id.* at 577-78. I will generally follow Minda's usage of terms. Note that he uses "modernism" somewhat differently from how it has been used elsewhere in philosophy. As Leszek Kolakowski explains, "modern" usually refers to the recurrent trend in popular culture to question prevailing orthodoxy. *See* LESZEK KOLAKOWSKI, MODERNITY ON ENDLESS TRIAL 3-13 (1990). While definitions are hazardous in this area, I take Minda's use of "postmodern" to mean essentially what Kolakowski means by "modern"; by "modern," in turn, I take Minda to mean the generally accepted dogma of the time, or at least the dogma of the present time.

11. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 2 (1995) (summarizing the standard story roughly as laid out by Minda); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation,* 65 S. CAL. L. REV. 2505, 2507 (1992) (same).

12. *See* p. 13 (citing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (Boston, Little, Brown & Co. 1871)).

13. *Formalism* holds that the principles underlying law, if properly applied, produce "right" answers to legal questions, as if those principles were the major premises of legal syllogisms. Pp. 13-14. Minda also uses the term *conceptualism* to describe Langdell's jurisprudence. Conceptualism generally is "a form of logic that classifies legal phenomena on the basis of a few fundamental abstract principles and concepts developed from the distinct methods of legal reasoning." P. 14. Thus, conceptualism is the belief that law is a value-free set of principles that exists independently of culture. Pp. 14-15. A good example of Langdell's outlook is found in the introduction to his casebook:

> Law, considered as a science, consists of certain principles or doctrines. . . . Moreover, the number of fundamental legal doctrines is much less than is commonly supposed . . . . If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.

LANGDELL, *supra* note 12, at viii-ix, *quoted in* Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence,* 76 IOWA L. REV. 661, 661 n.5 (1991).

ism allowed the application of rules without respect to the social inequities that may have given rise to them — racial, class inequality, and so on — or the unfairness that may result from their application (pp. 64-65).

The second major phase of American jurisprudence, which is commonly seen as a reaction to the ills of formalism,[14] is known as *realism.* Minda identifies the origins of realism in the frustration felt by certain faculty at the Columbia and Yale law schools with formalistic law and jurisprudence and their "deep skepticism about the possibility of decision making according to rule."[15] According to Minda, however, most legal realists did not wholly reject formalism. Although the realists recognized the "relationship between law and society [that] enabled [them] to argue in favor of 'non-technical' or 'extra-legal' considerations in legal decision making" (p. 28), they "were not that different from the traditional legal scholars they criticized" (p. 31). While Langdell had argued that "law is a science," the realists "advanced the similar idea that 'law is a social science' " (p. 31). Thus, although realism was a rejection of the formalist ideal of a discrete set of guiding *legal* principles, it nonetheless maintained the view that "correct" legal answers could be discovered through social science methods that properly take into account the cultural context in which law operates.[16]

Realism, which flourished throughout the 1920s and 1930s and lived on into the 1940s, was ultimately defeated by a temporary return to formalism. The 1940s saw the birth of several strands of thought that ultimately crystallized into what is now known as the "legal process" or "neutral principles" school (pp. 33-40). Legal process scholars proposed that law could be made objective if decisionmaking were based only on *process* values rather than on *substantive* values. This could be accomplished, they argued, by

14. *See* ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE 185-88 (1989).

15. P. 27. In particular, realists rebelled against the Supreme Court's so-called economic due process jurisprudence, as epitomized by the Court's decision in *Lochner v. New York,* 198 U.S. 45 (1905). Pp. 26-27.

16. Duxbury shares this view. *See* DUXBURY, *supra* note 11, at 158-59 (arguing that although the realists rallied against Langdellian formalism, they "generally lost their nerve when faced with the implications of their own jurisprudential constructions"). For a defense of the more traditional view — that realism fully broke with formalism and that, in fact, twentieth-century jurisprudence has merely been a "pendulum swing" between realism and formalism — see Robert W. Gordon, *American Law Through English Eyes: A Century of Nightmares and Noble Dreams,* 84 GEO. L.J. 2215, 2222-27 (1996) (reviewing DUXBURY, *supra* note 11).

As a general matter, Minda seems largely to accept the "pendulum swing" model of jurisprudential history. Although he shares some doubt that the realists wholly rejected formalism, he nevertheless seems to understand jurisprudence as an ongoing struggle between formalism and the rejection of formalism — from Langdell's formalism to the indeterminacy claims of the realists to the formalistic rigidity of the legal process scholars (discussed in more detail below) to the more skeptical works of the 1960s and 1970s that have led to the postmodern condition of today.

allowing the courts to consider only those matters within their institutional competence — disputes involving the individual interests of private parties — and requiring that they defer in all other matters to bodies more competent to resolve them. Thus, awkward value choices would be left to the representative legislatures, rather than the antimajoritarian courts.[17] This, in turn, would allow law to be more like the "science" envisioned by Langdell.

Modernism — all the jurisprudence predating postmodernism, including formalism, realism, and legal process — finally met the beginning of its end when courts and commentators began to understand the reciprocity of law and society. That is, the first seeds of postmodernism were sown when it became clear that law and the people who make it and are subject to it are interconnected and interdependent. Minda locates this shift in two places. First, he cites two scholarly articles written in the early 1960s: Ronald Coase's *The Problem of Social Cost*[18] and Charles Reich's *The New Property*.[19] The "common jurisprudential perspective" of these two articles was their "similar critical responses to the role and function of law in society. . . . Both authors implicitly rejected traditional faith in the efficaciousness of the legal process and the autonomy of fundamental rights" (pp. 72-73). Thus, they both considered it important to reject the prevailing formalist view that law may be studied profitably in a vacuum, without reference to the cultural context surrounding it.[20]

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17. Pp. 34-35. This view of legal process "winning" temporarily over realism again reflects the "pendulum swing" model. *See* Gordon, *supra* note 16, at 2222-27.

18. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

19. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

20. This statement of the roots of postmodernism may sound suspiciously like legal realism. After all, they both focus on the fact that formalistic doctrine and scholarship obscure the cultural and political content of law. Indeed, postmodernism and its most recent antecedent, critical legal studies (CLS), are often said to be at least closely analogous to, or even simply a rehash of, realism. *See* J. Stuart Russell, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy*, 18 OTTAWA L. REV. 1, 5 (1986) (claiming that critical legal studies has "a very pronounced ancestral relationship with Legal Realism"); A.W.B. Simpson, *Legal Iconoclasts and Legal Ideals*, 58 U. CIN. L. REV. 819, 830-31 (1990) (arguing that "iconoclasm" unites skeptical philosophies and that the differences between skeptical philosophies are superficial); *Discussion: Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 341, 345 (1988) (comment by Charles Fried) ("The whole difficulty which the pseudo-philosophy of critical legal studies and legal realism raise[d] is the difficulty about explaining . . . how it is that you can follow rules, the rules about following rules, and so on. And that is a mug's game . . . we do not need to play."). Indeed, some postmodern authors seem to admit as much. *See, e.g.*, Mark Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 516 (1986); Sanford Levinson, *Writing About Realism*, 1985 AM. B. FOUND. RES. J. 899, 908 (reviewing ROBERT JEROME GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW (1985)).

The fact that Minda understands these and other intellectual trends as distinct and separable makes up a major component of this Notice's criticism of the book. As discussed below, *see infra* notes 41-45 and accompanying text, if postmodernism is anything, it is a rejection of attempts to categorize and compartmentalize the world. To be sure, Minda is hardly the only

Minda also sees the beginnings of postmodernism surfacing in the civil rights case law of the Warren Court. In particular, in *Brown v. Board of Education*,[21] the Court rejected the then-dominant "separate-but-equal" regime because "traditional legal analysis had failed to recognize that law contributes to the construction of social reality" (p. 64) — that is, that "separate" seemed "equal" at least in part because the law said it was (p. 74).

The recognition of the reciprocity of law and society precipitated the changes in scholarly thought that have led to current jurisprudence. Young thinkers influenced by this recognition "rejected the notion that law was distinct from political and moral philosophy; [they] also rejected the idea that law could be rendered coherent by a comprehensive legal theory" (p. 77). This new brand of culturally influenced scholarship soon spurred the growth of five distinct scholarly movements — the "law-and" movements and the critical theory schools — that remain with us today. These recent movements are dealt with in the second part of Minda's book.

B. *The Five Schools*

Minda explains "that . . . five jurisprudential movements of the 1980s have . . . come to reflect the emergence of a new skeptical aesthetic, mood, or intellectual condition in American jurisprudential studies, which many have identified as *postmodern*" (p. 2). These five schools, each of which is treated separately in its own chapter, are (i) law and economics (chapter 5), (ii) critical legal studies (chapter 6), (iii) feminist legal theory (chapter 7), (iv) law and literature (chapter 8), and (v) critical race theory (chapter 9).

Minda explains that each school has gone through "generations" (p. 94). In each case, initial proponents of the school, while innovative, retained too much of the modernist baggage that they sought to discard. Later scholars purported to avoid their predecessors' mistakes. For example, "first-generation" law-and-economics scholars practiced a sort of orthodoxy that held that "law was economics, and economics was a neutral, apolitical science of 'reason'" (pp. 94-95). This did not differ in essence from Langdell's optimistic view that rigid rules underlie the law. By the mid-1980s, however, the strict first-generation orthodoxy, embraced primarily by "the 'hardliners' of the Chicago School" (p. 94), had begun to give way. "Second-generation" law-and-economics scholars came into their own, rejecting the rigidity of their forebears and accepting that values other than allocational efficiency can be used legitimately to drive legal choices (pp. 95-101).

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person who sees these trends as discrete entities. *See, e.g.*, DUXBURY, *supra* note 11, at 424. The point, however, is that Minda is a *postmodernist* who sees them that way.

21. 347 U.S. 483 (1954).

Furthermore, Minda apparently believes that the same postmodern forces that brought about the five schools themselves have caused them, in recent years, to deteriorate. He says that "[i]t is only now becoming clear that the new legal discourses of the 'law and' movements of the late 1970s and 1980s have themselves become transformed by a general disenchanted condition that has affected contemporary legal scholarship — *postmodernism*" (p. 79). Thus, the five schools "deepened and advanced a process of crisis and transition in modern jurisprudence" (p. 189). Apparently, this transition has caused many legal scholars to reject modernism entirely and enter fully into the phase of postmodernism.

C. *The Postmodern Turn*

It is not entirely clear what this turn to the postmodern means for legal scholarship.[22] In fact, the term *postmodern* itself has proved notoriously difficult to define.[23] As mentioned above,[24] *postmodernism* is generally defined by reference — it is that which is not *modern*.[25] This approach is significantly complicated by the fact that no one really agrees on what *modern* means[26] — the most precise definitions are to the effect that modernism is an extension of "the Enlightenment Project,"[27] and generally is an adoption of

22. What is clear, however, is that the postmodern turn has not been received very warmly in many quarters. *See, e.g.*, DUXBURY, *supra* note 11, at 422-28; Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989); Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714 (1994); Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEXAS L. REV. 1, 20-21 (1993); John R. Searle, *The World Turned Upside Down*, N.Y. REV. BOOKS, Oct. 27, 1983, at 74, 78 n.3 (book review) ("One [philosopher] characterized Derrida [a major influence in American postmodernism] as 'the sort of philosopher who gives bullshit a bad name.' We cannot, of course, exclude the possibility that this may be an expression of praise in the [postmodern] vocabulary.").

For the reaction typical of many scholars when confronted with postmodern work, see David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656 (1986). Upon first reading *Roll Over Beethoven* by Duncan Kennedy and Peter Gabel, Luban thought "it was a pile of crap" that "sounds like a pair of old acid-heads chewing over a passage in Sartre." *Id.* at 1671-72 (discussing Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984)).

23. Minda himself notes that "[t]o identify postmodernism with a set of propositions, beliefs, or 'postmodern narrative' would be too essentialist, too modernist, to be postmodern." P. 4.

24. *See supra* notes 8-10 and accompanying text.

25. Minda does this at one point. *See* p. 5 (claiming that we understand postmodern jurisprudence by "explor[ing] what came before postmodernism, that is, modernism").

26. *See* KOLAKOWSKI, *supra* note 10; Jamieson, *supra* note 9, at 577.

27. *See, e.g.*, pp. 58-59; Andrew M. Jacobs, *God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1144 (1995); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 262 (1992) ("Modernism is the form of thought identified with the spirit of the Enlightenment . . . .").

foundationalist knowledge and theoretical approaches.[28] Perhaps the best that can be done is to identify salient characteristics of postmodern scholarship. Postmodernism apparently contemplates both a set of approaches — such as deconstructive social criticism, antifoundationalist epistemology, and rejection of traditional metaphysics[29] — and a collection of attitudes — such as distrust of social categories like race or sex and a subjective view of personal identity.[30] One commentator attempted to capture the meaning of postmodernism by identifying four "interrelated concepts" with which it is associated. They are:

> (1) The self is not, and cannot be, an autonomous, self-generating entity; it is purely a social, cultural, historical, and linguistic creation. (2) There are no foundational principles from which other assertions can be derived; hence, certainty as the result of either empirical verification or deductive reasoning is impossible. (3) There can be no such thing as knowledge of reality; what we think is knowledge is always belief and can apply only to the context within which it is asserted. (4) Because language is socially and culturally constituted it is inherently incapable of representing or corresponding to reality; hence all propositions and all interpretations, even texts, are themselves social constructions.[31]

It is unclear what Minda means by "postmodernism." As is perhaps evident from the discussion of the five schools above, he uses it to describe different phenomena — for example, both the emergence of the schools themselves (p. 2), and the current sense of ennui and disaffection that has begun to spell their downfall (p. 79), are postmodern in nature.[32] His most general definition of the term

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28. *See* STEVEN BEST & DOUGLAS KELLNER, POSTMODERN THEORY: CRITICAL INTERROGATIONS 206-07, 230-31 (1991) (asserting that postmodernism rejects foundationalism); Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 353-54 (1995) ("Legal modernism is . . . motivated largely by the lawyer's romance, faith, and yes, obsession with the central idea that it is possible to uncover and explain the essential truths of the world by employing the correct methodology, narrative technique, or mindset."); Patterson, *supra* note 27, at 263 (asserting that modernism is characterized by "epistemological foundationalism").

29. *See* Feldman, *supra* note 13, at 663-64 (claiming that while deconstruction and philosophical hermeneutics do not reject all metaphysics, they do reject Cartesian subject-object metaphysics); Moore, *supra* note 22, at 892-957 (arguing that a wide range of philosophers associated with postmodernism have rejected traditional metaphysics and epistemology).

30. *See* Jamieson, *supra* note 9, at 583-84.

31. Schanck, *supra* note 11, at 2508-09. Minda largely rejects Schanck's formulation because "any attempt to locate the core concepts or essence of postmodernism falls prey to modernism." P. 190. That is, to attempt to identify the principles driving postmodernism would be to create a narrative, which is a modernist, and not a postmodernist, pursuit.

Minda's argument is exceptionally ironic. It may be right, but it also identifies what seems to be exactly the weakness in Minda's own book. *See infra* section II.B.

32. Minda devotes an entire chapter to "postmodern jurisprudence," giving it a treatment not unlike his treatment of the five schools. Thus, he seems to see postmodernism as both a set of forces guiding scholarship and a brand, or at least a loosely discernable class, of scholarship itself.

is that it is "a skeptical attitude or aesthetic that 'distrusts all attempts to create large-scale, totalizing theories in order to explain social phenomena.'"[33]

II. The Problem with Theories

Both as a historical account and as an argument about jurisprudence, *Postmodern Legal Movements* presents certain problems. First, as will be discussed in section II.A, the book's historical overview and synthesis of modernist legal thought seem too categorical. The discussion moves at rapid-fire speed through all of twentieth-century jurisprudence, and in the process puts forth an unduly rigid account. This occurs, it seems, both because the pace is very fast and because Minda tends to take ideological sides.[34] In the process, his historical analysis reveals a second and rather ironic problem: the book is subject to its author's very criticisms of modernism. This second problem will be addressed in section II.B.

A. *Difficulties of Method*

First of all, Minda's historical account often seems unduly wooden. This is an important problem in intellectual history; as Neil Duxbury writes, "the ways in which jurisprudential concepts and themes are interpreted and applied influence the manner in which ideas about law come to be understood historically" and therefore "intellectual historians ought to be wary of using words like birth and death."[35]

Postmodern Legal Movements has a powerful tendency to categorize and reify intellectual movements. Ironically, Minda suggests that even postmodern legal thought itself can be lumped into two

33. P. 224 (quoting Costas Douzinas, Postmodern Jurisprudence at x (1991)).

34. In particular, Minda berates the modernist status quo and predicts its downfall. Pp. 247-57; *see also* pp. 21-22 (claiming that legal modernism is based on a "paradoxical mindset" defined by "a set of conflicting and paradoxical abstract propositions about the nature of the legal system and the power of legal actors within the system"; thus, "[t]he dilemmas of modern legal theory have never been resolved"); pp. 64-65 ("[T]raditional legal analysis ha[s] failed to recognize that law contributes to the construction of social reality" because it is "naive."); p. 75 ("[T]he old modes of representation" of modern jurisprudence "[are] no longer credible."); p. 79 (arguing that modernist scholars fail in their attempt to "ground their particular rights in a stable meta-ethics, moral epistemology, or interpretive practice"); Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem,* 62 U. Colo. L. Rev. 599, 603 (1991) ("Postmodernist scholarship typically proceeds by uncovering the contradictions, paradoxes, and puzzles of American law."); Gary Minda, *The Jurisprudential Movements of the 1980s,* 50 Ohio St. L.J. 599, 660 (1989) ("[T]he prevailing visions of the 1950s and 1960s no longer adequately explain or justify the operation and conflict of everyday social life occurring in the marketplace, the workplace, and the family."); Minda, *supra* note 28, at 353 (describing legal modernism as an "obsession with . . . essential truths").

35. Duxbury, *supra* note 11, at 1, 6.

"sides" or "schools": the *neopragmatists* and the *ironists.*[36] It is unclear how this abstract classification of postmodern movements can be reconciled with Minda's general claim that the postmodernist "distrusts all attempts to create large-scale, totalizing theories" (p. 224).[37]

Furthermore, much of the historical discussion is one-sided and argumentative. For example, Chapter Six, devoted to the critical legal studies movement, is surprisingly polemical and defensive. The previous five chapters (setting out "modernism") are largely impartial, but when Minda reaches CLS, the book suddenly shifts in tone to read virtually like an appellate brief. CLS, says Minda, is "liberating" (p. 126), it is "important" because it "reveal[s] . . . the privileging process of legal hierarchies,"[38] and it is even "amazing" (p. 124). CLS is not "irresponsible" or even "irrelevant" or "banal," but rather it is of "continuing influence," for it presents a "critique [that] remains, to this day, unanswered" (pp. 123-27).

This tendency towards encapsulation and rhetoric is if anything more pronounced in Minda's characterizations of the overall *Gestalten* of various points in intellectual history. For example, in his sweeping, almost breathless summary of "Jurisprudence at Century's End" (pp. 247-57), Minda argues that postmodernism is

36. *See* chapter 12. In brief, the *neopragmatists* hold that there are no "essences" or inherent truths to be discovered by humans, and thus that "right" and "wrong" are at best mere beliefs that are contingent on historical circumstance. *See, e.g.,* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 189-98 (1989); *cf.* Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory,* 63 S. CAL. L. REV. 1569, 1569 (1990) (describing pragmatism as "freedom from theory-guilt"). Thus, neopragmatist legal scholars may believe that the law "should" take a given turn in a given case but that the normative "should" does not flow from any extra-human principle or value. These scholars are postmodernists, in Minda's view, because their "real interest is not in truth at all but in belief justified by social need." P. 235 (internal quotation marks omitted) (quoting RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 464 (1990)).

The *ironists* take a different view, rejecting the neopragmatic "middle ground" of normative answers based on historically contingent beliefs. The ironist viewpoint is "ironic" because, while legal ironists seek to "decenter and displace modernist claims of a universalist method" of legal thought, they recognize that they are themselves hopelessly trapped within modernist ways of thinking and arguing and thus that in their criticisms of modernism they are doomed to repeat its paradoxes and inconsistencies. P. 237. For an explication of this predicament and a defense of the postmodernist who operates within it, see Pierre Schlag, *Normative and Nowhere to Go,* 43 STAN. L. REV. 167, 174 n.18 (1990) ("Postmodernists are quite unlikely to take the demonstration of a paradox in their text as in and of itself evidence of weakness or flaw. . . . [They view the] naive rationalist conceptions of coherence, consistency, elegance, etc., [as] largely the product of disciplinary hubris and the inertia of academic bureaucracy."). It is this recognition that even postmodernist scholars cannot escape modernism that has led the ironists to reject even neopragmatism. Pp. 236-37.

37. *See* discussion *infra* section II.B.

38. Pp. 116-17. That is, CLS, by way of "deconstruction," demonstrates how the selection of one value by a legal rule arbitrarily rejects all other possible values; it "privileges" the chosen value. Adherents to the writings of Jacques Derrida, which have influenced CLS and postmodernism heavily, distrust this privileging process because the "hierarchies of the 'text' [that is, socially constructed narratives], which are frequently taken for granted, are essentially impossible to use for justifying foundational claims of knowledge." P. 118.

gradually overcoming modernism, and, apparently, will eventually *win*. He says that "[t]he older modes of defining, appropriating, and evaluating the objects of artistic, philosophical, literary, and social sciences [are] no longer credible because the boundary between subjects and their objects [has] dissolved" (p. 249). Therefore, it seems natural to Minda that "[t]here is a rising sentiment in the legal academy that modern legal theory has failed to sustain the modernists' hopes for social progress" (p. 249).

Strictly on the basis of numbers, however, it would seem that new "modernist" works of legal theory by far outnumber new works of arguably postmodern criticism, and while there may have been a surge of postmodern scholarship in recent years, there has also been a surge of scholarship bitterly criticizing it.[39] Thus, it seems that Minda is unduly hasty in his announcement that postmodernism will overcome modernism. Oddly enough, he claims in this same passage that "[c]ynicism comes with the realization that each succeeding generation of modern legal scholars has merely recycled the work of the previous generation . . . without ever achieving a successful . . . theory that can withstand the criticism of the next generation" (pp. 249-50). But it could as easily be said of legal postmodernism that it is in substance just a rehash of other skeptical movements that have already come and gone — notably the more radically skeptical works of the legal realist movement.[40] If so, then Minda's claim that postmodernism is "hastening the death" of modernist scholarship (p. 257) is surely exaggerated.

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39. *See* sources cited *supra* note 22.

40. For example, Felix Cohen argued that law and politics are interwoven, because the social forces that inform our ideals are the same forces that construct our law. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810-12 (1935). As early as 1924, Joseph Hutcheson, himself a federal judge, claimed that legal decisions were nothing more than "hunches," seasoned, perhaps, by experience, but nonetheless not driven by external principles, suggesting an extreme sort of indeterminacy, and — although Hutcheson did not say as much — opening the door to wholly politically driven judicial decisions. *See* Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 277-78 (1924).

It is not immediately clear how postmodernism differs significantly from radical realism; both perspectives seem to share the same views as to law's indeterminacy and its inseparability from politics. Minda admits that the critical legal studies movement grew from realism, p. 110, and that CLS as a movement grew from postmodernism, p. 116 (noting that late 1980s CLS papers began to apply postmodern techniques). But perhaps the relationship could better be stated as "reiterates." *See generally supra* note 16.

Furthermore, one might ask: What if there is no interesting difference between *any* of the skeptical schools, in that their basic claim — doubt — does not really differ across different schools? If so, then postmodernism can hardly be thought to be the revolution that Minda makes it out to be. Rather, it is merely the most recent resurgence of the skepticism that has always been with us. In this vein, Brian Simpson points out that there have always been skeptics or "iconoclasts" in law, and, although their methodology and jargon may change over time, their central thrust — simple doubt — has remained constant. *See* Simpson, *supra* note 20, at 830-31. Simpson identifies written evidence of such legal iconoclasm from as early as 1345. *See id.* at 828; *see also* Christopher L. Sagers, Waiting for Brother Thomas, 15-22 (unpublished manuscript, on file with author) (developing a similar point). Not everyone

In any event, the point here is not whether modernism or postmodernism is the victor, but only that Minda for whatever reason has chosen to tell an ideologically tilted story that is not so clear as he makes it out to be.

B. *The Modernism Irony*

These difficulties in Minda's historical presentation are ironic ones to discover in a work about postmodernism, and they point to the basic irony underlying the book: they are problems associated with *modernism,* if anything, and they occur because the book itself is a modernist project.

As discussed above,[41] postmodernism has proved notoriously difficult to define. If postmodernism for legal scholars has meant anything at all, however, it has been a rejection of the idea that truth can be summed up in "a theory or a concept," because in fact there is no "'real' world or legal system 'out there'."[42] Morton Horwitz — himself both a CLS adherent and a noted legal historian — writes that "[t]he subversive assault [on] traditional theories of law" has caused legal thinkers to "focus[ ] upon the classification and categorization of legal phenomena and [to] conclude[ ] that . . . [b]ecause there are no 'natural classes,' the process of categorization and classification is a social creation, not an act reflecting some prior organization of nature."[43] It is thus often said that postmodernists deeply distrust "metanarratives" — that is, broad, generalized explanations of phenomena.[44] As Minda explains:

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agrees, of course; for the view that realism, CLS, and postmodernism are more than trivially distinct, see DUXBURY, *supra* note 11, at 422-28.

41. *See supra* notes 8-10 and accompanying text.

42. P. 224 (quoting DOUZINAS, *supra* note 33, at x); *see also* DAVID HARVEY, THE CONDITION OF POSTMODERNITY 44 (1989) ("[T]he most startling fact about postmodernism [is] its total acceptance of ephemerality, fragmentation, discontinuity, and the chaotic . . . . Postmodernism swims, even wallows, in the fragmentary and chaotic currents of change as if that is all there is."); 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. L. REV. 1046, 1080 (1994) ("Postmodernism is anti-foundationalist and anti-essentialist . . . . [I]t accentuates that meaning always remains ungrounded[, and] ungrounded meanings are always unstable and shifting: meaning cannot be reduced to a static core or essence."); Jacobs, *supra* note 27, at 1144 (arguing that "postmodernism attacks the foundationalism of modernism, or the modernist belief that knowledge rests on some ultimately verifiable truths"); Schanck, *supra* note 11, at 2508 (identifying as major tenets of postmodernism that "there are no foundational principles from which other assertions can be derived" and that "[t]here can be no such thing as knowledge of reality"); Allan C. Hutchinson, *Inessentially Speaking (Is There Politics After Postmodernism?),* 89 MICH. L. REV. 1549, 1550 (1991) (reviewing MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990)) (describing postmodernists as the "obituarists of Truth and Grand Theory").

43. Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism,* 107 HARV. L. REV. 30, 33 (1993).

44. Jean-François Lyotard coined the term *metanarrative* as a means to define postmodernism itself, which, he said, is an attitude of "incredulity towards metanarrative."

> [p]ostmodernism . . . . is an aesthetic practice and condition that is opposed to "Grand Theory," structural patterns, or foundational knowledges. Postmodern legal critics employ local, small-scale problem-solving strategies to raise new questions about the relation of law, politics and culture. . . .
>
> . . . They seem to be united in their resistance to the sort of conceptual theorization and system building routinely practiced by legal academics and analytical philosophers. [p. 3].

The book thus argues at length that contemporary scholars have begun to lose faith in their ability to abstract categorizations from their observations and research. In Minda's terms, members of the American legal academy currently face a transition to a new era of scholarship in which "foundational truths, transcendental values, and neutral conceptions" are replaced with "more pluralistic, contextual, and nonessential explanation[s]" (p. 2).

Given this outlook, one might expect a postmodernist's recounting of intellectual history to be wary of rigid conclusions and categorizations. Quite to the contrary, however, Minda seems to believe that legal philosophies can be neatly sized up and summarized. Indeed, from the beginning he states as his purpose "to present a general overview of the state of law and jurisprudence at twentieth century's end" (p. xi). To do this, he "tr[ies to] capture the general jurisprudential climate by reviewing some of the 'great' books and law review articles on jurisprudence and legal theory" (p. xii). In other words, the jurisprudential *zeitgeist* can quite simply be crammed into "conceptual theorization and system building" because, apparently, there really is a "real" world "out there." The irony, then, is that Minda has written a book of the sort that he says should not be written. It does not "employ local, small-scale problem-solving strategies to raise new questions about the relation of law, politics and culture." It is simply another straightforward his-

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JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE at xxiv (Geoff Bennington & Brian Massumi trans., University of Minn. Press 1984) (1979). Lyotard defined "metanarratives" as "grand narratives," such as "the dialectics of spirit, the hermeneutics of meaning, the emancipation of the rational or working subject, or the creation of wealth." *Id.*; *see also* David E. Cooper, *Modern European Philosophy, in* THE BLACKWELL COMPANION TO PHILOSOPHY 702, 714 (Nicholas Bunnin & E.P. Tsui-James eds., 1996) (defining "metanarratives" as "the grand attempts, from the Enlightenment until very recently, to 'legitimate' various 'discourses' both scientific and moral"). Minda defines "legal metanarratives" as "rhetorical modes of conceptual and normative legal thought that presume the existence of a correct answer for every legal problem." P. 103 n.96. This seems unduly limited, given Lyotard's broad use of the term, and, in any event, appears indistinguishable from Minda's use of "formalism." Perhaps a better use of "legal metanarrative" would be "any attempt by legal scholars at generalized system building" or "legal theorization." For useful explanations of the influence of Lyotard and other continental philosophers on American jurisprudence, see Feldman, *supra* note 13; Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166 (1996).

tory of twentieth-century jurisprudence, several examples of which already exist.[45]

Minda's approach is more than simply ironic. A more careful analysis might have led Minda to face many important problems that instead are ignored here. That is, if Minda had engaged in criticism of postmodern criticism itself, he might have reached the many perplexing difficulties of postmodernism that are, to be frank, more interesting than the literature summary that makes up the bulk of this book.

For example, the thoughtful postmodernist might ask: How can one both deny the metaphysical reality of social values and engage in social criticism? That is, if all values are socially constructed, historically contingent, and relative, how can we ever say that any policy choice is "good" or "bad"? Opponents of postmodernism have raised this complaint often.[46] Several scholars have attempted to face this exceptionally difficult problem,[47] but it goes virtually unmentioned in this book.[48] Postmodernism raises many such paradoxes, all of which seem central to Minda's project. Yet, while he acknowledges some of them in passing, the vast bulk of the book ignores them in favor of lengthy literature review and synthesis.

A likely response to these criticisms would be that postmodernism, by its nature, is not troubled by contradiction or paradox. Postmodernism recognizes and embraces the predicaments of modernist language and argumentative techniques because the

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45. *See, e.g.*, DUXBURY, *supra* note 11; GRANT GILMORE, THE AGES OF AMERICAN LAW (1977); KARL N. LLEWELLYN, THE COMMON LAW TRADITION (1960).

46. *See, e.g.*, DUXBURY, *supra* note 11, at 422-23; Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOCY. REV. 697 (1992); Nussbaum, *supra* note 22 (arguing that the techniques of Jacques Derrida, which have been highly influential amongst postmodern legal philosophers, are nihilistic and morally relativistic); Patterson, *supra* note 22, at 21 (arguing that postmodern "interpretivism" leads to an "infinite regress" of solipsism and moral relativism, because every interpretation is subject to another interpretation).

47. For example, Stephen Feldman suggests that postmodernism does not lead to moral relativism or an infinite regression of interpretations because the interpretive or critical act that, in his view, is central to postmodernism is itself *ontological*. That is, the act *creates* meaning and thus allows us to act in the world. *See* Feldman, *supra* note 13, at 671-90 (arguing that postmodernism does not reject metaphysics but merely revolutionizes it; therefore, we can still meaningfully criticize); Feldman, *supra* note 44, at 185-92. J.M. Balkin, in contrast, seems to think that there are "transcendental" values on which humans can draw, including, most importantly, "justice." For him, postmodernists evade nihilism by searching for those values that flow from "the wellsprings of the human soul." J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131, 1139 (1994). Similarly, Joseph Singer has argued that law can be *re*constructed in the wake of nihilistic critique by an essentially pragmatic process of "moral decisions" that are no different than our "everyday moral decisions." Singer sets out a short list of rudimentary values he believes should be discovered through this process, including the prevention of cruelty and misery. *See* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 62, 67-70 (1984).

48. The problem is briefly raised late in the book, but receives no more attention than a three-page summary of the scholarship of Pierre Schlag. *See* pp. 243-46.

postmodernist, while aware of these problems, does not believe that scholars "should, will, or [are] even capable of demonstrably standing outside of [the modernist] system."[49] The postmodernist will thus claim that it is no argument to point out the paradoxes or inconsistencies in *Postmodern Legal Movements,* because they are merely the result of the paradoxes or inconsistencies of modernist thought. Furthermore, postmodernists might argue that to attempt to avoid the paradoxes of postmodern scholarship would be not only impossible, but *limiting;* to "claim to stand outside of this system, and thus claim to avoid paradox" would be to "beg the exceedingly interesting question of where the boundaries (if any) of this system of . . . legal thought are located and whether this system can even be adequately conceptualized as having a determinate or localizable inside and outside."[50]

The point, however, is not that Minda has not *solved* these problems, but rather that in this book he does not even *face* them. Furthermore, the problem is not simply lack of completeness — it is not as if this were a book on property law that fails to say enough about zoning. On the contrary, the book fails to address issues central to Minda's picture of postmodernism overtaking the legal academy, and it fails to address the awkward irony of heralding such a paradigm shift in a book that does not itself seem to be postmodern. Thus, *Postmodern Legal Movements* is like a book about property law that fails to say anything about property law.

Finally, these various problems raise a much more basic question or paradox of postmodern jurisprudence, and it is again one that remains completely unmentioned in *Postmodern Legal Movements.* The question is this: *Can one be a postmodern legal scholar?* That is, can one share in the doubts and criticisms postmodernists share, and yet also engage in the sort of discourse on which legal scholarship traditionally has been based — which, according to the postmodernist, appears to be useless? At the very least, can one do so without being disingenuous? If not, then why do it?[51]

Some postmodernists have suggested that there is no reason to. Robert Williams, for example, believes that

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49. Schlag, *supra* note 36, at 174 n.18.

50. *Id.*

51. As Louis Menand wrote, "[I]f one is a professor at Harvard or Stanford or Georgetown law school, one enjoys a rather desirable set of occupational conditions to have to worry about. It's nice to have available a style of radical politics that doesn't require giving any of them up." This outlook commends itself to "schemes for professors and janitors to share in communal decision-making at law schools, as a substitute for asking why — given their analysis — law schools . . . should exist." Louis Menand, *Radicalism for Yuppies,* THE NEW REPUBLIC, Mar. 17, 1986, at 20, 23.

> the model of the law professor that I had bought into during the early, cursed, deformative years of my academic career was . . . a nineteenth-century relic[; it] was constructed out of a Victorian-era law professor's wet dream [and was] warped and twisted and ill-suited to the demands of a postmodern multicultural world . . . .[52]

Williams therefore urges postmodern scholars to engage in postmodern *practice* — in his case, "Critical Race Practice." That is, the postmodernist should apply theory to practice by helping others, or serving the needs of the community, or whatever; the point is that postmodernism counsels one to discard traditional modes of argument in favor of more appropriate action. This is so, says Williams to the postmodernist, because it does not advance the postmodern project to "deconstruct the world with your word processor."[53]

The postmodernist might answer that, while it does seem to be inconsistent to be a *postmodern* legal scholar, there is nothing inherently wrong with inconsistency, and perhaps that it is impossible for humans *not* to be inconsistent. That would seem to be an implication of much of postmodern thought. Perhaps there are other compelling answers. But, again, the weakness of *Postmodern Legal Movements* is not its failure to resolve these perplexing questions, but its inexplicable failure even to address them. It could be a more interesting and provocative book if it did.

Conclusion

The project underlying *Postmodern Legal Movements* is ambitious and interesting, and to a certain extent the book is a successful effort. It is a useful and reasonably accessible primer on the basic concepts of American jurisprudence, and it will serve as a good introduction to students or lawyers who have little background in legal philosophy.

Beyond that, however, the book is problematic both on a superficial and on a deeper level, and for more advanced readers it will prove frustrating. On the surface, the book lacks caution in its historical rendering. Conclusions follow too quickly from scanty evidence. Minda often makes fairly sweeping claims about whole movements or schools in the face of plentiful evidence in favor of other interpretations. More important, the book is by its nature at odds with its own premises. The implicit claim of *Postmodern Legal Movements* seems to be that one can identify *movements* in legal thought, even though the postmodernist must apparently believe that whenever we arrive at such a claim — such a metanarrative —

52. Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 Mich. L. Rev. 741, 756-67 (1997).

53. *Id.* at 757.

we are *constructing* the world, not merely *describing* it. One construction is not more useful than any other, at least not for any reason that Minda provides. A whole series of issues arise from this conflict that are never addressed in the book but that would be very interesting and are important in defending Minda's thesis. Thus, *Postmodern Legal Movements* seems to raise more problems than it solves, whether as a defense or even a basic description of postmodernism.

—*Christopher L. Sagers*