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Theorizing Agency

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Theorizing Agency

Abstract

Progressive legal scholars today exhibit contrasting views on the scope of legal actors' agency in making "choices" about how to lead their lives. Feminist legal scholar Joan C. Williams, for example, challenges claims that women who leave the paid workforce to stay home with children have made a voluntary choice to take this path. Critical race scholar Ian Haney López, on the other hand, argues that the social construction of racial identity occurs precisely through the many voluntary choices members of both subordinated and dominant racial groups make about matters that implicate racial meanings. Williams contests the idea of voluntary choice; Haney López embraces it.

These different viewpoints highlight the need for further work in legal theory on how to theorize human agency ^{SFR} that is, the power of persons, at the individual or collective levels, to develop and achieve creative goals and to act effectively or bring about change within their the social environments in light of those goals. As a number of progressive legal scholars have point out, neither of two leading paradigms ^{SFR} which I will term liberal individualism and post-structuralism ^{SFR} are fully adequate to this task of theorizing agency within social constraints.

I argue that the reason that neither classical liberalism nor post-modernism will fully do stems from the inadequacies inherent in both paradigms' strongly divergent theories of the self. Strong forms of liberal individualism see the self as existing prior to its social surroundings and thus as capable of robust agency in making choices about life goals and how to achieve them, but this perspective arguably does not sufficiently account for the thoroughly socially constructed nature of human values and aspirations. Strong forms of post-structuralism, on the other hand, view the individual as a mere fiction ^{SFR} a construction embedded in the structure of language that masks the thoroughly constitutive priority of the social. But this approach, many critics agree, comes close to denying the capacity for human agency altogether.

Many scholars are today at work on new ways of theorizing agency that avoid the pitfalls of liberal individualist and post-structuralist approaches. These scholars include Haney López, as we have just seen, argues that social constructs such as race, having been created by human action, are subject to reconstruction through purposive human action; Devon Carboda and Mitu Gulati, who examine the agency of members of outsider identity groups in combating employment discrimination; feminist theorist Kathryn Abrams, who investigates new ways of theorizing "partial agency" in a revised liberal tradition; and post-structuralist queer theorist Judith Butler, who has written about the importance of preserving space for individual and collective agency in theorizing about the social construction of gender identity.

In this Article, I seek to make a modest but important intervention in this discourse about how to theorize agency within a social constructivist framework. I do so by hailing the classical pragmatists' theory of the self as an important but currently overlooked theoretical resource for this work. As revised for use in an early twenty-first century context, classical pragmatism can enrich the discourse on agency within the legal academy because it both acknowledges the thoroughly socially constructed nature of the self yet also recognizes a robust capacity for human agency at the individual and collective levels. The classical pragmatists' theory of the self does not depend on implausible notions that actors possess the ability to "choose" their identities or destinies; it instead embraces the social constructivist insight that actors in a legal system are thoroughly constituted, in their identities, values, desires and goals, by their social context. At the same time, the classical pragmatist conception of social identity construction differs from the subject formation theories of the post-structuralists because, to the classical pragmatists, selves in interaction with each other constantly

reconstruct the social environment, just as this social environment, itself composed of selves in interaction, constantly constructs, or gives social identity to, these selves.

Classical pragmatism, in other words, conceives of the relationship between selves and the social environment as an interaction with multiple directions, whereas liberal individualists and post-structuralists both tend to overemphasize a single directionality in what we should envision as a more complicated process. Individualists can too greatly emphasize the individual's priority in relation to his or her social surroundings; post-structuralists, revealing their origins in classic structuralism, can overemphasize the overwhelming force of the social on the subject. Classical pragmatism offers a greater emphasis on the multidimensional nature of the interaction among organism and environment, as well as among internalized, often inconsistent, dispositions of the organism and conflicting dimensions of the environment. The self is a multitude of interactions, not a static inside substance (mind) or a location in an external context (structure).

I develop my argument as follows: In Part I, I sketch the contrast between liberal individualist and post-structuralist approaches to the self, drawing for purposes of my brief overview on a several diverse scholars who have received wide attention among American legal academics. In Part II, I present my reading of the interactionist theory of the self the classical pragmatists developed, focusing especially on the work of John Dewey and George Herbert Mead. I show briefly how contemporary scholars in a number of disciplines--though not yet law, surprisingly--have drawn on Dewey and Mead to develop new theories of an agenic self responsive to the challenges of early twenty-first century social theory. These scholars have also begun to trace parallels between Dewey's concept of habit as the flexible mediating link between individuals and their social surroundings and Bourdieu's concept of habitus, derived from continental phenomenology ^{SPR} a parallel that deserves greater attention in legal theory today. In Part III, I make the case that the classical pragmatists' theory of the self offers an important intervention in the current discourse among progressive legal scholars about the scope of legal actors' agency. In Part III-A, I summarize key points of comparison between classical pragmatism and post-structuralism. I argue in Part III-B that the classical pragmatists' emphasis on the creativity of human agency offers an important feature missing from post-structuralism. In turn, classical pragmatism can be updated for use in an early twenty-first century context by incorporating into its basic framework the greater contemporary awareness of the pull of the unconscious and entrenched force fields of power, all without negating its emphasis on the potential efficaciousness of deliberative action. In Part III-C, I suggest some of the ways in which a classical pragmatist orientation to theorizing the self solves the difficulties of liberal individualist and post-structuralist approaches and outline some of the tenets of a classical pragmatist approach to the self and human agency as so revised. Finally, in Part III-D, I explore several examples drawn from recent historical debates among legal scholars that demonstrate more concretely the potential applications of such an updated classical pragmatist approach.

Keywords

Legal theory, agency, ethics, social change, political activism

ARTICLES

THEORIZING AGENCY

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INTRODUCTION

Feminists need only deny that family roles account for part of women's economic disadvantage if they adhere to the traditional view that women's "choice" disproves the existence of gender discrimination. But it does not. Say, in a segregated country, there are two drinking fountains, one for whites only. If a person of color walks up to the other, that is a choice. But that choice does not negate the existence of discrimination. Similarly, if employers define the ideal worker as someone who takes no time off for childbearing or childrearing, they are framing their ideal worker as someone with the body and traditional life patterns of a man. Regardless of mothers' choices, that is sex discrimination.¹

* * *

Racial choices occur both on mundane and on epic levels. Perhaps the most graphic illustration of choice in the construction of racial identities comes in the context of "passing." The ability of some individuals to change race at will powerfully indicates the chosen nature of race. The majority of racial decisions, however, are of a much more mundane nature. Because race in our society infuses almost all aspects of life, many daily decisions take on racial meanings. For example, seemingly inconsequential acts like listening to country and western music or moving to the suburbs constitute means of racial (dis-)affiliation. So too

1. Joan C. Williams, "It's Snowing down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate, 102 COLUM. L. REV. 812, 827-28 (2002) (footnotes omitted).

do a myriad of other actions taken every day by every person, almost always without conscious regard for the racial significance of their choices. It is here, in deciding what to eat, how to dress, whom to befriend, and where to vacation, rather than in the dramatic decision to leap races, that most racial choices are rendered . . .

Drawing upon this conception of choice, the challenge for Whites committed to dismantling Whiteness can be broken down into three steps. First, Whites must overcome the omnipresent effects of transparency and of the naturalization of race in order to recognize the many racial aspects of their identity, paying particular attention to the daily acts that draw upon and in turn confirm their Whiteness. Second, they must recognize and accept the personal and social consequences of breaking out of a White identity. Third, they must embark on a daily process of choosing against Whiteness.²

* * *

The above quotes reflect contrasting views among progressive legal scholars on the scope of legal actors' agency in making "choices" about how to conduct their lives. The first quote, from feminist legal scholar Joan C. Williams, challenges the import of claims that women who leave the paid workforce to stay home with children have made a voluntary choice to take this path. The second quote, from critical race scholar Ian Haney López, argues that the social construction of racial identity occurs precisely through the many voluntary choices members of both subordinated and dominant racial groups make about matters that implicate racial meanings. Williams contests the idea of voluntary choice; Haney López embraces it.

These quotes highlight the need for further work in legal theory on how to theorize *human agency*—that is, the power of persons, at the individual or collective levels, to develop and achieve creative goals, including social and political change, within their social environment. As a number of progressive legal scholars have pointed out, neither of the two leading paradigms—which I term *liberal individualism* and *post-structuralism*—are fully adequate to this task. Angela Harris, for example, argues that a "reconstructive jurisprudence" suitable for emancipatory activism must draw both from what she calls modernism, which emphasizes "free choice" and "enlightenment" from "false consciousness," and from post-modernism, distinguished by "a mood of profound doubt and skepticism."³

2. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 192-93 (1996).

3. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 743-58 (1994). Critical race feminists have made a similar point about the need to

The reason that neither paradigm will fully do for this project of theorizing agency for purposes of emancipatory activism, as I will demonstrate further below, stems from the contrasting inadequacies of both paradigms' divergent views of the self. Strong forms of liberal individualism see the self as existing prior to its social surroundings and thus as capable of robust agency in making choices about life goals and how to achieve them, but this perspective arguably does not account for the thoroughly socially constructed nature of human values and aspirations.⁴ Strong forms of post-structuralism, on the other hand, view the individual as a mere fiction—a construction embedded in the structure of language that masks the thoroughly constitutive priority of the social.⁵ But this approach, many critics argue, comes close to denying the capacity for human agency altogether.⁶

Many scholars today are at work on new ways of theorizing agency that

preserve some of liberal individualism's emphasis on rights and autonomy in such an emancipatory jurisprudence, noting that the post-modern enthusiasm about debunking "rights talk" can have deleterious consequences for those struggling against oppression. See, e.g., Celina Romany, *Ain't I a Feminist?*, 4 YALE J.L. & FEMINISM 23, 30-31 (1991) ("Autonomy and subjectivity have a lot of appeal to Third World women. Feminist scholars and feminist legal theories should pay more attention to the work of Third World cultural theorists, who expose the intimate connections between political and national history and the constitution of the subject..."); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, in CRITICAL RACE THEORY: THE CUTTING EDGE 84, 89 (Richard Delgado ed., 1995) ("The argument that rights are disutile, even harmful, trivializes [the experience] of any person or group whose genuine vulnerability has been protected by that measure of actual entitlement which rights provide."); see also CORNEL WEST, *Reassessing the Critical Legal Studies Movement*, in KEEPING FAITH: PHILOSOPHY AND RACE IN AMERICA 195, 203 (1993) (criticizing critical legal studies for ignoring "the creative ways in which oppressed and marginalized persons have forged traditions of resistance by appropriating aspects of liberalism for democratic and egalitarian ends").

Similarly, lawyer-activists committed to progressive political struggles to combat poverty and other forms of social oppression have frequently articulated the need to find a middle way on the question of human agency. See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 41 (1992) (emphasizing the importance of developing a theory of lawyering that recognizes that "no group is ever *absolutely* powerless in any relationship" and asserting that even relatively powerless people retain "the capacity to resist victimization and subordination and to reverse its tendencies"); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1676 (1991) (examining the interaction between theory and practice in clinical education and feminist theory).

4. See *infra* Part I.A (summarizing the liberal individualist approach).

5. See *infra* Part I.B (summarizing the post-structuralist approach).

6. For a summary of this debate between liberal individualists and post-structuralists on questions of the self, see 2 CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 6-11 (1985). As another critic puts it:

Methodological individualism in social theory, according to which isolated and atomistic individual actions fully account for humans' societies and histories, will not suffice. But the alternative is not the exclusive ascription of agency to impersonal forces, transcendental entities, or anonymous and autonomous discourses.

CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* 225 (1989).

avoid the pitfalls of liberal individualist and post-structuralist approaches. Haney López argues that social constructs such as race, having been created by human action, are subject to reconstruction through purposive human action.⁷ As the quote at the beginning of this Article reflects, Haney López's provocative position is that individuals construct race through choices as mundane as deciding what to eat and how to dress, and as major as life decisions about whether to "pass" as members of the majority group.⁸ He suggests that such individual and community decisions continually alter context: "[I]ndividual or community actions, when aggregated, have the power to rework the social context in which racial systems exist."⁹

Another example of creative work on reconceiving agency within a social constructivist framework is that of Devon Carboda and Mitu Gulati,¹⁰ who, in examining the agency of members of outsider identity groups in combating employment discrimination, argue that the post-modern rejection of liberal notions that we can "choose" our identity

does not imply that we cannot or do not make choices about how we want to be gendered. Certainly, individuals cannot decide *whether* they want to bring gender into being. But they do have some choices about *how* to bring gender into being. . . . [M]en can take very different actions by engaging in very different performances and still be intelligible as gendered subjects. We are mindful that these choices are exercised under constraints. . . . Yet . . . [t]here is some agency. People do participate in the social construction of their identities.¹¹

Many other leading scholars working in the genre of critical race theory are pursuing similar questions in other contexts as well.¹²

7. See, e.g., Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994) ("Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization.").

8. LÓPEZ, *supra* note 2, at 192-93.

9. López, *supra* note 7, at 50.

10. See generally Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) [hereinafter Carbado & Gulati, *Working*]; Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103 (2000).

11. Carbado & Gulati, *Working*, *supra* note 10, at 1265 n.11. Carbado and Gulati by no means paint a rosy picture, however, emphasizing that any such strategy an outsider uses will impose concomitant extra burdens. See *id.* at 1262 (suggesting that the strategies outsider groups use as "coping mechanisms" to counteract "workplace discrimination and stereotyping" impose additional burdens on those groups); *id.* at 1288-91 (describing examples of such burdens).

12. See, e.g., Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1467-69 (2002) (exploring the ways in which racial identity can be a source not only of oppression and subordination, but also of affirmative identity and resistance); Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the*

In feminist legal theory, Kathryn Abrams is investigating new ways of theorizing “partial agency” in a revised liberal tradition.¹³ Abrams argues that traditional liberal theory, with its focus on individual autonomy, is inadequate because it “mutes [] differences in power or social circumstances”¹⁴ and fails to explain how subordinated groups come to define their interests as coinciding with the interests of the powerful.¹⁵ She seeks to resolve this tension through a theory of partial agency that would show that women are “neither wholly empowered nor wholly incapacitated.”¹⁶

Abrams examines feminist approaches to sexuality as one illustration of the problem of theorizing agency. As Abrams observes, a “dominance” paradigm, which Katherine MacKinnon and others articulate, characterizes women’s sexuality as a construct of oppressive forces.¹⁷ Under this theory, women engage in sex in order to satisfy men’s desires to act out their urges to dominate women.¹⁸ But this conception leaves no room for women’s agency. If all heterosexual sex merely involves men acting out their desires, there is no room for women to say authentically that they enjoy having sex with men. At the same time, to say that sexuality and women’s other desires are thoroughly socially constructed is to leave no room for a theory of change. If women’s desires are simply the product of social construction, then it is difficult to articulate an understanding of how it is that women could come to develop a vision of a positive, self-affirming sexuality.¹⁹

Abrams uses sexuality as a paradigmatic example of the tensions

American Legal Profession, 1925-1960, 87 CORNELL L. REV. 1405, 1446, 1471-74 (2002) (examining the “partial agency” of the first generation of black women lawyers despite the discrimination they faced).

13. Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 361 (1995) [hereinafter Abrams, *Sex Wars Redux*]; see also Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 844 (1999) [hereinafter Abrams, *From Autonomy to Agency*] (arguing for “reconstructing liberal assumptions” so that the legal system would “more fully[] acknowledge . . . the social formation of human subjects”).

Other legal scholars whose work seeks to reconceive liberal theory through feminist lenses include Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 9-10 (1989) (searching for “a language of self-determination that avoids the blind literalness of the liberal concept”); Susan H. Williams, *A Feminist Reassessment of Civil Society*, 72 IND. L.J. 417, 417 (1997) (seeking to “reconstruct a form of autonomy that is consistent with . . . feminist commitments”). For similar inquiries in feminist philosophy, see, e.g., DIANA T. MEYERS, *SELF, SOCIETY, AND PERSONAL CHOICE* (1989); Diana T. Meyers, *Personal Autonomy and the Paradox of Feminine Socialization*, 84 J. PHIL. 619 (1987).

14. Abrams, *From Autonomy to Agency*, *supra* note 13, at 807.

15. Abrams, *Sex Wars Redux*, *supra* note 13, at 305-07.

16. *Id.* at 362.

17. *Id.* at 305.

18. *Id.* at 304-05.

19. *Id.* at 305.

inherent in liberal theory as applied to the question of theorizing agency from a feminist perspective,²⁰ but the same analysis applies to many other feminist issues as well. The question of the extent to which women's stated preferences should be viewed as the expression of the desires of an authentic, autonomous self, as liberal individualist theory would have it, arises with respect to women's decisions about balancing work and family, styles of professional presentation, and adoption of traditionally "feminine" values (caring, connection, and the like).²¹ This, indeed, is the question Williams addresses in the quote with which this Article begins: are women's decisions to leave the paid workforce to stay home with children a manifestation of "choice?"²² All of these and other areas have been the subject of contentious debates among feminist legal scholars, as I explore further in Part III.D.2 below.

In queer theory, post-structuralist philosopher Judith Butler has written about the importance of preserving space for individual and collective agency in theorizing about the social construction of gender identity. Although critics have accused Butler of developing a thoroughly non-genetic theory of the self,²³ she clearly articulates the importance of recognizing that the social construction of meaning and identity not only constrains but also empowers human agency.²⁴ Butler acknowledges that a good theory of agency must explain how it is that human striving sometimes produces transformative results,²⁵ and must point the way toward avenues for effective political and social activism.²⁶

20. See *id.* at 305-07.

21. For a brief overview of this debate, see discussion *infra* Part III.D.2.

22. Williams, *supra* note 1, at 827-28.

23. See, e.g., SEYLA BENHABIB, SITUATING THE SELF 218 (1992) (querying, in response to Butler's proposal that agency on a post-structuralist account could be "located within the possibility of a variation" on repetitions of identity performances, "where are the resources for that variation derived from? What . . . enables the self to 'vary' the gender codes? [T]o resist hegemonic discourses? What psychic, intellectual or other sources of creativity and resistance must we attribute to subjects for such variation to be possible?"). See generally SEYLA BENHABIB ET AL., FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE (1995) [hereinafter FEMINIST CONTENTIONS] (reflecting the debate on agency and other topics among leading feminist theorists representing various philosophical positions, including critical theory, post-structuralism, ethical feminism and neo-pragmatism).

24. See JUDITH BUTLER, THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION 2 (1997) ("Subjection consists precisely in this fundamental dependency on a discourse we never chose but that, paradoxically, initiates and sustains our agency."); *id.* at 15 ("[A]gency is the assumption of a purpose *unintended* by power, one that could not have been derived logically or historically, that operates in a relation of contingency and reversal to the power that makes it possible, to which it nevertheless belongs.").

25. See *id.* at 29 ("[A] critical analysis of subjection [should show] how agency may well consist in opposing and transforming the social terms by which it is spawned.").

26. Butler writes:

As much as a perspective on the subject requires an evacuation of the first person, a suspension of the "I" in the interests of an analysis of subject formation, so a reassumption of that first-person perspective is compelled by the question of agency. The analysis of subjection is always double, tracing the conditions of

This Article intervenes in this discourse about how to theorize agency within a social constructivist framework by hailing the *classical pragmatists*²⁷ theory of the self as an important but currently overlooked theoretical resource for this work. I argue that classical pragmatism, as revised for use in an early twenty-first century context, can enrich the project of theorizing agency for purposes of progressive legal theory because it acknowledges the thoroughly socially constructed nature of the self, yet also recognizes a robust capacity for human agency at the individual and collective levels. The classical pragmatists' theory of the self does not depend on implausible notions that actors possess the ability to "choose" their identities or destinies; it instead embraces the social constructivist insight that actors in a legal system are thoroughly constituted, in their identities, values, desires and goals, by their social context.²⁸ At the same time, the classical pragmatist conception of social identity construction differs from the subject formation theories of the post-structuralists because, to the classical pragmatists, selves in interaction with each other constantly reconstruct the social environment, just as this social environment, itself composed of selves in interaction, constantly constructs, or gives social identity to, these selves.²⁹

Classical pragmatism, in other words, conceives of the relationship between selves and the social environment as an interaction with multiple directions, whereas liberal individualists and post-structuralists both tend to overemphasize a single directionality in what we should envision as a more

subject formation and tracing the turn against those conditions for the subject—and its perspective—to emerge.

A critical evaluation of subject formation may well offer a better comprehension of the double binds to which our emancipatory efforts occasionally lead without, in consequence, evacuating the political. Is there a way to affirm complicity as the basis of political agency, yet insist that political agency may do more than reiterate the conditions of subordination?

Id. at 29-30; *see id.* at 18 (seeking the answer to "how we might make . . . a conception of the subject work as a notion of political agency in postliberatory times").

27. I use the term *classical pragmatism* to refer to the American pragmatists of the late nineteenth and early twentieth century, as described in more detail in Part II.A *infra*. These include philosophers William James, Charles Sanders Peirce, John Dewey and George Herbert Mead. They are to be distinguished from the *neo-pragmatists* of the later twentieth century, as I further discuss in Part I.B.2.b. For a helpful discussion of the differences between classical pragmatism and neo-pragmatism, see James T. Kloppenberg, *Pragmatism: An Old Name for Some New Ways of Thinking?*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 83 (Morris Dickstein ed., 1998) (describing the important differences resulting from the neo-pragmatists' emphasis on language as constitutive of meaning as compared to the classical pragmatists' emphasis on experience); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 286-88 (1997) (distinguishing naturalism of classical pragmatists from anti-naturalism of contemporary pragmatists such as Richard Rorty).

28. *See infra* Part II.B.1 and notes 215-224 for clarifying discussions of this notion.

29. *See generally infra* Part II (discussing classical pragmatism's interactionist approach).

complicated process. Individualists can too greatly emphasize the individual's priority in relation to his or her social surroundings;³⁰ post-structuralists, revealing their origins in classic structuralism, can overemphasize the overwhelming force of the social environment on the subject.³¹ Classical pragmatism offers a greater emphasis on the multidimensional nature of the interaction among organism and environment, as well as among internalized, often inconsistent, dispositions of the organism and conflicting dimensions of the environment.³² The self is a multitude of interactions, not a static inside substance (mind) or a location in an external context (structure).³³

Although classical pragmatists can sound surprisingly post-modern in their references to socially constructed and fractured selves,³⁴ they part company from post-structuralists on a number of key issues. First, for classical pragmatists social change is not the result of "variations" in performative acts that are random, accidental, or compelled by contradiction, as post-structuralists such as Judith Butler would have it.³⁵ Instead, such change results from individual or collective deliberative processes, which may be more or less conscious, depending on the circumstances, but nonetheless can produce purposive, efficacious results.³⁶ A second key difference between classical pragmatism and post-structuralism involves a shift in attitude or emphasis concerning the unconscious. For classical pragmatists, the unconscious is the seat of largely benign cultural resources; for post-structuralists, for whom Freud's theory of the unconscious is a far more significant influence, the unconscious is irrational, untamable and subversive of purposive ends.³⁷ Similarly, post-structuralists emphasize the operation of ideology and entrenched *force fields of power*³⁸ that bend human efforts away from their

30. See *infra* Part I.A (summarizing the liberal individualist approach).

31. See *infra* Part I.B (summarizing the post-structuralist approach); see also TAYLOR, *supra* note 6, at 8 ("[A]n individual is constituted by the language and culture which can only be maintained and renewed in the communities he is part of.").

32. For a discussion of this notion, see *infra* Part III.A.1 and note 339.

33. See discussion *infra* Part III.A.1 and accompanying notes (emphasizing the dynamic nature of the self according to classical pragmatism).

34. See, e.g., JOHN DEWEY, *Human Nature and Conduct* [hereinafter DEWEY, *Human Nature*], in 14 THE MIDDLE WORKS OF JOHN DEWEY 1, 96 (Jo Ann Boydston ed., S. III. Univ. Press 1988) (1922) [hereinafter DEWEY, MIDDLE WORKS] ("[A]ny self is capable of including within itself a number of inconsistent selves, of unharmonized dispositions.").

35. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 145 (1990) (theorizing that agency is "located within the possibility of variation" in repetitions compelled through discourse rules and normative structures); see also Part I.B.2.c *infra* (further discussing Butler's theory of agency).

36. See *infra* Part II.B.3 (explaining Dewey's concept of purposive intelligence).

37. See *infra* Part III.A.3 (contrasting classical pragmatism and post-structuralism approaches to the unconscious).

38. This phrase comes from Michel Foucault. See MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977*, at 98 (Colin

intended effects, whereas the classical pragmatists, though not naïve on this issue,³⁹ have a less developed view. I suggest that this late twentieth century wariness about the way in which forces that act through the unconscious and through fields of power can co-opt well intentioned efforts at reform need not overwhelm the classical pragmatists' emphasis on deliberative judgment, but can be incorporated into a classical pragmatist framework to update it for use in the early twenty-first century.

The classical pragmatists were not the only group of twentieth century theorists to develop interactionist conceptions of the self along the lines described above. As intellectual historians are now beginning to explore in an exciting new comparative literature,⁴⁰ the slightly later continental phenomenologists held strikingly similar conceptions.⁴¹ To the extent that important contemporary continental social theorists, such as Michael Foucault and Pierre Bourdieu, hold interactionist understandings of the self—as I will argue they do, despite the way in which they have been interpreted by some American post-structuralists⁴²—they derive their interactionism from phenomenology, not from classical pragmatism. I nevertheless focus on classical pragmatism rather than phenomenology here because of the importance of classical pragmatism to the history of American legal thought.⁴³ Classical pragmatism, I suggest, represents a “neglected historical moment” in a shared community of tradition.⁴⁴

Gordon ed., Colin Gordon et al. trans., 1980) (“Power must be analysed as something which circulates It is never localised here or there . . . never appropriated as a commodity”); *see also* text accompanying notes 103-108 (further discussing Foucault’s concept of force fields of power).

39. *See* Kloppenberg, *supra* note 27, at 117 (noting that the classical pragmatists had “already incorporated the most valuable insights of the linguistic turn and the postmodern suspicion of power”).

40. *See infra* notes 312-315 (citing relevant scholarship).

41. *See infra* Part II.C.2 and accompanying notes (explaining similarities between phenomenology and classical pragmatism).

42. For an example of a French theorist’s view of Anglo-American conceptions of post-structuralism, *see* Posting of Guillaume Garreta, garreta@wanadoo.fr, to dewey-L@Ganges.CSD.SC.EDU (Aug. 28, 2001) (on file with the American University Law Review) (arguing that “‘poststructuralism’ is definitely an American invention [I]n France we don’t have this image of a coherent ‘post’-structuralist trend . . .”).

43. *See, e.g.*, EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973) (exploring parallel developments in a wide range of early twentieth century disciplines); DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 143-71 (1991) (discussing pragmatists’ influence on law and the progressive social sciences); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 24-25, 57-58, 68-69 (1995) (tracing the ways in which Dewey’s pragmatic philosophy was a centerpiece of early realist consciousness); MORTON G. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1949) (exploring links among the thought of Dewey, Holmes, and other early twentieth-century thinkers).

44. In the words of one of classical pragmatism’s most visionary contemporary advocates:

The point is not to lift oneself out of the flux of history—an impossible task—but rather to immerse oneself more deeply into history by consciously identifying

I develop my argument as follows: In Part I, I sketch the contrast between liberal individualist and post-structuralist approaches to the self, drawing for purposes of my brief overview on several diverse scholars who have received wide attention among American⁴⁵ legal academics. In Part II, I present my reading of the interactionist theory of the self the classical pragmatists developed, focusing especially on the work of John Dewey and George Herbert Mead. I show briefly how contemporary scholars in a number of disciplines—though not yet law, surprisingly—have drawn on Dewey and Mead to develop new theories of an agenic self responsive to the challenges of early twenty-first century social theory. These scholars have also begun to trace parallels between Dewey's concept of *habit* as the flexible mediating link between individuals and their social surroundings and Bourdieu's concept of *habitus*,⁴⁶ derived from continental phenomenology—a parallel that deserves greater attention in legal theory today.

In Part III, I make the case that the classical pragmatists' theory of the self offers an important intervention in the current discourse among progressive legal scholars about the scope of legal actors' agency. In Part III.A, I summarize key points of comparison between classical pragmatism and post-structuralism. I argue in Part III.B that the classical pragmatists' emphasis on the creativity of human agency offers an important feature missing from post-structuralism. In turn, classical pragmatism can be updated for use in an early twenty-first century context by incorporating into its basic framework the greater contemporary awareness of the pull of the unconscious and entrenched force fields of power, all without negating its emphasis on the potential efficaciousness of deliberative action. In Part III.C, I suggest some of the ways in which a classical pragmatist orientation to theorizing the self solves the difficulties of liberal individualist and post-structuralist approaches, and outline some of the tenets of a classical pragmatist approach to the self and human agency as so revised. Finally, in Part III.D, I explore several examples drawn from recent historical debates among legal scholars that demonstrate more concretely the potential

with—and digesting *critically* the values of—a particular community or tradition.

For the radical historicist, the task of ethics is not *philosophic*, it is not to put forward irrefutable justifications of particular moral viewpoints. Rather the task of ethics is *theoretic*: the task is to discover ways in which to develop a larger consensus and community

CORNEL WEST, *Radical Historicism*, in THE ETHICAL DIMENSIONS OF MARXIST THOUGHT 3 (1991).

45. In the interests of manageability, I confine the scope of my investigation to literature published in American law reviews. I use the conventional term "American" rather than the somewhat awkward term "U.S.," but do not mean to convey that I have surveyed Canadian or Central and South American legal scholarship.

46. For Bourdieu's definition of *habitus*, see *infra* note 319.

applications of such an updated classical pragmatist approach.

I. APPROACHES TO THE SELF IN CONTEMPORARY LEGAL THEORY

Today, many legal theorists writing in American law journals adhere to one of two competing paradigms on questions of the self and human agency. They signal their theoretical allegiances through the vocabulary they employ. One paradigm involves what I label the liberal individualist approach, which asserts the primacy of the individual in social and political analysis. In its political theory form, liberal individualism views the individual as the primary possessor of rights. Individualism also has an epistemological aspect, which draws from René Descartes and other philosophers in the Western tradition to posit that the individual mind exists separate from and prior to its natural and social surroundings.⁴⁷ Finally, individualism has a methodological aspect, which seeks to understand collective behavior as the outcome of individual choices. A prominent example of methodological individualism is law and economics, along with its offspring, the law and social norms movement,⁴⁸ whose proponents' prolific contributions to leading law reviews⁴⁹ have helped reawaken interest in the relationship between individuals and social context.

A contrasting paradigm involves variations on the approach commentators term post-structuralism. Post-structuralism has many connotations; what I will be referring to in using the term is its use of the vocabulary of *the subject* to signal an understanding of the concept of the individual as a social construct⁵⁰ or fiction. I use the term post-structuralism rather than post-modernism to signal this approach because of post-modernism's wider umbrella,⁵¹ though some of the theorists whose

47. As one preeminent philosophical scholar on the historical origins of the self puts it: "a great shift" took place with Descartes—a "new conception of inwardness, an inwardness of self-sufficiency, of autonomous powers of ordering by reason." CHARLES TAYLOR, *SOURCES OF THE SELF* 152, 158 (1989). Descartes thus gave us his famous Cogito argument—"I think, therefore I am"—which posits as the starting point for all knowledge a detached self, unable to know for sure anything outside its own existence. Descartes posited the senses as deceptive and the world as external to the thinking mind and fundamentally unknowable and emphasized many of the fundamental dichotomies, such as the separation between mind and body, internal and external, and reason and desire, that both classical pragmatists and post-modernists find troublesome. *Id.*

48. I discuss examples of these approaches further in Part I.A *infra*.

49. See, e.g., Symposium, *Law, Economics & Norms*, 144 U. PA. L. REV. 1643 (1996); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 537 (1998).

50. On the term *social construction*, see generally PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966).

51. Cf. James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 497-99 (1999) (distinguishing between post-modernism, which Boyle defines as having as one "central catechism" a belief in "the fractured self,"

views I discuss refer to themselves as post-modernists.

Post-structuralists frequently express resentment at being categorized,⁵² but it seems safe to say that one rallying cry of this disparate group is the debunking of liberal individualism. Post-structuralists denounce liberal individualism for its untenable notions of the individual as an autonomous agent free to shape his or her destiny.⁵³ They further challenge metaphysical and epistemological notions of the primacy of the individual, arguing that no “self” can exist prior to and autonomous from its social context because a self outside a social context is meaningless.⁵⁴ Just as language is fundamentally social, all human knowledge and action is the product of socially constructed values and understandings. In fact, post-structuralists claim, the very structure of our language—the grammatical existence of the *subject position*—creates the illusion of self-directing individuals, thus masking the thoroughly constitutive priority of the social.⁵⁵

In retort, theorists in the liberal individualist tradition criticize post-structuralists for what they see as a lack of viable theory of human agency.⁵⁶ In these theorists’ view, to claim that no self exists outside the social is to deny the capacity for individual choice at the personal level and for purposive change at the collective level.⁵⁷ Some post-structuralists respond to such critiques simply by demurring.⁵⁸

and “pomo,” a cultural form built on kitsch, irony, juxtaposition and a “flight from ponderous sincerity”). See generally JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* 19-25 (1982) (discussing the rise of post-structural literary theory); Kathryn Abrams, *Afterword: Critical Strategy and the Judicial Evasion of Difference*, 85 CORNELL L. REV. 1426, 1437 n.52 (2000) (addressing similarities and differences between post-modernism, defined as “post-rationalism,” and post-structuralism, characterized by a “complex, contingent view of subject formation and power relations . . .”).

52. See, e.g., Judith Butler, *Contingent Foundations: Feminism and the Question of “Postmodernism”*, in *FEMINIST CONTENTIONS*, *supra* note 23, at 35, 38-42 (complaining about the way in which “authorizing power” creates and reifies a position labeled as “Butler’s” view).

53. See, e.g., James Boyle, *Is Subjectivity Possible: The Post-modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489, 520-23 (1991) (discussing the post-modern view of the subject); Pierre Schlag, *The Empty Circles of Liberal Justification*, 96 MICH. L. REV. 1, 34 (1997) [hereinafter Schlag, *The Empty Circles*] (critiquing the “liberal individual subject”); Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37, 51 (1987) (“The relatively autonomous self is (among other things) a language game.”).

54. See Schlag, *The Empty Circles*, *supra* note 53, at 37-39 (dismissing the notion that the individual can “abstract herself from her peculiar circumstances, her particular engagements, her specific tastes and preferences”).

55. I discuss post-structuralism further in Part I.B, *infra*.

56. See TAYLOR, *supra* note 6, at 6-11 (summarizing the debate between liberal individualists and post-structuralists on questions of the self).

57. See discussion *infra* Part I.A (setting out the basic tenets of the liberal individualist approach).

58. See, e.g., Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1739-40 (1991) (“[I]f the legal subject is no longer operating the levers . . . [w]e may simply be rehearsing and reproducing the instrumentalist logic of bureaucratic practices.”).

This debate between liberal individualists and post-structuralists has an enormously deep history in Western philosophical traditions, to which I obviously cannot even begin to give justice in the limited space of this Article. Instead, in Parts A and B below I merely sketch the broad contours of the debate between liberal individualists and post-structuralists, in order to set up my argument offering a revised version of classical pragmatism as a mediating alternative.

A. *Liberal Individualism*

Liberal individualist conceptions of the self infuse many areas of Anglo-American legal theory. Conceptions of individual autonomy, agency, and moral responsibility underlie many core areas of legal doctrine, including torts,⁵⁹ contracts,⁶⁰ property,⁶¹ criminal,⁶² and constitutional law.⁶³ Because

59. See, e.g., Jules Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 26 (1995) [hereinafter Coleman, *The Practice of Corrective Justice*] (arguing that under the principle of corrective justice, human agents owe a duty to correct for harms only if they are caused by the exercise of their human agency); Jules Coleman, *Mental Abnormality, Personal Responsibility, and Tort Liability* [hereinafter Coleman, *Mental Abnormality*], in MENTAL ILLNESS: LAW AND PUBLIC POLICY 107, 107 (Barach A. Brody & Tristram Engelhardt, Jr. eds., 1980) (noting that tort law recognizes mental deficiency as a defense to liability “not to deny fault, but to deny that the minimal conditions of agency or action have been satisfied”); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 488-90 (1992) (referring to the emphasis in tort law on outcome-responsibility—i.e., that, because we feel as if our actions in the world make a difference, we also believe that we should undo harms, even unintended harms, if they are caused by our actions); Ernest Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES IN L. 107, 112 (2001) (arguing for the importance of a party’s capacity for purposiveness in theories of corrective justice). See generally Tony Honore, *Responsibility and Luck*, 104 L.Q. REV. 530 (1988) (exploring the problem of moral luck, under which the law conceives of people as owning the results of their acts despite the large element of chance in those results).

60. See, e.g., Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 777-84 (1985) (describing conceptions of individualism underlying contract theory).

61. See Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, in LAW & THE ORDER OF CULTURE 162, 168 (Robert Post ed., 1990) (examining different metaphors of the self used in property law and arguing for the development of new metaphors that would foster the development of autonomy not through “protection against intrusion” but through “constructive relationship”).

62. See, e.g., Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 961 (1992) (contending that notions of moral responsibility are connected to “a conception of the human subject—the self—as possessing some important, immutable attributes to which the law responds, of which free will is most prominent”). Dan-Cohen concludes that

[t]he core of criminal law doctrine, centered around the concept of mens rea and the variety of criminal excuses, probably comes closer than any other set of social practices to [a] . . . conception of the responsible human subject . . . characterized exclusively by a rational free will unencumbered by character, temperament, and circumstance.

Id. at 1003; see also Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 319 (1996) (noting the presupposition underlying moral and legal responsibility that “any being who is held responsible must be sufficiently rational and autonomous”).

63. See, e.g., Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657,

this Article focuses on the theories of the self underlying legal theory rather than on particular doctrinal applications, I will not venture into the vast and fascinating literature exploring the connections between liberal individualism and Anglo-American jurisprudence,⁶⁴ except to note at the outset the enormous importance of liberal individualist theories of the self to legal doctrine generally.

Certain strands of critical and feminist legal theory also take liberal individualist assumptions about the self as a starting point, as scholars have explored.⁶⁵ This *subjectivist* vein in critical theory draws from thinkers such as Jean Paul Sartre, Jurgen Habermas, and others, to posit an unfree self, who could be liberated by radical changes in the social order.⁶⁶ Post-modernists sometimes criticize this strand of critical theory for possessing at bottom an individualist theory of the self, in the sense that a self crying out for emancipation exists prior to and independent of the social order.⁶⁷

Individualism also underlies the methodology of law and economics and its relatively young cousin, the law and social norms movement, as already noted.⁶⁸ Traditional law and economics analysis uses an extreme version of methodological individualism, pursuing Oliver Wendell Holmes's "bad man" thought exercise⁶⁹ to explore the insights obtained by thinking of legal actors as having no socialization or morality, but instead as being motivated solely by rational self interest. The law and social norms

1664 & n.31, 1666, 1696 (1997) (examining conceptions of agency in liberalism and constitutional theory and proposing "a more complex conception of the self" that would take into account constraints on women's agency); JoEllen Lind, *Liberty, Community, and the Ninth Amendment*, 54 OHIO ST. L.J. 1259, 1261 (1993) (analyzing traditional "dichotomy between liberty and community" in constitutional law and exploring how new emerging political theories "might converge to provide a reconceptualization of constitutional approaches to the person in society").

64. One leading theorist in this tradition is Joel Feinberg. See, e.g., JOEL FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 20-21 (1980) (discussing liberal individualist theory of self in relation to jurisprudence). Feinberg presents intricate applications of this conception of the individual to many important legal topics in a series of subsequent books. See, e.g., JOEL FEINBERG, *FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS* (1994); JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (1984) (4 volume series).

65. On critical legal theory, see Boyle, *supra* note 51, at 489 (explaining "subjectivist" strand in critical theory); see also James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 688 (1985) [hereinafter Boyle, *The Politics of Reason*] (discussing tension in critical legal thought between subjectivist and structuralist strands). On liberal feminist theory, see sources cited *supra* note 13.

66. See Boyle, *supra* note 51, at 489.

67. See, e.g., BUTLER, *supra* note 35, at 142 (complaining that most discourses pose a prior subject); Schlag, *supra* note 58, at 1685 (criticizing subjectivist strands of critical legal studies for posing "the idea of personal liberation").

68. See *supra* note 49.

69. See OLIVER WENDELL HOLMES, *The Common Law*, in *THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLISHED WRITINGS & SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES* 109, 149 (Sheldon M. Novick ed., Univ. of Chi. Press 1995) (1881) (suggesting that legal rules should be analyzed according to the incentives they create for a person who has no moral compunctions, i.e. a "bad man," but is concerned solely with the probabilities of detection and penalty).

movement retains a commitment to methodological individualism, but seeks to capture more of the complexity of human conduct.⁷⁰ These scholars examine social norms through a rational choice paradigm, though many seem to have abandoned the goal of being able to explain social norms from this perspective.⁷¹

In short, diverse fields of legal scholarship rest on liberal individualist assumptions about the nature of the self. The exploration of underlying assumptions about the nature of the self takes place most centrally in philosophy, and legal theorists tend to turn there to the extent that they critically examine their assumptions about the self at all. Legal philosopher David Luban can serve as our expert in setting this stage.

Liberal individualism, Luban explains, conceives of the individual as having metaphysical priority.⁷² Contrary to some claims, liberal individualists do not reject the observation that an individual's social environment profoundly affects her desires, interests, and goals; nonetheless, liberal individualists understand the individual as existing separate from and prior to that social environment. As Luban puts it, liberalism denies that "the self is essentially historical and relational," not as a matter of personality development, but as a matter of "metaphysics."⁷³

70. In the words of a number of writers borrowing from a remembered witticism of Arthur Leff, to the extent that law and economics may be a "desert," but law and society is a "swamp," the idea was to create law and economics as a more appealing and complex landscape than a desert, while still avoiding the opposite extreme of "swampiness." See, e.g., Robert Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1607 (2000) (citing ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 147 (1991) (quoting Arthur Leff)).

71. Law and social norms scholars have been stymied in their attempts to show that social norms advance efficient behavior because, while some social norms, such as rules of honesty, may lead to efficient outcomes in the long term, others, such as racially discriminatory practices, clearly do not. See, e.g., Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1698 (1996) (criticizing "the view that the norms of closely knit groups are efficient"). Lawrence Lessig, a leading spokesperson, has cited French sociologist Pierre Bourdieu in calling for an "interpretative turn" in law and economics that would allow consideration of "context" and "[m]eaning prescriptions and descriptions" that "are more local, more contingent." Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2184, 2188 (1996); see also Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 910-11 (1996) (noting that "[l]ibertarians, some economic analysts of law, and many liberals give inadequate attention to the pervasive functions of social norms, social meanings, and social roles," and that "[w]e should agree that social norms play a part in determining choices" (footnotes omitted)). Another emerging field seeks to unite the law and economics approach, which sees social norms as factors external to the rational actor, with the sociological approach, which sees social norms as internal and constitutive of the actor, through a new discipline of socio-economics, which sees social norms as having both sets of potentialities. See generally Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 LAW & SOC'Y REV. 157 (2000).

72. See David Luban, *The Self: Metaphysical Not Political*, 1 LEGAL THEORY 401, 402 (1995) ("[M]etaphysical questions seem deeply embedded in public controversies over abortion, medical ethics, criminal responsibility, corporate personality, genetic engineering, equal opportunity and multiculturalism . . .").

73. *Id.* at 402-03.

Luban defends this liberal individualist conception of the self, pointing out that it captures many of our observations about the individual nature of body, memory and consciousness,⁷⁴ as well as our moral intuitions that locate the basis for moral responsibility in the ability of individuals to

74. See *id.* at 429 (“I continue to inhabit the same body and, second, I retain continuity of memory and consciousness.”); *id.* (“A funny thing happened on the way from Kant to Sandel: Our most basic and everyday criteria of individuation—body, mind, memory—dropped by the wayside.”); see also *id.* at 430 (lamenting that Sandel’s communitarian vision “omits any account of the role of unity of consciousness in our concept of a person”). Here, Luban is referring to Immanuel Kant’s notion of *apperceptual unity*—i.e., the perception of having an individual self, united through time and through different sense impressions, or experiences. It would take us too far afield to explore Kant in any depth, but his philosophy of the self plays an important part in our received traditions. Kant begins where David Hume laid off, agreeing that we cannot through reason trust the reliability of the conclusions we derive from our senses. But, Kant argues, against Hume, this means that the world of experiences cannot be the only world of which humans have knowledge. Instead, our perception of *apperceptual unity* offers a tiny glimpse of the nature of the self in a metaphysical realm that we cannot know or understand. Kant argues that this realm is a transcendent world of “things as they are in themselves,” or *noumenon*, which he distinguishes from the tangible or *phenomenal* world of things as we can perceive them. See generally SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 265 (1994) (describing Kant’s notion of the noumenal).

The positing of a noumenal realm solves many of the paradoxes of human knowledge and perception for Kant. For one, it explains human subjectivity without falling into Humean skepticism. Hume is correct that we can only experience the world through our subjective experiences, but the very fact that we understand that our experiences are only subjective points to the existence of an objective realm of things in themselves. Indeed, many of the insights of post-modernism trace back to Kant, who agrees that we can never stand outside our own experience to reach conclusions about matters we perceive in the empirical world. Unlike post-modernists, however, Kant believes in human rationality and free will as a noumenal matter. Kant argues that human beings possess the distinctive characteristics of rationality and free will as a matter of the kind of beings that humans are. Kant’s noumenal self acts rationally in standing apart from its desires and ends in the phenomenal world in choosing its actions. This self possesses free will, not as a question subject to empirical validation or refutation, but again as a noumenon—a matter existing outside space and time and basically unknowable to human understanding. Free will, according to Kant, elevates human conduct above the casually determined nature of the phenomenal world. Even though human beings clearly are constrained by causes and effects in the phenomenal world, we have to understand human beings, as a matter of our rational understanding of the kinds of beings we are, as not being causally determined. We sense that we are the free originators of our actions, though we cannot understand how it is that this is so, except through resort to transcendent ideas of reason. See generally ROGER SCRUTON, *KANT* (rev. ed. 2001) (providing detailed, comprehensive commentaries on Kant’s philosophy); ROBERT J. SULLIVAN, *IMMANUEL KANT’S MORAL THEORY* (1989) (same).

Kant builds a deontological ethics on his ideas concerning the noumenal self. Human beings must be accorded basic respect and may not be treated as ends to other objectives because such respect is due to all rational human beings—not because they have shown themselves worthy of respect, but as an acknowledgment of the kind of beings humans are. Likewise, Kant links the noumenal idea of human beings’ free will to a conception of moral agency. Human beings are responsible for all of their actions because these actions are the product of their noumenal capacity for free choice. Again, for Kant, the point is not to ask whether or to what extent a person possesses free choice in the phenomenal world in any particular situation, but to understand the noumenal self as capable of rational, free action. See BLACKBURN, *supra*, at 147 (“In Kant, while the empirical or phenomenal self is determined and not free, the noumenal or rational self is capable of rational, free action.”). This linking of free will and moral responsibility has had enormous importance in Anglo-American jurisprudence, as I have already discussed.

reflect on and choose their ends and dispositions.⁷⁵

This idea that individuals exist separate from and prior to their social environment and have the ability to choose their values and ends has, of course, been the target of many critiques. One such challenge comes from communitarian philosopher Michael Sandel.⁷⁶ Sandel argues that liberalism's view of the self fails to take sufficient account of the way in which a person's experiences in a particular life world *constitute* the self's attachments—its interests, values, and aims.⁷⁷ Indeed, Sandel argues, a person's attachments to a community and its socially derived values constitute the person herself; we could not understand the concept of a person separate from these attachments.⁷⁸

Luban illustrates this difference in viewpoint between liberal individualists and communitarians by way of an example: Sandel, in claiming that attachments are constitutive of identity, must also argue that whenever a person engages in a "deep revision" of a constitutive attachment—as, for example, in the break up of a love affair—that person's identity also changes.⁷⁹ For a liberal individualist, on the other hand, even such deep changes "leave[] one's identity intact."⁸⁰

This difference is in turn related to another important characteristic of liberal individualists' understanding of the nature of the self. Liberal individualists' view of the self as existing separate from and prior to the social environment leads to a robust conception of human agency. Although tied to one's social environment, the individual is able to reflect on and act with autonomy and choice in response to it.⁸¹ As one contemporary liberal theorist explains, on a liberal view of the "deep self," "we do not create ourselves from nothing," but we can nevertheless "reflect on what sorts of beings we are, and on what sorts of marks we make on the world," and "can change what we don't like about ourselves and keep what

75. See Luban, *supra* note 72, at 431 (asserting that a claim that "there simply is no self behind the mass of dispositions" does not account for "the fact that we are able to adopt a reflective and critical stance toward our dispositions . . . and evaluate them").

76. See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 90 (1982) (posing the rhetorical question: if "none can know whether he shall have the misfortune to be born into . . . unfavorable social and family circumstances[,] why not "agree . . . to regard the distribution of natural and social liabilities as a common burden?").

77. See *id.* at 179 ("[W]e cannot regard ourselves as independent . . . without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are . . .").

78. See *id.* ("To imagine a self incapable of constitutive attachments such as these is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth.").

79. Luban, *supra* note 72, at 428.

80. *Id.*

81. See Susan Wolf, *Sanity and the Metaphysics of Responsibility*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 137, 143 (John Christman ed., 1989) [hereinafter CITADEL] ("For while other members of the natural world are not in control of the selves that they are, we, possessors of effective deep selves, are in control.").

we do.”⁸² Sandel, in contrast, disagrees with conceptions that tie human agency to the capacity to make change in one’s circumstances. Sandel writes, for “the subject whose identity is constituted in the light of ends already before it, agency consists less in summoning the will than in seeking self-understanding.”⁸³

For progressive legal scholars interested in promoting projects of emancipatory activism, however, the ability to theorize the potential for human agency as including the capacity to change one’s environment is obviously important; it is hard to promote the need for activism if we are so thoroughly captured by the constitutive priority of the social that we can do no more than seek to “understand” this—if we cannot, in other words, take effective purposive actions to reform our environment or reach individual or collective goals. At the same time, many such scholars eschew traditional liberal notions of the self for the reasons Abrams, Harris and others discuss—namely, that traditional liberalism fails to account for the restraints on agency placed on persons who exist within structures of subordination or oppression.⁸⁴ In light of the shortfalls of liberal individualism, some of these scholars have turned to alternative sources of theory that I will classify under the general rubric of *post-structuralism*. I examine post-structuralism in a brief overview below.

B. *Post-structuralism and the Renunciation of the Subject*

Post-structuralism refers to a wide array of voices and perspectives, and is, accordingly, hard to characterize, as already noted. It is fairly safe to generalize about one aspect of post-structuralism, however, which concerns post-structuralists’ attitude towards liberal individualist conceptions of the self. Put most simply, post-structuralists adamantly reject notions that the individual possesses metaphysical primacy, or indeed, any reality at all.⁸⁵ This rejection follows from certain trends in later twentieth century thought in the aftermath of the structuralist movement in fields such as linguistics, literary theory, and cultural anthropology.⁸⁶ It is not my intent to enter into

82. *Id.*; see also David A. J. Richard, *Rights and Autonomy*, in CITADEL, *supra* note 81, at 203, 213 (stating that “neo-Kantian deontological moral theory” views “the capacity of each person self-critically to evaluate and give order and personal integrity to one’s system of ends in light of a point of view of how to live one’s life” and “to take ultimate responsibility, as free and rational beings, for adopting and revising a point of view on how to live their lives”).

83. SANDEL, *supra* note 76, at 153.

84. See *supra* notes 3, 13-19 and accompanying text (proposing a new theory of agency that takes into account more fully the experiences of traditionally oppressed groups, especially women).

85. See, e.g., Schlag, *The Empty Circles*, *supra* note 53, at 34 (critiquing the “liberal individual subject”).

86. See generally Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984) (tracing the influence on the legal academy of structuralism and its critiques).

a lengthy analysis of post-structuralism here, but a short foray into its concept of the *subject*—or *subject position*, to use the preferred vocabulary—is in order to set up my analysis comparing the post-structuralist subject with the classical pragmatists' self.

1. *The self or subject as a fiction*

The influence of structuralist and post-structuralist theories on American legal theory is a broad and difficult topic, on which Thomas Heller offers a helpful account.⁸⁷ In a nutshell, Heller explains, *structuralism* involved a move away from understanding meaning in language as derived from the connection between linguistic referents and real things, and toward a focus on language as a system of signs that have meaning by virtue of their relationships to other signs.⁸⁸ Structuralist linguists posit that we see and understand objects and relationships only as those understandings are given to us through language.⁸⁹ Moreover, actors do not use language to achieve their purposes; rather, the relationship is the reverse—language creates actors' purposes.⁹⁰ Indeed, structuralists argue that language not only creates actors' purposes but creates the very actors—the subjects or subject positions—themselves. As Heller explains:

[S]ince meaning was contained in the intralinguistic system, the role of speaker as agent was displaced. The speaker was now dependent on language itself to engage in meaningful activities. The meaning available to a subject was that opened up by the conceptual ordering his or her language afforded. The subject was better understood as a product of culture, an identity created by language.⁹¹

In other words, structuralists argue that we think in terms of liberal individualist actors simply because our language causes us to do so. But the subject position—the *I*—is nothing more than a linguistic construct.⁹² We think the *I* is primary simply because that is the way our language constructs our consciousness.⁹³

This raises the question of why it seems that individual human beings

87. *Id.*

88. *Id.* at 140.

89. *See id.* ("Initial formulations of structuralist linguists relocated the production of meaning within the network of relations that was language itself.")

90. *See id.* (positing that the "meaning available to a subject was that opened up by the conceptual ordering his or her language afforded").

91. *Id.*

92. Scholars in comparative linguistics have supported claims that language constructs cultural understandings of the self. *See, e.g.,* Rom Harré, *The Self in Monodrama*, in *THE SELF: PSYCHOLOGICAL AND PHILOSOPHICAL ISSUES* 318, 343 (Theodore Mischel ed., 1977) (comparing Japanese and Western languages and correspondingly different conceptions of the self).

93. Indeed, one might speculate whether the fact that post-structuralist writing often appears of such "bad" quality is partly explainable by the difficulty of writing intelligibly with "the subject position erased."

use language to express ideas that are new, creative, and original to themselves. Ferdinand de Saussure, an early Swiss structuralist linguist, resolved this problem by dividing language into *langue* and *parole*.⁹⁴ *Langue* consists of the rules of language—the underlying structures that determine what thought or ideas can be expressed.⁹⁵ *Parole* is made up of the utterances that can be made by manipulating the underlying rules.⁹⁶ Similarly, cultural anthropologist Claude Levi Strauss adapted linguistic structuralist theory to explain social organization, proposing that social organization is largely the product of unconscious structures, just as language is.⁹⁷ Analogizing these underlying structures of social organization to de Saussure's concept of *langue*, Levi Strauss posited that observed variations among cultures are merely a kind of *parole*.⁹⁸

Structuralism in literary interpretation, as in anthropology, seeks to look beyond the actions of individuals—in this context, the so-called “authors”—to find the underlying structures and patterns in texts.⁹⁹ Structuralist literary theorists criticize the humanist idea that individual authors are creators. The author does not originate language; instead, the language speaks through authors.¹⁰⁰ Authors' apparent originality is simply recombination, or *parole*. Structuralist literary theorists are interested in detecting the underlying *langue*.

Post-structuralism accepts many of these basic theoretical positions, but rejects the totalizing tendencies of classical structuralism.¹⁰¹ Thus, as Heller explains in detail,¹⁰² post-structuralists eschew the goal of achieving

94. See generally FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 16-20 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans. 1959) (1916) (outlining de Saussure's linguistic theory).

95. *Id.*

96. *Id.*

97. Cf. Joan Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 464-65 (1987) (attributing Levi-Strauss's analysis of myths and other cultural institutions to his adoption of Saussure's linguistics).

98. *Id.*

99. See Mary Klages, *J. Derrida: Structuralism/Post-structuralism* (2004), <http://www.colorado.edu/English/ENGL2012Klages/1derrida.html> (“In structuralism, the individuality of the text disappears in favor of looking at patterns, systems, and structures.”).

100. *Id.*

101. Heller surveys the many critiques to which early twentieth century structuralism fell sway. See Heller, *supra* note 86, at 155-72. Among these was the proliferation of different structural accounts, so that human conduct could be explained by linguistic, economic, or psychoanalytic structuralism and by different versions of structuralism within each account. None of these accounts seemed demonstrably better than others and all could be united only through use of theory at such a level of abstraction or pretension “that it is esthetically offensive.” *Id.* at 158. Another group of such critiques, as Heller describes, pointed to the dual problems in structuralist accounts of indeterminacy, on the one hand (i.e., their “underdetermination of practice opens a gap within the logic of structuralist argument that seems to demand the resuscitation of an interpreting subject”) and of overdeterminism, on the other (i.e., their insistence on accounting for *all* practices, as in Marx's theory of proletarian revolution). *Id.* at 157-58.

102. As Heller explains, post-structuralists reject the impulse toward a universalizing

overarching, universal theories, as many structuralists sought to do, but retain the emphasis on structures of language as wholly constitutive of thought. Post-structuralists also adopt different conceptions of the operation of power than structuralists had embraced. Rather than thinking of power as a form of internal or external structure, post-structuralists follow French social theorist Michael Foucault in viewing power as a *force field*—in other words, “as something which circulates It is never localised here or there . . . never appropriated as a commodity or piece of wealth.”¹⁰³ Combining this idea with the structuralist (and Nietzschean¹⁰⁴) rejection of the subject, Foucault theorizes that one of the effects of power so conceived is the creation of subject positions:

[I]t is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires come to be identified and constituted as individuals. The individual, that is, is not the *vis-a-vis* of power; it is, I believe, one of its prime effects.¹⁰⁵

Put otherwise, post-structuralists reject command-and-control ideas of power—i.e., conceptions of power as involving claims by one powerful group of people to command the actions of another, less powerful

“metatheory” of earlier structuralists, accept multiple competing conceptions of structure, and recognize and embrace the indeterminacy of structural claims. *Id.* at 182-83. They also seek to be less serious about theory—to recognize that “explanatory theory is but another practice, valid in itself, but no more privileged than other representations within the system . . . to give up this image of a positive truth, whether of subject or structure.” *Id.* at 183.

103. FOUCAULT, *supra* note 38, at 98.

104. Post-structuralist theorist Gayatri Chakravorty Spivak explains the influence of Nietzsche on post-structuralism in the following brilliant but difficult prose:

The “subject” is a unified concept and therefore the result of “interpretation.” Nietzsche often stresses that it is a specifically linguistic figurative habit of immemorial standing: “that when it is thought there must be something ‘that thinks’ is simply a formulation of our grammatical custom that adds a doer to every deed.” The “insertion of a subject” is “fictitious.” The will to power as the *subject’s* metaphorizing or figurating, or introduction of meaning, must therefore be questioned. . . . Nietzsche accordingly entertains the notion of the will to power as an abstract and unlocalized figurative (interpretative) process: “One may not ask: ‘who then interprets?’ for the interpretation itself is a form of the will to power, exists (but not as a ‘being’ but as a process, a becoming) as an affect”

Sometimes Nietzsche places this abstract will to power, an incessant figuration, not under the control of any knowing subject, but rather underground, in the unconscious. The Nietzschean unconscious is that vast arena of the mind of which the so-called “subject” knows nothing. As Derrida remarks: “both [Freud and Nietzsche] often in a very similar way, questioned the self-assured certitude of consciousness For Nietzsche ‘the important main activity is unconscious.’”

Gayatri Chakravorty Spivak, *Translator’s Preface* to JACQUES DERRIDA, *OF GRAMMATOLOGY*, at ix, xxiv-xxv (Gayatri Chakravorty Spivak trans., 1st ed. 1976) (German language text and citations omitted); *see also* WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY*, at xii (1995) (“Nietzsche and Foucault discern the atomic powers of history in microphysical particles, in ‘descriptive’ languages, in moral systems, and in thwarted aggression and ideals—in short, in the very making of bodily subjects and socio-political desire.”).

105. FOUCAULT, *supra* note 38, at 98.

group¹⁰⁶—and replace such ideas with an understanding of power as a massive and multiply determined complex of ideologies and social forces that create subjects who are compliant in—even happy about—their domination.

In each of three major historical works, Foucault brilliantly traces how discourses about the subject changed over time as the result of the operation of force fields of power with respect to such matters as sanity and insanity, moral responsibility and punishment, and sexual activity and identity.¹⁰⁷ In the early Foucault, at least, there is a strong emphasis on the way in which such discourses change independent of the conscious efforts of human actors. Leading Foucault interpreters, who worked with Foucault in producing their interpretation, put it this way:

There is a logic to the practices. There is a push towards a strategic objective, *but no one is pushing*. The objectives emerged historically, taking particular forms and encountering specific obstacles, conditions and resistances. Will and calculation were involved. The overall effect, however, escaped the actors' intentions, as well as those of anybody else. As Foucault phrased it, "People know what they do; they frequently know why they do what they do; but *what they don't know is what what they do does*."¹⁰⁸

Foucault strongly objected to being labeled a post-structuralist (or any other label),¹⁰⁹ and, later in his life, as I will discuss in Part III.A.2 below,

106. Cf. Abrams, *Sex Wars Redux*, *supra* note 13, at 308 & n.1, 325, 327 (critiquing Katherine MacKinnon's "neck on the throat" concept of male domination).

107. See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) [hereinafter FOUCAULT, *DISCIPLINE*] (tracing historically changing approaches to punishment); MICHEL FOUCAULT, *HISTORY OF SEXUALITY* (Robert Hurley trans., 1990) [hereinafter FOUCAULT, *SEXUALITY*] (undertaking similar historical analysis of constructions of sexuality); MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (Richard Howard trans., 1965) [hereinafter FOUCAULT, *MADNESS*] (providing a similar analysis of mental illness).

108. HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 187 (2d ed. 1982) (emphasis added) (citing personal communication); see also *id.* at 109 ("Foucault . . . sees all psychological motivation not as the source but the result of strategies without strategists.").

Spivak offers a similar concept of a *subaltern subject* in the context of post-colonialism studies, which she explains this way:

I am progressively inclined, then, to read the retrieval of subaltern consciousness as the charting of what in post-structuralist language would be called the subaltern subject-effect. A subject-effect can be briefly plotted as follows: *that which seems to operate as a subject may be part of an immense discontinuous network ("text" in the general sense) of strands that may be termed politics, ideology, economics, history, sexuality, language, and so on. . . .* Different knottings and configurations of these strands, determined by heterogeneous determinations which are themselves dependent upon myriad circumstances, produce the effect of an operating subject.

Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, in THE SPIVAK READER 203, 213 (Donna Landry & Gerald MacLean eds., 1996).

109. See Interview by Gerard Raulet with Michel Foucault, *Structuralism and Post-structuralism*, in MICHEL FOUCAULT, AESTHETICS, METHOD, AND EPISTEMOLOGY 433, 437

he began to emphasize a perspective that is strongly interactionist in emphasis. But the early Foucaultian perspective strongly influences leading American post-structuralists in the legal academy, such as Pierre Schlag, whom I will discuss in Part I.B.2.a below.

Along with many other later twentieth century theorists, post-structuralists apply the concept of ideology to explain how humans resolve or disguise the logical contradictions of their language and thought systems.¹¹⁰ Ideologies are ideas with deep unconscious resonances that work to hide contradiction.¹¹¹ As applied to the question of the subject, post-structuralists invoke this understanding of how ideology operates to argue that the great emotional weight attached to the idea of free, autonomous individuals in Western liberal thought masks the utter fallacy of that idea.¹¹² In the legal academy, scholars labeling themselves as post-modernists or post-structuralists have devoted much attention to this ideological “problem of the subject,”¹¹³ as I examine below.

2. *The post-modern subject in legal theory*

In this section, I give several examples of post-modernists influential in the American legal academy who passionately reject liberal individualist conceptions of the self. I have selected these examples from among many I could have chosen, with an eye to those theorists who are best known and focus most extensively on the problem of theorizing the subject and human agency. What I hope to show is that, despite the widely varying orientations of the theorists I will discuss, each espouses a position tending to deny or minimize the capacity of persons to engage in meaningful individual or collective agency.

(James Faubion ed., Robert Hurley et al. trans., 1998) [hereinafter FOUCAULT, AESTHETICS] (“I have never been a Freudian, I have never been a Marxist, and I have never been a structuralist.”); *id.* at 448 (“[I] do not understand what kind of problem is common to the people we call ‘post modern’ or ‘post-structuralist.’”); *see also* DREYFUS & RABINOW, *supra* note 108, at xxiv (“Foucault was never a structuralist, strictly speaking, or a post-structuralist . . .”).

110. LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses (Notes towards an Investigation)*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127, 127 (Ben Brewster trans., 1971).

111. *See, e.g., id.* at 172 (arguing that a “peculiarity of ideology” is that it “imposes . . . obviousnesses, which we cannot fail to recognize and before which we have inevitable and natural reaction of crying out . . . ‘That’s obvious! That’s right! That’s true!’” (emphasis omitted)).

112. *See, e.g.,* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1193 (1985) (arguing that the subject/object dichotomy “tends to naturalize the status quo”).

113. *See, e.g.,* Boyle, *supra* note 51, at 520-23 (discussing post-modernists’ view of the subject); Peller, *supra* note 112, at 1193 (highlighting “continuity of the institutionalization of the subject/object dichotomy in legal representational thought”).

a. *Pierre Schlag*

One of the most comprehensive post-structuralist treatments of the subject in law is Pierre Schlag's aptly titled article, "The Problem of the Subject."¹¹⁴ In it, Schlag critiques many schools of jurisprudence "in terms of the kind of subject that the school of thought presupposes or celebrates."¹¹⁵ This is not the place to venture deeply into all of Schlag's arguments;¹¹⁶ suffice it to say that Schlag makes no bones whatsoever about denying the possibility of individual or collective agency. Schlag argues that

in a Foucaultian sense, this construction of the subject entails a prevailing unfreedom. 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 prescribed, already organized configuration of the individual being as chooser.¹¹⁷

114. Schlag, *supra* note 58.

115. *Id.* at 1656.

116. In brief summary, Schlag examines legal formalism, legal realism, critical legal studies, legal pragmatism and several other schools of jurisprudence and argues that all are deficient in their treatment of the subject. In late nineteenth century legal formalism, the liberal subject is introduced by means of "a double twist." First, the law itself is given the character of the transcendent subject that moves all by itself. *Id.* at 1647. This notion of law as an objective order does not explain how law can change. To explain that, subjects must insert themselves. Thus, Schlag argues, the subject reasserts itself and stands in opposition to "various transcendental orders of the object." *Id.* at 1642.

Schlag accuses the American legal realists of adopting the same structure of thought as the formalists. The realists stabilize the new realm of the object as the realm of social science explanation and functionalist prescription. Thus, whether the realm of the objective is doctrine or social science, jurisprudence "always leaves a *stabilized, untroubled, unexamined* subject in place." *Id.* at 1643.

Taking on critical legal studies, Schlag points to the tension between its structuralist and subjectivist strains. The subjectivist strand, "is informed by 'the idea of personal liberation' . . . by bursting free of the *constraints* imposed by the *reified structures of social life*." *Id.* at 1685 (quoting Boyle, *The Politics of Reason*, *supra* note 65, at 742). Again, the liberal free and autonomous subject surfaces as the construction of the subject underlying the critical impulse of critical legal theory. Schlag, *supra* note 58, at 1702. Drawing again on Boyle, Schlag locates this conception of the radically autonomous subject in the existentialist philosophy of Sartre. As Schlag puts it "Sartre is the worm at the heart of critical legal studies" and the liberal subject is the worm at the heart of Sartre. *Id.* at 1693. The assumption is that the subject, the individual is okay, that "all the problems are situated on the outside—in the external objectified thought structures that *constrain* the critical legal thinker . . ." *Id.* at 1702. Schlag also critiques the legal pragmatists. *Id.* at 1708-17. For Schlag's critique of pragmatism and my response to it, see *infra* note 117.

117. Schlag, *supra* note 58, at 1700. Schlag is here alluding to his assault on the relentless normativity of American legal scholarship. See, e.g., Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 177-78, 86 (1990). For a critique of Schlag's argument about normativity in legal scholarship, see Margaret Jane Radin & Frank Michelman, *Pragmatist and Post-structuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1021 (1991) (noting that Schlag's call not to be normative is itself normative).

Debunking what he sees as the naïve optimism of pragmatism,¹¹⁸ Schlag argues that, although “[i]t is our convention to pretend that culture is produced by artisans of meaning,” in reality “culture is now shaped by techno-bureaucratic service strategies of the mall, the HMO, the school, the prison, and the day care.”¹¹⁹ Schlag concludes that “[t]here is no human participation in the creation of culture or relations with others that is not already an instance of the regimen of techno-bureaucratic strategies.”¹²⁰ In Schlag’s words:

The pragmatist subject, understood in pragmatic terms, is the shopper at the universal mall making meaning with the commodified signs of our traditions and culture while the social aesthetics of techno-bureaucratic strategies are making him think he means something. Everything else is just nostalgia.¹²¹

In other words, Schlag accuses the pragmatists as a group of an unduly robust conception of the capacity for agency of human beings on both the

118. Schlag’s critique of legal pragmatists proceeds as follows: To their credit, the pragmatists “understand that the individual and his thoughts are socially constructed.” Schlag, *supra* note 58, at 1708. The problem, however, is that “[a]t the same time—and in apparent tension—the pragmatic view ‘grants no special authority to unconscious habit and slowly evolved custom; self-conscious reflection and innovative reason are equally central.’” *Id.* at 1709 (quoting Thomas Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 798 (1989)). To deal with this tension between the image of the subject as socially constructed and the image of the subject as in charge of his or her own thought and action, the pragmatist “invokes[] the image of mediation.” *Id.* Thus, Schlag says—entirely correctly, as I discuss further in Part II *supra*—for the pragmatist, the subject is the site at which such mediation occurs.

Schlag critiques this pragmatist conception on grounds including that: (1) the space of the pragmatist subject is left “relatively unstructured and unspecified[,]” *id.* at 1710; (2) there is no way to describe the “character, temperament, and sensibility of the pragmatist subject outside the representation of the field within which that subject’s character, temperament and sensibility is constituted,” *id.* at 1715 (emphasis omitted); and (3) the legal pragmatist is allowed to separate himself “from the grounds of his own social constructedness” or to stand “outside his social construction as a kind of epistemic free agent who decides what to make . . . of his own social constructedness,” *id.* at 1717. Thus, Schlag concludes, “[t]his understanding of the self—its agency and its situation—is, of course, utterly conventional—an instance of . . . the ‘relatively autonomous self.’” *Id.*

Schlag is completely right on points (1) and (2), although he can hardly be heard to complain about the thoroughly socially constructed nature of the pragmatist self, because post-structuralism takes the same position. On point (3), Schlag is correct that the pragmatists claim that the self can engage in critique of its situation, but he is wrong in arguing that the pragmatists assert that the self can stand outside its socially constructed circumstances to engage in such a critique. As I discuss in Part II, the pragmatists’ conception of how the self generates critique is rooted in the interaction between the self and the environment and among socially constructed selves, all of which are interacting with the environment and with each other. There is no “outside” in pragmatism, just as there is not in post-structuralism. The key difference is that in pragmatism the socially constructed self is interactive, deliberative, and creative; it gives birth individually or through collective action to new ideas, objects, institutions, and the like. Conversely, in Schlag’s version of post-structuralism, subjects are merely tinkering with—combining and recombining (*parole*)—forms or structures (*langue*) that are impervious to willed change.

119. Schlag, *supra* note 58, at 1721.

120. *Id.*

121. *Id.*

individual and collective levels.

Not all so-called pragmatist theorists share the same views on this question, however. To the contrary, as intellectual historian James Kloppenberg has helpfully analyzed,¹²² the so-called neo-pragmatists exhibit crucial differences from the classical pragmatists on a number of key points. One of these (which follows from Kloppenberg's analysis although he does not explicitly focus on it) concerns the contrast between the classical pragmatists' and the neo-pragmatists' view of human beings' capacity for agency. To illustrate this point, I will use two of the best known neo-pragmatist philosophers who contribute to American law reviews: Stanley Fish and Richard Rorty.

b. Neo-pragmatists Stanley Fish and Richard Rorty

Stanley Fish, a literary theorist by training, has also written extensively on the nature of legal practice and legal training.¹²³ Fish rejects conceptions of the self as existing separate from or prior to social context in favor of his neo-pragmatist version of social constructivism.¹²⁴ As Fish puts it, the self is "always and already constrained by the contexts of practice (interpretive communities) that confer on it a shape and a direction."¹²⁵ Fish uses this concept of interpretative communities to stake out a strong position on the nature of legal interpretation. In an essay analogizing baseball to law practice, Fish argues that the knowledge upon which judges draw in making legal decisions is a form of tacit, intuitively absorbed practice, just as baseball skills are.¹²⁶ Furthermore, carrying out law practice has no more relation to reflection on or understanding of that practice than playing baseball has to explaining it. Once the task becomes one of understanding a cultural practice, Fish argues, it ceases to be that

122. Kloppenberg, *supra* note 27, at 83 (describing the differences between classical and neo-pragmatists).

123. See, e.g., STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989) (collecting essays).

124. On the difference between Fish's neo-pragmatism and Dewey's classical pragmatism, see, for example, Stanley Fish, *Afterword: Truth and Toilets: Pragmatism and the Practices of Life*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 418, 419 (Morris Dickstein ed., 1998) ("If pragmatism points out that its rivals cannot deliver what they promise—once and for all answers to always relevant questions—pragmatism should itself know enough not to promise anything, or even to recommend anything. If pragmatism is true it has nothing to say to us; no politics follows from it or is blocked by it; no morality attaches to it or is enjoined by it."); Kloppenberg, *supra* note 27, at 84.

125. FISH, *Introduction: Going Down the Anti-Formalist Road*, in *DOING WHAT COMES NATURALLY*, *supra* note 123, at 1, 26.

126. FISH, *Dennis Martinez and the Uses of Theory*, in *DOING WHAT COMES NATURALLY*, *supra* note 123, at 372, 398 (analogizing law practice to baseball). But see DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 278 (1983) (noting that "even the pitcher who never 'thinks' during the game is happy to review films of the game in the privacy and safety of the locker-room").

practice, and becomes another kind of practice with its own set of tacit, inarticulable norms.¹²⁷

Fish, like Schlag, argues that normative reflection cannot affect practice.¹²⁸ Nothing can be done, in theorizing or teaching how to theorize, that can change the trap we are in within our interpretative community. Writing about pedagogy, Fish argues:

To put the matter in a nutshell, the knowledge that one is in a situation has no particular payoff for any situation you happen to be in, because the constraints of that situation will not be relaxed by that knowledge. It follows, then, that teaching our students the lesson of anti-foundationalism, while it will put them in possession of a new philosophical perspective, will not give them a tool for operating in the world they already inhabit.¹²⁹

Fish's argument that normative inquiry or critical reflection cannot affect practice places him, much like Schlag, in the category of post-modernists who exhibit a distinctly apolitical bent. If action based on reflection or normative inquiry can have no meaningful effect on the social context in which the action is conducted, then there seems little point in planning and carrying out such action.

Richard Rorty has a similar view. Rorty shares with other post-modernists an emphasis on language as completely constitutive of human thought, a shift in later twentieth century philosophy Rorty aptly terms the "linguistic turn."¹³⁰ As Rorty explains, one of the "great differences between the classical pragmatists and the neopragmatists . . . is the difference between talking about 'experience,' as James and Dewey did, and talking about 'language,' as Quine and Davidson do."¹³¹ Kloppenberg

127. Thus, Fish argues, once "actors in the legal community" cease to be forgetful of the social origins of their practices, they cease being legal actors and become "psychologists, or sociologists, or statisticians." FISH, *Dennis Martinez and the Uses of Theory*, in *DOING WHAT COMES NATURALLY*, *supra* note 123, at 372. For a philosophical discussion of the question whether tacit cultural knowledge can ever be fully articulated, see generally Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 *YALE L.J.* 253 (1996) (discussing Wittgenstein's and Heidegger's theories as to the lack of full accessibility to actors within a cultural system of tacit cultural knowledge).

128. See FISH, *Anti-Foundationalism, Theory, Hope, and the Teaching of Composition*, in *DOING WHAT COMES NATURALLY*, *supra* note 123, at 342, 350-51 ("One must remember that circumstantiality—another name for situatedness—is not something one can escape by recognizing it, since the act of recognition will itself occur within circumstances that cannot be the object of our self-conscious attention.").

129. *Id.* at 351.

130. Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in *PRAGMATISM IN LAW AND SOCIETY*, 89, 96 n.15 (Michael Brint & William Weaver eds., 1991).

131. RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* 35 (1999); see also Thomas C. Grey, *Freestanding Legal Pragmatism*, 18 *CARDOZO L. REV.* 21, 23 (1996) (describing the rejection of the concept of experience by contemporary philosophers); Richard Rorty, *Dewey Between Hegel and Darwin*, in *MODERNIST IMPULSES IN THE HUMAN SCIENCES, 1870-1930*, 54, 55 (Dorothy Ross ed., 1994) [hereinafter Rorty, *Dewey Between Hegel and*

thus terms Rorty's version of neo-pragmatism "linguistic pragmatism" and points to what he views as the unfortunate consequences of discarding the classical pragmatists' concept of experience as an epistemological term.¹³² In Kloppenberg's words, the classical pragmatists had "already incorporated the most valuable insights of the linguistic turn and the postmodern suspicion of power," but these "insights did not blind James and Dewey, nor have they blinded the contemporaries who have resurrected the spirit of their pragmatism, to the world of experience that lies beneath and beyond language . . ."¹³³ The classical pragmatist emphasis on experience, in other words, provides a bridge between human perception and the material world in a way that an emphasis on the wholly constitutive nature of language cannot.¹³⁴

Many important differences between classical pragmatism and Rorty's neo-pragmatism follow from this shift in focus from experience to

Darwin] (same).

132. Kloppenberg, *supra* note 27, at 116.

133. *Id.* at 117.

134. In retort, Rorty argues that Dewey's and James's reliance on the concept of experience to bridge the gap between human knowledge and external reality is philosophically problematic because it leads back to the difficulties of connecting mind and reality, but simply moves those difficulties to another level. Rorty writes:

The problem with this way of obtaining continuity between us and the brutes is that it shoves the philosophically embarrassing discontinuity back down to the gap between, say, viruses and amoebae. But why stop there? Only by giving something like experience to protein molecules, and perhaps eventually to quarks—only a full-fledged panpsychism—will eliminate such embarrassments.

Rorty, *Dewey between Hegel and Darwin*, *supra* note 131, at 58-59; *see also id.* at 60 ("Dewey's and James's attempt to give a 'more concrete,' more holistic, and less dualism-ridden account of experience would have been unnecessary if they had not tried to make 'true' a predicate of experiences and had instead let it be a predicate of sentences.").

A well received recent treatment argues that the classical pragmatists get the better of this argument. *See* DAVID L. HILDEBRAND, *BEYOND REALISM & ANTIREALISM: JOHN DEWEY AND THE NEO-PRAGMATISTS* 155 (2003) (arguing that the classical pragmatists have a better solution to the realist/anti-realist problem than do neo-pragmatists). The leading textbook on epistemology takes a similar view. *See* JOHN L. POLLOCK, *CONTEMPORARY THEORIES OF KNOWLEDGE*, at xii (arguing for an epistemology that espouses a naturalistic view of a human being as "a kind of biological information processor" capable of "interacting with its environment and surviving in a hostile world"); *see also* Leiter, *supra* note 27, at 267 (arguing for a return in philosophy to the naturalism of early pragmatists); POLLOCK, *supra*, at 35 & n.7 (rejecting Rorty's version of anti-foundationalism).

Recent discoveries of neurology suggest that human thought and language are *not* coextensive. Individuals who do not acquire language or lose it through brain damage can engage in many kinds of complex thought, and certain very disabling forms of learning disability are characterized by very high language skills but very low abstract reasoning abilities. Neuroscientists believe that these disabilities arise from a lack of sufficient connections in areas of the brain that process non-language based data, such as spatial reasoning. *See, e.g.,* STEVEN PINKER, *THE LANGUAGE INSTINCT* 44-73 (1994) (summarizing research suggesting that thought occurs in part in a medium other than language); JOHN J. RATEY, *A USER'S GUIDE TO THE BRAIN* 285-89 (2001) (describing neuroscience findings about differences between language and thought); BYRON P. ROURKE, *NONVERBAL LEARNING DISABILITIES: THE SYNDROME AND THE MODEL* (1989) (describing findings about the impact of nonverbal learning disabilities on cognitive functioning).

language, but for my purposes the key issue concerns the view of contemporary neo-pragmatists such as Fish and Rorty on the question of human agency.¹³⁵ As Rorty writes:

the notions of criteria and choice (including the idea of “arbitrary” choice) are no longer in point when it comes to changes from one language game to another. Europe did not *decide* to accept the idiom of Romantic poetry, or of socialist politics, or of Galilean mechanics. That sort of shift was no more an act of will than it was a result of argument.¹³⁶

Commentators analyzing this passage summarize Rorty’s view on human agency this way:

The point upon which Rorty is fastening here is important: the concept of decision, as it is employed within the context of a given language game (for example, to decide between competing descriptions of a given state of affairs), has no obvious application at the level of language games as a whole. But he takes this to imply that cultural change is itself primarily a matter of shifts in vocabulary which are as little affected by human will and reason as is the weather. And what is true of culture *per se* must be true of political culture: in other words, for Rorty, liberalism is now simply a part of our cultural weather system.¹³⁷

Indeed, Rorty’s perspective on the potential of human beings to engage in effective action to bring about purposive change in their social environment is so weak that critics sometimes accuse him of being “insufficiently pragmatic” for this reason.¹³⁸ In denying the possibility that human agency can affect the course of human affairs, Rorty, like Schlag

135. For example, another important difference between classical pragmatism and Rortian neo-pragmatism that follows from this shift but lies beyond the scope of this article concerns scientific inquiry. As many commentators have noted, under Rorty’s anti-realism “the widely held distinction between the ‘soft’ human sciences and the ‘hard’ natural sciences collapses.” WEST, *supra* note 6, at 202; *see also* J. JUDD OWEN, RELIGION & THE DEMISE OF LIBERAL RATIONALISM: THE FOUNDATIONAL CRISIS OF THE SEPARATION OF CHURCH & STATE 30 (2001) (noting the “enormous” differences between Rorty and Dewey on ideas about science). Rorty argues that the only kind of knowledge humans can produce is poetry: there “is nothing more for man to be, in short, *except* a poet.” Richard Rorty, “Heidegger against the Pragmatists,” unpublished essay quoted in WEST, *supra* note 6, at 204 & 268 n.64. Classical pragmatists, in contrast, saw an important role for science-based disciplines in deliberative judgment.

136. RICHARD RORTY, CONTINGENCY, IRONY, SOLIDARITY 6 (1989).

137. STEPHEN MULHALL & ADAM SWIFT, LIBERALS & COMMUNITARIANS 245 (1992).

138. *See, e.g.*, Kloppenberg, *supra* note 27, at 106 (arguing that Rorty’s “liberal ironism encourages selfishness, cynicism, and resignation by undercutting efforts to confront the hard facts of poverty and greed”); *id.* (describing Rorty’s neo-pragmatism as a “symptom of the crisis in a highly specialized professional stratum of educational workers”); WEST, *supra* note 6, at 225 (arguing against neo-pragmatists’ “exclusive ascription of agency to impersonal forces, transcendental entities, or anonymous and autonomous discourses” and contending that “[f]or prophetic pragmatists, human agency remains central—all we have in human societies and histories are structured and unstructured human social practices over time and space”).

and Fish, arrives at a scholarly attitude that all but calls for abandoning projects linked to political activism or social reform.

Although the three leading post-modernists I have examined above adopt perspectives that are distinctly apolitical in their implications, many theorists who identify as post-modernists or post-structuralists are far from apolitical in this sense. Indeed, there is a great deal of intensely political writing among some such scholars. The pessimistic fatalism of Schlag and Fish, who claim, respectively, that normative thought is useless and that theorizing does nothing to alter practice, simply cannot do for those committed to such political projects, because it leaves those “subject to”¹³⁹ social oppression with nowhere to go. For this reason, arriving at an alternative theory of agency has been high on the agenda of many post-modern theorists. This theory must avoid the implausibility of an overly robust conception of agency, but also must not cast aside members of oppressed groups as so thoroughly socially constructed as to be mere victims or “the other.” One such leading theorist, on whom many progressive legal theorists frequently draw, is philosopher and self-described post-structuralist feminist and queer theorist Judith Butler.

139. See ALTHUSSER, *supra* note 110, at 182 (noting the dual meaning of term “subject” as “free subjectivity, a center of initiatives, author of and responsible for its actions,” and “a subjected being, who submits to a higher authority, and is therefore stripped of all freedom”).

c. *Judith Butler*

Butler examines the problem of theorizing agency in several books: the classic work, *Gender Trouble*;¹⁴⁰ *Bodies that Matter*,¹⁴¹ which sought to respond to critics of *Gender Trouble* and offer “a rethinking” of some parts of the earlier book; and *The Psychic Life of Power: Theories in Subjection*.¹⁴² In the first two books Butler’s central project is to theorize how a person takes on gender identity. As one part of that project, Butler addresses the thorny problem of locating agency within a post-structuralist approach. This question, Butler writes, “is usually associated with the viability of the ‘subject,’ where the ‘subject’ is understood to have some stable existence prior to the cultural field that it negotiates.”¹⁴³ Under this approach, “‘culture’ and ‘discourse’ *mire* the subject, but do not constitute that subject,” a move that “has appeared necessary to establish a point of agency that is not fully *determined* by that culture and discourse.”¹⁴⁴ Butler, on the other hand, seeks a concept of agency in which the subject appears only “through a signifying practice that seeks to conceal its own workings and to naturalize its effects.”¹⁴⁵

To create such a space for change while repudiating the existence of an agenic actor, Butler draws on J. L. Austin’s theory of performative utterances.¹⁴⁶ Structures, Butler explains, do not simply exist and perpetuate themselves; they continue by being “instantiated” through repetition.¹⁴⁷ The repetitions are not voluntary; they are not the product of choice of free autonomous subjects. Instead, they are compelled by discourse rules and normative structures. Butler theorizes that “‘agency,’ then, is to be located within the possibility of a variation on that repetition.”¹⁴⁸

Butler describes several possible ways in which the repeated performance of gender can lead to subversion or change. The first arises from inevitable slips or mistakes in repetition: “The injunction *to be* a

140. BUTLER, *supra* note 35.

141. JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX”*, at xii (1993).

142. BUTLER, *supra* note 24.

143. BUTLER, *supra* note 35, at 142.

144. *Id.* at 143.

145. *Id.* at 144.

146. See generally J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1975). Butler further explains that she uses Austin as “read through” Jacques Derrida and Paul de Man. See Butler, *For A Careful Reading*, in *FEMINIST CONTENTIONS*, *supra* note 23, at 134 (referring to a performative act as “one which brings into being or enacts that which it names, and so marks the constitutive or productive powers of discourse” and further stating that “[t]o the extent that a performative appears to ‘express’ a prior intention, a doer *behind* the deed, that prior agency is only legible *as the effect* of that utterance”).

147. Butler, *For A Careful Reading*, in *FEMINIST CONTENTIONS*, *supra* note 23, at 134.

148. BUTLER, *supra* note 35, at 145.

given gender produces necessary failures, a variety of incoherent configurations that in their multiplicity exceed and defy the injunction by which they are generated.”¹⁴⁹ The second arises through the intersecting and conflicting pressures of social structure. These pressures produce change, but not, Butler emphasizes, because a prior agent exists behind social roles or structural conflicts to do the choosing or thinking.¹⁵⁰

Butler develops her views on agency in the context of understanding how persons take on gender identities and sexual orientations. As Butler repeatedly emphasizes, these are aspects of personality that are particularly embedded in unconscious forces and thus particularly resistant to conscious change. Nevertheless, Butler’s conception of agency as lying primarily in mistakes in compelled repetitions gives rise to the question of what Butler proposes as the political project for feminist and gay rights activists. In *Gender Trouble*, Butler suggests that

[t]he critical task is . . . to locate strategies of subversive repetition enabled by those constructions, to affirm local possibilities of intervention through participating in precisely those practices of repetition that constitute identity and, therefore, present the immanent possibility of contesting them.¹⁵¹

Butler is here specifically addressing the arena of sexual identity formation, a field of erotic attachment that is, as already noted, particularly unsusceptible to deliberative judgment. But theorists have not interpreted Butler’s ideas as confined to questions related to sexual identity. Instead, her call for engaging in localized projects of subversion involving contesting oppressive practices and repetitions while participating in them—along the lines of performances “in drag”—became an icon for Butler’s ideas generally.¹⁵² In turn, the image of performing in drag as a form of political activism has generated enormous controversy, even among sympathetic commentators.¹⁵³ Abrams, for example, argues that

149. *Id.*

150. BUTLER, *supra* note 141, at 10. Thus, Butler explains, in discussing “the forcible reiteration of norms surrounding sex”:

As a sedimented effect of a reiterative or ritual practice, sex acquires its naturalized effect, and yet, it is also by virtue of this reiteration that gaps and fissures are opened up as the constitutive instabilities in such constructions, as that which escapes or exceeds the norm, as that which cannot be wholly defined or fixed by the repetitive labor of that norm. This instability is the deconstituting possibility in the very process of repetition, the power that undoes the very effects by which “sex” is stabilized, the possibility to put the consolidation of the norms of “sex” into a potentially productive crisis.

Id.

151. BUTLER, *supra* note 35, at 147.

152. *Id.*

153. See, e.g., Nancy Fraser, *Pragmatism, Feminism, and the Linguistic Turn*, in *FEMINIST CONTENTIONS*, *supra* note 23, at 157, 163 (arguing that “in *Gender Trouble*, Butler vastly overestimated the emancipatory potential of such gender-bending performance in

Butler, “notwithstanding the breadth of her endorsement of a politics of ‘drag’ or ‘subversive repetition,’” fails to account for “which repetitions become ‘disruptive’ and which become ‘domesticated[.]’”¹⁵⁴ Similarly, Joel Handler argues that the idea that resistance is only possible through small-scale, localized acts of subversion produces a politics that fails to address the crucial task of guiding large-scale, “macro” level political change.¹⁵⁵

In later work, Butler returns to the problem of theorizing agency yet again, and sketches a theory based on the dynamic of ambivalence, contained in Freud’s theory of melancholia,¹⁵⁶ as a starting point.¹⁵⁷ Butler notes that the adoption of a particular sexual identity, such as heterosexuality, involves the renunciation of other objects of sexual desire, but those objects remain in the psyche precisely by virtue of their renunciation.¹⁵⁸ Similarly, Butler suggests, there is ambivalence or melancholia in all forms of identity construction achieved through the operation of social power.¹⁵⁹ Butler proposes that this melancholic ambivalence may point to the beginnings of a theory of resistance at the political level: “The ‘plaints’ of the melancholic are invariably

everyday life” and “missed its susceptibility to commodification, recuperation, and depoliticization—especially in the absence of strong social movements struggling for social justice”).

154. Kathryn Abrams, *Cross-Dressing in the Master’s Clothes*, 109 YALE L.J. 745, 774 (2000) (reviewing JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000)) (citing Susan Bordo, *Post-modern Subjects, Post-modern Bodies*, 18 FEMINIST STUD. 159, 172 (1992) (internal citations omitted)).

155. See, e.g., Joel F. Handler, *Post-modernism, Protest, and the New Social Movements*, 26 LAW & SOC’Y REV. 697, 719-28 (1992) (criticizing focus of post-modernist activism on local disruptions that fail to produce sustained, large-scale political change).

156. See generally SIGMUND FREUD, *Mourning and Melancholia*, in GENERAL PSYCHOLOGICAL THEORY 164 (Phillips Rieff ed., 1963) (describing the general features of “melancholia” and recommending methods of treatment).

157. BUTLER, *supra* note 24, at 132.

158. Concerning this rejection, Butler explains:

For a gay or lesbian identity position to sustain its appearance as coherent, heterosexuality must remain in that rejected and repudiated place. Paradoxically, its heterosexual *remains* must be *sustained* precisely through insisting on the seamless coherence of a specifically gay identity. Here it should become clear that a radical refusal to identify suggests that on some level an identification has already taken place, an identification has been made and disavowed, whose symptomatic appearance is the insistence, the overdetermination of the identification that is, as it were, worn on the body that shows.

Id. at 49.

159. Butler expands on this notion of ambivalence:

The power imposed upon one is the power that animates one’s emergence, and there appears to be no escaping this ambivalence. Indeed, there appears to be no “one” without ambivalence, which is to say that the fictive redoubling necessary to become a self rules out the possibility of strict identity. Finally, then, there is no ambivalence without loss as the verdict of sociality, one that leaves the trace of its turn at the scene of one’s emergence.

misdirected, yet in this misdirection resides a nascent political text.”¹⁶⁰

Post-modern scholars in the legal academy have not taken up Butler’s psychoanalytical exploration of agency as inhering in a melancholic ambivalence about social identity formation to nearly the same extent as the ideas in her first two books. This third work of Butler’s is exceptionally preliminary, tentative—often couched in terms of questions—and deeply invested in Freudian analysis, an approach not currently in vogue in the American legal academy. It is nevertheless significant because in it Butler, first, continues to acknowledge the still unmet need for a theory of agency that can enable and guide emancipatory political activism,¹⁶¹ and, second, acknowledges the paradoxically empowering, unpredictable, and transformative potential of human agency.¹⁶² In Part II below, I argue that classical pragmatism offers some of the tools for enhancing contemporary theoretical perspectives on agency in both of these respects.

II. THE CLASSICAL PRAGMATISTS’ INTERACTIONIST THEORY OF THE SELF

It is surprising that the classical pragmatists’ approach to the self has not received more attention in law, especially in light of the recent resurgence of interest within the legal academy in pragmatism generally.¹⁶³ Scholars

Id. at 198.

160. *Id.* at 184. The dynamics of melancholia produce an unstable, changing playing field:

Melancholia is a rebellion that has been put down, crushed. Yet it is not a static affair; it continues as a kind of “work” that takes place by deflection. Figured within the workings of the psyche is the power of the state to preempt and insurrectionary rage. The “critical agency” of the melancholic is at once a social and psychic instrument.

Id. at 190-91.

161. In Butler’s words:

As much as a perspective on the subject requires an evacuation of the first person, a suspension of the “I” in the interests of an analysis of subject formation, so a reassumption of that first-person perspective is compelled by the question of agency. The analysis of subjection is always double, tracing the conditions of subject formation and tracing the turn against those conditions for the subject—and its perspective—to emerge.

A critical evaluation of subject formation may well offer a better comprehension of the double binds to which our emancipatory efforts occasionally lead without, in consequence, evacuating the political. Is there a way to affirm complicity as the basis of political agency, yet insist that political agency may do more than reiterate the conditions of subordination?

Id. at 29-30; *see also id.* at 18 (asking “how we might make such a conception of the subject work as a notion of political agency in postliberal times”).

162. *Id.* at 29 (“A critical analysis of subjection involves . . . how agency may well consist in opposing and transforming the social terms by which it is spawned.”).

163. Law school symposia on pragmatism include Symposium, *The Revival of Pragmatism*, 18 CARDOZO L. REV. 1 (1996); Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 16 (1990).

have discussed pragmatist theory in relation to contemporary feminist theory,¹⁶⁴ democratic political theory,¹⁶⁵ anti-foundationalist theories of adjudication,¹⁶⁶ socio-legal studies,¹⁶⁷ substantive law,¹⁶⁸ legal representation,¹⁶⁹ and much more. The rise of neo-pragmatism has also spurred renewed historical interest in the late nineteenth and early twentieth century classical pragmatists.¹⁷⁰ In law, scholars displayed particular interest in Dewey, in part because Dewey had the closest relationship with the legal realists.¹⁷¹ Thus a large literature focuses on Dewey's few writings on the subject of law.¹⁷² But this literature has not yet explored in any depth the classical pragmatists' theory of the self. This neglect may in part be due to the fact that legal theorists remember the classical pragmatists primarily as instrumentalists—as thinkers concerned with common sense and expediency.¹⁷³ Recent scholarship in disciplines outside law, however, argues that such readings overemphasize the pragmatists' instrumentalism at the expense of the interpretative, contextual, and aesthetic themes of their work.¹⁷⁴ My treatment here is

164. See generally Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990) (exploring how pragmatism and feminism interact).

165. See, e.g., Hilary Putnam, *Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1671 (1990) (borrowing concepts and language from Dewey to support a claim that democracy is "the precondition for the full application of intelligence to the solution of social problems").

166. See, e.g., Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996) (defending his concept of pragmatic adjudication and criticizing others).

167. See, e.g., BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW*, at xi (1997) (arguing for a "nonpolitical" version of neo-pragmatism as a helpful approach to socio-legal studies).

168. See, e.g., James R. Hackney, Jr., *The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatic Instrumentalism*, 39 AM. J. LEGAL HIST. 443, 443-44 (1995) (discussing pragmatism's influence on theories of tort liability).

169. See, e.g., William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WILLIAM & MARY L. REV. 127, 181 (2004) (contrasting pragmatist approach to legal representation to legal liberalism).

170. See, for example, LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001) for recent Pulitzer prize-winning treatment of the classical pragmatist movement.

171. See *supra* note 43 for an illustrative list of works discussing Dewey's pragmatist approach. Because I hope this Article will be read by scholars beyond the legal academy, I take the precaution of noting, to avoid the potential for serious confusion, that American legal realism is very different from philosophical realism. Writing in the 1920s and 1930s, the American legal realists challenged the naturalness of and necessity for traditional legal doctrines. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960*, 169-92 (1992) (discussing transition from classical to realist legal thought); G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 99-135 (1978) (discussing transition from late nineteenth century legal thought to legal realism).

172. See, e.g., AMERICAN LEGAL REALISM 153, 185 (William W. Fisher III et al. eds., 1993) (including Dewey's two main law review articles in a collection of the most important legal realist writings); Scott Brewer, *On the Possibility of Necessity in Legal Argument: A Dilemma for Holmes and Dewey*, 34 J. MARSHALL L. REV. 9, 10 (2000) (criticizing fallacies in Dewey's theory of judicial reasoning).

173. See, e.g., DAVID LUBAN, *LEGAL MODERNISM* 10 (1994) (arguing that pragmatism "subordinates the demands of theory to the exigencies of future-directed problem solving").

174. See Thomas Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 798

firmly rooted in this later perspective, finding little of interest in instrumentalist readings—as favored, for example, by legal neo-pragmatists such as Richard Posner¹⁷⁵—and instead emphasizing the ethical, interactionist, and critical-evaluative aspects of the classical pragmatists’ thought.

In broad summary, the classical pragmatists’ theory of the self has the following distinctive features: It (1) rejects individualist conceptions of the self as existing apart from, or prior to, social context; (2) conceives of the self as thoroughly constituted by its social context, which precedes the self and provides it with all meaning and identity, and understands *habit* as the mediating link between social context and the human organism; and (3) views purposive intelligence or deliberative judgment as a process of achieving aesthetic resolution or fit among conflicts between habits and between habits and the changing demands of the environment. Finally, in Dewey, especially, these features of the self are (4) linked to a pedagogy and political theory that provides collective goals for such purposive striving. I discuss each of these features in turn in Part II.B below. Consistent with Dewey’s thought, which views all ideas as the product of particular historical circumstances, I begin in Part II.A with a short synopsis of Dewey’s intellectual context.

A. Dewey’s Context

As Louis Menand’s Pulitzer-prize winning book, *The Metaphysical Club*,¹⁷⁶ has recently brought back to popular attention, classical pragmatism arose in the context of a gentlemen’s conversational club founded in Cambridge, Massachusetts, in 1872.¹⁷⁷ Members of this club

(1989) (noting that while “older accounts of pragmatism emphasized its instrumentalism, the distinctive feature of recent reinterpretations of pragmatism is to give equal significance to the contextual thesis”). Examples of this literature include THOMAS M. ALEXANDER, *JOHN DEWEY’S THEORY OF ART, EXPERIENCE, AND NATURE: THE HORIZONS OF FEELING* (1987). Alexander comments on Dewey:

It is the thesis of this book that the best approach to what Dewey means by “experience” is not to be gained by focusing primarily on the theme by which Dewey is generally known, his “instrumentalism,” but instead by looking at experience in its most complete, most significant, and most fulfilling mode: experience as art.

Id. at xiii. See generally DEWEY RECONFIGURED: ESSAYS ON DEWEYAN PRAGMATISM (Casey Haskins & David I. Seiple eds., 1999) (collecting new approaches to Dewey); READING DEWEY: INTERPRETATIONS FOR A POSTMODERN GENERATION (Larry A. Hickman ed., 1998) (compiling new Dewey scholarship).

175. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 4 (1995) (explaining that his concept of pragmatism is “practical and instrumental”).

176. MENAND, *supra* note 170.

177. See PHILIP P. WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* 18-30 (1949) (providing one of the the first historical works documenting the origins of the American pragmatist movement in the Metaphysical Club); see also MENAND, *supra* note 170, at 200 (drawing heavily on Wiener’s historical research to explore Menand’s own set

included the jurist Oliver Wendell Holmes, Jr., whose hard-nosed, anti-classical approach to law set the stage for the transformation of American jurisprudence through the course of the twentieth century;¹⁷⁸ William James, the influential turn-of-the-century philosopher and psychologist; and Charles Sanders Peirce, a brilliant mathematician, logician, and philosopher whose difficult writings have enjoyed a great renaissance along with the growth of interest in semiotics.¹⁷⁹

Members of this first generation of classical pragmatists were in many ways still anchored to the preoccupations of the nineteenth century, and their views exhibit what today can appear to be a strange mix of foundationalist and teleological conceptions of human knowledge and history,¹⁸⁰ on the one hand, and strong interests in naturalism and experimentalism,¹⁸¹ on the other. Especially in these latter interests, Peirce and James served as important intellectual forerunners for the second generation of pragmatists Dewey and Mead represent, bridging old and new ideas in ways that pointed this next generation toward the path their mature thought would take.

of questions related to the burgeoning contemporary interest in classical pragmatism).

178. See generally Grey, *supra* note 174, at 811-57 (analyzing Holmes's thought in relation to pragmatist movement); THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. (Steven J. Burton ed., 2000) (collecting leading legal scholarship on Holmes's influence).

Three other members of the Metaphysical Club were also lawyers, prompting a preeminent historian of the pragmatist movement to observe that "it is significant historically to note that there were more lawyers than natural scientists in the Metaphysical Club," and that to these lawyers should go credit for "major steps" in the "history of American social thought." WIENER, *supra* note 177, at 152. One of these lawyer members was law professor Nicholas St. John Green, a proto-realist foe of legal formalism. Green's most famous articles, written in 1870, advanced the proto-realist argument that the law's concept of proximate cause was merely a metaphor used by judges to arrive at the result they wished to achieve in particular cases. See MENAND, *supra* note 170, at 223-24 (quoting NICHOLAS ST. JOHN GREEN, *Proximate and Remote Cause*, in ESSAYS AND NOTES ON THE LAW OF TORT AND CRIME 1, 13, 15 (1933)). According to Menand, Peirce found this legal "method of analysis thrilling." *Id.* at 224. Green ended up resigning from his professorial position at Harvard Law School, disgusted with the legal formalism that came to dominate the school after Christopher Langdell was appointed dean there in 1875. *Id.* at 231. See generally Hackney, *supra* note 168, at 450-56 (discussing Green's influence on theories of product liability); WIENER, *supra* note 177, at 152-71 (describing Green's departure from Harvard).

179. See KAJA SILVERMAN, THE SUBJECT OF SEMIOTICS 3-4 (1983) (defining semiotics as the subfield of philosophy that studies the use of signs and symbolic systems in the creation of meaning).

180. For a discussion of the teleological aspects of Peirce's views, see MENAND, *supra* note 170, at 199-200. For a discussion of James's teleological functionalism, see ALEXANDER, *supra* note 174, at 41.

181. Peirce, for example, "claimed that the infantile condition of philosophical inquiry was due to the fact that philosophy 'has been pursued by men who have not been nurtured in dissecting rooms and other laboratories, and who consequently have not been animated by the true scientific *Eros* . . .'" VINCENT M. COLAPIETRO, PEIRCE'S APPROACH TO THE SELF: A SEMIOTIC PERSPECTIVE ON HUMAN SUBJECTIVITY, at xvii (1989) (internal quotations omitted).

By the time this second generation of pragmatists reached maturity as thinkers in the late 1890s, their intellectual focus was aimed at the anti-foundationalist, secular preoccupations of the twentieth century.¹⁸² Full of progressive optimism, confident in the promise of scientific inquiry, and bullish on the potential of humankind to solve its age-old problems once it escaped from the shackles of convention, this second generation of pragmatists developed a philosophy that abjured many of the traditions of liberalism and laid groundwork for many later developments in twentieth century social theory.

Born in Burlington, Vermont, in 1859, Dewey described his heritage as “‘of New England culture,’ with its dualisms of self and world, soul and body, nature and God”¹⁸³ The “consequent painful oppression” first led Dewey to his interest in philosophy and especially in “Hegel’s synthesis of subject and object, matter and spirit, [and] the divine and the human”¹⁸⁴ In college, Dewey studied primarily a classical curriculum, but in his zoology and geology classes he also discovered evolutionary theory.¹⁸⁵ In 1882, Dewey enrolled for postgraduate studies at Johns Hopkins University.¹⁸⁶ There he studied primarily with professors who espoused Hegel’s “absolute idealism”—the notion that, through the gradual unfolding of history, truths in the form of “absolute objective ideals” would reveal themselves to human consciousness.¹⁸⁷ Charles Sanders Peirce was also a teacher at Johns Hopkins while Dewey was studying there, but, Dewey later reported, had little influence on him at the time.¹⁸⁸

182. The turn of the century also saw changes in the structural location of the American intelligentsia. The transmission of ideas no longer took place through informal conversations of gentlemen-scholars in small, elite social clubs; this second generation of pragmatists was comprised of full-time academics located in universities, which were evolving into increasingly professionalized practice locations. *See generally* THE ORGANIZATION OF KNOWLEDGE IN MODERN AMERICA, 1860-1920, 51-268 (Alexandra Oleson & John Voss eds., 1979) (addressing, in a collection of essays, the increasing specialization of science and scholarship in the early twentieth century). At these universities, Dewey and Mead enjoyed frequent interactions with a variety of scholars who were likewise looking for new approaches to solve the problems of a new century. Representatives of the disciplines of philosophy, psychology, social work, law, and anthropology exerted significant reciprocal influences on each other, producing an outpouring of new ideas and lines of inquiry. *See generally* PURCELL, *supra* note 43, at 3-113 (describing common themes of social science disciplines in early twentieth century).

183. ALEXANDER, *supra* note 174, at 15-16.

184. *Id.* at 16 (quoting 5 JOHN DEWEY, THE LATER WORKS 1925-1953, at 153 (Jo Ann Boydston ed.) (internal quotations omitted)). Consistent with his emphasis on the basis of thought in emotion and impulse, Dewey noted that the ideas of philosophy were to him in his youth “no mere intellectual formula,” but an “immense release.” *Id.* (quoting DEWEY, *supra*, at 153).

185. NEIL COUGHLAN, YOUNG JOHN DEWEY: AN ESSAY IN AMERICAN INTELLECTUAL HISTORY 7 (1975).

186. *See id.* at 17 (stating that Dewey enrolled to study philosophy and psychology).

187. *See* MENAND, *supra* note 170, at 263-67 (detailing Dewey’s study of Hegel at John Hopkins University).

188. Dewey reported that he “only dropped in” to some of Peirce’s lectures and “was

Nevertheless, Peirce's views on the self presaged some of the most important elements of Dewey's and Mead's later approach.

Peirce and Swiss linguist Ferdinand de Saussure are considered the two founders of semiotics.¹⁸⁹ But whereas de Saussure pioneered a structuralist approach, as already discussed, Peirce's version reflected a *process* approach, which emphasized the role of human creativity. As one Peirce scholar explains, for structuralists such as de Saussure "the decentering of the subject amounts to nothing less than the liquidation of the agent"¹⁹⁰ For the pragmatist Peirce, on the other hand, the "repudiation of the Cartesian starting point means the recovery of flesh-and-blood actors who are continuously defining themselves through their give-and-take relationships with both the natural world and each other."¹⁹¹ To capture this element of indeterminacy, Peirce's semiotics envisions a triadic interaction among sign, symbol, and object.¹⁹² Several scholars have analyzed the echos of Peirce in Mead's conception of the self as a dialogue between the *Me* and the *I*, as I explore in Part II.C.1 below.¹⁹³ Peirce's emphasis on the role of reflective analysis and creativity in the human organism's interaction with the natural and social world is evident in Dewey's mature philosophy as well.

never a regular student of his," because he was "not prepared at that time, either by my dominant interests or my previous training, to appreciate the significance of his work." Letter from John Dewey to Paul Weiss (Oct. 1, 1931), in DEWEY'S CORRESPONDENCE VOL. II (electronic edition 2002), Rec. No. 07611; *see also* MENAND, *supra* note 170, at 273 (reporting that Dewey, concerned that his mathematical talents fell below the standards Peirce required in his logic class, did not take courses with Peirce until his last year of study). Dewey began to understand Peirce only after he had "reached under other influences a position somewhat akin to his." Letter from John Dewey to Read Bain (Mar. 12, 1935), in DEWEY'S CORRESPONDENCE, *supra*, at Rec. No. 07781.

189. *See generally* SILVERMAN, *supra* note 179, at 4-25 (contrasting semiotics of Peirce and de Saussure).

190. COLAPIETRO, *supra* note 181, at xix.

191. *Id.*; *see also id.* at 27-29 (further analyzing the differences between the semiotics of Peirce, who, "in granting priority to signs over ideas shifts the focus *from* what occurs within a finite, individual consciousness *to* what occurs between social beings within a common framework of experience and action," and structuralist semiotics, as exemplified by Umberto Eco, who "leaves unexamined the subject, the fabricator of codes and the producer of signs," "questions the very possibility of examining the subject from the perspective of semiotics," and "holds that the human subject, precisely as subject, falls outside the 'natural boundaries' of semiotic inquiry," thus creating "what appears to be the case of the vanishing subject in semiotic theory").

192. *See* COLAPIETRO, *supra* note 181, at 5 (explaining that the difference between structuralists' and Peirce's versions of semiotics "can be stated simply: The focus of Peircean semiotic is the disclosure of trichotomies (e.g., icon, index, symbol), whereas the concern of Saussurean semiology is the detection of oppositions (e.g., *langue* and *parole*; diachrony and synchrony; paradigm and syntagm)").

193. *See id.* at 90-91 (quoting Peirce's 1905 article, *What Pragmatism Is*, stating that "[w]hen one reasons, it is that critical self that one is trying to persuade" and describing Peirce's self "as a being in dialogue with itself[.]" with this "intrapersonal dialogue [being] potentially part of a larger context, an interpersonal dialogue"); NORBERT WILEY, *THE SEMIOTIC SELF* 34 (1994) (exploring parallels between Peirce's semiotics and Mead's symbolic interactionism).

When Dewey graduated from Johns Hopkins, however, he was still very much aligned with the Hegelian idealists. For the next four and a half decades, Dewey made his living as a university professor, at the University of Michigan (1884-1894), the University of Chicago (1894-1904), and Columbia University (1904-1930).¹⁹⁴ At Michigan, Dewey met and became close friends with Mead, and Mead remained an important intellectual collaborator and friend for the rest of Dewey's life.¹⁹⁵ Mead, like Dewey, had been strongly influenced by Hegelian idealism, but, starting in the 1890s, both men began to reject idealism in favor of an experimental naturalism grounded in a view of the human organism as a product of its surroundings.¹⁹⁶

Dewey first turned to William James's work, *Principles of*

194. See JOHN P. MURPHY, *PRAGMATISM FROM PEIRCE TO DAVIDSON* 60 (1990) (describing Dewey's academic career). After his retirement, Dewey enjoyed another twenty-two years of active engagement with the issues of his time, remaining involved in social activism on a wide variety of fronts and producing almost half of his written output, until his death in 1952 at the age of ninety-three. A visionary thinker who tended to leave the details of his ideas to be worked out by others, Dewey's work spans great divides in subject matter and made important contributions in a wide variety of fields including philosophy, psychology, education, political science, and social theory. See *THE COLLECTED WORKS OF JOHN DEWEY, 1882-1953* (Jo Ann Boydston ed., 1991); see also ALAN RYAN, *JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM* 201 (1995) (describing Dewey's output). On top of this prodigious written output, and consistent with his philosophical commitment to experience as the source of all knowledge, Dewey was an enormously energetic left-wing social activist, who was involved in many leading early twentieth-century reform movements. He was, for example, a founder and early advisory board member of the National Association for the Advancement of Colored People ("NAACP"), a frequent visitor to Jane Addams' Hull House settlement in Chicago, an anti-war activist, a founder of the American Civil Liberties Union ("ACLU"), and an outspoken opponent of McCarthyism. On Dewey's energetic social activism on a wide variety of fronts, see SIDNEY HOOK, *JOHN DEWEY: AN INTELLECTUAL PORTRAIT* 23-25 (Greenwood Press 1971) (1939) (summarizing Dewey's activism on causes including farm-labor organizing, ending war, government relief and unemployment, the Sacco-Vanzetti case, and chairmanship of commission of inquiry that exonerated Leon Trotsky from Soviet charges of treason); MENAND, *supra* note 170, at 235-36 (recounting Dewey's prolific writings on a variety of subjects and membership in his several prominent educational and political organizations); STEVEN C. ROCKEFELLER, *JOHN DEWEY: RELIGIOUS FAITH AND DEMOCRATIC HUMANISM* 207 (1991) (recounting Dewey's collaborative projects with Jane Addams); *id.* at 286-88 (describing Dewey's commitments and speeches on issues of feminism and race equality); *id.* at 303 (describing Dewey's participation in founding the organization that became the ACLU); RYAN, *supra*, at 284 ("Dewey threw himself into a postretirement career as a political activist, propagandist, pamphleteer, and gadfly to the New Deal with an energy that would have been astonishing in a man half his age."). Dewey conceived of his philosophy and his social activism as intertwined. See *THE PHILOSOPHY OF JOHN DEWEY* 44 (Paul Schilpp & Lewis Edwin Hahn eds., 3d ed. 1989) (quoting Dewey's statement that "I doubt if the force of the idea in the theory of social action would have come home to me without my experience in social and political movements").

195. See ALEXANDER, *supra* note 174, at 123 (describing Dewey's and Mead's mutual influence on each other); *THE PHILOSOPHY OF JOHN DEWEY*, *supra* note 194, at 25 (describing the friendship between Dewey and Mead at Michigan and then at Chicago, where they moved together).

196. COUGHLAN, *supra* note 185, at 146-47.

Psychology,¹⁹⁷ for a model of human behavior that emphasized the primacy of active experience.¹⁹⁸ He also began to return to his early studies of zoology and other biological sciences for metaphors to explain human experience. He was especially interested, as were many of the pragmatists, in Darwin's theory of evolution,¹⁹⁹ and drew from it an organic theory of the self as an active, ever changing product of its natural environment.²⁰⁰ Rejecting the Cartesian idea that human consciousness should be separated from the natural world, Dewey used the terms "organism" and "environment" in place of "mind" and "matter" to describe a relationship of interaction rather than radical opposition.²⁰¹ He similarly rejected the "spectator" theory of knowledge—i.e., the theory that "knowing is direct grasp or beholding of the forms of things, totally unrelated to practical action"²⁰² In contrast, Dewey viewed all knowledge as experiential and aimed at future action. The key article in which Dewey worked out these ideas, "The Reflex Arc Concept in Psychology," was published in 1896,²⁰³ most Dewey scholars date this as the point of Dewey's coming into maturity in his thinking and commitment to pragmatism.²⁰⁴ Dewey

197. 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* (Harvard Univ. Press 1981) (1890).

198. See ALEXANDER, *supra* note 174, at 41 (discussing Dewey's period of "experimental idealism" in which he sought to assimilate James's seminal writings).

199. See Larry A. Hickman, *Dewey's Theory of Inquiry*, in *READING DEWEY*, *supra* note 174, at 166, 167 (noting the influence of Darwin on Dewey, including Dewey's understanding of the necessity of ideas adapting to changing conditions). See generally WIENER, *supra* note 177 (analyzing the impact of evolutionary theory on the pragmatist movement). Dewey's interest in evolutionary theory was not at all like that of the "social Darwinists" of roughly the same period. See *THE OXFORD COMPANION TO UNITED STATES HISTORY* 725 (Paul S. Boyer et al. eds. 1966) (explaining that social Darwinists believed in the economic survival of the fittest and laissez faire capitalism). Nor would Dewey have brooked the simplistic approach espoused by sociobiologists today. For Dewey's views on what we today call sociobiology, see DEWEY, *THE PUBLIC AND ITS PROBLEMS* (Swallow Press/Ohio Univ. Press 1954) (1927) ("[T]he alleged instinct and natural endowment appealed to as a causal force . . . represent physiological tendencies which have previously been shaped into habits . . . by means of the very social conditions they are supposed to explain.").

200. As one Dewey scholar puts it:

Once species themselves had been brought into the world of change, once they came into and went out of existence, philosophers could no longer feel justified in assuming the superiority of the fixed and final, and change and origin could no longer be justifiably treated as signs of defect and unreality. For Dewey, the influence of Darwinism on philosophy 'resided in its having conquered the phenomena of life for the principle of transition, and thereby freed the new logic for application to mind and morals and life.'

MURPHY, *supra* note 194, at 63 (internal citations omitted).

201. See JAMES GOUINLOCK, *JOHN DEWEY'S PHILOSOPHY OF VALUE* 21 (1972) ("[T]he two sets of complementary terms have very different connotations . . .").

202. *Id.* at 71.

203. John Dewey, *The Reflex Arc Concept in Psychology*, *PSYCHOL. REV.*, III 357-70 (1896), reprinted in 5 JOHN DEWEY, *THE EARLY WORKS, 1882-1898* 96-109 (Jo Ann Boydston ed., 1972) [hereinafter DEWEY, *EARLY WORKS*].

204. See, e.g., ALEXANDER, *supra* note 174, at 41 ("This essay marks the breakthrough

declared his renunciation of Hegelian idealism in favor of a thoroughly naturalistic, or scientific, account of even “man’s most ‘spiritual’ activity, thinking.”²⁰⁵ This article laid the groundwork for much of Dewey’s later work on the self including the idea of conflicts within a situation that give rise to the need for reconstitution or reconstruction.²⁰⁶

Dewey shifted from a biological to a social framework for understanding the self after his move in 1904 to the Philosophy Department of Columbia University.²⁰⁷ There he began his lively exchanges with the legal realists,²⁰⁸ and enjoyed intellectual friendships with social scientists such as anthropologist Franz Boas.²⁰⁹ In this stimulating environment, Dewey wrote his two most important works on his theory of self, *Human Nature and Conduct*²¹⁰ and *Experience and Nature*.²¹¹ These books mark Dewey’s turn to the socially constructed nature of human conduct.²¹²

B. Dewey’s Social Self

Dewey’s theory of the self rests on the proposition that all human belief

toward which Dewey had been struggling . . . and is the foundation upon which his later philosophy is erected.”); RICHARD J. BERNSTEIN, *JOHN DEWEY* 15 (1967) (stating that the essay was “the basis of Dewey’s mature theory of experience”); COUGHLAN, *supra* note 185, at 142 (asserting that at this point Hegelianism had “slipped away” and Dewey’s own philosophy was coming into its “maturity”).

205. COUGHLAN, *supra* note 185, at 142.

206. BERNSTEIN, *supra* note 204, at 20.

207. COUGHLAN, *supra* note 185, at 150 (explaining that during Dewey’s time at Columbia he wrote extensively while “exploring that ‘flash of insight’ he had in his last years at Michigan.”).

208. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* 50 (1986) (noting that legal realist Thomas Reed Powell met Dewey at Columbia and regarded him as his intellectual mentor); SCHLEGEL, *supra* note 43, at 24-25, 59-60 (asserting that Dewey’s pragmatic philosophy was a centerpiece of the early realist consciousness and giving many examples of the interactions between Dewey and legal realists Walter Wheeler Cook and Underhill Moore at Columbia).

209. See GEORGE DYKHUIZEN, *THE LIFE AND MIND OF JOHN DEWEY* 118-19 (Jo Ann Boydston ed., 1973) (listing many leading scholars in various disciplines with whom Dewey came into contact at Columbia); MENAND, *supra* note 170, at 383-86 (discussing the relationship between Boas and Dewey); ROCKEFELLER, *supra* note 194, at 278 (discussing influence of Boas, historian Charles Beard, and others on Dewey at Columbia). Boas sought to develop anthropology as a discipline that would study cultural differences without imposing ethnocentric views of Western values, and heavily influenced Dewey with his ideas about the lack of moral superiority of one culture over another. MENAND, *supra* note 170, at 383-86; see also RYAN, *supra* note 194, at 166-67 (describing Boas’s influence on Dewey).

210. DEWEY, *MIDDLE WORKS*, *supra* note 34.

211. JOHN DEWEY, *EXPERIENCE AND NATURE* (Waverly Press 1926) (1925).

212. These works gained great popularity among American intellectuals on their release and arguably marked the apex of Dewey’s influence as America’s leading public philosopher. See BERNSTEIN, *supra* note 204, at 1, 59 (noting the great popularity of these books); see also Grey, *supra* note 174, at 791 (highlighting how Oliver Wendell Holmes, Jr., on reading the books in the 1920s, commented that they contained a “‘view of the universe [that] came home to me closer than any other that I know’”) (quoting a letter dated July 26, 1930 in 2 HOLMES-POLLOCK LETTERS 272 (M. Howe ed., 1941)).

and conduct begins with its construction by preexisting associations of human beings.²¹³ These associations, in turn, represent “modes of interaction of persons with one another” in the form of customs and institutions.²¹⁴ Like Sandel, Dewey argues that individuals have no existence prior to or separate from historically received customs and institutions. Also like Sandel, Dewey is a strong critic of liberal individualism, and it is helpful in understanding Dewey’s thought to examine how he positioned his philosophy in relation to this tradition.

1. *Dewey on liberal individualism*

Dewey’s opposition to liberal individualism is a topic to which he returns in many of his works.²¹⁵ His thoughtful and measured critiques trace the intractable problem of divesting modern thought of its liberal individualist fallacies to a form of historical error. That error occurred, Dewey argues, when the political ideas of liberalism, which arose as a progressive and laudable reaction to particular social circumstances, came to be conflated with epistemological ideas that should have been discarded.²¹⁶

Under earlier conceptions of knowledge as “divinely revealed,”²¹⁷ it would never have occurred to people to identify mind with the personal self because beliefs were transmitted by custom.²¹⁸

With the rise of liberalism as a political theory in an historical era characterized by a struggle for greater freedom in thought and action, however, two very different sets of ideas became conflated. One set consisted of political ideas that promoted the right to espouse beliefs different from orthodoxy—a right to which, Dewey argues, we should continue to be fully in favor. The other was a set of ideas aimed at a different level of analysis, which Dewey calls philosophical subjectivism.²¹⁹ By first identifying “mind with self” and then positing the “self” as “independent and self-sufficient,” the subject (or “knower”) and object (or “thing to be known”) became “wholly separate from one another,” making it “necessary to frame a theory to explain how they get

213. DEWEY, *Human Nature*, *supra* note 34, at 44.

214. *Id.*

215. These include DEWEY, *supra* note 199; JOHN DEWEY, *INDIVIDUALISM OLD AND NEW* (Prometheus Books 1999) (1930); JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* (Prometheus Books 2000) (1935); JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1916) [hereinafter DEWEY, *DEMOCRACY*].

216. DEWEY, *supra* note 199, at 87-88 (“[T]he practical movement for the limitation of the powers of government became associated . . . with the doctrine that the ground and justification of the restriction was prior non-political rights inherent in the very structure of the individual.”).

217. DEWEY, *DEMOCRACY*, *supra* note 215, at 341.

218. DEWEY, *Human Nature*, *supra* note 34, at 43-53.

219. DEWEY, *DEMOCRACY*, *supra* note 215, at 302.

into connection.”²²⁰ This problem “became almost the exclusive preoccupation of philosophic thought.”²²¹ Dewey seeks through his pragmatist theory of the self to overthrow this entire constellation of ideas.

He does so, first, by rejecting methodological individualism. As he explains, “[w]e often fancy that institutions, social customs, collective habit, have been formed by the consolidation of individual habits,” but “this supposition is false to fact.”²²² Customs or uniformity of habit may exist in part because individuals “face the same situation,” but a much more important factor accounting for the persistence of customs is the fact that individuals form their personal habits under the conditions set by prior customs.²²³ These customs, or social context, constitute the self: the human organism cannot think or be without a prior social context.²²⁴ Dewey thus embraces a form of social constructivism, in the sense that he rejects the idea that individuals have an existence prior to or separate from historically received customs and institutions. But his is a quite different form of social constructivism than that of the post-structuralists because his version retains, *inter alia*, a conception of individual biological existence and personality, as I will discuss further below.

2. *The self as habits*

To Dewey, as already noted, historically received institutions provide the social context that constitutes the self. But Dewey’s interactionism provides an alternative to strong versions of social constructionism in that selves in interaction with each other and their historically received institutions continually reconstitute their environment at the same time that they are constituted by it.

Ever the unrepentant naturalist, Dewey conceives of morality as a product of one’s social environment just as all other customs are: Morality “is as much a matter of interaction of a person with his social environment as walking is an interaction of legs with physical environment.”²²⁵ Thus,

220. *Id.*

221. *Id.* at 342.

222. DEWEY, *Human Nature*, *supra* note 34, at 43.

223. *See id.* at 43-44 (arguing that, in the same way in which individuals learn the language of their social group, which exists in a preexisting association prior to every particular human being born into the world, they learn the preexisting forms of association that we call customs and institutions).

224. Or, to be even more precise, Dewey would say that neither environment nor human organism can be stated to be conceptually prior, since the organism gives continued meaning to its environment just as its environment gives meaning to it. *See* ALEXANDER, *supra* note 174, at 133 (“Environments are not prior to organisms. That is, both are dynamically interdependent and are understood in terms of the other.”).

225. DEWEY, *Human Nature*, *supra* note 34, at 219. Thus, Dewey writes, “[i]t thinks’ is a truer psychological statement than ‘I think.’” *Id.* at 216. The thoughts we experience, the ideas that “sprout and vegetate” proliferate as they “come from deep unconscious sources.” *Id.* at 216. This “stuff of belief and proposition is not originated by us. It comes to us from

an idea that, in “The Reflex Arc Concept,” is a biological theory about how the human organism responds to its natural environment, shifts to focus on the primacy of social context.²²⁶ Morals “mean customs, folkways, established collective habits,” and people acquire morality just as they inherit the speech of their social group.²²⁷ To explain how people come to inherit customs in this way, Dewey invokes the concept of *habit*.

Customs and habits are to Dewey “the sole agents of observation [and] recollection.”²²⁸ Thus habits “constitute the self”; “they *are* will.”²²⁹ Habits do “the perceiving, recognizing, imagining, recalling, judging, conceiving and reasoning”²³⁰ What we think of as character is no more than the “interpenetration of habits”: were it not for “the continued operation of all habits in every act, no such thing as character could exist.”²³¹ Without the force of habit, formed through the human organism’s repeated interactions with the social and natural environment, the organism would simply be “a bundle, an untied bundle at that, of isolated acts.”²³²

But even habits do not produce a unified personality or coherent self. Just as “the environment is many, not one,” so too “will [or] disposition is plural.”²³³ Here Dewey’s concept of the self appears to resonate with the inconsistent or fragmented self of the post-structuralists; to Dewey, “any self is capable of including within itself a number of inconsistent selves, or unharmonized dispositions.”²³⁴ Likewise, Dewey agrees with the post-structuralists that our sensation of individual consciousness or subjective specialness is not evidence of the priority of individual existence.²³⁵ What traditional individualism sees as “distinctively individual in behavior and mind” is not, in fact, “an original datum” but merely the “physical or physiological individuality” that colors responsive activities.²³⁶ Dewey

others, by education, tradition and the suggestion of the environment,” and “is bound up . . . with community of life of which we are a part.” *Id.*

226. RYAN, *supra* note 194, at 126.

227. DEWEY, *Human Nature*, *supra* note 34, at 43, 54.

228. *Id.* at 123.

229. *Id.* at 21.

230. *Id.* at 124. In using the term “habit,” Dewey was drawing both from James’s biological version of habit, discussed in JAMES, *supra* note 197, at 109-27, and Peirce’s extensive treatment of the same concept. See ALEXANDER, *supra* note 174, at 141 (“[The concept of habit], so central in pragmatism, received extensive treatment from Peirce and James before Dewey.”).

231. DEWEY, *Human Nature*, *supra* note 34, at 29.

232. *Id.*

233. *Id.* at 38.

234. *Id.* at 96; see also *id.* (“Only the hold of a traditional conception of singleness and simplicity of soul and self blinds us to perceiving . . . the relative fluidity and diversity of the constituents of selfhood.”).

235. *Id.* at 60 (“Orthodox psychology starts however from the assumption of precisely such independent minds.”).

236. *Id.* In downgrading the importance of the sensation of personal selfhood, Dewey was following the view of Peirce, as opposed to that of James. See COLAPIETRO, *supra* note

argues that what we experience as consciousness is simply the constant process of adjustment between the human organism and its ever changing environment.²³⁷ Sensations arise from the continual readjustment of habits as they interact with the environment. This constant bumping of habits against the environment results in our experience of a “stream of consciousness.”²³⁸ We experience consciousness continually because habits are never static. Readjustments of habits occur continually: “[I]n every waking moment, the complete balance of the organism and its environment is constantly interfered with and as constantly restored.”²³⁹

Conversely, according to Dewey, the more “suavely efficient a habit” is, the more unconscious it is.²⁴⁰ Dewey’s concept of the unconscious is thus quite different from that of his contemporary, Sigmund Freud.²⁴¹ For Freud, the unconscious is the repository of instincts and drives that arise from within the individual but lack acceptable social outlets and thus must be repressed back into the individual psyche.²⁴² For Dewey, in contrast, the unconscious is the seat of socially derived habits that function so efficiently and effortlessly that we lose awareness of their operation.²⁴³ Rather than the site of that which is conflict-ridden and problematic, as in Freud’s account, the unconscious is the site at which habits are working the most smoothly.

For the most mundane activities (dressing, eating, walking) to the highest human achievements (art and science), the unconscious serves as

181, at 62-63 (noting that, for James, “the finite self is characterized by an ineradicable privacy,” whereas for Peirce, “this dimension possesses neither the importance nor the scope that James grants it,” so that Peirce stated: “Everybody will admit a personal self in the same sense in which a snark exists; that is, there is a phenomenon to which that name is given,” and that: “It is an illusory phenomenon; but still it is a phenomenon. It is not quite *purely* illusory, but only *mainly* so.” (quoting 8 CHARLES SANDERS PEIRCE, *THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE* § 8.82 (Hartshorne & P. Weiss eds., 1934))).

Likewise, Dewey’s theory of personality as a “bundle of habits” echoes Peirce’s similar conceptions. See *id.* at 113 (summarizing Peirce’s view of habits); COLAPIETRO, *supra* note 181, at 83, 88 (quoting Peirce on his bundle of habits theory). This focus on the importance of habits is evident in James as well. See JAMES, *supra* note 197, at 109-31 (asserting that habits, while controllable by living beings, work to define to a large extent who they are).

237. DEWEY, *Human Nature*, *supra* note 34, at 125.

238. *Id.*

239. *Id.*

240. *Id.*

241. Dewey is sometimes accused of lacking an awareness of the unconscious. See, e.g., RYAN, *supra* note 194, at 368 (“Dewey was oddly untouched by Freud and oddly uninterested in either the anxieties or the possibilities of emancipation that Freud brought the twentieth century.”). Careful scrutiny of his work, however, suggests otherwise. Dewey clearly was familiar with Freudian psychoanalytic theory, but found it lacking, for reasons that will be explored further in *infra* notes 242-246 and accompanying text.

242. See, e.g., SIGMUND FREUD, *THE EGO AND THE ID* 5-7 (James Strachey ed., Joan Riviere trans., W.W. Norton & Co. 1962) (1923) (describing the unconscious as containing ideas that are dynamically repressed from the ego).

243. DEWEY, *Human Nature*, *supra* note 34, at 125.

the site of cultural intelligence.²⁴⁴ Indeed, as I will suggest later, the post-structuralists' conception of the unconscious, derived largely from Freud and his intellectual heirs, is ironically individualist in its focus on idiosyncratic, rebellious and irrational qualities. Dewey's view of the unconscious, on the other hand, embraces the concept of purposive human intelligence (and, indeed, is the source of legal realist Karl Llewellyn's important concept of "horse sense," as I note below²⁴⁵). Dewey located this concept of purposive intelligence—thinking, as he called it—in the constant process of interaction and adjustment between habit and environment as well as in the interstices, conflicts and problems of received ideas.²⁴⁶

3. *Purposive intelligence and deliberation*

To Dewey, ideas arise primarily from the frustration of habits: A "habit denied overt expression asserts itself in idea."²⁴⁷ Ideas thus are not "bloodless abstractions" arising in the mind, as the Cartesians would have it, but have great urgency because they are "charged with the motor force . . . of habit."²⁴⁸ Ideas work to change the environment so that it is in accord with habit. The example Dewey uses is that of food. The human organism has the habit of eating. If it finds this habit stymied by a lack of food, it is motivated by the urgency of the drive to eat, as shaped into a habit, to find the kind of food for which it has a liking.²⁴⁹

Another way in which habits change is through conflicts among habits. Such conflict "releases impulsive activities" that require a "modification of habit, of custom and convention."²⁵⁰ Similarly, conflicts among institutions can produce the impulse for deliberation and change.²⁵¹ This view of habit

244. *Id.* at 124-25.

245. *See infra* note 347 and accompanying text (explaining Llewellyn's "horse sense" concept).

246. DEWEY, *Human Nature*, *supra* note 34, at 125.

247. *Id.* at 39.

248. *Id.* ("[An idea] has its source in objective conditions and it moves forward to new objective conditions.").

249. *Id.* Thus to Dewey, biological drives have a natural basis—wholly unshaped, yet existing as a fact of the human organism's natural status. Dewey saw impulses toward activity and problem solving as part of the human organism's natural endowment. *See* Grey, *supra* note 174, at 802 (adding that the "pragmatists treat critical reflection as a natural aspect of thought"). This anchoring of the human organism in the natural world is part of what gives classical pragmatism a framework on which to build a self capable of agency, as I will discuss further in *infra* notes 328-331 and accompanying text.

250. DEWEY, *Human Nature*, *supra* note 34, at 62. Dewey further notes that these clashes among habits, which result in some desires being "rejected by the immediate situation," are another phenomenon that can produce the sensation of a separate and private self. *Id.*

251. *Id.* at 90 (finding that just as complex culture includes "habits formed on differing, even conflicting patterns," so too can a "conflict of patterns involved in institutions which are inharmonious with one another" produce change).

in interaction with the environment forms the foundation for Dewey's theory of deliberation, which Dewey views as the process of reconciling conflicts in a situation through purposive thought.²⁵²

Dewey describes deliberation as "a dramatic rehearsal (in imagination) of various competing possible lines of action."²⁵³ Each "habit [or] impulse involved in the temporary suspense of overt action takes its turn in being tried out" to see what the resultant action would be, and a choice is made as soon as some combination of habits finds its way open.²⁵⁴ It is thus not that we do not have a preference until we make a choice, but that we choose among an "excess of preferences."²⁵⁵ As he puts it, "reasonableness is [] a quality of an effective relationship among desires rather than a thing opposed to desire."²⁵⁶ This resolution or *fit* gives rise to an aesthetic appreciation that signifies an idea for future action.²⁵⁷

Dewey's theory of aesthetics deserves some attention here because of its connection to his theory of deliberation.²⁵⁸ For Dewey, all human judgments, from everyday life to the highest forms of art, call for aesthetic judgment, which involves in every instance the achieving of an emotional or tactile quality—a bodily sense, to foreshadow Merleau-Ponty—of fit in connection with the resolution of ruptures in or among aspects of the environment.²⁵⁹ Ethical judgment involves the same type of judgments: What we experience as "good" involves the activity of reconciling conflict or the "entanglement of various incompatible impulses."²⁶⁰

252. *Id.* at 132-33.

253. *Id.* at 132.

254. *Id.* at 132-34.

255. *Id.* at 134. Arguing against Kant and others, Dewey asserts that "[r]ationality . . . is not a force to evoke against impulse and habit [but] attainment of a working harmony among diverse desires." *Id.* at 136.

256. *Id.* at 135.

257. *Id.* at 66. Dewey illustrates the point with an example of making judgments about another person in a job interview:

It is even possible for each attitude and gesture, each sentence, almost every word, to produce more than a fluctuation in the intensity of the basic emotion; to produce, that is, a change of shade and tint in its quality. The employer sees by means of his own emotional reactions the character of the one applying. He projects him imaginatively into the work to be done and judges his fitness by the way in which the elements of the scene assemble and either clash or fit together. The presence and behavior of the applicant either harmonize with his own attitudes and desires or they conflict and jar. Such factors as these, inherently esthetic in quality, are the forces that carry the varied elements of the interview to a decisive issue. They enter into the settlement of every situation, whatever its dominant nature, in which there are uncertainty and suspense.

JOHN DEWEY, *ART AS EXPERIENCE* 43 (Capricorn Books 1959) (1934) [hereinafter DEWEY, *EXPERIENCE*].

258. See generally DEWEY, *EXPERIENCE*, *supra* note 257 (systematically presenting Dewey's aesthetic theory).

259. See *id.* at 10-11 (noting that our everyday experiences involve aesthetic judgments).

260. DEWEY, *Human Nature*, *supra* note 34, at 146.

Elsewhere in his writing, Dewey describes a similar process as one of *valuation*,²⁶¹ which he invokes as the basis for his model of scientific inquiry. To Dewey, valuation involves an interactive process between facts and values.²⁶² Neither side in this process has priority or a stronger claim to reality or truth.²⁶³ Instead, understandings of facts are always infused with values, just as values are always affected by understandings of facts.²⁶⁴ As changes occur on one side of this process, changes occur on the other, so that they cannot be separated.²⁶⁵ Here, as elsewhere in his philosophy, Dewey strives to break up what he views as false dichotomies—to explain how these dichotomies, such as between facts and values, exist only by virtue of their relationship to each other.

In particular, Dewey uses his theory of valuation to explain the process of inquiry in the human and social sciences.²⁶⁶ There is thus an interpretative thrust to his view of social science. Dewey argues that there is no neutral or objective perspective from which anyone, including a social scientist, can evaluate human phenomena.²⁶⁷ Instead, with respect to such inquiry, facts and values must always interact.

This position leads Dewey to eschew what he sees as the determinism of

261. Dewey elaborated on his theories of deliberative valuation in John Dewey, *Theory of Valuation*, in 2 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE 1, 33 (Otto Neurath et al. eds., 1939); see also GOUINLOCK, *supra* note 201, at 21 (discussing Dewey's theory of valuation).

262. Dewey, *supra* note 261, at 64-65.

263. *Id.*

264. *Id.*

265. *Id.*

266. Dewey's views on the natural and human sciences and their influence on American legal thought are complex and highly contested questions among contemporary scholars, but need not detain us here. For a flavor of that debate, compare MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 209-10, 270 (1992) (arguing that legal realists' interest in behavioral social science dulled that movement's critical edge), with SCHLEGEL, *supra* note 43, at 7 (questioning Horwitz's interpretation).

Dewey was often confusing on his views about social science inquiry, but, to the extent the impression exists among legal scholars that Dewey embraced a vision of objective, value-neutral social science that would emulate natural science and detach facts from values, that impression is belied by Dewey's texts. For one, it fails to jibe with Dewey's theory of valuation, which posited a continual interaction between facts and values, and which he designed specifically for social science inquiry, as just discussed. Second, it contradicts Dewey's statements about the difference between the natural and social science, such as the following:

The prestige of the mathematical and physical sciences is great, and properly so. But the difference between facts which are what they are independent of human desire and endeavor and facts which are to some extent what they are because of human interest and purpose, and which alter with alteration in the latter, cannot be got rid of by any methodology. The more sincerely we appeal to facts, the greater is the importance of the distinction between facts which condition human activity and facts which are conditioned by human activity. In the degree which we ignore this difference, social science becomes pseudo-science.

DEWEY, *supra* note 199, at 7.

267. Dewey, *supra* note 261, at 63.

structuralist sociologists such as Durkheim and Marx.²⁶⁸ Indeed, Dewey attempts to avoid the free will/social determinism debate altogether. He does so by arguing for the social construction but ultimate indeterminacy of all normative judgment. Dewey argues that, although morality is always socially constructed, it is not ever “socially determined.”²⁶⁹ This is because moral consciousness, though always embodied in institutions, is “never wholly self consistent.”²⁷⁰

Moral consciousness may realize ideas in some relationships but not others, such as when institutions are supposed to embody a common good that ends up being available only to “the privileged few.”²⁷¹ In this situation, reflective intelligence “cross-questions the existing morality” and pulls from it ideas that it only “pretends to embody,” thus arriving at criticisms of existing morality: It “points out the inconsistencies, the incoherencies, the compromises, the failures, between the actual practice and the theory at the basis of this practice.”²⁷² This active process of human judgment or valuation happens continually, on matters both insignificant and extremely consequential. The reflective examination that happens at the smallest scale all the time involves essentially the same process as that which gives urge to deeper criticism and transformation.²⁷³ Dewey demonstrates the application of this process by analyzing and critiquing the institutions of his own times, including education and democracy.

4. *Pedagogy and democracy*

Precisely because he believed in the power of human agency, Dewey devoted a great deal of his writing to developing prescriptions for change in response to the issues of his times. It is worth quickly surveying some of those prescriptions here because they help illuminate the relationship between Dewey’s theory of the self and his overall philosophic system. Dewey’s deliberative theory ties elegantly into his theory of democracy, which in turn displays an ascetically pleasing “fit”²⁷⁴ with his pedagogical vision.

Dewey’s political theory is a large topic, to which he devoted much

268. See JOHN DEWEY, *The Need for Social Psychology*, reprinted in 10 DEWEY, MIDDLE WORKS, *supra* note 34, at 53, 60 (referring to Durkheimian thought as a “school of collective mind” and criticizing “unremitting structuralism” generally).

269. *Id.*

270. John Dewey, *Outlines of a Critical Theory of Ethics*, in 3 JOHN DEWEY, EARLY WORKS, *supra* note 203, at 358.

271. *Id.*

272. *Id.* at 359.

273. *Id.* at 357.

274. See *supra* text accompanying notes 258-260 (discussing theory of aesthetics underlying Dewey’s theory of deliberative judgment).

writing but to which I can give only passing attention. Suffice it to say that Dewey passionately believed in the virtues of democracy; indeed, Dewey scholars have described democracy as Dewey's deepest preoccupation—the underlying passion that motivated him in his prolific output.²⁷⁵ Unlike philosophers such as John Rawls, however, Dewey uncoupled democracy from the institutions of Western capitalism, and was intensely critical of capitalism as he saw it developing in his lifetime. To Dewey, capitalism spelled economic inequality, which was anathema to his vision of democracy based in local deliberative processes.²⁷⁶

Dewey saw education as the process through which children would acquire the habits that would allow them to become members of a democracy, well equipped for the kind of reflective thought and deliberation that democracy required.²⁷⁷ Thus, education was for Dewey a fundamental method of social progress and reform.²⁷⁸ For this reason, Dewey, unlike most modern philosophers, gave pedagogy a central place in his philosophy. Dewey saw education as the scientific laboratory in which the ideas of pragmatism would be put to the test of experience.²⁷⁹ To Dewey, the ability to engage in good deliberative judgment—to exercise clear foresight on ethical as well as instrumental matters—was a habit that could and should be cultivated through education. Thus Dewey thought that education should not be a “succession of studies but the development of new attitudes towards, and new interests in, experience.”²⁸⁰

275. For a biography emphasizing this dimension of Dewey's life project, see ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* (1999).

276. See, e.g., DEWEY, *EXPERIENCE*, *supra* note 257, at 8 (lamenting the tendency of capitalism to promote “the idea that [works of art] are apart from the common life”); DEWEY, *Human Nature*, *supra* note 34, at 186 (criticizing the mundane and oppressive nature of “modern economic life”).

277. See, e.g., DEWEY, *Human Nature*, *supra* note 34, at 89 (“[T]he chief means of continuous, graded, economical improvement and social rectification lies in utilizing the opportunities of educating the young to modify prevailing types of thought and desire.”).

278. *Id.*

279. Unfortunately, Dewey does not appear to have written about pedagogy in the context of higher education. Nor do Dewey's ideas about education seem to have influenced his own teaching, which was not reputed to be particularly innovative or inspiring. One anecdote describes Dewey's classroom teaching as follows:

Always carefully prepared before he came to class, Dewey would seem to be making a fresh start when he began to lecture. There was something unconsciously optimistic about the literal way he took the ideals of graduate instruction. For he would never spend time in motivating interest or attention. Once, after spending three consecutive hours on the analysis of the meaning of the word “this,” he tentatively concluded with the remark “I think this is a little clearer to me now.” He was a little perplexed at the amusement of the class, most of whose members had never imagined that there was anything problematic about “this” except why Dewey was discussing it.

HOOK, *supra* note 194, at 21.

280. John Dewey, *My Pedagogic Creed*, in 5 DEWEY, *EARLY WORKS*, *supra* note 203, at 84, 91. Dewey thus rejected, as a matter of educational theory as well as epistemology, the idea of the mind as something passive that merely receives the imprint of what is instilled in

No relativist on matters concerning his own place and time, Dewey denounced the “inert stupid quality of current customs,” which “perverts learning into a willingness to follow where others point the way, into conformity, constriction, surrender of scepticism and experiment.”²⁸¹ In lieu of teaching to new generations habits that represent such “enslavement to old ruts,”²⁸² Dewey wanted to inculcate better habits—“flexible, sensitive” ones that could grow “more varied, more adaptable by practice and use.”²⁸³ These, in turn, were the habits Dewey identified as necessary for democracy to succeed.

Here, the contrasts with Stanley Fish are stark. Fish, as we have seen, argues that teaching methods of critical analysis to students does not change practice outside the classroom.²⁸⁴ Practice in the world outside the classroom and the doing of theory proceed on two unrelated planes. Dewey, conversely, repudiated the separation of theory and practice as a false dualism, arguing that those who espouse theory for theory’s sake are in fact espousing “two kinds of practice.”²⁸⁵ Moreover, he argued, “[t]hose who wish a monopoly of social power find desirable the separation of habit and thought” because this “dualism enables them to do the thinking and planning, while others remain the docile . . . instruments of execution.”²⁸⁶ Thus, for Dewey, theory was a form of practice in the world that had great potential to fuel political and social change, and the decision to do and teach theory as a practice separate from political and social issues was a political decision with particular normative consequences—namely, the promotion of political disengagement and apathy.²⁸⁷

What I will call Dewey’s “soft” *perspectivism* also figures strongly into his ardent belief in the virtues of participatory democracy. Consistent with his emphasis on experience as the basis for all knowledge, Dewey unabashedly argued that persons with different life experiences will tend to hold different perspectives on political issues.²⁸⁸ This is the very reason

it. Instead, Dewey argued, learning involves a “process [that] begins unconsciously almost at birth, and is continually shaping the individual’s powers, saturating his consciousness, forming his habits, training his ideas, and arousing his feelings . . .” *Id.* at 84.

281. DEWEY, *Human Nature*, *supra* note 34, at 47.

282. *Id.* at 48.

283. *Id.* at 51-52.

284. FISH, *Anti-Foundationalism, Theory, Hope, and the Teaching of Composition*, in *DOING WHAT COMES NATURALLY*, *supra* note 123, at 342, 351.

285. DEWEY, *Human Nature*, *supra* note 34, at 50.

286. *Id.* at 52.

287. *See id.* at 50 (discussing the practice of theory as a device to promote “popular education—up to the point of disseminating as matter of authoritative information for the many what the few have established by thought, and up to the point of converting an original docility to the new into a docility to repeat and conform”).

288. As one feminist and expert scholar of the classical pragmatists explains:

Dewey explicitly uses his pragmatist principle of perspectivism to argue that women’s experiences differ significantly enough from men’s to affect the

active participatory democracy is necessary—in order to ensure that all viewpoints figure into the deliberative process. Dewey is only a “soft” perspectivist, however, because in his version of perspectivism all viewpoints and voices matter and add value in the process of political debate. Under Dewey’s theory of participatory democracy, no viewpoint is infallible. Thus, although Dewey is deeply concerned about the effects of privilege in amplifying power and political voice, he would not agree, as I discuss further in Part III.D.1, with what I will distinguish as “hard” perspectivism—namely, the idea that only those subject to a particular experience of oppression or subordination have legitimate standing to address it. To Dewey, no one social group has the best view or understanding about any situation, even about a situation that particularly affects that group; but, by the same token, participation and representativeness are key to effective deliberation.

C. Dewey, Mead, and Theorizing Agency Today

In disciplines outside law, an exciting body of scholarship is building that explores the potential of the classical pragmatists’ theory of the self in theorizing agency for contemporary purposes. In his eloquent call to what he terms *prophetic pragmatism*, for example, Cornel West argues that neither “methodological individualism” nor Foucault’s “downplaying” of “human agency” will do.²⁸⁹

In stark contrast, prophetic pragmatists take seriously moral discourse—revisable means and ends of political action, the integrity and character of those engaged and the precious ideals of participatory democracy and the flowering of the uniqueness of different human individualities.²⁹⁰

Another scholar with a similar purpose, who is independently engaged in a painstaking excavation that complements West’s more sweeping call, is Vincent Colapietro. Colapietro has toiled in careful, insightful scholarship to illuminate the ways in which Peircean process semiotics offers theories of robust agency missing from structuralist accounts,²⁹¹ as well as to

philosophies they develop. He says that “women have as yet made little contribution to philosophy. But when women who are not mere students of other persons’ philosophy set out to write it, we cannot conceive that it will be the same in viewpoint or tenor as that composed from the standpoint of the different masculine experience of things.”

Charlene Haddock Seigfried, *John Dewey’s Pragmatist Feminism*, in *READING DEWEY*, *supra* note 174, at 187, 202 (internal citation omitted); *see also* Radin, *supra* note 164, at 1720 (arguing that a pragmatist focus on perspectivism “finds its concrete payoff in the perspective of feminism and in the perspectives of oppressed people generally.”).

289. CORNEL WEST, *On Prophetic Pragmatism*, in *THE CORNEL WEST READER* 149, 163 (1999).

290. *Id.* at 164; *see also id.* at 163 (internal citation omitted) (quoting Edward Said’s “perceptive” critiques of Foucault).

291. *See* COLAPIETRO, *supra* note 181, at xix (arguing that Peirce’s “refusal to eliminate

resurrect Dewey's theory of the self from its current neglect.²⁹² Colapietro succinctly puts it this way: "[W]hat need[s] to be stressed at the outset is the general point regarding radical agency: we are *inherently* active beings who inevitably undergo transformations as a consequence of our activities."²⁹³

Thomas Alexander, a leading Dewey scholar interested in the links between pragmatism and other strains of contemporary theory, locates the classical pragmatists' conception of agency in Dewey's process-based understanding of time:

[Time] is a feature of the nature of individuals, from sub-atomic particles to human beings, and this always involves an element of novelty, the realization of some potentiality Dewey, again like Peirce, conceives of potentiality as the "tychistic" factor in nature, i.e., the domain of "the precarious," the aleatory and chancy, undetermined, brute, and contingent face of things²⁹⁴

Alexander further highlights the importance of "the situation" in Dewey's metaphysics: such qualities as unfold through time are not inherently "in" individuals or in structures waiting to unfold but "arise" in the interactions between the living organism and its environment.²⁹⁵

In short, as these contemporary theorists explain, Dewey's metaphor of the developing organism embraces an account of human conduct as socially constructed, but not in the same way structuralists do. Indeed, as I have already discussed, Dewey emphatically rejects structuralist accounts of human conduct—not only the historical idealism of Hegel²⁹⁶ and the dialectical materialism of Marx,²⁹⁷ but also the structuralism of his contemporary Emile Durkheim, the founder of modern sociology.²⁹⁸ To Dewey, as to Peirce and other process philosophers, "once you have embraced the principle of continuity no kind of explanation of things will

the acting subject along with the Cartesian *cogito* is one of the important respects in which Peirce's semiotic vision is superior to the antihumanist orientation of Saussure's structuralist and poststructuralist offspring").

292. See Vincent M. Colapietro, *Embodied, Enculturated Agents*, in DEWEY RECONFIGURED, *supra* note 174, at 63, 64 (defending a pragmatic, Deweyan theory of selfhood as "especially helpful in illuminating the nature of subjectivity or selfhood").

293. *Id.* at 68-69.

294. ALEXANDER, *supra* note 174, at 100-01 (quoting DEWEY, *supra* note 211, at 236, 239-40).

295. See *id.* at 112 ("The 'quality' of the situation is neither 'in' the sentient organisms nor 'in' the object. The quality is only in the situation and is of it.").

296. See *id.* at 99 ("Dewey's account of emergence of new types of order rejects the Hegelian belief that this emergence is dialectically necessary").

297. See RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* 30-31 (1999) (quoting Dewey's views rejecting Marx).

298. See JOHN DEWEY, *The Need for Social Psychology*, reprinted in 10 DEWEY, MIDDLE WORKS, *supra* note 34, at 53, 60 (discussing Durkheim).

satisfy you except that they grew.”²⁹⁹

Still other scholarly treatments along these lines draw from Mead in mining classical pragmatism to revitalize a theory of agency for contemporary use. These scholars suggest that Dewey’s sweeping theory of the self is best read along with Mead’s more careful and detailed examination, and point out that Dewey often seems to incorporate Mead’s work into his own, often without explicit attributions but with sufficiently detailed reference to make his connection with Mead unmistakable.³⁰⁰

1. *Mead on the I and the Me*

For all Dewey’s prolixity, Mead had a massive case of writer’s block, and his ideas are preserved mostly through his students’ sometimes cryptic transcriptions of his lectures, first published after Mead’s death.³⁰¹ He is best known today as the founder of the school of social theory called symbolic interactionism.³⁰² The key component of Mead’s thought of importance here is his emphasis, paralleling Dewey’s, on the interactive process between humans and their social and natural environment. For Mead, like Dewey, this process begins with the infant’s interactions with its social and natural world.³⁰³ Mead, however, focuses on the way in which this interaction becomes internalized, from which he develops a theory of how social identity is formed and modified.

Mead conceives of the self as an internal conversation and uses the concepts of the *Me* and the *I* to describe this interaction. The *Me* is the

299. ALEXANDER, *supra* note 174, at 100 (internal citation omitted) (quoting Peirce).

300. See GOUINLOCK, *supra* note 201, at 93 n.64 (“Dewey never explicitly discusses the self-conscious self as a social emergent. There could hardly be doubt that his thought on this matter would proceed much like that of G.H. Mead.”); *see also id.* (noting that *Experience and Nature* “owes much to Mead” and citing an example of a passage in which “the connection with Mead is most obvious”).

Intellectual historians disagree about who took the lead in influencing whom with respect to their theory of the self. Compare RYAN, *supra* note 194, at 123 (“[Dewey] took over Mead’s account of the formation of the self and the nature of reflective thinking lock, stock, and barrel.”), with COUGHLAN, *supra* note 185, at 149 (“[Mead] adopted Dewey’s construct but then developed it brilliantly . . .”). Accepting the pragmatists’ contention that all ideas are social, not individual, we need not tease out who led whom. What is clear is that their theories of reflective intelligence are so similar that the writing of one and the other is sometimes indistinguishable. See generally John D. Baldwin, *Mead’s Solution to the Problem of Agency*, 58 SOC. INQUIRY 139, 150 (1988) (internal citations omitted) (quoting passages from Mead on selfhood reminiscent of Dewey in their emphasis on experiential development of the self).

301. A large literature debates Mead’s intent with respect to these sometimes cryptic transcriptions, but those debates concern advanced matters of interpretation that need not concern us.

302. See HERBERT BLUMER, *SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD* 3 (1969) (describing symbolic interactionism as taking the position that “the meanings that things have for human beings are central in their own right”).

303. See, e.g., DEWEY, *Human Nature*, *supra* note 34, at 89 (describing “impulsive activity” of the young as “vivid, flexible, experimenting, curious”).

socially constructed interpretation of the self reflected back to itself as the result of its interaction with its environment; the *I* exists in the space that precedes awareness of this ever changing *Me*. As Mead puts it:

The “I” reacts to the self which arises through the taking of the attitudes of others. Through taking those attitudes we have introduced the “me” and we react to it as an “I”. The simplest way of handling the problem would be in terms of memory. I talk to myself, and I remember what I said and perhaps the emotional content that went with it. The “I” of this moment is present in the “me” of the next moment . . . It is as we act that we are aware of ourselves. It is in memory that the “I” is constantly present in experience . . . As given, it is a “me,” but it is a “me” which was the “I” at the earlier time. If you ask, then, where directly in your own experience the “I” comes in, the answer is that it comes in as a historical figure. It is what you were a second ago that is the “I” of the “me.”³⁰⁴

Mead’s rather obscure concept of the *I*, which forms the basis for his theory of agency, derives from process metaphysics,³⁰⁵ and it is therefore helpful to briefly revisit process metaphysics in seeking to interpret Mead’s concept of agency as embedded in the *I*.

As contrasted to substance metaphysics, process metaphysics emphasizes chance (tychism), flux, unpredictability, and opportunity.³⁰⁶ Process philosophers’ ability to conceptualize human agency within a socially constructed self stems in part from this emphasis on the indeterminateness of being; to use William James’s language, a process approach allows the substitution of the concept of “chance” for notions of human freedom.³⁰⁷ Process philosophers can be understood further as locating individual and collective agency in the dimension of time—in the space between the past and what is now becoming.³⁰⁸ Mead’s *I*, in other

304. GEORGE H. MEAD, *MIND, SELF, AND SOCIETY* 174 (Charles W. Morris ed., Univ. of Chi. Press 1969) (1934).

305. See NICHOLAS RESCHER, *PROCESS METAPHYSICS: AN INTRODUCTION TO PROCESS PHILOSOPHY* 32-33 (1996) (“[P]rocess philosophy is best seen as a broad movement that urges a particular sort of approach to the problems of metaphysics . . .”).

306. See *id.* at 35 (comparing substance and process metaphysics through adjectival opposites such as “discrete individuality/interactive relatedness”; “separateness/wholeness (totality)”; “condition (fixity of nature)/activity (self-development)”; “uniformity of nature/innovation”; “classificatory stability/fluidity and evanescence”; and “passivity (being acted upon)/activity (agency)”).

307. See William James, *The Dilemma of Determinism*, in *PHILOSOPHERS OF PROCESS*, 54, 76 (Douglas Browning & William T. Myers eds., 2d ed. 1998) (arguing that “the word ‘chance,’ with its singular negativity, is just the word” to use “instead of ‘freedom’”).

308. See, e.g., John Dewey, *Time and Individuality*, in *PHILOSOPHERS OF PROCESS*, *supra* note 307, at 211, 224 (“Genuine time . . . is all one with the existence of individuals as individuals, with the creative, with the occurrence of unpredictable novelties.”); RESCHER, *supra* note 305, at 16 (quoting William James, *A World of Pure Experience*, in *ESSAYS IN RADICAL EMPIRICISM* 34, 54 (1912)) (“We live, as it were, upon the front edge of an advancing wave-crest, and our sense of a determinate direction in falling forward is all we cover of the future of our path.”).

words, exists in the interaction between present and the past, in the moment in which one becomes conscious of what one is about to do, which will in the next moment become part of the socially constructed *Me*.³⁰⁹

Thus for Mead, as for Dewey, there is no free and autonomous individual out in the world pursuing its goals. Mead and Dewey agree that, to the extent that a “sense of freedom” created by the experience of the momentary *I* leads some people to a metaphysical belief in free will, this is an illusion—a fallout from the way we experience consciousness. Nevertheless, for Mead, a space for creative agency exists in the unpredictable process that takes place through a dialogue between the *Me* and the *I*:

That which takes place in present organic behavior is always in some sense an emergent from the past, and never could have been precisely predicted in advance . . . and in the case of organic behavior which is intelligently controlled, this element of spontaneity is especially prominent by virtue of the present influence exercised over such behavior by the possible future results or consequences which it may have

As we reflect on the possible solutions of problems, we become aware of novel and unexpected alternatives, reevaluate and reconstruct our memories of past experiences, and reassess the possible future outcomes of the alternatives. From the complicated interaction of the perceptual present with images of the past and future, complex decisions and actions emerge.³¹⁰

Social theorists have begun to explore Mead’s notion of the *I* for its potential value in reinvigorating an agenic theory of the self.³¹¹

309. MEAD, *supra* note 304, at 175 (“The ‘I’ is his action over against that social situation within his own conduct, and it gets into his experience only after he has carried out the act. Then he is aware of it.”).

310. MEAD, *supra* note 304, at 98-99. In analyzing the interaction between the *I* and the *Me*, Mead also asserts:

The ‘I,’ then, in this relation of the ‘I’ and the me,’ is something that is, so to speak, responding to a social situation which is within the experience of the individual Now, the attitudes he is taking toward them are present in his own experience, but his response to them will contain a novel element.

Id. at 177.

311. Norbert Wiley, for example, presents a complex argument linking Mead’s symbolic interactionism with Peircean semiotics to arrive at a justification for democratic social theory. Most interesting for our purposes is his emphasis on the pragmatists’ process-based understanding of the self in creating room for voluntary action. According to Wiley:

Viewed in this way, the voluntarist and egalitarian qualities of the self are more solidly anchored. Voluntarism or freedom is built into the semiotic process, which emerges over time. The agent or I of the present interprets the history or me of the past to and with the you of the future. This interpretation does not mirror, nor is it caused by, the past. It creates, and it does so by a kind of cognitive reality construction. It defines and redefines the situation in a somewhat undetermined manner. In this theory, the action itself, which may flow from the interpretation, can be viewed as determined (e.g. by the greater good) or “compatible” with

Some of these same scholars have turned to an investigation of the parallels between continental phenomenology and classical pragmatism to further elucidate the ways in which theorizing about agency can be reinvigorated in contemporary thought. Although my focus is on the classical pragmatists, this literature deserves brief summary in order to further situate my argument within contemporary currents of social theory.

2. *Parallels with phenomenology*

As a fascinating comparative literature is beginning to investigate,³¹² social theorists on the other side of the Atlantic—most notably, Merleau-Ponty in his work in phenomenology starting in the 1940s—independently pursued conceptions of the self with uncanny similarities to classical pragmatism. Like Dewey and others, Merleau-Ponty sought to study human consciousness in ways that avoided the trap of mind/body dualism. Like Dewey and Mead, Merleau-Ponty developed theories that looked to “embodied” human experience in social context as the source of human knowing.³¹³ Merleau-Ponty’s opus, *Phenomenology of Perception*, which

determinism. But the freedom is still there, back a step, in the creative act of interpretation.

Wiley, *supra* note 193, at 15; see also Mustafa Emirbayer & Ann Mische, *What is Agency?*, 103 AM. J. SOC. 962, 963 (1998) (arguing for an interactionist theory of agency “as a temporally embedded process of social engagement, informed by the past (in its habitual aspect), but also oriented toward the future (as a capacity to imagine alternative possibilities) and toward the present (as a capacity to contextualize past habits and future projects within the contingencies of the moment)”).

312. See, e.g., VICTOR KESTENBAUM, *THE PHENOMENOLOGICAL SENSE OF JOHN DEWEY: HABIT AND MEANING* 7, 26, 111 (1977) (highlighting similarities between Dewey’s and French phenomenologist Merleau-Ponty’s views of experience, habit, and judgment); Joseph Margolis, *Dewey in Dialogue with Continental Philosophy*, in *READING DEWEY*, *supra* note 174, at 231, 249 (noting convergences between Dewey’s pragmatism and Merleau-Ponty’s phenomenology); SANDRA B. ROSENTHAL & PATRICK L. BOURGEOIS, *MEAD AND MERLEAU-PONTY: TOWARD A COMMON VISION* 86 (1991) (discussing the “common focus” of Mead’s and Merleau-Ponty’s views of the self).

So far as the historical record reveals, Dewey and Merleau-Ponty worked independently, drawing on some of the same sources in the Western philosophical tradition but not directly from each others’ work. Nevertheless, they arrived at theories of the relationship between self and society that are almost uncanny in their similarities. See, e.g., Mitchell Aboulafia, *A (neo) American in Paris: Bourdieu, Mead, and Pragmatism*, in *BOURDIEU: A CRITICAL READER* 153, 155-56 (Richard Shusterman ed., 1999) (discussing similarities between Dewey’s and Mead’s emphasis on habit and Bourdieu’s concept of habitus); see also PIERRE BOURDIEU & LÖIC J.D. WACQUANT, *AN INVITATION TO REFLEXIVE SOCIOLOGY* 122 (1992) (relaying an interview with Bourdieu in which he states that “the affinities and convergences are quite striking” between his work and Dewey’s, and that his theory of practical sense “presents many similarities with theories, such as Dewey’s, that grant a central role to the notion of habit, understood as an active and creative relation to the world”); Mustafa Emirbayer & Ann Mische, *What is Agency?*, 103 AM. J. SOC. 962, 967 (1998) (noting links between American pragmatism and Continental phenomenology).

313. These similarities have led one Dewey expert to dub Merleau-Ponty Dewey’s “French twin.” Posting of Thomas Alexander, tallex@siu.edu, to dewey-L@Ganges.CSD.SC.EDU (Aug. 22, 2001) (on file with the American University Law Review).

articulates a concept of the embodied body similar to Dewey's and Mead's theories of the self,³¹⁴ has been a particular focus of this comparative literature.³¹⁵

Another related literature traces the influence of Merleau-Ponty on important contemporary French theorist Pierre Bourdieu.³¹⁶ American legal theory has barely begun to contend with Bourdieu's important work on social class, which shows how subtle manifestations of taste reflect class origins and reinforce class hierarchies in realms of human conduct ranging from art to food, styles of dress, and academic argument.³¹⁷ Bourdieu's central concept of *habitus*³¹⁸ sounds like a darker, post-modern version of Dewey's habit;³¹⁹ however, Bourdieu is most interested in how habitus produces agents who accept their lots in life rather than in how the agents seek to change them. In any event, Bourdieu's project signifies a key late twentieth century effort to reconcile the insights of structuralist and phenomenological theorists, in much the same way as Dewey sought to span philosophical dualisms early in the century. As one commentator has observed:

314. See generally MAURICE MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION* 77-232 (Colin Smith trans., Routledge Classics 2002) (1945).

315. See, e.g., ALEXANDER, *supra* note 174, at 143-45 (comparing Dewey's theory of the whole organism being involved in experience with Merleau-Ponty's habituated body); *id.* at 144 (noting agreement between Dewey's and Merleau-Ponty's theories of habit); KESTENBAUM, *supra* note 312, *passim* (containing a lengthy point-by-point comparison of similarities between Dewey's and Mead's theories of the self); ROSENTHAL & BOURGEOIS, *supra* note 312, at 26 (discussing similarities between Mead's and Merleau-Ponty's understandings of "the emergence of perceptual objects within the context of holistic, anticipatory bodily activity"); *id.* at 86 (describing how Merleau-Ponty's "focus on the lived body" informs Mead's "concept of the self"); *id.* at 96 ("Merleau-Ponty, like Mead . . . has developed a view of the essentially intersubjective or social nature of the self."); Margolis, *supra* note 312, at 249 (arguing that "Dewey, from the side of pragmatism" converges with Merleau-Ponty "from the side of phenomenology").

316. See, e.g., DAVID SWARTZ, *CULTURE AND POWER: THE SOCIOLOGY OF PIERRE BOURDIEU* 30 (1997) (noting the importance to Bourdieu of Merleau-Ponty's use of the social sciences in his philosophy).

317. See generally PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (Richard Nice trans., 1979) (showing that consumers' choices and popular taste result in an "aristocracy" of culture).

318. See generally Cheleen Mahar et al., *The Basic Theoretical Position*, in *AN INTRODUCTION TO THE WORK OF PIERRE BOURDIEU: THE PRACTICE OF THEORY* 1, 10-12 (Richard Harker et al. eds., 1990) (discussing the role of Bourdieu's concept of habitus in linking structure and subjectivity).

319. Bourdieu defines habitus as a set of dispositions, explaining that:

The conditionings associated with a particular class of conditions of existence produce *habitus*, systems of durable, transposable dispositions . . . as principles which generate and organize practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming at ends or an express mastery of the operations necessary in order to attain them.

PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 53 (Richard Nice trans., Stanford Univ. Press 1990) (1980). But see *supra* Part II.B.2 (explaining Dewey's habit).

One of Bourdieu's main contributions is to propose a framework that addresses the agency/structure problem in contemporary social theory. He in fact was one of the first poststructuralist sociologists to bring actors back into structural models of stratification by showing that the idea that structures reproduce and function as constraints is not incompatible with the idea that actors create structures. . . . Yet he also criticizes interpretative and phenomenological approaches for not situating action with respect to broader structural constraints. Bourdieu's idea that action is generated by the *interaction* of the opportunities and constraints of situations with actor dispositions—the repository of past experience, tradition, and habit—seems to constitute a considerable advance over these alternative views.³²⁰

Put otherwise, Bourdieu's "principal concern was to introduce the idea of agency into structuralist analysis without recourse to the kind of voluntarism he found in Sartre's existentialism"³²¹ Whether Bourdieu's conception of *habitus* contains a sufficiently robust conception of human agency has been the topic of much debate,³²² but that question is beyond the scope of this Article. The point for this preliminary exploration is simply that theorists on both sides of the Atlantic have recognized the usefulness of the concept of habit in providing a mediating link between self and social context that does not emphasize static form, or unchanging structure, as in overly structuralist interpretations.

III. THE BENEFITS OF CLASSICAL PRAGMATISM

My central claim in this Article is that an updated classical pragmatist theory of the self can help avoid both liberal individualism's tendency to discount the self's socially constructed nature and the tendency of some leading post-modernists to discount the possibilities of effective human agency. In this Part, I do my best to make good on this claim. I begin in Part III.A by summarizing key contrasts between classical pragmatism and

320. SWARTZ, *supra* note 316, at 290-91.

321. *Id.* at 101.

322. Compare James Bohman, *Practical Reason and Cultural Constraint: Agency in Bourdieu's Theory of Practice*, in BOURDIEU: A CRITICAL READER, *supra* note 312, at 129, 148 (arguing that Bourdieu's concept of habitus leaves insufficient room for critical reflection), and SWARTZ, *supra* note 316, at 294 ("[Bourdieu] has very little to say on the central questions of when subordinate groups will have the inclination and capacity to act upon the critical findings of social science to actively resist domination."), with Scott McLemee, "Not a Fish in Water": Close Colleague of Bourdieu Reflects on His Influence, CHRON. OF HIGHER EDUC., Feb. 8, 2002, at A18, available at <http://chronicle.com/weekly/v48/i22/22a01801.htm> (interview with L  c Wacquant discussing Bourdieu's desire to "give the broadest possible range of people the instruments to think for themselves, the critical tools to get through the crust of preconceived ideas and discourse, so they could collectively engage in enlightened civic debate"), and Katha Pollitt, *Pierre Bourdieu, 1930-2002*, THE NATION, Feb. 18, 2002, at 10 (arguing that Bourdieu "retained . . . faith in people's capacities for transformation").

post-structuralism, in an effort to demonstrate the importance of engaging in a detailed interrogation of various theories of the self in order to expose points of difference. In Part III.B, I outline my version of a classical pragmatist theory of the self. This theory, I argue, has the important virtue of sustaining a sufficiently robust theory of human agency to make it useful for progressive legal scholars seeking to aid projects of emancipatory activism. My theory draws from classical pragmatism, yet revises it to take account of—indeed, to embrace—important developments in social theory over the course of the twentieth century, all without sliding into the political pessimism theorists such as Butler, Fish, Rorty, and Schlag display. In Part III.C, I return to the quotes with which this Article began in order to examine more specifically the benefits of my theory in comparison to liberal individualist or post-structuralist approaches. Finally, in Part III.D, I give concrete examples of the application of my classical pragmatist approach in the context of several contentious debates within the American legal academy in recent years.

A. *Classical Pragmatism and Post-structuralism Compared*

In their emphasis on the socially constructed nature of meaning and the self, classical pragmatists such as Dewey and Mead sound much like the post-modernists described in Part I.B. But the classical pragmatists were decidedly not post-modernists on certain key points,³²³ and these contrasts bear summary in order to sharpen my claim that something important is at stake in interrogating alternate theories of the self. Key differences involve the concepts of experience, repetition, reflective analysis, power, ideology, and the unconscious, all resulting in different conclusions about the scope of human agency.

1. *Experience versus language as constitutive of the self*

The first key difference I and others have explored involves the classical pragmatists' naturalism³²⁴—that is, their grounding of the self in a material world of experience. In this respect, the classical pragmatists hold assumptions very different from those of post-modernists who embrace the late twentieth century “linguistic turn.”³²⁵ To classical pragmatists such as

323. See, e.g., Leiter, *supra* note 27, at 268 (discussing Heidegger and Wittgenstein's theories of tacit cultural knowledge).

324. See generally Kloppenberg, *supra* note 27, at 101 (discussing Dewey's enthusiasm for naturalism as encompassing multi-dimensional elements of experience); Leiter, *supra* note 27 (distinguishing realism, with its aspects of naturalism and pragmatism, from post-modernism).

325. See Kloppenberg, *supra* note 27, at 84, 91-100 (noting the contemporary trend toward language as critical to all experience); see also text accompanying notes 130-134 (discussing the later twentieth century linguistic turn).

Dewey, certain biological drives have a natural basis—wholly unshaped, yet existing as a fact of the human organism's natural existence.³²⁶ Thus, while Dewey would agree that, with respect to such activities as eating (and probably also sex, although Dewey had little to say about that subject³²⁷), what we consider desirable is thoroughly socially constructed, Dewey would insist that the drive to perform these activities has a basis in human beings' biological makeup.

Dewey likewise saw human impulses toward activity and problem-solving as natural aspects of the human organism's endowment.³²⁸ In this sense, human beings' natural existence provides a foundation for Dewey's self in a way that the construction of subject positions through language does not. This anchoring of the human organism in the natural world is part of what allows classical pragmatism to theorize a self capable of robust agency.

The social constructivism of classical pragmatism thus turns out to be quite different from that of late twentieth century post-modernism.³²⁹ Along with the move from the classical pragmatist emphasis on experience to the later twentieth century emphasis on language as constitutive of human knowledge³³⁰ comes greater difficulty in theorizing human agency. The classical pragmatists' theory of the self based in experience emphasizes the multidimensional interactions among organisms and their social and natural environments—through which persons constantly create and change environments, just as environments continually create and recreate them. The post-modernist focus on language as exclusively constitutive of human thought and action, on the other hand, leads to an

326. See, e.g., DEWEY, *Human Nature*, *supra* note 34, at 67 (“[I]t goes without saying that original, unlearned activity has its distinctive place and that an important one in conduct. Impulses are the pivots upon which the re-organization of activities turn . . .”).

327. See RYAN, *supra* note 194, at 367 (“[Dewey] had nothing to say about sex, neither about its emancipatory possibilities nor about the difficulties that sexual passion, sexual jealousy, and sexual boredom pose for the progressive.”).

328. Grey, *supra* note 174, at 802 (“[P]ragmatists treat critical reflection as a natural aspect of thought . . .”). A post-structuralist, of course, would point out that our conception of human organisms as having a status in the natural world itself reflects a socially constructed discourse. In response, a pragmatist would agree, but argue that, in our particular historically and socially constructed moment, the concept appears more normatively valuable than its alternatives.

329. This difference can be further illustrated by an example drawing on Foucault. In *History of Sexuality*, Foucault argues that our current conception of sexuality as something social forces have historically repressed is as much a product of the reigning discourse of our times as earlier discourses that viewed “deviant” sexuality as a the product of mental illness. See generally FOUCAULT, *SEXUALITY*, *supra* note 107. Foucault thus argues that even as seemingly natural and instinctive a realm as sexuality is thoroughly socially constructed; there is no more natural basis for the human impulse for sex than any other socially constructed human activity. Dewey, in contrast, naturalizes human biological drives and includes problem solving among them.

330. Interestingly, some contemporary trends in epistemology seem to be swinging back toward Dewey, as discussed *supra* note 134.

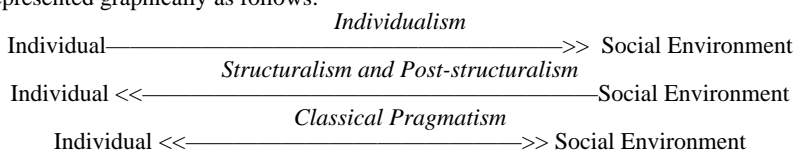
emphasis on the one-way influence of language in constituting the subject.³³¹

2. *Habit versus iteration*

A comparison between Dewey and Butler illustrates another key difference between classical pragmatism and post-structuralism. This contrast involves the difference between the classical pragmatist conception of *habit* and post-structuralist conceptions of *iteration*. As we saw in Part I.B.2.c, Butler theorizes that change results from the mistakes and contradictions inevitable in compelled repetitions of identity performances. In contrast, Dewey stresses that in his system, habits are *not* repetitions: “Repetition is in no sense the essence of habit. Tendency to repeat acts is an incident of many habits but not of all.”³³² Butler focuses on performative acts, but Dewey emphasizes that habits are “acquired predisposition[s] to *ways* or modes of response, not to particular acts”³³³ Habits involve “special sensitiveness or accessibility to certain classes of stimuli, standing predilections and aversions, rather than bare recurrence of specific acts.”³³⁴

This distinction reflects an important difference. Dewey’s conception of the link between the individual and social as occurring through disposition or general habit emphasizes tendency—the embodied nature of experience in shaping future conduct—but not compulsion.³³⁵ For Butler, on the other

331. Classical pragmatism, in other words, conceives of the relationship between selves and the social and natural environment as an interaction with multiple directions, whereas individualism and post-structuralism each sometimes tend to overemphasize a single directionality in what we should envision as a much more complicated process. Individualism can too greatly emphasize the individual’s priority in relation to his or her social surroundings; post-structuralists, revealing their origins in classic structuralism, tend to emphasize too greatly the overwhelming force of the social on the subject. This point can be represented graphically as follows:



332. DEWEY, *Human Nature*, *supra* note 34, at 32.

333. *Id.*

334. *Id.*

335. The same result can be reached through French phenomenologist Merleau-Ponty. *See, e.g.*, JAMES SCHMIDT, MAURICE MERLEAU-PONTY: BETWEEN PHENOMENOLOGY AND STRUCTURALISM 49 (1985) (noting that, according to Merleau-Ponty, arguing against Durkheim, “the social is not collective consciousness but intersubjectivity, a living relationship and tension among individuals” (emphasis and internal citations omitted)); *see also id.* at 52 (“Merleau-Ponty argued, against Durkheim, that society be conceived not as a ‘conscience collective’ but rather as ‘intersubjectivity’” (emphasis and internal citations omitted)). Indeed, as I show in Part II.C.2, *infra*, important contemporary continental theorists who are frequently included in the post-structuralist camp, such as Pierre Bourdieu, likewise draw on the concept of habit—as developed through Merleau-

hand, performance—in the context of sexual identity formation, at least—occurs through forced iterations and compelled repetition. Change arises not from a deliberative process in reconciling conflicts among competing pressures as mediated through habits, as in the classical pragmatist conception, but from accidental, non-purposive mutations.³³⁶

As we saw in Part II.C.2, both classical pragmatists and contemporary continental theorists such as Bourdieu and Merleau-Ponty³³⁷ share a view of habits as enduring dispositions or historically received, internalized approaches to solving problems. This approach preserves room for human agency in a way that post-structuralist accounts do not. Although habits can be resistant to change, they are never completely static. They are coping mechanisms, but generally are not irresistible compulsions. They interact and adapt to changes in the environment in unpredictable and creative ways that reflect intelligent reflection and agency, whereas compelled performances cannot.

Indeed, it bears pointing out, even Foucault, whom Schlag and many other American post-structuralists take as their theoretical mentor,³³⁸ began to emphasize by the end of his life the importance of an interactionist view of the subject. In his late writing, Foucault cautions that “[r]efusing the philosophical recourse to a constituent subject does not amount to acting as if the subject did not exist, making an abstraction of it on behalf of a pure objectivity.”³³⁹ Instead, Foucault writes, this “refusal has the aim of eliciting the processes that are peculiar to an experience in which the subject and the object ‘are formed and transformed’ in relation to and in terms of one another.”³⁴⁰ Alluding to each of his major historical projects, Foucault further explains:

The discourses of mental illness, delinquency, or sexuality say what the subject is only in a certain, quite particular game of truth; but these games are not imposed on the subject from the outside according to a necessary causality or structural determination. They open up a *field of experience* in which the subject and the object are both constituted only under certain simultaneous conditions, but in which they are constantly modified in relation to each other, and so they modify this *field of*

Ponty—to avoid falling into overly structuralist accounts of the relationship between individual conduct and social context.

336. See *supra* text accompanying notes 148-151 (describing Butler’s theory of social change).

337. See *supra* notes 312-322 and accompanying text (discussing Bordieu and Merleau-Ponty).

338. See *supra* text accompanying note 117 (giving an example of Schlag’s reliance on Foucault).

339. Maurice Florence, *Foucault*, in FOUCAULT, AESTHETICS, *supra* note 109, at 459, 462. Foucault wrote this summary of his work under the pseudonym “Maurice Florence” for an encyclopedia of philosophy. *Id.* at 459 n.*.

340. *Id.* at 462.

experience itself.³⁴¹

In short, even in Foucault, by the time of his late writings, the subject takes on a reality and capacity for agency (and, interestingly, becomes anchored in “a field of experience”) that is missing from the conceptions in much Anglo-American post-structuralist writing. It seems as if the “fiction of the subject” is in fact the fiction, one that deserves retirement as having outlived its useful theoretical life.

To be sure, even in its most interactionist version, Foucault’s conception of the subject as constructed by the operation of multiple insidious force fields of power is far bleaker than the socially constructed self of the classical pragmatists. But the point remains: even Foucault in the end embraces an interactionist view, an observation that may lend still further support to the classical pragmatist position in the eyes of post-modernists who view Foucault as canonical.

3. *The unconscious*

A third key difference between classical pragmatism and post-structuralism concerns perspectives on the *unconscious*. Here again, drawing a contrast between Dewey and Butler proves illuminating. Both Dewey and Butler agree that the unconscious is a powerful force in directing human conduct. Dewey, however, views the unconscious as a seat of rational, culturally transmitted intelligence;³⁴² Butler, with a much more strongly Freudian view, emphasizes the unconscious’s irrational and antisocial qualities.³⁴³ These contrasts lead to differences between classical pragmatists and post-structuralists on the potential efficacy of collective and individual action. Post-structuralists such as Butler view the pull of force fields of power as so strong that small, localized acts of subversion are the most we can hope for in seeking to make change.³⁴⁴ Dewey, though also aware—and wary—of the strong pull of tradition,³⁴⁵ sees in the complex conflicts and inchoate flux inherent in the situations that confront us an equally compelling mandate to engage in recreation, experimentation, and reform.

To be sure, the classical pragmatists’ theory of the self is in need of

341. *Id.* (emphasis added).

342. *Supra* note 246 and accompanying text.

343. *Supra* notes 148-153 and accompanying text.

344. *See supra* note 159-160 and accompanying text (discussing Butler’s call for subversive acts).

345. *See, e.g.,* DEWEY, *Human Nature*, *supra* note 34, at 77 (“The force of lag in human life is enormous Ways of belief . . . are not easily modified after they have once taken shape.”); *see also id.* (“[T]he short-cut revolutionist fails to realize the full force of . . . institutions as embodied habits. . . . A social revolution may effect abrupt and deep alterations in external customs But the habits that are behind these institutions . . . are not so easily modified.”).

refurbishing in light of our deeper contemporary appreciation of the effects of power, operating through ideology, as well as the importance of unconscious and erotic processes in forming identity and distinguishing self from the other. Although the classical pragmatists were not naïve about these issues, later twentieth century theory surely offers a more developed view. As I will argue below, however, there is no reason one cannot embrace both sets of ideas: those concerning the unconscious and ideology operating through force fields of power *and* those concerning purposive human conduct that can have significant transformative effects. Put otherwise, the post-modern wariness of the way in which the pull of unconscious forces can co-opt well-meaning efforts at reform offers a reflective insight of enormous importance from a classical pragmatist perspective.

B. Updating Classical Pragmatism for the Twenty-First Century

My version of an updated classical pragmatist account approaches the central question of human agency as follows: Agency lies in the interactive process between organism and environment and among different or competing aspects of this environment, internalized as experience and tradition in the form of habits. The process of reconciling or achieving aesthetic resolution among these competing aspects of the environment and habits occurs through a deliberative process that may be more or less conscious depending on the circumstances and degree of difficulty associated with the reconciliation. Indeed, it is probably the case that a considerable amount of experiential knowledge is not fully accessible to descriptive articulation.³⁴⁶ But this does not mean that such tacit knowledge is not subject to change and development through experience. For the classical pragmatists, much of the best deliberative judgment occurs at a preconscious level—as embodied, for example, in legal realist and Dewey admirer Karl Llewellyn’s notion of the “horse sense” that guides expert practitioners of any craft, including law.³⁴⁷

346. See, e.g., Leiter, *supra* note 127, at 264 (discussing Wittgenstein’s and Heidegger’s theories as to the limited accessibility of tacit cultural knowledge to actors within a cultural system).

347. Llewellyn argued that legal practice was “really a rather elaborate and Janus-faced set of techniques” with regard to which “very considerable portions” are “not taught, resting largely in the inarticulate, though they are *learned* by most men of the law.” Karl N. Llewellyn, *Law and the Social Sciences—Especially Sociology*, 62 HARV. L. REV. 1286, 1289 (1949) [hereinafter Llewellyn, *LSS*]. Llewellyn frequently invoked his concepts of “situation sense” and “horse sense” to describe the way in which good lawyers creatively apply the intuitively learned “know how” of their professional specialties: lawyers apply legal rules to achieve sensible results “through smuggling bits of horse-sense into action and discussion by techniques akin to that of the wizard’s hat, though largely unconscious in their operation.” *Id.* at 1290-91; see also Karl Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 602 (1940) (“[A] goodly portion of our effective

At the same time, my updated classical pragmatist account of agency is both aware and wary of the relationship between unconscious and conscious intents. There is no reason Freudian insights into the erotic dimensions of human energy—his focus on the preconscious and erotic processes through which identity formation and distinction of the other occurs—cannot supplement a classical pragmatist paradigm. There are, in fact, many interesting parallels between Dewey's theory of natural drives towards achieving aesthetically satisfying resolutions of unmet desires and Freud's theories of libidinal attachments.³⁴⁸ Where the two part ways is in Freud's emphasis on the individualist, inherently irrational and antisocial tendencies of the libido as compared to Dewey's emphasis on the tacit social intelligence built into the unconscious. One might easily start with Dewey's social constructivist framework and add to it Freud's insights into the erotic, as given shape and content (as with any other biological drive, as Dewey would say), by the social environment.

In short, the emphasis on the unconsciousness in late twentieth century social theory offers important insights. Its problematic aspect arises from the way in which, in some forms of post-modernism at least, this insight overshadows attention to the possibilities for productive agency contained in preconscious as well as conscious judgment.

C. The Benefits of Classical Pragmatism

1. Rejecting paradigms based on "choice"

The key advantage of employing the classical pragmatists' interactionist framework is that it emphasizes that an interactive process between organism and environment, defined as deliberative judgment, affects both the organism and the environment. Just as the environment constantly changes the organism, the organism's responses to the environment alter the environment, in ways small and large, which in turn lead to a changed

tradition is not taught at all, but remains hidden in the unspoken; it is only learned, it is absorbed through the pores or through haphazard imitation, or it is reinvented, man by man, in the process of doing the job."'). Moreover, Llewellyn, much like Dewey, viewed this largely unconscious absorption of situation sense as the seat of much that is good and graceful about human action. Llewellyn thus described the "craft know-how" of various specialists as endeavors that could "be handled on a high and successful level of questing for beauty, health, glory." Llewellyn, *LSS, supra*, at 1298. As his biographer points out, Llewellyn frequently uses such aesthetic terms in his writing about even the driest areas of the law—rhapsodizing, for example, "about the beauty of the letter of credit" and "praising judgments for their loveliness." WILLIAM L. TWINING, *KARL LLEWELLYN AND THE LEGAL REALIST MOVEMENT* 122 (1973).

348. See Sigmund Freud, *The Libido Theory*, in *GENERAL PSYCHOLOGICAL THEORY* 180 (Philip Rieff ed., 1963) (explaining Freud's theory of the libido). See generally PHILIP RIEFF, *FREUD: THE MIND OF THE MORALIST* (1979) (comparing Freud and Dewey along these lines); PHILIP RIEFF, *THE TRIUMPH OF THE THERAPEUTIC* (1968) (discussing the interplay between Freud's therapeutic tradition and models for political emancipation).

environment that again influences the organism, and so on.³⁴⁹ Human beings constantly remake and alter their worlds in the process of living in them—and in this sense have agency, to a greater or lesser degree depending on complicated and unpredictable combinations of factors involving the interaction of chance, opportunity, context, and capacities. But this is not also to say that human beings can choose the world in which they want to live. As Mead's theory of the *Me* insists, individuals do not choose social identities;³⁵⁰ social identities construct them. The actions of individuals and communities in interaction with their social context may—and indeed, constantly must—remake meanings, either by preservation, alteration, or some of both. But that vision of agency is not equivalent to claims based in notions of “choice.”³⁵¹

A critique of the positions on choice of the two leading theorists whose quotes preface this Article can illustrate this important point. Haney López uses the term “choice” in discussing racial identity formation; Williams compares a middle class woman's “choice” to stay home with her children to a black man's decision not to drink from a fountain labeled “whites only.” Haney López's suggestions connote liberal individualist understandings of the self's priority and capacity for free choice; Williams's comment is subject to the interpretation that she thinks there is no real difference between the subject positions of a middle class woman in late twentieth century America and a black man in the Jim Crow South. Both quotes inspire controversy because of the ways in which they employ the concept of choice. The use of this term in both contexts is problematic because it does not allow for recognition of differences or graduations in the agency permitted by one's social circumstances.

As legal philosophers note in examining ideas about choice embedded in Anglo-American jurisprudence, choice refers to any purposive action—any action performed through the voluntary contraction of one's muscles.³⁵² As

349. See, e.g., GOUINLOCK, *supra* note 201, at 22 (“[t]here are functionally inseparable processes of organism and environment; and in the very interaction of these processes traits of nature emerge whose character depends in crucial ways on this interaction itself”).

350. This is true with the limited exception of persons situated near the margin between identity categories, who can choose to “pass” as one or the other identity. Some critical race theorists, including Haney López, have been particularly fascinated by cases reflecting the problematic policing of these margins between identity categories, especially in the race context, because of the underlying assumptions about social meanings such cases reveal. But such cases are, of course, the exception to the immediate and automatic ascription of social identity once persons transmit information about themselves to others through socially relevant codes over which they often have little control.

351. See, e.g., Hutchinson, *supra* note 12, at 1464-65 (noting implausibility of Robinson's “New Age Philosophy” claim that “persons of color” mired in poverty can simply change their circumstances through the exercise of free will).

352. Cf. Coleman, *Mental Abnormality*, *supra* note 59, at 107 (arguing that “mental deficiency may surface as a defense in torts not to deny fault, but to deny that the minimal conditions of agency or action have been satisfied”).

one philosopher puts it, when a bank robber holds a gun to a bankteller's ribs, the bankteller "chooses" to turn over the cash—in other words, in "a strange sense you choose, you want to do, what you are forced to do."³⁵³ But the mere fact that we have inherited a theory of choice through traditional Anglo-American jurisprudence³⁵⁴ does not mean we must use it in the context of scholarship seeking to understand the capacity of legal actors for agency with respect to the pressing problems of our times. A theory of agency suitable for these purposes must be able to distinguish between various types of "choice."

Interactionism offers just such a finely tuned instrument for thinking about agency. Under an interactionist view, a person can have more or fewer options for action, depending on circumstances. Whereas a post-structuralist might see little difference between the two situations posed by Williams—both reflect socially constructed "choices" mediated through complex systems of language and symbols—a classical pragmatist account would see a large difference between actions taken due to a menacing threat of physical violence and legal prescription, on the one hand, and actions motivated by social conventions and emotional attachments that disadvantage identity categories organized on axes of class and gender, on the other. Both situations involve injustice, but there is a vastly different quality of *experience* embodied in the two examples. A social theory aimed at assisting in projects of emancipatory activism surely should make a distinction between levels of economic, legal, social and physical oppression through violence in order to distinguish the two examples. This is not to say that we should not work on both forms of injustice, of course, but simply that an adequate theory of agency should be able to distinguish between the two scenarios.

By the same token, my version of an updated classical pragmatist account avoids exaggerating the degrees of agency even privileged actors possess. Haney López, in arguing that whites should "renounce" their whiteness, can be argued to slide into a liberal individualist fallacy that members of dominant social identity categories, at least, are free to "choose" race. Perhaps López commits this error because his own identity is at the boundary between two social identity categories.³⁵⁵ But the fact

353. Irving Thalberg, *Hierarchical Analyses of Unfree Action*, in CITADEL, *supra* note 81, at 123, 24.

354. See, e.g., Coleman, *The Practice of Corrective Justice*, *supra* note 59, at 23 (describing jurisprudence as "middle level theory," that seeks to extract "principles and norms from existing practices" but does not seek to justify those principles as correct); Ernest Weinrib, *supra* note 59, at 108 (noting that whether the Kantian "notion of rational agency is plausible is a philosophical question that lies beyond tort theory," though it undeniably provides the foundation for such theory).

355. See López, *supra* note 7, at 10 (explaining that his personal background is as the son of a Latina mother and white father, and contrasting his identification with the Latina—

remains that people most often cannot choose the identity categories—the *Me*—to which they are assigned. We do not choose our identity categories; socially constructed meanings about race, gender, class, and other salient characteristics precede us in our social milieus and are operationalized at every moment by those we encounter in ways that we are often unable to renounce.

Nevertheless, this rebuttal to Haney López's apparent suggestion that whites "renounce" their racial identity does not compel the opposite conclusion to which too many post-structuralists resort—namely, that whites have *no* agency—i.e., no meaningful capacity to engage in purposeful action aimed at social change with respect to the construction of meanings about race. Some might make compelling arguments to this effect, pointing out the ways in which social reformers' well-meaning efforts often have had unintended and counterproductive consequences. In the Part that follows, however, I suggest that we are not necessarily forced to this conclusion. An interactionist theory of the self along the lines of the updated version of classical pragmatism I propose can help us develop a conception of partial agency that is open to the possibility of purposive political change, but still wary of and on guard against claims that anything near completely free agency is possible in this regard.

2. *Meaning, social identity, and difference*

For classical pragmatists, social meanings arise through language and symbols *and* through experience.³⁵⁶ As I discussed in examining Mead in particular, the social construction of identity occurs through both the social construction of, and the organism's experience of, difference. Such socially constructed, interactively generated differences produce the salience of identity categories organized around difference. Even though human beings are generally not free to choose their identity categories with respect to such socially constructed matters as race, they do contribute, through collective and individual action and with limits imposed by social constraints, to the development of meanings within and about social identity categories.³⁵⁷ In this regard, it seems to me Haney López is exactly right. Racial meanings are in flux and do depend, in part, on the effects of agency, particularly at the collective level but, in some less significant way, at the individual level as well.³⁵⁸ But to say that human actors' conduct

López—side of his heritage with his brother's identification with the white—Haney—side).

356. *See supra* Part III.A.1.

357. *Id.*

358. As an interesting historical note, it is worth pointing out that "new institutionalism," the theoretical framework in which Haney López identifies himself as working, has direct historical links to symbolic interactionism, the school of social theory to which Mead's work gave birth. *See* Ian F. Haney López, *Institutional Racism: Judicial Conduct and a*

continually contributes to racial meaning is not to say that such conduct creates that meaning *ab initio* or can erase it at will, but instead that purposive human action counts in the mix.

Drawing from Mead's claim with respect to the unpredictable futurity inherent in the *I*—an *I* present at both the individual and collective levels, as Mead emphasizes³⁵⁹—we can further apply interactionist theory to highlight the potential for agency in shaping future constructions of meanings around race and other social identity characteristics, just as Haney López asserts. This is, to repeat once again, not to suggest either free will or optimism about the possibilities for progressive change on such matters. It is instead simply to observe, first, that social meanings are subject to change over time—as, indeed, any Foucaultian devotee would necessarily acknowledge³⁶⁰—and, second, as classical pragmatists but not all post-modernists would add, that the processes by which such meanings change involve multidimensional interactions in which purposive human action has a significant impact on those meanings, just as those meanings shape human action.

Moreover, as classical pragmatists, but not all Foucaultian devotees, would add, the way in which people contribute to the development of such meanings is not solely through mistakes in performance or unwitting participation in the operation of force fields of power, but is also in part subject to reflection and control. Force fields of power mediated through unconscious identification with repressed values or ideologies bend conscious purposes in directions other than those actors may intend, but purposive human effort contributes to the mix. Contrary to the positions of theorists such as Schlag, Fish, and Rorty, critical reflection and deliberative judgment do matter in the creation and change of social meanings. This, I believe, is the best way to interpret and benefit from Haney López's arguments that human beings create and change race and racial meanings through their individual and collective actions. Although a person typically

New Theory of Racial Discrimination, 109 YALE L.J. 1717, 1769-76 (2000) (identifying himself as a "new institutionalist" and explaining that new institutionalism identifies its theoretical father as ethnomethodologist Harold Garfinkel); see also Gary A. Fine, *The Sad Demise, Mysterious Disappearance, and Glorious Triumph of Symbolic Interactionism*, 19 ANN. REV. OF SOC. 61, 66-69 (1993) (explaining that the intellectual roots of ethnomethodology can be traced to symbolic interactionism and its founder, Mead); Donald D. Searing, *Roles, Rules, and Rationality in the New Institutionalism*, 85 AM. POL. SCI. REV. 1239, 1246 (1991) (tracing links between new institutionalism and Mead's symbolic interactionism).

359. See MEAD, *supra* note 304, at 176-77 (discussing his concept of the "I").

360. Foucault's central project was, after all, to trace how discourses about the subject changed over time with respect to such matters as sanity and insanity, moral responsibility and punishment, and sexual activity and identity. See generally FOUCAULT, *DISCIPLINE*, *supra* note 107 (tracing historical changes in approaches to punishment); FOUCAULT, *MADNESS*, *supra* note 107 (similar analysis of mental illness); FOUCAULT, *SEXUALITY*, *supra* note 107 (undertaking similar historical analysis of constructions of sexuality).

cannot choose her socially ascribed identity categories (the *Me*), the *I* (both individually and collectively in communities) reacts and responds to such socially received meanings. In the process of doing so, meanings change. Again, this is not say that we can erase racism or refuse to be treated as one who belongs to a “race” simply by willing this to be so—that kind of claim skirts far too close to liberal individualist notions of free will. But it is to say that purposive human action affects outcomes within limits—that humans do possess, in variable and somewhat unpredictable degrees, what Abrams refers to as “partial agency.”³⁶¹

D. Concrete Examples

In this final Part, I apply my updated version of classical pragmatism to several concrete examples of debates within the legal academy in recent decades that could benefit from the application of classical pragmatist insights. I show that examining assumptions about the theories of the self that underlie such debates can help explain them, and that application of interactionist insights can help move them forward.

1. The scholars of color debate

One debate that could have benefited from the insights of classical pragmatism was that about *perspectivism*, which took place in the American legal academy in the mid-1980s.³⁶² This debate arose after critical race theorists Mari Matsuda, Richard Delgado, and Derrick Bell each published works arguing that scholars of color had special perspectives on race matters to which the legal academy should pay more attention.³⁶³ With very different approaches and tones,³⁶⁴ these scholars

361. See Abrams, *Sex Wars Redux*, *supra* note 13, at 361 (proposing partial agency as a strategy for adjudicating claims of sexualized injury).

362. See Pierre Schlag, Commentary, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1085 (2002) (“The introduction and development of a perspectivist aesthetic in American law owes much to feminist and critical race theory scholarship of the 1980s and 1990s.”).

363. See, e.g., DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 181-235 (1987) (addressing various issues affecting African-Americans in the United States, including crime, affirmative action, and reparations); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 302-14 (1987) (assessing the negative and positive features of the Critical Legal Studies (CLS) program); Richard Delgado, Commentary, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561-62 (1984) [hereinafter Delgado, *The Imperial Scholar*] (claiming that minority scholars were underrepresented in civil rights literature); Mari J. Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN’S L.J. 1, 1-2 (1988) [hereinafter Matsuda, *Affirmative Action*] (using the claim that women and persons of color have different “personal knowledge” based on their life experience as an argument for affirmative action in law school hiring, on grounds that “outsiders” will bring new perspectives on law); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325-26 (1987) [hereinafter Matsuda, *Looking*

argued that, because persons of color living in the United States inevitably had personal experiences of racism, they could be expected to have special insights into race issues. Along with this argument came various claims about what implications should flow therefrom. Bell's fictional story seemed to suggest that race should be the deciding factor for candidates whose academic credentials were otherwise equal,³⁶⁵ but Delgado, in the most provocative volley in these skirmishes, argued that, no matter what their views or politics, white scholars had no place contributing to civil rights scholarship, but should instead "redirect their efforts" and "stand aside," so that the resulting "gap" could be "quickly filled by talented and innovative minority writers and commentators."³⁶⁶

This was so strong a claim³⁶⁷ that it must have been, at least in part, a strategy designed to provoke strong reaction. It certainly had this result. Randall Kennedy, then one of the few tenured African-American professors at the Harvard Law School, published the most notable response. Kennedy argued for greater appreciation of the complexity of human experience, more careful methodology in drawing conclusions from complex and incomplete empirical evidence, and adoption of a spirit of democracy and inclusion in which all interested voices should be respected and heard.³⁶⁸

to the Bottom] (suggesting a "new epistemological source for critical scholars: the actual experience, history, culture, and intellectual tradition of people of color in America" and arguing that "victims of racial oppression have distinct normative insights").

364. Compare Matsuda, *Affirmative Action*, *supra* note 363, at 2 (inviting legal scholars to try to explore and cite "outsider" literature), with Delgado, *The Imperial Scholar*, *supra* note 363, at 577 (suggesting that, while white scholars might "contribute occasional articles and useful proposals" to the civil rights movement, they ought not "make a career out of it").

365. See BELL, *supra* note 363, at 140, 142-43 (narrating a fictional story about a law school that refused to hire a seventh African-American law professor despite his outstanding credentials).

366. Delgado, *Imperial Scholar*, *supra* note 363, at 577.

367. See Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1349 (1991) (noting that even friend Derrick Bell had described the article as "an intellectual hand grenade") (further citations omitted).

368. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). Kennedy argued, for example, that Matsuda should be faulted for two forms of "reductivism," claiming that her analysis was marred "by both her tendency to homogenize the experience of persons of color and her tendency to minimize the heterogeneity of opinions held and articulated by persons of color." *Id.* at 1782. Responding to Matsuda's assertion that "'Black Americans, because of their experiences, are quick to detect racism, to distrust official claims of necessity, and to sense a threat to freedom,'" Kennedy acknowledged that "some black Americans undoubtedly do display certain moral and intellectual virtues derived from experience with racial oppression," but noted that this is by no means always true. *Id.* at 1780 (quoting Matsuda, *Looking to the Bottom*, *supra* note 363, at 360). "The mere experience of racial oppression provides no inoculation against complacency. Nor does it inoculate the victims of oppression against their own versions of prejudice and tyranny." *Id.* Instead, Kennedy suggested, the decision to fight against oppression should be seen as "an act of will." *Id.* at 1804. Thus, Kennedy argued, "the

Little that Kennedy said in this regard would meet with the disagreement of a pragmatist in the Deweyian tradition. In a crucial final parry, however, Kennedy argued that neutral, objective standards—detached from race or, presumably, other indicia of social identity—should be used to differentiate the best scholarship from that which was second-rate. Instead of using race as a proxy for the quality of legal scholars' work, Kennedy argued, we should evaluate "the work itself."³⁶⁹ In this respect, Kennedy was decidedly not a pragmatist in the Deweyian tradition, because, as we have seen, Dewey's theory of valuation would emphasize the need for ongoing evaluation of facts and values in relation to each other. Moreover, Dewey would argue, dominant groups' judgments of value will tend to reflect the perspectives and interests of those groups, just as Delgado, Matsuda and Bell had asserted. Applied to legal academia, this model would predict that the scholarly writing on race and civil rights issues most likely to be valued would be that of scholars at the top of the profession's status hierarchy, and correspondingly would likely reflect the interests and purposes of that elite, in which scholars of color were at the time clearly under-represented.³⁷⁰

Dewey was not a "hard" perspectivist, however, as I have already discussed; to the contrary, what I have labeled his "soft" perspectivism recognized the potential fallibility of all socially constructed viewpoints. For Dewey, "such differing standpoints will exhibit the limitations as well as the strengths of their points of view and need to be corrected by listening to and interacting with others differently situated."³⁷¹

The advantage of an interactionist theory, in other words, is that it offers a version of perspectivism that recognizes the socially contingent nature of value judgments without reaching the conclusion that perspectives are no more than the product of persons' subject positions. Instead, as we have seen, perspectives involve continual processes of deliberative *valuation*—a

relationship between thought, experience, and racial status is not nearly so predictable" as Matsuda suggested. *Id.* at 1781. Kennedy further criticized Matsuda for presuming that all legal scholars of color share similar race experiences without actually examining what such experiences were, thus assuming that class identity is much less important than race as a determinant of outlook. As Kennedy put it, "Matsuda's analysis wraps in one garment of racial victimization the black law professor of middle-class upbringing with a salary of \$65,000 and the black, unemployed, uneducated captive of the ghetto. In the overwhelming majority of cases, however, these two social types will inhabit radically dissimilar social universes." *Id.* at 1782 (citation omitted). To this point Kennedy's approach sounds like a classical pragmatist's in its interest in complexifying rather than reducing social phenomena, in remaining tentative in the face of uncertainty, and in its spirit of collective, free ranging deliberation.

369. *Id.* at 1798.

370. Cf. PIERRE BOURDIEU, *HOMO ACADEMICUS* (Peter Collier trans., Stanford Univ. Press 1988) (1984) (correlating the social positions of French academics with the scholarly styles they value).

371. Seigfried, *supra* note 288, at 202.

continual interaction between facts and values.³⁷² Contrary to the claims of Fish and Schlag that such reflective analysis is futile to practice, this process of valuation is key to all practices, including scholarly production.

On the classical pragmatists' model, to raise the issue of the operation of force fields of power in the social construction of hierarchies of scholarship is not to claim that better and worse scholarship cannot be distinguished, but to urge reflective analysis of the criteria used to make such distinctions. Classical pragmatism, in other words, preserves the idea of reflective capacity that theorists working in a revised liberal tradition emphasize. Reflection does not give us entirely free agency, as a strong liberal theory might argue, but at least provides the possibility of partial agency. Reflection on values (such as standards for scholarship) in the context of evaluating facts (such as the racial and gender distributions of publication statistics), provides possibilities of deliberative judgment leading to change.

Today the scholars of color debate has largely wound down,³⁷³ though related issues continued to percolate in American law reviews throughout the 1990s.³⁷⁴ In its wake, the increase in outstanding, creative scholarship on race in law reviews suggests at least several lessons: First, that perspective can enhance the contributions, be it to scholarship or to formulating an agenda for social activism; and, second, that agency does matter—that forcing an examination of the standards applied to choose

372. See generally Dewey, *supra* note 261 (articulating his theory of deliberative valuation).

373. See, e.g., Alex M. Johnson, *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 804 (1994) (claiming that the "Voice of Color" debate "fizzled to a halt as a result of the limitations caused by the current era of 'political correctness'").

374. One such debate concerned the legitimacy of the use of narrative as a genre in legal scholarship, which its participants closely associated with, and traced back to, the scholars of color debate. See, e.g., *id.* at 819 (claiming that those "employing the Voice of Color" subvert "the neutral process of writing and evaluating scholarship, a process in which the author's identity is said to be irrelevant," and that they instead, "speaking in the Voice of Color demonstrate that society largely constructs social reality"). See generally Daniel A. Farber & Suzanna Sherry, *Telling Stories of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (questioning the legitimacy of narrative as a genre in legal scholarship).

Another debate with themes similar to the 1980s scholars of color debate took place among Asian-American scholars in the mid-1990s. Compare Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1243 (1993) (calling for an "Asian American Moment" in legal scholarship), with Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 145-49 (1994) (condemning Chang's position as embracing a form of "racial fundamentalism" opposed to important principles of individualism and freedom of association). See also Garrett Epps, *What's Loving Got to Do With It?*, 81 IOWA L. REV. 1489, 1500 (1996) (collecting comments on Chang/Chen debate); Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 CONN. L. REV. 535, 536-39 (2001) (examining the Chang/Chen debate and calling for greater civility in debating race conscious versus race blind approaches).

“leading” scholarship arguably did help open the arena to significant new contributions. As Delgado described in an article written a decade later, there has been change in the legal scholarship on race in leading law reviews, not only in terms of approaches but also in the racial and gender identities of the leading scholars in the field.³⁷⁵

One contemporary outgrowth of the scholars of color debate is Derrick Bell’s interesting and provocative *interest convergence* thesis. This thesis asserts that political and social change that helps the position of racial minorities occurs only when that change converges with the interest of the more powerful majority.³⁷⁶ I have discussed and critiqued this thesis elsewhere,³⁷⁷ but it is worth noting that, here again, my updated version of classical pragmatism offers a somewhat different perspective. On such a classical pragmatist account, no invisible hand or unvarying law of social forces mandates that change can occur only when it benefits the interests of the majority. There is, instead, opportunity—for success *and* for failure—in the changing flux of many factors in interaction with each other. These factors include, importantly, the fact that the very definition of what is in the interests of the dominant class is a question subject to social construction. Almost any progressive reform can be justified as in the long-term interests of the privileged. Wealth redistribution in favor of greater economic equality can be argued to be in the long-term interests of the wealthy because this step lessens social strife, for example, even though it directly contravenes the short-term economic interests of the well-to-do.

My version of a classical pragmatist perspective, therefore, would call for a focus on the construction, manipulation, and transformation of social meanings about entitlement, fairness, and equality. This perspective seems better suited to guiding strategies for successful social and political change

375. See generally Delgado, *supra* note 367. Delgado surveyed the publication practices of three elite law reviews and found that scholars of color and women were the authors of nearly three-quarters of the articles on civil rights. See *id.* at 1352-53 n.15 (concluding overall that “most civil rights writing published in top law reviews these days is written by women and minorities”). He further concluded that at least some majority-race scholars were citing this scholarship of women and scholars of color appropriately—though he also noted many ways in which other scholars were resisting the call for fairer citation practices, such as by engaging in only minimal or cursory treatment of outsider scholarship. See *id.* at 1355-72 (detailing varied techniques majority scholars still use to marginalize outsider voices).

376. The classic statement of this thesis can be found in Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

377. See Susan D. Carle, *How Should We Theorize Class Interests in Thinking about Professional Regulation?*, 12 CORNELL J.L. & PUB. POL’Y 571, 589-90 (2003) [hereinafter Carle, *Class Interests*] (critiquing use of overly reductionist theses concerning class interests as explanations for legal ethics regulation); Susan D. Carle, Response, *Elite Privilege and Public Interest Lawyering*, 20 LAW & HIST. REV. 153, 154-55 (2002) (responding to a “materialist thesis” concerning the motivation of elite lawyers’ involvement in social change advanced in comments of David Wilkins).

than one that dismisses out of hand any aspirations for change that do not serve the apparent interests of those in power.

2. *Feminist legal theory*

Like critical race theory, feminist theory became bogged down in a sameness/difference debate, which played itself out in the American legal academy in the mid-1980s. The debate revolved around whether the growing influx of women lawyers could be expected to bring a special, and potentially transformative, perspective to the legal profession. Occurring both in the same time period and with a similar underlying structure of argument and rebuttal as the scholars of color debate, the sameness/difference debate began when some feminists argued that women's life experiences could be expected to give them a more "relational" or "caring" perspective in their jobs as lawyers.³⁷⁸

On the other side of the debate, feminist legal theorists such as Joan Williams, who identifies herself as a post-modernist, and Margaret Jane Radin, who identifies herself as a pragmatist, strongly dissented from arguments for change within the legal profession based on purported differences between the lawyering styles of men and women. These commentators cautioned that the use of any generalizations about gender-linked lawyering approaches, even positive ones, risked creating stereotypes that would do great harm to women's attempts to advance in the legal profession.³⁷⁹

378. In the words of one participant in this debate, explaining the "difference" perspective:

Drawing on the work of the affiliational or relational feminist theorists, like [Carol] Gilligan . . . and others, I speculated that women who reason with ethics of care and concern, as well as justice, and who took account of relationships and context rather than searching for abstract principles to solve legal problems might structure the legal system and legal practice in different ways.

Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 LAW & SOC. INQUIRY 289, 312 (1989); see also Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 40 (1985) (considering implications for the legal profession of social psychology data revealing differences in male and female styles of moral reasoning); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75, 76 (1994) (reassessing earlier article in light of decade's further insights).

In a similar vein, constitutional scholar Suzanna Sherry argued that women tend to exhibit a uniquely "feminine jurisprudence," characterized by a greater concern with connection and context, and that this different style of reasoning can be detected in the opinions of Justice Sandra Day O'Connor. See Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 615 (1986) ("[R]ecognition of Justice O'Connor's unique perspective, and the unique perspective of women in general, might aid us in ameliorating the distortions of an overly individualist liberal paradigm.").

379. See, e.g., Margaret Radin, Remarks, *Reply: Please Be Careful with Cultural Feminism*, 45 STAN. L. REV. 1567, 1569 (1993) (suggesting that "we should push for more freedom to get women out of those stereotypical roles of cultural feminism"); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 806 (1989) (arguing against

Williams later proposed a resolution to the sameness/difference debate, resting on what she referred to as the post-modernist idea of a fractured and decentered self.³⁸⁰ As Williams pointed out, the problem inherent in strong forms of structuralism that claim that social structure creates and constitutes subject positions is that this claim leads to the conclusion that all people who are structurally located within similar social categories—organized on axes such as gender, race, class, or religion, for example—should have the same socially constructed perspectives.³⁸¹ But such claims, as with the “special voices” of outsiders, easily fall into the traps of stereotyping or essentialism. Williams argued that moving from crude structuralism to a more sophisticated approach in the same tradition could solve these problems. As Williams explained:

This post-modern approach starts from the notion of a fragmented and shifting self. Sometimes I feel like a white, sometimes a heterosexual, sometimes a Jew, sometimes a lawyer, sometimes an Episcopalian. Often I feel simply like my mother’s daughter. A post-modern approach to difference highlights that each person is embedded in a matrix of social and psychological factors that interact in different contexts. Essentialism dissolves before the notion of a shifting, constantly reconfigured self, shaped but not determined by membership in sets of social categories that crystallize power relations in America.³⁸²

In other words, according to Williams, it is not that we are defined by one structural location but by a great many such locations. The great variation we see in opinions and perspectives, even of people who appear to have similar locations in the matrix, arises from the fact that beneath our individual skin shells exist an infinite array of combinations of socially constructed perspectives.

As already discussed in the context of the scholars of color debate, however, perspectivism need not be reduced to the operation of structurally defined subject positions existing within skin shells that create the illusion of individuality. The classical pragmatist approach sees the self, not merely as a combination of socially constructed fragments created by locations in a complex structural matrix, but as an unpredictable interaction among internalized habits or dispositions, the demands of new situations, and biological capacities, including personality traits and cognitive processes.³⁸³

“stereotypes” about how women’s personalities differ from men’s on grounds that these marginalize women).

380. See Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 306-22 (using post-modernism to re-conceptualize the sameness/difference debate).

381. *Id.* at 307.

382. *Id.* at 307-08.

383. In more recent work, Williams takes a perspective on questions of personality

Feminists continue to debate these and related issues. The ongoing dialogue is reflected in Kathryn Abrams's review of Williams's book, *Unbending Gender*.³⁸⁴ In that review, Abrams praises Williams's work in many respects, but questions Williams's decision to rely on Judith Butler's theory about how to achieve social change through small, localized acts of subversion, or, put otherwise, performances "in drag."³⁸⁵ True to her commitments to a revised form of liberal theory, Abrams further questions Williams's "Deweyian" pragmatism in seeking to find new paths on the basis of a "reshuffling of traditional norms."³⁸⁶ In this Article, of course, I have argued that there is a large difference between Butler and Dewey and that Dewey's pragmatism offers a better model for social change than Butler's post-structuralist approach, because Dewey in fact embraces the very theory of a reflective, partially agenic self that Abrams is working toward in her important work based in a revised version of liberalism.³⁸⁷

Some feminist philosophers are beginning to explore the potential of a classical pragmatist theory of the self in resolving the tensions in feminist theory illustrated by the sameness/difference debate and its aftermath.³⁸⁸ As I have suggested in this Article, feminist legal scholars could benefit from drawing further on such literature to pursue an approach that sees the self as a site or process of interaction among aspects of internalized tradition, or habit, and the changing demands of the environment. I have attempted such an analysis in the context of analyzing the agency of one

formation much closer to mine. See, e.g., Joan C. Williams, *Fretting in the Force Fields: Why the Distribution of Social Power Has Proved So Hard to Change*, 71 UMKC L. REV. 493, 494 (2002) ("[A] description of someone's social location is inaccurate as a picture of her identity. Identity is profoundly shaped by one's social power position, but it is also shaped by (among other things) one's personality, psychology, and life experience—themselves influenced but not determined by social location.").

384. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

385. See Abrams, *supra* note 154, at 773-77 (criticizing Williams's use of the concept of "domesticity in drag" and stating that "whether the answer to domesticity lies in a radical destabilization and denaturalization of gender or in a systematic, substantive challenge to institutionalized norms, it is unlikely to be found in 'domesticity in drag'").

386. *Id.* at 748 ("I remain unconvinced by the Deweyian aspect of Williams' pragmatism: the decision to deploy the norms of domesticity against themselves.").

387. See *supra* Part III.A (discussing the differences between post-structuralist and classical pragmatist approaches to individual and collective action).

388. See generally CHARLENE HADDOCK SEIGFRIED, *PRAGMATISM AND FEMINISM: REWEAVING THE SOCIAL FABRIC* (1996) (exploring connections between feminism and classical pragmatism); KATHRYN PYNE ADDELSON, *IMPURE THOUGHTS: ESSAYS ON PHILOSOPHY, FEMINISM, AND ETHICS* (1991) (calling on feminists to apply symbolic interactionism to resolve the theoretical problem of explaining agency within social constraints). Another well-known pragmatist feminist philosopher is Nancy Fraser, whose work draws on contemporary pragmatic discourse theory, which has its roots primarily in the work of Habermas rather than the classical pragmatists. See, e.g., NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION* 155, 160, 214 (1997) (discussing interactionist and pragmatic discourse theories).

early twentieth century American feminist in other work.³⁸⁹

3. *Future directions*

The refurbished theory of an agenic self I argue for here has many other potential applications. An agenic, interactionist theory of the self could be helpful, for example, to the study of the operation of class privilege in the legal profession's construction of ethical rules and practice norms, as I have also suggested elsewhere.³⁹⁰ Indeed, such issues concerning the operation of class in the legal arena and American society generally stand as one of the most important yet submerged areas needing further inquiry in legal theory. Here American legal scholars may want to follow the lead of scholars who have pointed to the work on habitus of master continental theorist of class, Pierre Bourdieu.³⁹¹ It remains to be seen whether Bourdieu's theory of habit—a darker post-modern version of the classical pragmatists, as a developing literature has started to explore³⁹²—fully gets us where we need to go in developing a theory that captures both the possibilities and the limits of human agency on issues of economic injustice and social class. That fascinating subject points toward a direction for future research.

CONCLUSION

I have argued in this Article for a revival of the classical pragmatists' theory of the self as a starting point for a richer and more helpful understanding of the way in which social identity and meanings are constructed and changed through human beings' interactions with their social and natural environments. The underlying questions, about how to theorize the self and human agency, might seem largely irrelevant to all but a handful of scholars, but I have sought here to persuade that they are not. As Dewey's theory of valuation shows, how we conceive of the process by which human beings take on values and act in accordance with them itself becomes a value that figures into the system by which values are produced and changed. It deeply matters, in other words, how legal scholars conceive of human agency, because those ideas in turn shape their sense of the possible.

389. See Susan D. Carle, *Gender in the Construction of the Lawyer's Persona*, 22 HARV. WOMEN'S L.J. 239, 270-73 (1999) (reviewing KATHRYN KISH SKLAR, FLORENCE KELLY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830-1900 (1995)).

390. See Carle, *Class Interests*, *supra* note 377, at 603 (suggesting applications of Foucault and Bourdieu in legal ethics scholarship).

391. See, e.g., Lessig, *supra* note 71, at 680 (pointing to Bourdieu as a useful source of theory for how "meaning" infuses actors' conduct).

392. See *supra* Part II.C.2 (discussing how American legal scholarship has only just begun to contend with Bourdieu's work on social class); see also *supra* note 319 (defining Bourdieu's habitus and comparing it with Dewey's habit).