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## KNIGHT'S GAMBIT TO FOOL'S MATE: BEYOND LEGAL REALISM

Eric Engle\*

### I. INTRODUCTION

In chess, a gambit is to offer a piece to draw an opponent into a worse position. Knights are often gambited early in the game because they can enter play quickly and are of low value later in the game. This Article discusses a different type of gambit: the gambit made by progressives in taking up the idea of moral relativism in the hope to thereby critique the failed conservative morality. But that gambit draws the Left into a fool's mate, a rapid and unexpected reversal of fortunes. By taking the gambit, the Left becomes trapped and immobilized by the erroneous belief that normative inferencing is impossible. That erroneous belief paralyzes any moral critique and transforms all arguments into economic ones.

Political discourse of the last thirty years in America has been effectively monopolized by the political Right. The American Left has, across the board, failed in its efforts to develop a coherent program<sup>1</sup> to use law as a tool for reform, whether radical or gradual.<sup>2</sup> Why is that?<sup>3</sup> We can look at any issue, whether political and defined around interests groups (women,<sup>4</sup> non-whites, homosexuals,<sup>5</sup> and criminals),<sup>6</sup> or

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<sup>1</sup> Paul H. Brietzke, *Urban Development and Human Development*, 25 IND. L. REV. 741, 755 n.46 (1991).

<sup>2</sup> See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1083 (2001). See generally Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997).

<sup>3</sup> One suggestion is that the failure is due to alternative proposals by the Left. I disagree. Alternatives were proposed, attempts were made at implementation, yet proposed projects were not in fact implemented or immediately rolled back. See, e.g., Martha Minow, *School Reform Outside Laboratory Conditions*, 28 N.Y.U. REV. L. & SOC. CHANGE 333, 335 (2003) (supposed lack of alternative propositions).

<sup>4</sup> An example is the failure of the federal Equal Rights Amendment. William P. Gunnar, *The Fundamental Law that Shapes the United States Health Care System: Is Universal*

## 1634 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

economic and of general interest (health insurance,<sup>7</sup> pensions, unemployment insurance, and poverty relief).<sup>8</sup> In each and every case, the Left agenda, whether redistributive<sup>9</sup> or social, has been routed. At the same time, the current United States government has squandered a budget surplus built by Democrats,<sup>10</sup> along with the goodwill of the entire world<sup>11</sup> and the American people,<sup>12</sup> in a counterproductive war in

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*Health Care Realistic Within the Established Paradigm?*, 15 ANNALS HEALTH L. 151, 178 n.226 (2006).

<sup>5</sup> See, e.g., Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 248 (2006).

<sup>6</sup> E.g., Lucy C. Ferguson, *The Implications of Developmental Cognitive Research on "Evolving Standards of Decency" and the Imposition of the Death Penalty on Juveniles*, 54 AM. U. L. REV. 441, 442 (2004) (reconstitutionalization of the death penalty).

<sup>7</sup> Bruce Spitz & John Abramson, *When Health Policy Is the Problem: A Report from the Field*, 30 J. HEALTH POL. POL'Y & L. 327, 338 (2005).

<sup>8</sup> Daniel B. Klaff, *Evaluating Work: Enforcing Occupational Safety and Health Standards in the United States, Canada and Sweden*, 7 U. PA. J. LAB. & EMP. L. 613, 617 (2005) (failure of President Johnson's Great Society program).

<sup>9</sup> Thomas D. Rowe, Jr., *Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation, Background Paper*, 1989 DUKE L.J. 824, 835.

<sup>10</sup> Nancy-Ann DeParle, *Medicare at 40: A Mid-Life Crisis?*, 7 J. HEALTH CARE L. & POL'Y 70, 96 (2004).

When the Bush Administration took office in January 2001, the Congressional Budget Office projected a \$5.6 trillion surplus over the next ten years. Now the surplus is gone—thanks in no small part to a \$1.7 trillion tax cut—and the government faces deficits as far as the CBO computers can calculate.

*Id.* George Anastaplo, *Law, Judges, and the Principles of Regimes: Explorations*, 70 TENN. L. REV. 455, 487 n.116 (2003) ("We have seen, since this 1992 talk, that remarkable switch in positions which has had a Democratic Administration presiding over a Budget surplus and a Republican Administration preparing to preside over an unprecedented Budget deficit.").

<sup>11</sup> For a brief and powerful moment, most of the rest of the world genuinely shared our loss. Most were prepared to support us in almost every conceivable way to win the war on terrorism. Needless and senselessly, we have squandered that good will. How? In part, by employing bullying rhetoric (as President Bush did in his address to Congress on September 20, 2001, when he said, "either you are with us, or you are with the terrorists"), by reinforcing perceptions of American bias in the Israeli-Palestinian conflict, and by demanding the world fall in line, on our schedule and on the basis of shifting rationales, to depose Saddam Hussein.

George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 21, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>; Susan E. Rice, *U.S. National Security Policy Post-9/11: Perils and Prospects*, FLETCHER F. WORLD AFF., Winter 2004, at 133-34.

<sup>12</sup> "We have to renew the spirit of national purpose, unity, and resolve we showed after September 11th—and which George W. Bush has squandered since." *In Their Own Words: The 2004 U.S. Presidential Candidates on Foreign Policy*, Joseph I. Lieberman, FLETCHER F. WORLD AFF., Winter 2004, at 5, 21.

Iraq.<sup>13</sup> Yet we see no presidential impeachment, neither for incompetence nor for lying and sending Americans to perish in the desert in search of nonexistent weapons of mass destruction. The failure of the Left could not be more complete.

This Article traces and explains the failure of the Left's agenda in legal discourse.<sup>14</sup> Particularly, this Article discusses the failure of the Left to implement its agenda. Affirmative action? Racial profiling. Women's rights? Feminazis. Prison reform? Three strikes. Further, the Left's comprehensive failure due to its adoption of a failed axiology is explained.

Axiology is the theory of values – the theory of choice of determinant values. The Left adopted moral relativism as early as the 1930s in the work of the legal realists. But relativist axiology has taken the Left nowhere because it is inaccurate; the Left's erroneous relativist axiology is the result of an erroneous epistemology.<sup>15</sup> Thus, the correct epistemological foundations needed in order to obtain a correct theory of moral choice must first be exposed and clarified. The failed relativist axiology results from a confused and incoherent relativist epistemology. The incoherent relativist epistemology is, in turn, the result of a confused ontology; ontology is the theory of being – the science of determining the basic nature of existence. A correct and coherent epistemology is needed

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<sup>13</sup> “[W]hatever legal and political capital that the United States and its military campaign fuelled in the run up to ‘Operation Enduring Freedom’ was effectively squandered away in the rash and ill-advised ‘Operation Iraqi Freedom.’” Jackson Nyamuya Maogoto, *Countering Terrorism: From Wiggled Judges to Helmeted Soldiers – Legal Perspectives on America's Counter-Terrorism Responses*, 6 SAN DIEGO INT'L L.J. 243, 293 (2005). “Indeed, instead of working for progress toward a rule of law, . . . the Bush Administration [is] lurching toward a rule of scofflaw.” John W. Head, *Responding to 9/11: Lurching Toward a Rule of Scofflaw*, KAN. J.L. & PUB. POL'Y, Fall 2005, at 4.

<sup>14</sup> Ackerman seems to blame the failure of the Left on psychological and mass psychological grounds. Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1528 (1997) (new Left failed due to psychological grounds); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 489-90 (1989) (new Left failed due to mass psychology). If the Left just needed a good therapist, it would have been in power ages ago. Others also think the failure of the Left is due to psychological factors: “Ironically, it turns out that the American intellectual left failed in large part because they somehow mistakenly assumed that everyone, at base, was like them.” David M. Smolin, *The Dilemmas and Methodologies of Academic Political Liberalism: An Analysis of Professor Lawrence Friedman's Response to the Problem of Violent Crime*, 27 CUMB. L. REV. 959, 972 (1996-97). But, in fact, most people are like each other. Psychology does not explain the failure of the Left. The Reagans and Bushes are every bit as dysfunctional as the Clintons. Although this Article rejects the psychological failure thesis, the fact that intellectuals are so off base that they are looking at psychology, as if politics were a talk show or a sitcom, shows the shallowness of contemporary United States political discourse.

<sup>15</sup> Epistemology is the theory of knowledge.

1636 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

to find a well-founded theory of moral choice, which is necessary for legal reforms. To obtain a correct epistemology, a correct ontology is required. Determine the correct ontology, and the epistemology basically falls into place. Rectify the epistemology, and the axiology falls into place. Rectify the axiology, and legal methodology and political agenda fall into place. With a correct theory of moral values, the Left is more likely to implement its substantive policies.

Thus, this Article addresses the goal—implementing certain ideas—in reverse order. First, the essential nature of the problem—its ontology—is diagnosed in Part II. Certain basic propositions of the theory of knowledge (epistemology) are then determined, which must be understood in order to move to the next step. From a correct epistemological perspective, this Article moves forward to a correct theory of choice of values (axiology) in Part III. Then, with a basic understanding of a correct ontology, epistemology, and axiology, it is possible to properly situate American legal and political discourse, understand its potential and limits, and resituate that discourse and its legal methods as part of a coherent framework for fundamental change. This contextualization permits one to pose and answer fundamental questions of legal theory (methods of interpretation) and political practice (finalities of U.S. foreign policy), which is the topic of Part IV.

More specifically, a materialist ontology leads to a monist epistemology, and thus an objective epistemology. Materialism and monism preclude dualist noetic theories such as platonism and neoplatonism. Avoiding platonism also avoids confusion resulting from needless multiplication of intentional entities. On the basis of the materialist epistemology, a correct cognitivist axiology can be attained and an incorrect relativist axiology will be avoided. Cognitivism is simply the idea that moral values are knowable, that we can have knowledge of what is meant by “good” and “bad” acts. Cognitivist axiology allows the Left to resituate arguments that have been pushed into the economic arena from the moral arena. But the Left cannot advance its agenda of equal rights in economic terms. Only by resituating the discourse of equality back into the field of morality can the Left hope to implement its views.

The Left’s discourse has failed.<sup>16</sup> This was due to errors in assumptions of the nature of reality.<sup>17</sup> The Left’s goals may have been

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<sup>16</sup> See, e.g., Dennis H. Wrong, *The Last Intellectuals: American Culture in the Age of Academe*, 17 CONTEMP. SOC. 381-83 (1988) (book review).

unrealistic, but even realistic goals can only be attained on the basis of correct understandings of the world as it is. In place of the failed relativism of the Left, this Article uses a monist, materialist, holist, and cognitivist method. This method is applied proceeding from fundamentally prior concepts to their theoretical consequences. The epistemological basis of realist legal method is examined in Part II. After understanding materialist epistemology, Part III examines the axiological consequences of the chosen theories. In Part IV, a discourse on legal method flows logically from the mutually supporting theories of ontology (materialism), epistemology (monism), and axiology (cognitivism), which leads to a new theory of natural law with attendant legal methods.

## II. THE EPISTEMOLOGICAL BASIS OF REALIST LEGAL METHOD

Late modern legal thought often suffers from confusion stemming from two distinct but similar concepts: epistemological relativism<sup>18</sup>

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<sup>17</sup> See Richard Flacks, *Reflections on Strategy in a Dark Time: Radical Democracy—A Relic of the 60s, or an Idea Whose Time has Come?*, BOSTON REV. (Dec. 1995/Jan. 1996), available at <http://bostonreview.net/BR20.6/flacks.html>.

We in the new left assumed that the corporate-liberal model was the only viable framework for sustaining modern capitalism. We assumed that laissez-faire capitalism was a thing of the past, that economic growth could now be permanently engineered by the corporate state, and that a sense of social responsibility was prevalent among corporate managers. And so, we tended to believe, the welfare state did not need defence from the left—our job was to present its conservative functions in dampening social unrest, expanding consumer markets, and undermining class consciousness. The benefits of corporate liberalism for the wider population were assumed by new leftists to be well-established. Our goal was to undertake its critique and try to create alternatives. Over the past 25 years, however, this radical-democratic impulse of the New left has been lost. The explanation of that loss begins in the early 1970s, when the fiscal crisis of the state turned corporate elite consensus against The Model. With corporate profits shrinking under the pressure of global economic competition, elite consensus shifted toward the need to free capital for global opportunities. That meant a lowering of living standards and expectations for American workers, as well as a reduction in state efforts to channel investment for domestic purposes. It was the corporate-liberal state — not laissez-faire — that was obsolete.

*Id.*

<sup>18</sup> “[T]he whole texture of twentieth century philosophical thought, which has produced an epistemological relativism often said (with some justice) to underlie contemporary liberalism.” Kevin F. Ryan, *Lex et Ratio*, VT. B.J., Apr. 2003, at 5, 12.

1638 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

(nihilism<sup>19</sup> or skepticism) and axiological relativism<sup>20</sup> (intersubjectivity).<sup>21</sup> If a legal theorist employs either or both of these related lines of thought carelessly, the result is the usual post-modern confusion.<sup>22</sup> This prudent council, to be careful to make one's presumptions known, would be met with approval by David Hume.<sup>23</sup>

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<sup>19</sup> For a sense of the depth of the split in U.S. legal discourse, see, e.g., Harry V. Jaffa, *Graglia's Quarrel with God: Atheism and Nihilism Masquerading as Constitutional Argument*, 4 S. CAL. INTERDISC. L.J. 715, 716 (1995) (commingling nihilism and relativism).

<sup>20</sup> Axiology is merely the theory of choice of values. Some authors appear to confound axiology and relativism. "Schmitt proposes a conceptual and historical analogy between axiology (the theory of values as ethical relativism) and total war." Jorge E. Dotti, *Schmitt Reads Marx*, 21 CARDOZO L. REV. 1473, 1483-84 (2000). An objectivist axiology is also possible.

<sup>21</sup> See, e.g., Paul R. Tremblay, *Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 U.S.F. L. REV. 659, 677 (2002).

<sup>22</sup> See Katherine C. Sheehan, *Caring For Deconstruction*, 12 YALE J.L. & FEMINISM 85, 95-96 (2000).

[A]ll its connections as well as all other attributes it may be thought to possess, are accidental, contingent, or random, and furthermore, they are so *essentially*. This is not an empirical, descriptive, tentative claim about our modern nature, it is a transcendental claim about the nature of nature. . . . [T]he postmodern self so dear to the heart of postmodern theorists is . . . as changing, unstable, and unpredictable as the wind. . . . To repeat, that inessential self is . . . not a hypothetical description, subject to modification or amendment as new evidence presents itself. It is a metaphysically transcendent truth. It is very difficult to see what sort of idea West is describing here. At times West seems to regard this postmodern self, like the liberal self, as a description of an empirical entity—a claim about "the nature of nature," albeit one that the postmodernists dogmatically refuse to allow to be contested or corrected by contrary evidence. Confusingly, West depicts the postmodern self as "unstable, and unpredictable as the wind," implying that, like the weather, the postmodern self has a real existence in the world, if one that is sometimes hard to keep track of. West's declaration that the postmodern self is essentially inessential is the sort of glib verbal manipulation feminists have always had to endure in arguments with the patriarchy.

*Id.* (quoting ROBIN WEST, *CARING FOR JUSTICE* (1997)). The problem is not with West or with Feminism. The problem is with postmodernism. West is correct. The postmodern sense of self—and anything else for that matter—is mutable because it is founded not on objective empirical facts but subjective internal feelings. Postmodernism is one step short of solipsism. West is just one example.

<sup>23</sup> But see Francesco Parisi, *Alterum Non Laedere: An Intellectual History of Civil Liability*, 39 AM. J. JURIS. 317, 338 (1994).

David Hume challenged the scholastic notion of prudence, underscoring the practical insufficiency of such a moral ideal in a society of self-centered beings. In the Aristotelian ideal of prudence, the goal of self-perfection of human character was paramount. According to Hobbes, however, the self in need of perfection was foreign to real political and legal concerns. In his view, of the four

Moral relativism<sup>24</sup> and post-modernism<sup>25</sup> have been responsible for confusion in legal thinking<sup>26</sup> because of misinterpretations of Hume<sup>27</sup> and Nietzsche.<sup>28</sup> By addressing the philosophical roots of legal methodology this Article seeks to clarify some of that confusion to correct the methodology that flows from it, so that law can work justice.

Hume observes that those who make prescriptive arguments—arguments about what one ought to do—generally make the following mistake:<sup>29</sup> the proponent of the argument will begin with a series of descriptive statements—factual descriptions of reality as it is<sup>30</sup>—but the argument's proponent will reach a prescriptive conclusion—that one

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cardinal virtues, only justice could maintain full dignity in a truly positivist conception of law. While prudence and the other cardinal virtues of courage and temperance remained desirable attributes of the human character, they no longer could imply the existence of related civil or legal obligations.

*Id.*

<sup>24</sup> “[T]he emergence of moral relativism in Western thought, in which it is believed that there are no objective truths and that morals are relative and subjective, has led contemporary legal theories to reject natural law and other normative concepts.” Erin Englebrecht, *Three Fallacies of the Contemporary Legal Concept of Environmental Injury: An Appeal to Enhance “One-Eyed Reason” with a Normative Consciousness*, 18 TUL. ENVTL. L.J. 1, 38 (2004).

<sup>25</sup> “Hume deconstructed the self, and argued that the self was simply a bundle of perceptions. The postmodernist conception can jokingly but pretty accurately be characterized as ‘Hume plus advertising.’” Dale Jamieson, *The Poverty of Postmodernist Theory*, 62 U. COLO. L. REV. 577, 585-86 (1991).

<sup>26</sup> E.g., Samuel K. Murumba, *Grappling with a Grotian Moment: Sovereignty and the Quest for a Normative World Order*, 19 BROOK. J. INT’L L. 829, 850 n.61 (1993). “The confusion of targets identified in postmodernist theories also bedevils C[ritical] L[egal] S[tudies].” *Id.*

<sup>27</sup> E.g., Steven Hetcher, *Climbing the Walls of Your Electronic Cage*, 98 MICH. L. REV. 1916, 1921-22 (2000) (reviewing LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE* (1999)). “Hume’s Law is sometimes stated as: An ought cannot be derived from an is. The proper conception of Hume’s Law, however, is that an ought statement cannot be derived *merely* from an is statement.” *Id.* This Article goes further and suggests that Hume was not saying anything more than one must make his ought statements known and not confuse them with his is statements.

<sup>28</sup> Most frequently, people think that Nietzsche is saying that there is no morality, when in fact Nietzsche was struggling to build a new morality.

<sup>29</sup> See DAVID HUME, *A TREATISE OF HUMAN NATURE* 469 (L.A. Selby-Bigge & P.H. Niddich eds., Oxford Univ. Press 2d ed. 1978) (1739-40) [hereinafter HUME, *A TREATISE OF HUMAN NATURE*]. “In every system of morality, which I have hitherto met with, I have always remark’d, that the author proceeds for some time in the ordinary way of reasoning . . .” *Id.*

<sup>30</sup> “[T]he author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs . . .” *Id.*

ought to do a certain thing.<sup>31</sup> Hume's critique is that the proponent of the prescriptive argument has shifted from descriptive statements of what "is" ("is" statements) to a prescriptive statement of what "ought" to be done ("ought" statements).<sup>32</sup> Hume implores proponents of prescriptive arguments to explain how they make this transition from descriptive "is" statements to prescriptive "ought" statements.<sup>33</sup> That is all Hume says on the subject—nothing more, nothing less. If one is to mix statements of what is and what ought, one must make explicit the prescriptive or descriptive nature of those statements and how one shifts from description to prescription—for example, the major premise that "one ought to be kind" and the minor premise that "torturing people is not kind" with the conclusion that "thus, one ought not torture people." This is a perfectly valid syllogism of practical reasoning (*phronesis*) in the form of *modus ponens*, and it is unambiguous because the "is" and "ought" statements are explicit. One may attack either the major or minor premise with no risk of confusion of an "is" statement with an "ought" statement. If both the major and minor premises were "is" statements with an "ought" conclusion, that might be *per se* invalid. However, Hume does not get that explicit in his critique of enthymematic "ought" statements. Even if "is" and "ought" statements had to be distributed such that there was a prescriptive statement both in the premise and in the conclusion, which is what Hume was really referring to, that might not be invalid if one can recast "ought" statements as a particular kind of "is" statement. However, Hume leaves a lot unsaid.

But here is why: Hume's argument, though clear on its own terms is, in fact, very modest. Hume is merely exhorting philosophers to make their "is" and "ought" statements explicit and to show how they make

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<sup>31</sup> "[W]hen of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not." *Id.*

<sup>32</sup> This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.

*Id.*

<sup>33</sup> But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason.

*Id.*

the transition from an “is” statement to an “ought” conclusion. But he might believe they cannot and, in all events, puts the burden of proof on he who would infer norms. That move is far more effective than trying to determine when and whether normative inferencing is possible.

However, Hume’s modest proposal has been extended well beyond its own terms.<sup>34</sup> Hume has been interpreted to argue that normative inferencing—deriving “ought” statements—is somehow impossible.<sup>35</sup> However, Hume does not make that argument.<sup>36</sup> Those who take the

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<sup>34</sup> See Nicholas Capaldi, *Hume’s Rejection of ‘Ought’ as a Moral Category*, 63 J. PHIL. 126, 135-36 (1966).

Hume’s statements about moral sentiments are confused with his statements about moral judgments. It is this confusion which largely accounts for the misinterpretation of (I-O). That (I-O) is not concerned with moral judgments but with moral sentiments is best seen in two ways. First, the entire section deals with a single problem: the attempt to show that moral distinctions or sentiments are perceived not as relations of ideas but as impressions. Second, the conclusions of (I-O) all deal with the analysis of moral distinctions as impressions. Since (I-O) concerns moral sentiments and not moral judgments, we may inquire into the cause of the confusion. At least one reason is that the paragraph is occasionally read or quoted in an incomplete manner. . . . Once we accept the view that moral distinctions are impressions, we must also accept the fact that we can make inferences about such distinctions and even infer their existence from accompanying circumstances.

*Id.*

<sup>35</sup> See W. D. Falk, *Hume on Is and Ought, in OUGHT, REASONS, AND MORALITY* 551 (W.D. Hudson ed., MacMillan 1969). Hume supposedly

denies the deductibility of the latter from the former, as the ‘ought’ expresses ‘a new relation or affirmation’, ‘entirely different from the others’. And this is commonly taken as saying that the ought statement is ‘different’ and non-deducible, because it is no longer a ‘purely factual statement’, to wit one that makes another ordinarily testable truth claim. However, recent criticism, by W.D. Hudson and others, points out that Hume says other things seemingly inconsistent with this. . . . How is one to understand Hume here so as to save him from incoherence? It is said by Flew that Hume really meant that moral statements, rather than being about attitudes, serve to express them. The real Hume was the ancestor of noncognitivism, and the ‘is-ought’ passage its early charter. By contrast, it is said by MacIntyre that really Hume did not mean to deny deducibility. When he said that it ‘seemed inconceivable’, he meant that it only seemed so without really being so.

*Id.*

<sup>36</sup> See A.C. MacIntyre, “*Hume on ‘Is’ and ‘Ought,’ in THE IS-UGHT QUESTION* 485, 493 (W.D. Hudson ed., MacMillan 1969). “Hume in the celebrated passage does not mention entailment. What he does is to ask how and if moral rules may be inferred from factual statements, and in the rest of Book II of the *Treatise* he provides an answer to his own questions.” *Id.*

## 1642 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

overly broad interpretation of Hume improperly argue that Hume shows that normative inferencing is impossible, and if that is so, it is also impossible to make any “ought” statements at all.<sup>37</sup> But this is not Hume’s point.<sup>38</sup> If normative inferencing were impossible, then prescriptive argumentation would also be impossible. And, if prescriptive argumentation were impossible, then everyone would be relativists, regardless of their subjective opinions about their (supposed) objectivity. However, the logical conclusion is based on a faulty premise. Hume does not argue, let alone prove, anything about normative inferencing. But this misinterpretation of Hume as arguing for an impossibility of normative inferencing is one of the bases of contemporary moral relativism.<sup>39</sup> Moral relativism as an ideology is a failure, and its failure helps explain the subsequent failure of the left.<sup>40</sup> Exposing misinterpretations of Hume sets the stage for a correct reposition of political discourse regarding inalienable human rights back into the arena of morality and out of the field of alienable economic goods. By showing that normative inferencing is possible (distributed prescriptive major premise and conclusion), it becomes possible again to argue that (1) one ought to oppose killing; (2) the war in Iraq kills; and (3) thus one ought to oppose the war in Iraq. If one asks why one ought to do anything, the quick answer is “survival of the species.” That is materialism—grounding statements not in ideals floating in the air, but in the facts of the world as it is.

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<sup>37</sup> See W.D. Hudson, *Hume on Is and Ought*, in *THE IS-UGHT QUESTION* 511 (W.D. Hudson ed., MacMillan 1969). “Here, as elsewhere in Hume, adumbrations of modern theory are distorted by his failure to differentiate clearly and explicitly logical from psychological or sociological issues.” *Id.*

<sup>38</sup> See Falk, *supra* note 35, at 562. “Hume’s point . . . is not to deny that merit is cognitively derived from fact; but to make sure that their derivation is not mistaken for deduction.” *Id.*

<sup>39</sup> See, e.g., *Ethics*, *THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY* (2006), <http://www.iep.utm.edu/e/ethics.htm>.

David Hume argued that moral assessments involve our emotions, and not our reason. We can amass all the reasons we want, but that alone will not constitute a moral assessment. We need a distinctly emotional reaction in order to make a moral pronouncement. Reason might be of service in giving us the relevant data, but, in Hume’s words, “reason is, and ought to be, the slave of the passions.” Inspired by Hume’s anti-rationalist views, some 20th century philosophers, most notably A.J. Ayer, similarly denied that moral assessments are factual descriptions.

*Id.*

<sup>40</sup> See, e.g., Eric Barnes, *Supplemental Notes on Relativism*, (Sept. 29, 1999), available at <http://138.110.28.9/courses/ebarnes/205/205-sup-relativism.htm>.

Nietzsche is the other principal basis of moral relativism. And, like Hume, he is misinterpreted often and those misinterpretations paralyze critical discourse. Nietzsche argues that morality is subjective in that it is the product of individuals' choices.<sup>41</sup> He rejects Christian morality and repositions morality by putting it on an individualist and authoritarian basis.<sup>42</sup> Rather than the Christian morality of martyrdom and self-sacrifice, Nietzsche proposes an individualistic morality of egoistic self aggrandizement.<sup>43</sup> Nietzsche is not amoral. Rather, he clearly has a prescriptive agenda, though his morality is not Christian.

Like Hume, Nietzsche is also often taken too far: Nietzsche might be some kind of a *moral* relativist, but his *epistemology* is not relativist. By pointing out Nietzsche's objective epistemology and correctly understanding his axiology not as nihilism but as egoism, the abuse of Nietzsche to advance the relativism which sapped the strength of the Left can be rejected. If epistemology is objective, which is Nietzsche's view, then an objective axiology is possible.

By focusing on the bases of moral relativism, this Article will show how an objective morality is possible and that, by shifting from a failed relativist world view toward a materialist morality, the Left can regain those moral cognitivists it has lost to the Right. Likewise, an objective materialist view of axiology would allow the Left to make prescriptions,

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<sup>41</sup> See, e.g., Friedrich Nietzsche, *Götzendämmerung*, "Die Verbesserer der Menschheit," <http://gutenberg.spiegel.de/nietzsch/goetzend/goetze08.htm> (last visited Feb. 14, 2007).

Man kennt meine Forderung an den Philosophen, sich jenseits von Gut und Böse zu stellen,—die Illusion des moralischen Urtheils unter sich zu haben. Diese Forderung folgt aus einer Einsicht, die von mir zum ersten Male formulirt worden ist: dass es gar keine moralischen Thatsachen giebt. Das moralische Urtheil hat Das mit dem religiösen gemein, dass es an Realitäten glaubt, die keine sind. Moral ist nur eine Ausdeutung gewisser Phänomene, bestimmter geredet, eine Missdeutung. Das moralische Urtheil gehört, wie das religiöse, einer Stufe der Unwissenheit zu, auf der selbst der Begriff des Realen, die Unterscheidung des Realen und Imaginären noch fehlt: so dass "Wahrheit" auf solcher Stufe lauter Dinge bezeichnet, die wir heute "Einbildungen" nennen. Das moralische Urtheil ist insofern nie wörtlich zu nehmen: als solches enthält es immer nur Widersinn. Aber es bleibt als Semiotik unschätzbar: es offenbart, für den Wissenden wenigstens, die werthvollsten Realitäten von Culturen und Innerlichkeiten, die nicht genug wussten, um sich selbst zu "verstehn." Moral ist bloss Zeichenrede, bloss Symptomatologie: man muss bereits wissen, worum es sich handelt, um von ihr Nutzen zu ziehen.

*Id.*

<sup>42</sup> Friedrich Nietzsche, *Beyond Good and Evil*, <http://gutenberg.spiegel.de/nietzsch/jenseits/jense002.htm> (last visited Feb. 14, 2007).

<sup>43</sup> *Id.*

## 1644 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

and thus enable it to win arguments that it currently cannot win because of being trapped within the dead-end that is relativism.

A. *Dualism (Plato)*

Dualism<sup>44</sup> (particularly Manichaeism)<sup>45</sup> has marked and marred Western thought virtually since the beginning of recorded history. The results of dualism are rather clear: separation (self vs. other), alienation (employer vs. employee), depression, abuse (parent vs. child), and war (“my” country vs. “your” country). Plato is perhaps the first recorded example of dualism in Western philosophy<sup>46</sup> and should be contrasted from pre-Socratics, such as Pythagoras and Heraclites, who were monists.<sup>47</sup> Unfortunately, though Plato’s epistemology is largely rejected, his ontological dualism is not. Plato distinguishes ideas (*eidōs*)<sup>48</sup> from the material (*hulē*),<sup>49</sup> and believes that the idea is somehow prior to the material in the sense of somehow causing it. For Plato, material objects are a reflection of ideas,<sup>50</sup> and the world is nothing more than a reflection of the thoughts of God. In modern terms, he is guilty of magical thinking, he makes a map of reality and then thinks the map is reality.

Unfortunately for Plato, and fortunately for science, no one has taken his epistemology very seriously for at least a millennium. One mark of modernity is the monopoly of empirical materialism on scientific debate. For modernity, our ideas are a reflection of the material world. But the rejection of Plato did not have to await industrialization. Even Aristotle

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<sup>44</sup> Dualism is the idea that there is a fundamental split between mind and matter.

<sup>45</sup> Manichaeism is the idea that the universe is dualistic and that the duality is marked by an absolute conflict between polar opposites.

<sup>46</sup> The view that there is a separation in the human person between the mind and the body dates from the history of Western thought to Platonic dualism. Plato’s dualist theory holds that there are actually two different worlds: the physical world of appearances and the higher world of intelligible Forms. For Plato, human beings live in a visible world of the sensible or physical and the invisible world of the intelligible or abstract. This Platonic dualism was carried forward into a similar separation in the human person between mind and body. Don G. Rushing & William D. Janicki, *Treatment of Posttraumatic Stress Disorder Claims Under the Warsaw Convention*, 70 J. AIR L. & COM. 429, 430 (2005).

<sup>47</sup> Ron Shapira, *Structural Flaws of the “Willed Bodily Movement” Theory of Action*, 1 BUFF. CRIM. L. REV. 349, 385 n.121 (1998).

<sup>48</sup> Alicia Juarrero-Roque, *Fail-Safe Versus Safe-Fail: Suggestions Toward an Evolutionary Model of Justice*, 69 TEX. L. REV. 1745, 1748 (1991).

<sup>49</sup> Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245, 2267 (2001).

<sup>50</sup> Aloysius A. Leopold & Marie E. Kaiser, *The Lord in the Law: Reflections on a Catholic Law School*, 25 ST. MARY’S L.J. 385, 389 (1993).

was skeptical about Platonic formalism.<sup>51</sup> Similarly, Descartes<sup>52</sup> and Pascal,<sup>53</sup> although themselves dualists,<sup>54</sup> did not attempt to defend platonic idealism, despite the solipsistic<sup>55</sup> skepticism of Descartes that could admit Plato's purely noëtic world.<sup>56</sup> In fact, Aquinas seems to be the most recent person to have taken platonic idealism seriously.<sup>57</sup>

In law, platonism plays out as formalism: to see the law in rigid terms of eternal and unchanging forms of action, which themselves are reflections of logical structure. Plato was wrong: reality is not the reflection of ideas; ideas are a reflection of reality. However, attempts to oppose formalism with relativism have not only failed, they have backfired because, though Plato was wrong, Cicero was right—law is right reasoning in accord with nature<sup>58</sup>—and consequently Holmes was wrong<sup>59</sup>—the life of law is logic in action; it is phronesis,<sup>60</sup> the practical

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<sup>51</sup> ARISTOTLE, METAPHYSICS bk. I, pt. 9 (W.D. Ross trans., Clarendon Press 1924) (350 B.C.E.), available at <http://classics.mit.edu/Aristotle/metaphysics.mb.txt>; see also ARISTOTLE, POSTERIOR ANALYTICS bk. B, pt. 3, l.10 (Hippocrates G. Apostle trans., 1981); ARISTOTLE, PRIOR ANALYTICS bk. A, pt. 31 (Robin Smith trans., 1989).

<sup>52</sup> RENE DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY (1641), available at <http://oregonstate.edu/instruct/phl302/texts/cartes/meditations/meditations.html>.

<sup>53</sup> Pascal, for example, specifically declines any attempt to prove the existence of "God" that is a noös. "Therefore I shall not undertake here to prove by natural reasons either the existence of God, or the Trinity, or the immortality of the soul, or anything of that nature . . ." BLAISE PASCAL, PENSÉES § VIII (1660), available at <http://www.textfiles.com/etext/NONFICTION/pascal-pensees-569.txt>.

<sup>54</sup> See generally *id.*

<sup>55</sup> Solipsism is the philosophical theory that the self is the only thing that can be known and verified. See DESCARTES, *supra* note 52 (English); *id.*, available at <http://abu.cnam.fr/cgi-bin/go?medit3> (French).

<sup>56</sup> See Philippe Nonet, *In Praise of Callicles*, 74 IOWA L. REV. 807, 808 (1989).

The *Republic* restates the same thought in the form of the distinction between two realms: that of the *noëton*, accessible to reason, *nous*, and of which knowledge, *noësis*, is possible; and that of the *horaton*, visible to the eyes, and about which there can be only *doxa*, what seems, mere opinion.

*Id.*

<sup>57</sup> See, e.g., ST. THOMAS AQUINAS, SUMMA THEOLOGICA (Fathers of the English Dominican Province trans., 1947).

<sup>58</sup> "[E]st quidem vera lex recta ratio, naturae congruens, diffusa in omnis, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterreat . . . [H]uic legi nec obrogari fas est, neque derogari aliquid ex hac licet, neque tota abrogari potest . . ." MARCUS TULLIUS CICERO, DE REPUBLICA: SCRIPTA QUAE MANSERUNT OMNIA 96, bk. III, pt. 22, § 33, ll. 26-32 (K. Ziegler ed., Leipzig 1969) (Bibliotheca Teubneriana fasc. 39).

<sup>59</sup> Holmes argues for a pre-scientific view of law:

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more

1646 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

reasoning that looks at the world as it is and attempts to shape the world as it ought to be. Holmes did not realize that he was trying to describe phronesis because his ideas were influenced by Hume<sup>61</sup> rather than Aristotle, and Hume is interpreted as rejecting the possibility of practical reasoning because he (supposedly) does not see that moral prescriptions can be based on material analysis.<sup>62</sup>

One can infer from all this that Platonic idealism is indefensible. It has been quietly abandoned and replaced—first by materialism, then by skepticism, and now, perhaps, by relativism. Both relativism<sup>63</sup> and Platonic idealism<sup>64</sup> are unscientific because they lack an empirical foundation, which is definitive of science.<sup>65</sup> The material world is radically separated from and anterior to the world of ideas (Plato), or relativised (post-modernism),<sup>66</sup> and so no scientific verification of their propositions is possible.

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to do than the syllogism in determining the rules by which men should be governed.

OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881). A simple reductio meets the argument. If syllogisms are irrelevant why bother thinking? Why not just break out the billy clubs? If law is nothing but passion and prejudice, then law has no moral force and I might as well go be a criminal. Of course, if one were a criminal one would have a bad life and society would be worse off. Actions follow ideas. Moreover, if we look at the law, we see it is more than physical force it is also moral constraint. Holmes' view is amoral, but the province of law is morality. *See Id.*

<sup>60</sup> Scharffs, *supra* note 49, at 2265-66.

<sup>61</sup> Holmes and Hume alike embrace Western values but question their ultimate foundation. Rob Atkinson, *Law as a Learned Profession: The Forgotten Mission Field of the Professionalism Movement*, 52 S.C. L. REV. 621, 653 (2001).

<sup>62</sup> HUME, *A TREATISE OF HUMAN NATURE*, *supra* note 29, at 416. It is not "contrary to reason to prefer even my own acknowledg'd lesser good to my greater . . ." *Id.*

<sup>63</sup> Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1203 n.98 (2001).

<sup>64</sup> "[S]ome form of mind-body dualism has been part of Western philosophy since Plato . . ." Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 411 (1995).

<sup>65</sup> J.B. Ruhl, *The Battle over Endangered Species Act Methodology*, 34 ENVTL. L. 555, 564 (2004). "Scientific Method . . . is defined by the use of empirical observation and experimental testing to formulate and evaluate hypotheses, usually about causal mechanisms, with which to predict . . ." *Id.*

<sup>66</sup> Some even try to combine relativism with dualism. For example, Radbruch combines relativism with neo-Kantian methodological dualism: statements of what the law ought to be may be established only through other statements concerning the "ought," never through what the law "is." "Ought" statements may not be "discerned but only professed." Therefore, legal science in the field of the "ought" can achieve three things: (1) "establish the means necessary to realize the end that ought to be attained," (2) "think a legal value judgment through down to the remotest means for its realization,

B. *Relativism*

The task of epistemology is to determine “what is knowledge.”<sup>67</sup> Post-modern thought often presents relativism as though it were something new, a radical reaction to the violence and cynicism of two world wars. In fact, however, truth skepticism is nothing new. Even among pre-modern philosophers—notably the cynics, but also the sophists generally—truth skepticism, even nihilism, could be found. More recently, the roots of (post-)modern relativism are generally ascribed, with some degree of justice and distortion, to Hume<sup>68</sup> and Nietzsche.<sup>69</sup> The post-modernists are riding the crest of a wave of skepticism, which has indeed grown due to the failure of the nation-state system to preserve peace in the last century. However, post-modernism as a system of thought is neither particularly new nor correct.

## 1. Nietzsche

Nietzsche is probably the most well-known modern example of skepticism towards received truth.<sup>70</sup> The idea of progress is a central

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[and] . . . clarify it up to its ultimate presuppositions of world outlook,” and (3) develop systematically the “conceivable ultimate presuppositions and, consequently, all starting points of legal evaluation.” Radbruch presents a relativistic legal philosophy that exhaustively presents the individual with all possibilities from which only he or she can decide.

Heather Leawoods, *Gustav Radbruch: An Extraordinary Legal Philosopher*, 2 WASH. U. J.L. & POL’Y 489, 509-10 (2000). But where is the law in that? Law is nothing other than ought statements. You ought not to steal (or you will go to jail). In fact, any “ought” statement can be recast into a conditional (“if . . . then”) statement. Thus, “you ought not to steal” really means: “If you steal then you may go to jail.” Seeing the world only in terms of descriptions of existing facts or prescriptions of possible states is a static view. A dynamic world view takes into account state-changes. The world is not only about static facts (“is” statements); it is also about dynamic processes (conditionals). If any ought statement can be recast as a conditional, then Hume’s (supposed) dichotomy breaks down completely.

<sup>67</sup> “Epistemology is the philosophical study of what is ‘knowledge’ (what it is to know) and how do we come to know (when do we have ‘knowledge’).” Scott DeVito, *The Ontology of Copyright Infringement: Puzzles, Parts, and Pieces*, 35 CONN. L. REV. 817, 817 n.3 (2003).

<sup>68</sup> “Hume’s scheme jeopardizes the intersubjective ascribability of merit. One might no longer be allowed to ask whether tolerance *is* good, only whether it is good with me or with you; or, worse still, with me or you *now* . . .” Falk, *supra* note 35, at 123, 138.

<sup>69</sup> See, e.g., FRIEDRICH WILHELM NIETZSCHE, *BEYOND GOOD AND EVIL* (Helen Zimmern trans., 1997), available at <http://digital.library.upenn.edu/webbin/gutbook/lookup?num=4363> (Project Gutenberg).

<sup>70</sup> James A. Gardner, *Madison’s Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 171 (2000). “During the nineteenth century, skepticism toward the Enlightenment concept of objective truth appeared everywhere, from Bentham’s dismissal of natural law as ‘nonsense on stilts’ to Nietzsche’s antifoundationalism.” *Id.*

## 1648 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

defining point of both modernity<sup>71</sup> and Nietzsche's work. Thus, Nietzsche is not a post-modernist: he is part of the discourse of modernity because he believes in progress and makes proposals on how to obtain it. The objective of Nietzsche's work is the conscious evolution of the human species. However, unlike his contemporary and fellow modernist Karl Marx,<sup>72</sup> who sees the progress of the species as driving towards new and better modes of production throughout history, Nietzsche defines progress as the ability of the species to genetically surpass itself via Darwinian evolution.<sup>73</sup> Both are modernists, scientists, and materialists, but they take different perspectives on progress.

Much of what Nietzsche says appears on first glance to be post-modernist.<sup>74</sup> He is certainly skeptical about the truth. However,

<sup>71</sup> Tawia Ansah, *A Terrible Purity: International Law, Morality, Religion, Exclusion*, 38 CORNELL INT'L L.J. 9, 64, (2005).

<sup>72</sup> See KARL MARX, *CAPITAL* (Frederick Engels ed., 1936).

<sup>73</sup> See FRIEDRICH NIETZSCHE, *THUS SPAKE ZARATHUSTRA* (Thomas Common trans., 1960) [hereinafter NIETZSCHE, *THUS SPAKE ZARATHUSTRA*].

<sup>74</sup> Many mistake Nietzsche for a postmodernist. E.g., Barbara Stark, *International Human Rights Law, Feminist Jurisprudence, and Nietzsche's "Eternal Return": Turning the Wheel*, 19 HARV. WOMEN'S L.J. 169, 182 n.68 (1996). Nietzsche's commitment to objective truth and progress place him firmly in the modernist camp. Even those who recognize some problems between Nietzsche and postmodernism fail to recognize just how deep the split is. For example,

Postmodern thinkers generally trace their intellectual debts back to Nietzsche, but Nietzsche stands diametrically opposed to the caricature of a postmodern thinker who is paralyzed by the collapse of metaphysics and therefore incapable of critical theorizing. Consequently, Gadamer's arguments against Habermas's critical theory do not carry much force in response to Nietzschean critique. My thesis is that by understanding how Nietzsche can at once be a critical theorist and a postmodern critic of the metaphysical tradition, we can develop an important resource for articulating the role of critical theory within Gadamer's philosophical hermeneutics.

Francis J. Mootz III, *Nietzschean Critique and Philosophical Hermeneutics*, 24 CARDOZO L. REV. 967, 971 (2003). The ignorance continues: "Friedrich Nietzsche, who has been called the 'patron saint of [P]ostmodern philosophy,' proclaimed the death of God in what amounted to a rejection of Modern thought, primarily a rejection of the idea of a 'unifying center.'" Matthew McNeil, *The First Amendment out on Highway 61: Bob Dylan, RLUIPA, and the Problem with Emerging Postmodern Religion Clauses Jurisprudence*, 65 OHIO ST. L.J. 1021, 1040-41 (2004). Wrong again. First, the mixed metaphor of a patron saint of a godless religion is inapt. Nietzsche is not looking to build a church filled with what he and Jesus both regarded as sheep. He is seeking wolves to go hunting with. Second, and more importantly, Nietzsche does not reject modernity. Rather, he seeks to advance modernity to the next stage in its evolution. A rejection of pre-scientific superstition is a part of modernity's belief in *Vorsprung durch Technik*—progress through technology. Nietzsche may be a forerunner of postmodernism but is no post-modern. After all truth skepticism goes back all the way to William of Occam. So calling Nietzsche postmodern on that basis would justify calling the pre-modern Occam postmodernist.

Nietzsche's mocking skepticism of the received wisdom, as a product of rote repetition of those in power, does not mean he rejects the possibility of the existence of truth. Nietzsche is no nihilist; in fact, he was passionate about truth. For Nietzsche, *if* truth can exist and is knowable, then, once determined, he would defend it with the Wagnerian ardor of *Gotterdämmerung*: "the absolute truth—against itself."<sup>75</sup> It is exactly the love of truth that pushed Nietzsche to ask the question, "what is truth?"

Aristotle describes virtue generally as the median between equally opposite and destructive antitheses.<sup>76</sup> For example, Aristotle regards the virtue of prudence as a median between the extremes of rashness and cowardice.<sup>77</sup> Though Aristotle counsels prudence, Nietzsche counsels the exact opposite. Nietzsche's Hyperborean is a man of extremes. Nietzsche once said, "I am not a man; I am Dynamite."<sup>78</sup> Like Heraclites,<sup>79</sup> (who also influenced Marx on this point), Nietzsche believes that truth results from conflict. Thus, though skeptical about existing "truths," Nietzsche believes the truth could exist and, if it does, is worth fighting for. Some post-modernists, with their rejection of universal absolutes and ideology, go beyond Nietzsche: they do not argue for the clash of the absolute "truth" against itself.<sup>80</sup> Ultimately, they argue that

<sup>75</sup> FRIEDRICH WILHELM NIETZSCHE, *GÖTZEN-DÄMMERUNG* bk. 5 (1888), available at <http://www.gutenberg2000.de//nietzsch/goetzend/goetze05.htm>.

<sup>76</sup> ARISTOTLE, *NICOMACHEAN ETHICS* 44-48, bk. 2, ch. 7 (Martin Ostwald trans., 1962).

<sup>77</sup> Thomas L. Shaffer & Mary M. Shaffer, *Character and Community: Rispetto as a Virtue in the Tradition of Italian-American Lawyers*, 64 *NOTRE DAME L. REV.* 838 (1989).

<sup>78</sup> "Ich bin kein Mensch, ich bin Dynamit." FRIEDRICH NIETZSCHE, *WARUM ICH EIN SCHICKSAL BIN* 1 (1889).

<sup>79</sup> HERACLITES, *THE FRAGMENTS* (b), 8 (c. 500 B.C.), available at <http://ratmachines.com/philosophy/heraclites/>.

<sup>80</sup> "The elevation of rationalism to a position of ultimate authority has created an intolerance for ambiguity and subjective beliefs." Erin Englebrecht, *Three Fallacies of the Contemporary Legal Concept of Environmental Injury: An Appeal To Enhance "One-Eyed Reason" with a Normative Consciousness*, 18 *TUL. ENVTL. L.J.* 1, 38 (2004).

In short, the emergence of moral relativism in Western thought, in which it is believed that there are no objective truths and that morals are relative and subjective, has led contemporary legal theories to reject natural law and other normative concepts. Alexander offers the possibility, however, that it is really the limits of human rationality, and not the limits of morality, that prevent us from perceiving ultimate, substantive truths. Alexander contends that by adopting an epistemology aware of human limitation, contemporary jurisprudence would not develop narrow and short-sighted answers to dilemmas that are inherently not objective, not quantifiable, and not concrete. Instead, a humbled epistemology demands a jurisprudence that seeks the assistance of disciplines other than economics and science such as theology and moral philosophy.

*Id.*

## 1650 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

truth is relative to subjective standards.<sup>81</sup> However, that proposition eventually collapses into the conclusion that there can be no objective universal truth, and thus there can be no science (*episteme*), but rather only opinion (*doxa*). This failure of moral vision, resulting from an erroneous axiology, is exactly what has crippled the Left in the United States.

At first glance, the post-modern argument that “all truth is relative” might seem unproblematic. However, with reflection, it becomes clear that saying “all truth is relative” is equivalent to saying “there is no objective truth.” The relativist statement in fact creates a paradox. That fact should tip us off that something may be wrong in the world of relativism. This Article refers to this as the paradox of the “unknowing knower”: if truth does not exist, then how can we know that truth does not exist? Logically speaking, we cannot. In this way, relativism leads us to truth nihilism. And truth nihilism, in turn, either disintegrates on the paradox or degenerates into a pure *volonté de puissance*<sup>82</sup> (i.e., brute force). Relativist thought thus risks degeneration into fascism—if truth is unknowable and moral values relative, then only force exists. And if force is the only real argument, then why not be fascist?<sup>83</sup> This paradox plagues post-modern thought and dooms it to irrelevance—or worse. This also explains why the relativist position must be rejected. Its foundational presumptions are wrong, and it leads us nowhere we want to go.

The relativist position is thus easily dispatched by either the paradox of the unknowing knower or the *reductio ad absurdum* that truth nihilism and moral relativism can eventually result in fascism. There are, however, better positions of truth skepticism. Some, such as Nietzsche’s, rise to the level of brilliance.<sup>84</sup> However, most of them will also fail—

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<sup>81</sup> Steven Best & Douglas Kellner, *Postmodern Theory: Critical Interrogations* (1991), [http://www.uta.edu/huma/pomo\\_theory/](http://www.uta.edu/huma/pomo_theory/).

<sup>82</sup> “Will to power.”

<sup>83</sup> That point also constitutes a general critique of legal positivism. However, naturalist theories of law cannot offer an alternative to legal positivism because they rely at least implicitly (in the case of Aquinas explicitly) on Platonic idealism. This Article suggests that any alternative to purely voluntarist theories of law must be founded on an ontology which rejects Hume’s dualism just as it must also be founded on an epistemology which rejects Plato’s dualism.

<sup>84</sup> In fact, Nietzsche believed that truth, if it exists, is only discovered through the battle to the death with its opposite. For Nietzsche, truth must fight to live: this is his will to truth; not the will to shape “truth” out of falsehood, but the will to the battle of truth against falsehood. In this, Nietzsche, like Marx (e.g., KARL MARX & FREDERICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1848), available at <http://www.hartford-hwp.com/archives/26/176.html>), harkens back to Heraclites (HERACLITES, *supra* note 79, at

albeit not so quickly or nicely as truth nihilism. In its more refined form, the truth skeptic's argument against the existence of truth is really only an argument against the ability to cognize truth. The truth skeptic argues that truth may (or may not) exist, but even if truth did exist it may not be cognized (i.e., known, as such). The "strong" version of this argument, that truth does not exist, has already been shown to be flawed. This weaker version, that the truth is unknowable, leads to the same conclusion—that science would be impossible. It seems almost as untenable by *reductio*. But what about truth skepticism? What happens if only some truths are unknowable? Namely, what if we accept the validity of our sense impressions and use our perceptions of reality as the basis for objective descriptions of reality? Then some truths would be knowable—particularly, truths about material facts—and we would be out of the dark (relativism) and back into science. That is Nietzsche's position—at least some truths are knowable.

Thus, Nietzsche is faithful to the idea of truth because he rejects intersubjectivity.<sup>85</sup> Truth may or may not always be knowable, but at least sometimes it is, and thus science is possible. Nietzsche is willing to entertain the possibility that truth, or at least some of the truth, could be generally incapable of cognition (i.e., formal demonstration). Basically, he admits we might all be staggering around in the dark, and that might be inalterable, but he clearly hopes otherwise. If no truth at all were possible, we would not and could not know it. For this reason, our *praxis* must presume that truth is possible and then fight for it.

Precisely because Nietzsche defends truth, he accepts that we should live in a world of skepticism because it is possible that the truth value of some statements may be unknowable (which is a different proposition than that there is no truth). Misapprehension of this fine distinction is one reason why post-modernism presents untenable positions. It overstates truth skepticism and elevates it to intersubjective relativism or nihilism. Understanding these errors makes it easier to reject them. Rejecting relativism makes it possible to argue from a moral viewpoint against economic values as the standard par excellence of political discourse.

But while Nietzsche admits it is possible that we cannot know the truth about all objects, he believes that, if only for the practical reason stated, it is possible to know the truth about some objects. Just as

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(b)). See FRIEDRICH NIETZSCHE, *MENSCHLICHES, ALLZUMENSCHLICHES* (erster Hauptstück) (1878).

<sup>85</sup> See FRIEDRICH NIETZSCHE, *DIE FRÖHLICHE WISSENSCHAFT* (1882).

1652 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

Nietzsche recognizes the existence of darkness (ignorance) in the Platonic cave<sup>86</sup> (the material world, specifically The City),<sup>87</sup> and points out the possible existence of false illumination (the central fire),<sup>88</sup> he also admits the Apollonian possibility (but not the necessity) that there might be the true light of reason<sup>89</sup> (the sun in Zarathustra) and that the only way to find the light is to ruthlessly question its existence (because of the false light). It is this sort of a critical attitude that is needed to pose the questions and find the answers needed to remedy the breakdown of American political discourse and its resulting incoherent foreign policy.

The apotheosis of Nietzsche is cognition of his own ignorance: he knows he does not know. He has knowledge of his ignorance. That is, proverbially, wisdom.<sup>90</sup> All philosophy may or may not begin in wonder.<sup>91</sup> But all truth begins, often painfully, in the cognition of our

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<sup>86</sup> See NIETZSCHE, *The Sign*, in THUS SPAKE ZARATHUSTRA, *supra* note 73, at 365, ch. 80. Nietzsche describes his higher men—the next evolutionary stage in human development—as living in a cave:

In the morning after this night however Zarathustra sprang up from his camp, girded his loins, and came out of his CAVE glowing and strong, like the dawn's SUN which comes out from behind dark mountains. You giant star', he spoke, as he had first spoken 'you deep eye of luck and joy, what would be your joy and happiness if you did not have they whom you enlighten!/And if they remain in their chambers while you are already awake and come to give and share - how would your pride be upbraided!/Well! They still sleep these higher men, while I am awake. They are not my true comrades. I do not await them here in my mountains!/I want to go to my work, to my day: but they do not understand what the signs of my morning are, my step is for them no wake up call./They still sleep in my cave . . .

*Id.*

<sup>87</sup> *Id.* at *Zarathustra's Prologue* (especially pt.3: "The Rope Dancer").

<sup>88</sup> PLATO, *The Allegory of the Cave*, in THE REPUBLIC bk. VII (360 B.C.E.), available at <http://www.constitution.org/pla/republic.htm>. "This wanderer is no stranger to me: many years ago he went by here. He is called Zarathustra; but he has changed. Then you carried your ASHES to the mountains: do you want to carry FIRE to the valleys? Do you not fear the arsonist's punishment?" *Id.*; see NIETZSCHE, *Zarathustra's Prologue*, in THUS SPAKE ZARATHUSTRA, *supra* note 73 (author's translation). Like Prometheus, Zarathustra brings men fire, yet he brings not the truth of reason (the sun) but the stolen Promethean fire. Is it a lie?

<sup>89</sup> He does this in his metaphor about the sun.

<sup>90</sup> He who knows not and knows not that he knows not, is a fool . . . shun him. He who knows not and knows that he knows not, is ignorant . . . teach him. He who knows and knows not that he knows, is asleep . . . wake him. He who knows and knows that he knows, is a wise man . . . follow him.

*Knows and Knows*, <http://www.xenodochy.org/ex/quotes/knowsnot.html> (last visited Jan. 27, 2007) (Persian proverb).

<sup>91</sup> PLATO, THEAETETUS (360 B.C.E.), available at <http://classics.mit.edu/Plato/theatu.html> (citing Socrates).

own ignorance. Nietzsche's entire work is defined around his reaction to his own ignorance. Americans are ignorant of foreign languages,<sup>92</sup> geography, histories, religions, and cultures.<sup>93</sup> One can rightly ask: Are Americans deliberately kept ignorant of foreign cultures and languages to make them more manipulable? Whether the ignorance is calculated or merely the result of physical isolation from the rest of the world, Americans can no longer afford the luxury of monolingualism and Amero-centrism. Only if Americans become conscious of their ignorance and take steps to cure it can they avoid the pain their ignorance causes. Americans do not know and think they know.<sup>94</sup>

They approach a vast complex world with simplistic universalist ideals, which are generally perverted and cynically used to advance a corporatist agenda. Worse, the occasional Left attempt to thwart the corporatist agenda is crippled by relativism, which is also an example of knowing not that one knows not. Correcting the flawed relativism would empower efforts to oppose corporatism. Understanding the complexities of the world is a necessary first step to avoid "living in a glass towers and throwing stones." But an entire reconceptualization not only of history and geography and language, but also the proper role of America in the world and of moral choice is necessary to stop the stone throwing and the counter-stone throwing.

In *Thus Spake Zarathustra*, we see Nietzsche, as Zarathustra, reject society and the crowd (i.e., The City, to seek the "all seeing eye" – the sun, representing Apollonian truth).<sup>95</sup> However, even after this illumination, when he returns to The City he discovers he is *still* ignorant. For why else would the crowd reject him? Why else would the risk-takers and rope-dancers – the innovative catalysts of progress,

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<sup>92</sup> "I spoke in English, but no one minded that. *Everyone expects Americans to be ignorant of any foreign language.*" Ronald D. Rotunda, *Constitution-Building in the Former Soviet Union*, GREEN BAG, 1998, at 168 (emphasis added).

<sup>93</sup> "[P]opular American culture reflects broad ignorance of overseas events and foreign affairs." Raymond M. Brown, *I Into Thou: American Resistance to Narratives of International Humanitarian Law Violations*, 28 T. JEFFERSON L. REV. 1, 5 (2005).

<sup>94</sup> Andrew Sagartz, *Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court*, 13 OHIO ST. J. ON DISP. RESOL. 675, 683 n.42 (1998).

Americans have neither the tradition nor the necessity of living internationally. Their ignorance about foreign countries, cultures and customs, their lack of linguistic abilities, and their inability to always respect foreign sensitivities are entirely understandable. . . . [Others] take offense [however] when . . . American ignorance goes arm-in-arm with American arrogance.

*Id.* (internal quotations omitted).

<sup>95</sup> NIETZSCHE, *THUS SPAKE ZARATHUSTRA*, *supra* note 73.

## 1654 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41]

his Heroes, forerunners of the next Man—plummet to their death? Only Nietzsche's/Zarathustra's ignorance of the limitations of *homo sapiens* could explain the masses' rejection of enlightenment. Though Nietzsche is rejected by the masses, he does not himself reject logical scientific truth. Rather, he believes that he has perceived an uncomfortable objective truth—that humanity, as it is, is not capable of perceiving or accepting all of the truth.

This is also the conclusion of Leo Strauss<sup>96</sup> and Machiavelli.<sup>97</sup> However, Nietzsche does not share another conclusion of Strauss and Machiavelli—that one should be economical with the truth and use it sparingly for tactical advantages. Instead, Nietzsche takes a radical strategy that, if correct, perhaps outmaneuvers Marx: if humanity as it exists on the whole is beneath the standard of rationality, risk-taking, and facing hard truths, then humanity must evolve beyond itself.<sup>98</sup> Nietzsche's objective is no less than to push the human species into the next phase of its upward evolutionary spiral.<sup>99</sup> Marx seeks to advance the human species as a collective methodically through technological progress. Nietzsche, in contrast, seeks out individuals who are “higher types,” precursors of the next strain of *homo*, to determine how to cultivate such exceptions to mediocrity so that their numbers will grow. Like Marx, he is trying to push the society forward following the logic of modernity, “progress,” but in a very different way. Such projects, however, are impossible without scientific truth.

Both strategies simply outmaneuver dishonest tacticians like Leo Strauss or Machiavelli, who are playing for much lower stakes and are strategically blinded because of their tactical choice to deploy dishonesty. It is this sort of tactical “shrewdness” that leads the Left to wrongly reject moral discourse. Hoping to outmaneuver conservative moralists, most of the Left has abandoned the idea of morality. That,

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<sup>96</sup> “Strauss believed that the essential truths about human society and history should be held by an elite, and [h]e held that philosophy is dangerous because it brings into question the conventions on which civil order and the morality of society depend.” R. Alta Charo, *Passing on the Right: Conservative Bioethics Is Closer than It Appears*, 32 J.L. MED. & ETHICS 307, 311 (2004).

<sup>97</sup> NICCOLO MACHIAVELLI, *THE DISCOURSES* 139, 143 (Bernard R. Crick ed. & Leslie J. Walker trans., Penguin 1970) (1520). Machiavelli, like Plato, counseled religious hypocrisy. *Id.*

<sup>98</sup> NIETZSCHE, *THUS SPAKE ZARATHUSTRA*, *supra* note 73, at sec. 3, available at <http://gutenberg.spiegel.de/nietzsch/zara/als2003.htm>. “Ich lehre euch den Übermenschen. Der Mensch ist Etwas, das überwunden werden soll.” *Id.*

<sup>99</sup> NIETZSCHE, *On the Higher Men*, in *THUS SPAKE ZARATHUSTRA*, *supra* note 73, at bk. IV, sec. 3. “Zarathustra aber fragt als der Einzige und Erste: “wie wird der Mensch überwunden?” *Id.*

however, shifts all debates to economic values where the Left is doomed to lose because any redistributive agenda entails transaction costs and thus is uneconomical: slavery is profitable. By tactically sacrificing the idea of morality in vain hopes of evading conservative moralists, the Left commits a grave strategic error because the debates are then shifted out of the sphere of morality (where persons have inalienable value) to the sphere of the market where all is bought and sold according to the logic of profit. However, the worst excesses of that can be avoided with a correct appreciation of Nietzsche. Nietzsche is not a nihilist; he is not even a relativist. Rather, Nietzsche is a moralist, but his morality is anti-Christian. A correct appreciation of Nietzsche's contribution to a scientific understanding of morality would allow the Left to diminish, and even escape, its strategic error (the fool's mate) at the hands of economists, gained for a tactical advantage over the conservative moralists (the knight's gambit).

In sum, Nietzsche, though cryptic, is no liar. He is a truth skeptic and is ultimately a scientist. His scientificity comes through most clearly in *Die Fröhliche Wissenschaft* (cognitively, *The Frolicking Science*, eulogos—in some sense a eulogy for Ignorance).<sup>100</sup> He believes in truth. But his faith in truth is not the blind faith of religion: his faith in truth is founded on a skeptical experiential inquiry guided by a teleology only dimly perceived by most—a conscious effort to force the evolution of the human species. Post-modernists who see Nietzsche as their role model simply do not know what modernity is or what Nietzsche was saying about progress, truth, and science.

## 2. Gödel, Quine, Saussure

Roots of post-modernism and relativism have been seen in Nietzsche, and the reason for their misapprehension has been explained. Nietzsche is not the only source of confusion among post-modernists and other relativists. The most defensible position that seems relativist is the cognitive skeptic's argument that we should distrust what we are told is truth and that truth may not always be knowable. Other defensible roots of indefensible positions can be seen in the works of Kurt Gödel, Willard Quine, and Ferdinand de Saussure.

Gödel's famous theorem, that in a closed formal system all true theorems cannot be proven and all false theorems cannot be disproven, supports the cognitive skeptic's argument that truth cannot always be

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<sup>100</sup> NIETZSCHE, *DIE FRÖHLICHE WISSENSCHAFT*, *supra* note 85.

## 1656 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

known.<sup>101</sup> When understood, Gödel's complex idea is a powerful one, but does not compel relativism in any way. Similarly, Saussure argues that the sign is an arbitrary value:<sup>102</sup> for Saussure, there is no underlying universal root language common to all world languages.<sup>103</sup> Willard Quine argues that language is inevitably indeterminate as every term is mutually defined.<sup>104</sup> Ultimately, the sign is arbitrary—anything can stand for anything else.<sup>105</sup>

How correct is relativist epistemology? Though signs are mutually defined, they are not exclusively so defined. The sign is not completely arbitrary because certain signs are reflections of material facts and because some words are indeed onomatopoeic. Linguistic determinacy is secured by anchoring signs in material objects. Representations of Quine that argue that his work implies that legal discourse be indeterminate because all argument is ultimately tautological miss the point and take Quine too far. All argument is ultimately founded on axioms and postulates, and thus is ultimately tautological. However, maneuvering from axioms and postulates to theorems must nonetheless result from internally consistent rule generation methods, which may be valid or invalid. Their validity is a reflection of material facts and material processes. Law is like a formal system, an abstract game with rules of production, axioms, postulates, and theorems.

Truth skepticism—unlike nihilism or relativism—is defensible. Language may (or may not) be an intersubjective construct. However, language is only indeterminate when we engage in the dualist error of seeing language as pure idea with no connection to the material objects that it describes and reflects. Most of the flaws in Western theory arise out of dualism.<sup>106</sup> If the Left were to reject dualism, numerous dependant issues would fall into place. But so long as the Left follows dualism, it will be presented with blind alleys and rabbit trails.

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<sup>101</sup> K. Gödel: *Über formal unentscheidbare Sätze der Principia Mathematica und verwandter Systeme*, I. MONATSHEFTE FÜR MATHEMATIK UND PHYSIK 38, 173-98 (1931), translated in van Heijenoort: *From Frege to Gödel* (Harvard Univ. Press 1971), available at <http://home.ddc.net/ygg/etext/godel/>.

<sup>102</sup> See FERDINAND DE SAUSSURE, *THIRD COURSE OF LECTURES ON GENERAL LINGUISTICS* (1910), available at <http://www.marxists.org/reference/subject/philosophy/works/fr/saussure.htm>.

<sup>103</sup> See *id.*

<sup>104</sup> W. V. O. QUINE, *WORDS AND OBJECTS* (1960).

<sup>105</sup> PETER BICHSEL, "Ein Tisch ist ein Tisch," in *KINDERGESCHICHTEN* (Berlin und Neuwied 1969).

<sup>106</sup> Dualism is a flawed theory. See Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 612 n.42 (2001); Richard Hyland, *The Spinozist*, 77 IOWA L. REV. 805, 822 (1992).

However, a monist-materialist perspective allows us to escape from the problem of linguistic indeterminacy as the sign, even if syntactically arbitrary, is not semantically arbitrary because the sign is a reflection of a material object. As the syntax of the sign is intersubjective and its object is objective, signs are determinate functions. Language is not semantically arbitrary because objective knowledge exists. Additionally, because objective knowledge exists, knowledge, whether an objective morality, exists and the content of that morality is possible. Again, resituating the Left's discourse in moral terms allows the Left to obtain the long absent traction needed to advance its arguments.

As this Article will show, the axiology that flows from dualism and relativism is fundamentally flawed. That flawed axiology, when consciously rejected, allows the Left to argue coherently for moral positions. Whenever the Left has taken up the failed relativist axiology to oppose conservative moralism, it has lost. It has neither changed the mind of the conservative moralists nor implemented its alternative vision of reality. Instead, it has undercut its own moral force. The Left, by taking up the failed relativist axiology has tried to develop and implement legal methods that distort discourse and mute critique of the dominant paradigm in the legal and political arena. Taking up the failed relativist axiology prevents effective legal reform. This failed axiology leads to incoherent political positions and incoherence in contemporary political discourse. Understanding the source of these distortions is the first step in ending them. Ending the distorted and incoherent legal and political debates by taking up a correct monist and materialist axiology is a necessary step to rectifying injustice.

### C. *Constructivism: Popper*

We have already seen that, for Plato, our ideas construct the universe. Constructivism argues that knowledge is not discovered; rather, it is created socially, and thus is constructed. For example, Saussure is a constructivist.<sup>107</sup> Truth is not objective for the constructivist, rather it is intersubjective. However, the constructivist position runs into the same obstacles as relativism. Some facts clearly are not socially constructed.

Similar to constructivism, and another possible root of relativism, is the falsification thesis of Popper. For Popper, like Nietzsche, all

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<sup>107</sup> SAUSSURE, *supra* note 102.

## 1658 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

knowledge is tentative.<sup>108</sup> However, Popper also argues that science is not the discovery or affirmation of positions, but rather the falsification and rejection of competing theories.<sup>109</sup> For Popper, it is not that we know that *P* is true, but rather that we know that *not P* is false.<sup>110</sup> Again, this is similar to Nietzsche because it implies a sort of epistemological Darwinism, where easily falsified ideas fail quickly and less easily falsified ones continue to exist until finally disproved, but the surviving ideas are still subject to the possibility of falsification. Popper's position is quite defensible, and it is an example of what might appear to be relativism, yet is in fact good science.<sup>111</sup> Essentially, Popper is arguing that knowledge is tentative and refutable, which is a position of classic modern science since Francis Bacon.<sup>112</sup> But when we see that skepticism is a root belief of the scientific method that leads us to a paradox, which might please Marx, the scientific method sows the seeds of its own destruction.<sup>113</sup> The skepticism of the scientific method has prepared the ground for the intersubjectivist thesis that knowledge is socially constructed out of subjective experience. But that, if true, would imply the impossibility of objective knowledge and of science.

#### D. Intersubjectivism

According to relativists, all knowledge is subjective and socially constructed into an intersubjective reality, except for the knowledge that knowledge is relative and intersubjective. Thus, intersubjectivism leads us to nothing other than a slightly more elaborate variant of the paradox of the unknowing knower. This regress into paradox can be avoided

<sup>108</sup> KARL R. POPPER, *The Problem of Induction*, in POPPER SELECTIONS 101, 104 (David Miller ed., 1985). "[T]he whole apparatus of induction becomes unnecessary once we admit the general fallibility of human knowledge... the conjectural character of human knowledge. . . . [S]cientific knowledge is essentially conjectural or hypothetical." *Id.*

<sup>109</sup> KARL POPPER, *OBJECTIVE KNOWLEDGE* (1972).

<sup>110</sup> Popper's famous explanatory example is rendered thus by Bryan Magee, "although no number of observation statements reporting observations of white swans allow us logically to derive the universal statement 'All swans are white', one single observation statement, reporting one single observation of a black swan, allows us logically to derive the statement 'Not all swans are white.'"

Laurie W.H. Ackermann, *Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jörg Fedtke*, 80 TUL. L. REV. 169, 184 (2005).

<sup>111</sup> See, e.g., *Karl Popper*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006), available at <http://plato.stanford.edu/entries/popper/>.

<sup>112</sup> FRANCIS BACON, *THE NEW ORGANON OR TRUE DIRECTIONS CONCERNING THE INTERPRETATION OF NATURE* ch. LXX (1620), available at [http://www.constitution.org/bacon/nov\\_org.htm](http://www.constitution.org/bacon/nov_org.htm).

<sup>113</sup> See also Karl Marx & Friedrich Engels, *The Manifesto of the Communist Party*, reprinted in *COMMUNISM, FASCISM, AND DEMOCRACY* 82-89 (Carl Cohen ed., 2d ed. 1972).

only if one admits the possibility of the objective knowledge of the subjectivity of knowledge. But if we admit that there is an objective epistemology, then why should objectivity be limited to epistemology? If epistemology can be objective, then why could an objective moral science or physical science not also be possible? So the regress, if denied by that step, lets us get back into an objective view of the world. And the material facts of the objective world contradict the constructivist and relativist position. It is an objective fact that water always boils at a certain temperature, regardless what we think or say about it. Thus, an unqualified non-cognitivist stance can be cogently defended, if at all, only with great difficulty, namely by admitting a position that sneaks objectivity into the supposedly intersubjective universe through the back door.

Why defend these awkward positions? Awkward positions such as these are the result of the sort of tactical gambits of the realists and the truth economies recommended by Strauss and Machiavelli. In this case, the supposed Left wing gambit, namely masking a Leftist morality in the guise of moral relativism or scientific neutrality after Weber (sometimes even relying on a radical individualist libertarian argument which is another strategic error) backfires—which would probably delight Strauss—and hopefully demonstrates the danger of using the truth sparingly.

The Left critique of morality attempts to undermine moral values with which the Left disagrees, usually in an attempt to liberate the subject from power.<sup>114</sup> This explains why radical individualism and/or libertarian arguments are sometimes made in bad defenses of Left wing agendas. Those arguments ultimately backfire, however, because capitalism is individualistic and based on money. This is not the only way that supposed radicals, by taking opportunistic gambits, err. Undermining moral values elevates market values<sup>115</sup> as the only objective scientific value. As most money is controlled by men, undermining moral values leads to elevating market values, which, in turn, leads to augmenting the power of men.<sup>116</sup> Thus, the pseudo-Left gambit reinforces patriarchy and reiterates the hierarchy of the rich as

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<sup>114</sup> On the liberation of the subject from power see, e.g., Eric Engle, *The Torture Victim's Protection Act, the Alien Tort Claims Act and Foucault's Archaeology of Knowledge*, 67 ALB. L. REV. 501 (2003), or anything by Foucault.

<sup>115</sup> Robert F. Blomquist, *Re-Enchanting Torts*, 56 S.C. L. REV. 481, 483 n.18. (2005).

<sup>116</sup> See, e.g., Krysia Kubiak, *History of the Women in the Law Division Gender Bias Subcommittee*, LAWYERS J., Oct. 27, 2006, at 4 (discussing slow pace and continuing reality of sex inequality in the legal profession).

1660 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

more valuable than the poor. So rather than being a clever ruse or tactical advantage, that move is a clear loser as it twice loops right back into inequality.

How would materialist ontology impact the truth constructivist argument? Basically, the constructivists argue that knowledge (i.e., verifiable statements of truth and falsehood) is constructed in an intersubjective world. However, if truth statements are objectively verifiable (i.e., if truth is an objective fact), then truth cannot be created but only discovered. And if truth is not created, but “merely” discovered, then the constructivist argument of a pure positive science collapses. This is wonderful for science, but it is terrible for moral relativism and explains why the relativist positions are generally indefensible.

Having seen how post-modern epistemology collapses due to a subjectivism, which ultimately denies the possibility of science, this Article now turns to analyzing how this subjectivism cripples post-modern thought, preventing it from shaping vigorous normative propositions about acknowledged social problems and, in fact, reinforces patriarchy, hierarchy, and inequality by evacuating the moral sphere of all values other than market values.

### III. AXIOLOGICAL BASIS OF REALIST LEGAL METHOD

In Part II it was shown that the epistemological relativism was a non-starter and that a moral theory was at least possible, as knowledge is possible. Part III shows that an objective materialist moral theory is possible. Morality, in materialist terms, is that which enables the human animal to survive and not merely to survive, but also to prosper and obtain the good life. With an objective morality, a normative discourse outside of economic terms becomes possible, which in turn enables the Left agenda to be implemented.

Several of the epistemological positions of relativism and constructivism, if properly qualified, appear defensible. Aristotle considered social justice as founded on an axiology, which was not natural, but varied dependant on the society one examined.<sup>117</sup> What modernity calls social justice is, for Aristotle (who called it distributive or

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<sup>117</sup> See Aristotle, *Politics*, in THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH bk. II, ch. V (Benjamin Jowett ed., Oxford Univ. Press 1966).

geometric justice),<sup>118</sup> not a natural, but a positive function and it varies from society to society.<sup>119</sup> Thus, it may not be surprising that the axiological positions of relativism appear to be less subject to critique than the epistemological positions. However, the axiological positions of relativism are nonetheless hard to defend.

Moral relativism, reflected in Weber's value-free neutrality,<sup>120</sup> essentially asserts that either (1) moral values do not exist, that they are in fact purely subjective elements of personal taste,<sup>121</sup> or (2) even if moral values do exist, they are not capable of cognition. Epistemological relativism implies axiological relativism (though the reverse is not true), which implies that the existence of moral values is unknowable. However, some values, such as the inherent value of human life, are universal.<sup>122</sup> A rough factual moral standard can be the tendency of an act or acts to foster the survival of the human species. Such a standard is not subjective; it is based in the material world. Thus, it is capable of scientific verification—that is, a materialist and not a platonic or neo-platonic formal idealist measure.

The reason that moral relativism appears attractive to those who would critique Western values is because Western moral theory neither prevented nor sanctioned witch hunts,<sup>123</sup> crusades,<sup>124</sup> slavery,<sup>125</sup> imperialism,<sup>126</sup> and world wars (the most obvious evidence of failure of Western morality); it actually often encouraged such brutality and

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<sup>118</sup> See ARISTOTLE, NICOMACHEAN ETHICS 107 (D.P. Chase trans., Ernest Rhys ed., J. M. Dent & Sons Ltd. 1911).

<sup>119</sup> Aristotle, *Politics*, *supra* note 117, at bk. V.

<sup>120</sup> MAX WEBER, "Objectivity" in *Social Science and Social Policy*, in THE METHODOLOGY OF THE SOCIAL SCIENCES 49 (Edward A. Shils & Heary A. Finch trans. & eds., 1949). Like Hume, Weber is only proposing a prudent methodological counsel as a way to avoid confusion.

<sup>121</sup> "Understanding and 'taste' (by which merit is discovered) address themselves to different issues. The one is the 'discovery of truth and falsehood' the other the importance of things to us . . . their relevance for us as things to be responded to with favor or disfavor." Falk, *supra* note 35, at 554. "Because merit is discerned by taste it is not and cannot be among the facts discovered by the understanding." *Id.* at 551.

<sup>122</sup> Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11, 148 (2005).

<sup>123</sup> Gila Stopler, *Gender Construction and the Limits of Liberal Equality*, 15 TEX. J. WOMEN & L. 43, 51 (2005).

<sup>124</sup> Andrew Coleman & Jackson Maogoto, *Democracy's Global Quest: A Noble Crusade Wrapped in Dirty Reality?*, 28 SUFFOLK TRANSNAT'L L. REV. 175, 216 (2005).

<sup>125</sup> See, e.g., A. Leon Higginbotham, Jr., *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority*, 17 CARDOZO L. REV. 1695 (1996).

<sup>126</sup> See, e.g., Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 892 (1998).

1662 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

inhumanity.<sup>127</sup> All too often, the old “moral” values were immoral. However, rejecting a failed moral system is itself a moral choice. Moral relativism can neither claim normative power nor reject other theories of morality—that would require a value judgment. Relativists regard value judgments as meaningless or impossible, and thus impermissible.

In fact, however, we can and do have objective material standards by which we can judge the moral worth of any society—namely, the life expectancy of its members and several other indicia as well (e.g., infant mortality, literacy, homelessness). When radical scholars wish to reject the failed Western morality, they should not take the relativist gambits because (1) with no moral ground to stand on, their own arguments can become relativized, and thus marginalized; and (2) rejecting moral arguments leads to an augmentation in the power of the market as arbiter of male power (because men control most of the money) and individualism.

A. *Hume and Kelsen*

The presupposition that moral values are statements about facts, and not themselves facts, can be traced to David Hume, who is the last major root of erroneous post-modern thought that we will examine. Hume, in turn, influenced Kelsen to adopt this dualism. For Hume and Kelsen, there is an essential and ineluctable difference between statements of fact (“is” statements) and statements about facts (“ought” statements).<sup>128</sup> For Hume, to state that there is insufficient food in Ireland to feed the Irish is a statement of fact: either there are or are not X kilograms of wheat needed to feed Y persons to avert starvation. A statement, however, that there is insufficient food to feed the Irish (Somalians), and thus one ought to donate food to them is, according to Hume, an “ought” statement. Hume is generally presented as rejecting the viability of “ought” statements as being implicit in “is” statements, and thus as rejecting normative and practical syllogisms.<sup>129</sup> That representation, however, is inexact.<sup>130</sup> Hume does infer norms.<sup>131</sup> But proper normative

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<sup>127</sup> Hart, then Fuller describes this as the problem of “immoral morality.” Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958).

<sup>128</sup> “It is generally accepted that the first person to deny the possibility of this inference [from is to ought] was David Hume.” Capaldi, *supra* note 34, at 126.

<sup>129</sup> HUME, A TREATISE OF HUMAN NATURE, *supra* note 29 (asking readers to note the distinction between is and ought statements and to explain how one can be derived from the other—and nothing more nor anything less).

<sup>130</sup> Hume’s point in the *Inquiry*, and in the ‘is-ought’ passage, if read in the light of his comments in the *Inquiry*, is not to deny that merit is cognitively derived from fact but to make sure that this derivation is

inference,<sup>132</sup> according to Hume, must be explicitly declared.<sup>133</sup> In fact,

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not mistaken for deduction. . . . The *Inquiry*, more so than the *Treatise*, shows Hume's concern in this matter to be two-edged: to ward off the entrenched confusion of evaluative inference with demonstrative proof; and to show what cognitive procedure is instead. . . . Hume's point is that the facts as known are the basis, not of a formal, but rather of an experimental, proof . . . .

Werner David Falk, *Hume on Is and Ought*, CANADIAN J. PHIL. 562-63 (1976).

<sup>131</sup> "Hume makes it clear that he believes that factual considerations can justify or fail to justify moral rules." MacIntyre, *supra* note 36, at 485, 489.

<sup>132</sup> While Hume is skeptical about causality and thus deduction, he is even more radical in his critique of induction:

[A]n assumption that arguments must be either deductive or defective . . . is the very assumption which underlies Hume's skepticism about induction. And this skepticism is commonly treated as resting upon, and certainly does rest upon, a misconceived demand, . . . "the demand that induction shall be shown to be really a kind of deduction." This is certainly an accurate way of characterizing Hume's transition from the premise that "there can be no *demonstrative* arguments to prove, that those instances of which we have had no experience resemble those of which we have had experience" to the conclusion that "it is impossible for us to satisfy ourselves by our reason, why we should extend that experience beyond those particular instances which have fallen under our observation." Part of Hume's own point is that to render inductive arguments deductive is a useless procedure. We can pass from "The kettle has been on the fire for ten minutes" to "So it will be boiling by now" (Strawson's example) by way of writing in some such major premise as "Whenever kettles have been on the fire for ten minutes, they boil." But if our problem is that of justifying induction, then this major premise itself embodies an inductive assertion that stands in need of justification. For the transition which constitutes the problem has been justified in the passage from minor premise to conclusion only at the cost of reappearing, as question-beggingly as ever, within the major premise. To fall back on some yet more general assertion as a premise . . . would be to embark on a regress, possibly infinite and certainly pointless.

*Id.* at 487.

[S]ince Hume holds in some passages on induction at least that arguments are deductive or defective, we could reasonably expect him to maintain that since factual premises cannot entail moral conclusion . . . there can be no connections between factual statements and moral judgments . . . . [H]is remarks on "is" and "ought" are not only liable to receive but have actually received a wrong interpretation.

*Id.* at 488.

<sup>133</sup> What I have so far argued is that Hume himself derives "ought" from "is" in his account of justice. Is he then inconsistent with his own doctrine in that famous passage? Someone might try to save Hume's consistency by pointing out that the derivation of "ought" from "is" in the section on justice is not an entailment and that all Hume is denying is that "is" statements can entail "ought" statements, and that this is quite correct.

the practical syllogism evident by the example of a famine is obvious. We must feed the poor not only for pleasant altruistic reasons, but also for practical ones: desperate people do desperate things; therefore, alleviating famine reduces the likelihood of being attacked or robbed. Positive reasons exist as well. By aiding the victims of famine, their descendants may be more favorable to our descendants. Of course, humanity also provides a practical justification to explain why the fact of famine implies the act of feeding. We are social animals, we are not cannibals, and part of what separates us from sharks is the fact that we have compassion for the weak. All of this shows the practical measure of morality as that which ensures species survival seems more or less self evident and is, in all events, an objectively measurable universally admitted good.

For Hume and Kelsen, the difference between “is” and “ought” is ineluctable and essential. Hume presents this dualistic difference as a postulate: he does not seek to prove the existence of that difference; he sees it as fundamental (i.e., axiomatic). Hume thus does not raise or refute the idea that “ought” statements might also be fact—an alternative possibility this Article presents. The idea that Hume’s “law” holds that statements of “is” and “ought” are fundamentally different and that the one cannot be derived from the other is an interpolation of Hume based on a presumption that he did not necessarily make. It is certainly not the only possible interpretation of Hume.<sup>134</sup> Further, Hume’s dualism is not a necessary (i.e., inevitable, position, and generates theoretical

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*Id.* at 492.

<sup>134</sup> See, e.g., Barbara Winters, *Hume on Reason*, in I HUME STUD. 229, 234 (1979), available at <http://departments.oxy.edu/philosophy/hs/issues/v5n1/winters/winters-v5n1.pdf>.

[Hume] is arguing that if reason is viewed on the traditional conception, then reason does not determine us to have beliefs, e.g. about the unobserved. But he does not stop with this result. Hume is trying to give an account of human nature based on an examination of how we in fact operate, and when he investigates the processes that go on in us in coming to believe things, he comes to a discovery that we do reason to our beliefs, but what goes on when we reason is not what was traditionally thought to occur. His empirical investigation, then, results in a different understanding of what reason is like, and when reason is viewed according to his interpretation it can be seen that in making the transition from the observed to the unobserved we are reasoning and inferring. I see Hume, then, as rejecting reason under one conception as inoperative in human affairs, but arguing that if conceived in another way, reason does cause belief and influence action. This interpretation, which I develop below, will resolve the paradoxes and explain the inconsistency between Book I and Books II and III.

*Id.*

inconsistency). Moreover, courts infer from facts to norms (induction)<sup>135</sup> and from norms to facts (deduction) all the time.

Those who interpolate Hume as arguing that “ought” can never be deduced<sup>136</sup> from “is” overstate Hume.<sup>137</sup> He does not say that the derivation of “ought” from “is” is impossible.<sup>138</sup> He certainly does not

<sup>135</sup> “Under *stare decisis*, contrary to Hume’s law, courts may indeed derive, to some extent, an ‘ought’ from an ‘is,’ as the mere fact that cases were decided in a certain manner in the past lends normative force toward deciding like cases in a like manner in the future.” Steven Hetcher, *Non-Utilitarian Negligence Norms and the Reasonable Person Standard*, 54 VAND. L. REV. 863, 866 (2001).

<sup>136</sup> In fact Hume criticizes deduction because what is taken for causal may only be—perhaps even can only be—coincidence:

I have found that such an object has always been attended with such an effect, and I foresee that other objects, which are, in appearance, similar, will be attended with similar effects. I shall allow, if you please, that the one proposition may justly be inferred from the other; I know in fact, that it always is inferred. But if you insist that the inference is made by a chain of reasoning, I desire you to produce that reasoning.

4 DAVID HUME, THE PHILOSOPHICAL WORKS 30 (Green & Grose eds., Scientia Verlag 1964) [hereinafter HUME, THE PHILOSOPHICAL WORKS]. “All inferences from experience therefore, are effects of custom, not of reasoning.” *Id.*

All our reasonings concerning matter of fact are founded on a species of Analogy, which leads us to expect from any cause the same events, which we have observed to result from similar causes. Where the causes are entirely similar, the analogy is perfect, and the inference, drawn from it, is regarded as certain and conclusive: nor does any man ever entertain a doubt, where he sees a piece of iron, that it will have weight and cohesion of parts; as in all other instances which have ever fallen under his observation. But where the objects have not so exact a similarity, the analogy is less perfect and the inference is less conclusive; though it still has some force, in proportion to the degree of similarity.

*Id.* at 85. “[M]en, learn many things from experience and infer, that the same events will always follow from the same causes.” *Id.*

<sup>137</sup> For example,

the standard interpretation of this passage takes Hume to be asserting here that no set of nonmoral premises can entail a moral conclusion. It is further concluded that Hume therefore is a prime opponent of what Prior had called “the attempt to find a ‘foundation’ for morality that is not already moral.” Hume becomes, in this light, an exponent of the autonomy of morality and in this at least akin to Kant. In this paper, I want to show that this interpretation is inadequate and misleading.

MacIntyre, *supra* note 36, at 486.

<sup>138</sup> Falk noted:

[Hume] denies the deductibility of the latter from the former, as the ‘ought’ expresses ‘a new relation or affirmation’, ‘entirely different from the others’. And this is commonly taken as saying that the ought statement is ‘different’ and nondeducible, because it is no longer a ‘purely factual statement,’ to wit one that makes another ordinarily

1666 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

say there is no connection between them. Hume says that whoever wishes to make the transition from “is” to “ought” must explicitly enumerate exactly how they make that transition.<sup>139</sup> In other words, Hume presents a prudential council:<sup>140</sup> it is wise for a philosopher to explicitly show the connection between his normative and factual statements,<sup>141</sup> as this clarifies thinking both for the philosopher and his audience.

Thus, Hume’s “law” is not a “law.” It appears, on closer examination, to be a mere prudential council. However, a critical examination will also show that Hume’s “law” is in fact a trap for the unwary.<sup>142</sup> Hume does not say that moral values do not exist or cannot be cognized. Rather, Hume’s critique is a much more subtle<sup>143</sup> challenge to all who wish to present moral choices as objective values to explicitly do so. In other words, Hume merely and properly places the burden of proof upon the movant to show that moral values exist objectively as fact. As he presupposes a fundamental difference between “is” and

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testable truth claim. However, recent criticism, by W.D. Hudson and others, points out that Hume says other things seemingly inconsistent with this. . . . How is one to understand Hume so as to save him here from incoherence? It is said by Antony Flew that Hume really meant that moral statements, rather than being about attitudes, serve to express them. The real Hume was the ancestor of noncognitivism and the ‘is-ought’ passage its early charter. By contrast, it is said by Alasdair MacIntyre that really Hume did not mean to deny deducibility. When he said that it ‘seemed inconceivable’, he meant that it only seemed so without really being so

Falk, *supra* note 35, at 551.

<sup>139</sup> “Hume’s point . . . is not to deny that merit is cognitively derived from fact but to make sure that this derivation is not mistaken for deduction.” *Id.* at 562.

<sup>140</sup> “Hume . . . in the celebrated passage does not mention entailment. What he does is to ask how and if moral rules may be inferred from factual statements, and in the rest of Book III of the *Treatise* he provides an answer to his own question.” MacIntyre, *supra* note 36, at 493.

<sup>141</sup> “[I]n all reasonings from experience, there is a step taken by the mind, which is not supported by any argument or process of understanding.” HUME, *THE PHILOSOPHICAL WORKS*, *supra* note 136, at 36.

<sup>142</sup> [O]ur willingness to accept the normative conception of ethics is so deeply embedded that, when someone such as Hume challenges it, we take the challenge as a classic defense. (I-O) is not the foundation of normative ethics but its death warrant. Perhaps the shock value of this revelation will lead us to reconsider what might be the most important issue in twentieth-century philosophy.

Hudson, *supra* note 37, at 508.

<sup>143</sup> “Hume’s attitude to induction is much more complex than appears in his more skeptical moments and is therefore liable to misinterpretation—his remarks on ‘is’ and ‘ought’ are not only liable to receive but have actually received a wrong interpretation.” MacIntyre, *supra* note 36, at 488.

"ought," this burden of proof cannot in fact be met, at least not within Hume's dualistic universe.<sup>144</sup> The only way out of Hume's trap is to recognize it as dualism<sup>145</sup> and reject the presumption of dualism. It seems to me that Hume has not proven the existence of "is" versus "ought," but rather presumes it. Therefore, just as Hume can rightly insist that the practical syllogism be founded on explicitly declared presumptions, we can also insist that Hume prove his dualist position.

From a monist perspective, moral statements are simply statements of facts—another "is" statement.<sup>146</sup> For example, just as it is a fact that the sun rises, it is also a fact that certain persons believe that others ought not kill. Dualism runs throughout Western thought and is at the root of alienation, division, separation, and suffering. Plato's "mind" (*eidos*) "matter" (*hulē*) distinction may be the first recorded example of dualism in Western thought. It is not the last. Plato essentially presumes the existence of the *eidos* as a postulate and never proves it, much as Hume assumes a dualism which he does not prove.<sup>147</sup> In fact, Plato's dualism cannot be proven, as material objects would not be the measure of proof of mental forms. Thus, platonic formalism does not admit to proof by materialist standards of science. Christianity makes a similar god/man

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<sup>144</sup> "Hume observes, that the good divides from the true. The standard for the latter is 'eternal and inflexible' in being founded on 'the nature of things'; while that for the former is variable, in depending on 'the internal frame and constitution of animals.'" Falk, *supra* note 35, at 565.

<sup>145</sup> "In short, Hume is rejecting any normative conception of morals." Capaldi, *supra* note 34, at 134. Is that statement circular? If normativity and morality are synonyms, then it is. Hume has been accused by recent scholars of equivocation. A view upholding a univocal reading of such terms, then attributes to Hume the position that we reason to and infer such beliefs, that such transitions are ones of reasoning, but that reason doesn't produce the beliefs. And it must hold that, despite the fact that Hume concludes that animals have reason from the fact that they make some of the same inferences that we do, he believes that in the human realm such examples of reasoning are not produced by reason. It must claim that whatever faculty is which Hume thinks reasons and infers, it is not reason. Winters, *supra* note 134, at 233.

<sup>146</sup> Hume is a materialist:

How does Hume defend his view of the derivation of morality from interest? By appeal to the facts. How do we in fact induce someone to do what is just? How do we in fact justify actions on our own part? In observing what answers we have to give to questions like these, Hume believes that his analysis is justified.

MacIntyre, *supra* note 36, at 491. But, unfortunately, Hume is also a dualist. "All reasonings may be divided into two kinds, namely demonstrative reasoning, or that concerning relations of ideas, and moral reasoning, or that concerning matter of fact and existence." HUME, THE PHILOSOPHICAL WORKS, *supra* note 136, at 31. It is his dualism that leads to his trouble with moral statements as fact. It sets him up for dichotomies like "ideas" versus "impressions" and of course "is" and "ought."

<sup>147</sup> HUME, THE PHILOSOPHICAL WORKS, *supra* note 136, at 31.

1668 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

duality. We also see dualism in Descartes, who separates mind and body, human and animal.

Aristotle would, however, disagree with Descartes' man/animal duality. For Aristotle, man is an animal—a rational talking animal. Cartesian dualism, however, is very convenient for scientific experimentation (vivisection), factory farming, and other abuse: if an animal has no soul and is, as Descartes argues, a mere automaton, then it cannot suffer. Those are the types of errors that dualism generates: distinctions between “self” and “other,” which allow dehumanization and destruction of the other leading ultimately to a Weberian technocratic nightmare of bureaucratic specialization wherein each individual—from the worker in the munitions plant, to the pilot, to the bombardier—can ignore and deny that they are killing and maiming other humans.

If dualism and (neo-)platonian idealism are fatally flawed, what about monism and materialism? For the consistent empiricist, ideas do not exist apart from the people who think them. Thus, to say that moral values exist or not is senseless. What can be said is that the vast majority of persons in all times and places hold certain fundamental values. It can also be said that ideas have certain objective consequences. In both senses ideas (and moral values are one type of idea) exist, but they have no existence independent from the people who hold them. Ideas are reflections of objects. After all, our bodies are made of matter and our ideas, which are not congruent to material reality, are soon corrected, whether we like it or not, by materiality. For the monist-materialist, “is” and “ought” are not distinct and irreconcilable. Rather, “is” swallows “ought” whole: “ought” statements are just another form of “is” statements.<sup>148</sup> How these critiques of post-modern epistemological and moral theory influence law is the topic of the next section.

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<sup>148</sup> Hume's rejection of “ought” as a special moral category is far more revolutionary than his rejection of the traditional concept of causal necessity. . . . One can no longer chant the refrain that “ought is not deducible from is” because this presupposes the very thing that is to be proved, and it is the very thing that Hume rejects, namely the existence of peculiarly normative entities. In place of a normative conception, Hume holds the view that ethics is an empirical science.

Capaldi, *supra* note 34. If that interpretation is correct, however, then Hume's ethics are flawed by epistemological dualism.

## IV. LEGAL METHOD

In Parts I through III, the ontological, epistemological, and axiological bases of a theory for fundamental critique of American legal-political discourse were set out. A monist materialist ontology sets an irrefutable base for the possibility of objective truth as measured by correspondence between descriptions of reality and observations of reality.<sup>149</sup> Monism and platonic and neo-platonic noetic formalism are contradictory.<sup>150</sup> Materialism leads to a rejection of platonic forms.<sup>151</sup> Further, Materialism leads one to reject epistemological relativism—things do not become true simply because large numbers of people believe them. Rather the truth is “out there” in the real world. Truth is possible and is measured as a correspondence between objective reality in the material world and descriptions of that reality in human language. Human language too escapes irrelevancy because of its connection to empirical reality. Thus, an objective morality is theoretically possible. Morality took on an objective sense when it, consequent to the materialist method proposed, is grounded not in erroneous formal noetic views, but rather as a dispassionate materialist calculus of what improves the life expectancy and caloric intake of humans. With an objective measure of morality, we can make moral arguments that circumvent economism, as they look at something more fundamental than money: inalienable human dignity. Thus, the method proposed leads us out of the cold world of cash and into the world of humanitarianism. Human dignity is not fungible. Basic human rights are inalienable. Thus, they cannot be comprehended in economic terms.

How does this understanding of ontology (materialist and monist), epistemology (not nihilism or relativism, but skepticism), and axiology (cognitivism not relativism) influence legal methods of argumentation? Summarily, the realists' rejection of formal logic was as much an error as their rejection of morality as a category. By rehabilitating philosophical (Aristotelian and scholastic) logic on a *materialist* basis, in place of its usual noetic formalist basis, it is possible to apply objective morality to the law. Thus, a unique and, in fact, new form of natural law reasoning is proposed. A written law may conflict with customary moral law.

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<sup>149</sup> *The Correspondence Theory of Truth*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2005), <http://plato.stanford.edu/entries/truth-correspondence>.

<sup>150</sup> See, e.g., *Monism*, CATHOLIC ENCYCLOPEDIA, <http://www.newadvent.org/cathen/10483a.htm> (last visited Feb. 14, 2007).

<sup>151</sup> For a synoptic summary of the struggle of dualist neo-platonism against materialism see, *Neo-Platonism*, CATHOLIC ENCYCLOPEDIA, <http://www.newadvent.org/cathen/10742b.htm> (last visited Feb. 14, 2007).

## 1670 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

However, unlike traditional views of natural law, the existence and resolution of conflict points between written law and unwritten law is determined by a materialist analysis—a contextualized examination of objective reality—and not by an idealistic deduction from amorphous ill defined pure concepts. This argument is vectored through the failed conceptual challenges posed by legal realism as the logical conclusion of Parts I through III. By reviewing legal realism’s failure, the necessity of a new way of thinking about the law becomes clear. Both formalism and realism were partial and imperfect solutions to the problem of legal interpretation. The theory of materialist natural law proposed is the dialectical synthesis resulting from the opposition of formalism versus realism, a relative opposition occurring within the super-structural justifications of a given mode of production namely, late capitalism (which is also called fast capitalism or casino capitalism).<sup>152</sup>

Epistemological and axiological choices shape method. Legal realism was more or less the direct outcome of these various epistemological and axiological currents. Legal realism dominated United States legal thought from the 1930s to the 1980s, at which point it was first challenged.<sup>153</sup> It has now been overtaken by economic theories of the law.<sup>154</sup> However, so great was the influence of the realists—in fact they set the stage for law and economics<sup>155</sup>—that their methodology continues to heavily mark the law.

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<sup>152</sup> See, e.g., Robert Goldman, Stephen Papson & Noah Kersey, *Speed: Through, Across, and in – The Landscapes of Capital*, [http://www.uta.edu/huma/agger/fastcapitalism/1\\_1/gpk2.htm](http://www.uta.edu/huma/agger/fastcapitalism/1_1/gpk2.htm) (last visited Feb. 14, 2007); Timothy W. Luke, *Kanban Capitalism: Power, Identity, and Exchange in Cyberspace*, <http://www.cddc.vt.edu/tim/tims/Tim589.htm> (last visited Feb. 14, 2007).

<sup>153</sup> John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 849 n.39 (1991).

<sup>154</sup> Sharon K. Hom, *Equality, Social and Economic Justice, and Challenges for Public Interest Lawyering*, 8 N.Y. CITY L. REV. 511, 516 (2005); Jess M. Krannich, *The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 88 (2005).

<sup>155</sup> “Thus, critical race realism encompasses not only the goals and methodologies of the broader critical race and feminist projects, but also some of the shared goals and methodologies of legal realism and law and market economy theory (which I have integrated into my critical race work elsewhere).” Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455, 457 (2005).

A. *Legal Realism vs. Formalism*

Epistemologically, legal realism<sup>156</sup> opposed psychology,<sup>157</sup> voluntarism, and hints of class conflict against classical logic. The realists quite successfully introduced a new terminology, substituting negative words to describe institutions they wished to replace and positive words to describe proposed replacements. Thus, classical logic was relabeled formalism.<sup>158</sup> Binary reasoning was relabeled, at best, bright-line analysis,<sup>159</sup> at worst, talismanic<sup>160</sup> and, in all events, as rigid<sup>161</sup> and inflexible. In contrast, the realists were flexibly<sup>162</sup> balancing<sup>163</sup>

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<sup>156</sup> See, e.g., Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

<sup>157</sup> See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 119-20 (Brentano's 1970) (1930).

<sup>158</sup> Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897). Holme's article is oft cited and illustrates exactly the problem of modernity—the separation of law and morality consequent to relativism.

<sup>159</sup> For example, "Some commentators discussing constitutional restrictions have suggested reasons for successive prosecution in addition to those discussed above. Professor Amar, for example, advocates 'flexible, fact- and case-specific rules of due process, rather than global, rigid, bright-line rules of double jeopardy.'" Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1284 (2004).

<sup>160</sup> For example, "In the final analysis, the marriage movement will not relinquish the talisman of marriage as fixed and natural instead of 'ultimately dependent upon social and economic structures.'" Richard F. Storow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 366 (2006).

<sup>161</sup> I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from *a priori* conceptions. In the philosophy of to-day, "theories are instruments, not answers to enigmas, in which we can rest."

T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 957 (1987). In fact, instrumentalism is the essence of opportunists anywhere. If anyone was unscientific, it was the realists and their progeny, the post-modernists, not the formalists. The old values were the wrong values; that does not mean there are no values.

<sup>162</sup> Nor did balancing commit the Court to an overall theory of a constitutional provision. The old conceptualization could be discarded and a balancing approach could temporarily fill the theoretical void while the Court groped towards a conception more attuned to the times. Of course, there was the risk that balancing's flexibility would be viewed as unprincipled adjudication.

Aleinikoff, *supra* note 161, at 961.

<sup>163</sup> See, e.g., Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987).

## 1672 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

competing interests.<sup>164</sup> Rules were replaced with standards<sup>165</sup> and laws were replaced with norms.<sup>166</sup>

Methodologically, the legal realists advocated flexible multi-factor balancing tests,<sup>167</sup> which could and did consider interests not only of the plaintiff and defendant, but also of society and third parties.<sup>168</sup> They opposed the (supposedly) rigid, deterministic, formally valid, but substantively empty logic of classical legal scholarship. Formalism, rigid, inflexible, and (supposedly) teleologically blind, could not defend itself in its own terms against the flexible, visionary, balanced realists because realism, unlike classical logic, pretended to understand and deploy psychology and to ignore the form of reasoning and look to the mechanics of the practical workings of power. Thus, realism could claim to perceive issues that formalism (in the interest of objectivity) ignored, and thus be a more accurate and persuasive world view.

The realists argued that rigid formal logic generally led to substantive injustice.<sup>169</sup> In its place, they argued for flexible guidelines, which risk indeterminacy.<sup>170</sup> But flexibility, while it permits the court to decide cases on their individual merits, can also be criticized as capricious,<sup>171</sup> unprincipled, and open to abuse. The legal methods of the realists, though flexible or supple, are also indeterminate. The legal realists reject binary bright-line categorical analysis in favor of multivariate balancing tests.<sup>172</sup> That rejection is not generally well-founded. Though the realists' epistemology leads to an erroneous general methodological rejection of categorical analyses, the alternative methodology they propose is not necessarily more objective. Indeed,

<sup>164</sup> Frank N. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 40 (1988).

<sup>165</sup> Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 543 (2000).

<sup>166</sup> Sidney W. DeLong, *Placid, Clear-Seeming Words: Some Realism About the New Formalism (with Particular Reference to Promissory Estoppel)*, 38 SAN DIEGO L. REV. 13, 50 (2001).

<sup>167</sup> Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567, 2624 (1993).

<sup>168</sup> "Methodologically, legal realism is a pluralistic view that marshals a multi-disciplinary analysis of the constitutionality of speech incorporating historical, linguistic, social and political insights." Alexander Tsesis, *The Boundaries of Free Speech*, 8 HARV. LATINO L. REV. 141, 152 (2005).

<sup>169</sup> For a brief overview of realism and an attempt to both criticize and ameliorate realist discourse, see Anthony D'Amato, *The Limits of Legal Realism*, 87 YALE L. J. 468 (1978).

<sup>170</sup> Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

<sup>171</sup> Lynne Marie Kohm, *A Reply to "Principles and Prejudice": Marriage and the Realization that Principles Win over Political Will*, 22 J. CONTEMP. L. 293, 325 (1996).

<sup>172</sup> For a discussion of balancing tests in legal theory and pedagogy, see James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003 (1985).

how could it be given the subjectivism of the realists' epistemological and axiological assumptions? Both balancing tests and bright-line categorical analyses are not necessarily well founded, but they can be if their terms are certain. Terms are certain if they are empirically verifiable. However, empirical verifiability, in a world of subjective moral values, leaves but one standard—cash money. Thus, any attempt to use legal realism to impel necessary fundamental reform to an ossified constitutional structure is doomed from its inception. For realism ultimately compels us, perhaps surprisingly, to the marketplace.

Contemporary legal epistemology follows the realists' lead and tends (incorrectly) to reject bright-line categorical tests and other methods derived from formal logic on the following grounds:

While categorical analyses are unambiguous, they are, at best, teleologically blind and, at worst, teleologically vicious.

(a) When teleologically vicious, formal manipulations are nothing more or less than the mask of class dominance.<sup>173</sup>

(b) When teleologically blind, formal manipulations ignore whether substantive outcomes are just and elevate the procedural form over the substantive result.<sup>174</sup>

The realists' conclusion—laws of formal logic, such as *tertium non-datur*, the law of identity “*A* or *not A*,” and categorical bright-line analysis—must be rejected in the name of substantive justice. In their place, flexible (or manipulable) balancing tests should be adopted.<sup>175</sup> The rejection of formal logic is, however, ill founded. While some realists pretend to be post-modernists, applying value neutral language, they do in fact make moral choices. However, their moral values are not

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<sup>173</sup> The legal realists, Tushnet explained, demonstrated the indeterminacy of legal doctrine, which meant that rules and precedents could be manipulated to produce often contradictory legal outcomes. The result was, the realists argued, that the explanation for these outcomes must be sought outside of the system of legal doctrine, in the sociology of power.

Morton J. Horwitz, *Mark Tushnet*, *Legal Historian*, 90 *GEO. L.J.* 131, 131-32 (2001).

<sup>174</sup> See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976).

<sup>175</sup> See Eric Allen Engle, *When is Fair Use Fair?: A Comparison of E.U. and U.S. Intellectual Property Law*, 15 *TRANSNAT'L LAW.* 187 (2002).

## 1674 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

those of feudalism or even liberalism. Critical scholars reject patriarchy and capitalism, which is a *normative* (i.e., *moral*) choice.<sup>176</sup> This explains why radical critique should not be quick to reject morality or normativity, as radical discourse is also normative and must be if it wishes to effectuate change.

Categorical analysis, a formalist method, requires an exact methodology (i.e., terminological and empirical certitude and strict application of formal logic). Recall, however, the linguistic critiques of Saussure and Quine, which explain why categorical logic was rejected by the realists. Since the realist revolution of the 1930s, categorical formal methods are criticized and generally rejected as rigid, inflexible, and formalism. However, early realists' rejection of formal logic, which they characterize as rationalization, is simplistic: the realists ignore that formal logic and empiricism are perfectly compatible as methodological tools in the search for truth. If balancing tests, favored by the teleological interpretation realism prescribes, can be evaluated and determined according to objective empirical evidence, then so too can bright-line categorical analyses. There is no empirical difference between determining the weight to be assigned to a factor in a multi-variant balancing test and determining whether a bright-line threshold has been crossed. The realist argument that flexible "balancing tests" are better than formalist, bright-line tests is thus empty.

This Article has just shown why the realist critique is overly-simplistic; that critique also goes too far. The realists argue that formal logic is at least abused, if not misused. Logic can, of course, be abused. However, the realists ignore that formal logic is only contingently, and not necessarily, manipulable.<sup>177</sup> The manipulability of formal logic is contingent upon a combination of terminological inexactitude—which can exist—and intellectual dishonesty: it is not inevitable. If all formal logic were merely a manipulation designed to mask the raw exercise of power, then logical argument would be pointless.<sup>178</sup> Again, that would force us into fascism's *volonté de puissance*. For the strong, that is not a problem, but supposedly radical critique claims to want to advance the

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<sup>176</sup> How can we distinguish *norm* and *morés*? The *norm* is that which is customary, habitual and thus seen as normal. These terms seem synonymous.

<sup>177</sup> This argument requires that one understand that contingent truth is only potentially true depending upon circumstances whereas necessary truths are true in all times and places.

<sup>178</sup> A post-modernist paradox: If no truth exists, how can the truth that there be no truth exist? This alone should demonstrate the flaw of epistemological nihilism and/or moral relativism.

interests of the poor, the downtrodden, and the suffering. Consequently, radical critique will never be arguing from a powerful position where it can simply force its objectives on the agenda. Rather, all altruistic efforts at bettering the lot of those less fortunate must ultimately argue persuasively from compassion because the dispossessed lack the instruments of state power.

Not only does regarding formal logic as mere manipulation—the mask of power—lead us to voluntarism and the fascist *reductio*, it also is self-contradictory and leads to a conclusion which, like the paradox of the unknowing knower, voids most nihilist discourse. Logical contradictions thus undermine most relativist theses, whether such discourse is presented as legal realism or post-modernism. Members of both schools of thought assert that there is no truth or that all truth is relative. That position leads to an antinomy. It is illogical to use logic to argue that one cannot use logic. If there were no truth, or if all truth were relative (to what?), then statements such as “there is no truth” or “all truth is relative” would be logically empty of meaning. But if such statements are logically empty, they cannot be the foundation of an argument for the result is infinite regress. The antinomic conclusion is the inevitable conclusion which most post-modern and realist epistemology leads to and must lead to if one takes their assertions of truth nihilism or relativism seriously, and not as a mere sensationalist foil for a healthy truth skepticism which they generally are.

Although post-modernism taken to its logical conclusion leads to an impermissible antinomy, a qualified realism is admissible. The statement “the abuse of formal logic leads to some injustice” is perfectly admissible (i.e., that statement is formally valid, empirically true, and possibly even necessarily true). This qualified realism is admissible and does not overstate the realist critique. Truth sceptics and realists have some points—logic can be, and sometimes is, manipulated. But truth sceptics and realists should be careful not to take their points too far lest nihilism annihilate their own discourse. That annihilation—the negation of the negation,<sup>179</sup> so to speak—necessarily occurs whenever realists or post-modernists assert a truth statement purporting to negate the existence of truth statements. This annihilation happens, for example, when they attempt to simultaneously assert that “all moral values are relative” and “no truth exists.” Those two statements are, in fact, logically incompatible. They cannot be asserted simultaneously in

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<sup>179</sup> Friedrich Engels, *Anti-Dühring* (1877), available at <http://www.marxists.org/archive/marx/works/1877/anti-duhring/ch11.htm>.

logical discourse. They are antinomic, the former, heterologically and, the latter, autologically.

This leads to the conclusion that the realists overestimated the difficulties of linguistic indeterminacy and formalism's elevation of form over substance. Thus, substituting interest balancing tests for bright-line categorical tests may not have been necessary. Furthermore, interest balancing tests are generally ambiguous. What factors are chosen? What weight are the factors given? How is that weight measured? Thus, realism is an imperfect solution to an ill-defined problem, as interest balancing is just as manipulable as bright-line, categorical hermeneutics.

*B. Realism Set the Stage for Law and Economics*

Legal realism has given judges the necessary tools to allow the deployment of their *subjective* will—in the search for substantive justice—without any moral *telos* (final design) to guide that will. Despite flaws in the relativists' positions, their arguments have been so successful that contemporary values generally are only considered in market terms.<sup>180</sup> Moral values are generally ignored as being subjective and/or indemonstrable and/or unscientific in contemporary legal discourse.<sup>181</sup> As a result, economic analysis is ascendant. This is because economic analysis can claim to be objective, and thus scientific. Economic arguments appear to be objective because they appear to be empirically quantifiable, therefore verifiable, and thus objective. Of course, a searching critical regard shows that economic analysis carries

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<sup>180</sup> See, e.g., RICHARD POSNER, *THE ECONOMICS OF JUSTICE* (1981). Posner's arguments are certainly coherent and internally consistent—but equating justice to the marketplace requires several unrealistic assumptions (rational profit maximizing economic actors, fungible goods, no transaction costs) and is in the end likely wrong. There are values which are non-fungible: they're called human rights. *But see* *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand's test).

<sup>181</sup> See, e.g., Nigel Purvis, *Critical Legal Studies In Public International Law*, 32 HARV. INT'L L.J. 81, 94 (1991). Purvis argues, incorrectly, that liberalism postulates that value is subjective.

The second premise of liberalism is the principle of subjective value. This radical epistemology emphasises that moral truth and moral worth are subjective, because as an epistemological matter universal morality is unknowable. There is no accessible "objective value," "intelligible essence," "virtue," or Platonic form. There can be "no natural distinctions among things, nor any hierarchy of essences that might serve as the basis for drawing up general categories of facts and classifying particulars under those categories."

*Id.* But Purvis confuses epistemological dualism with axiological cognitivism. It is perfectly possible to be both an ontological or epistemological materialist and a moral cognitivist.

its own biases and that some objects do allow economic analysis—markets with very few or even no actors, for an easy example. Externalities<sup>182</sup> and the question of fungibility also explain why skepticism towards the universality of market values is justified. Economic agents are not always rational profit maximizers.<sup>183</sup> Goods are not always fungible or alienable, nor should they always be.

The teleological critique of formalism presented by realism depends upon an objectivist axiology, which realism helped to destroy.<sup>184</sup> Realism's inability to elaborate a viable axiology is one more reason why the realist critique of legal methodology, which is ultimately a critique of formalism's supposedly absent teleology, failed.

If all moral values are merely subjective, then only economic values are scientifically objective (i.e. quantifiable and verifiable). Thus, the judicial willpower realism unleashed is now exercised to serve the interests of the wealthy because only economic values can claim to be objective in a world that holds moral values are intersubjective. Moral values have been eclipsed by economic values because contemporary epistemology is generally skeptical toward the existence of truth and rejects the existence, or at least the cognizability, of objective moral values. If "no truth exists" or "all values are relative"—statements that were shown to be illogical but were nonetheless in vogue because they are shocking (thus getting media attention), and their less extreme versions, are well-founded—then economic empiricism is the only remaining scientific argument. Taking the gambit of moral relativism in an attempt to change failed values is a dead end. It prevents elucidating any new values to replace the failed old ones. This vacuum is then filled by "objective" economic values, which merely ensure the continuation and even exacerbation of income inequality, patriarchy, and social injustice.

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<sup>182</sup> Efficient markets "require that participants have perfect information, incur no transaction costs, and that there are no externalities not reflected in the market information . . ." Patrick J. Ryan, *Rule 14a-8, Institutional Shareholder Proposals, and Corporate Democracy*, 23 GA. L. REV. 97, 169 n.295 (1988).

<sup>183</sup> "[F]ew (if any) sellers are always rational profit-maximizers." *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1275 (E.D. Pa. 1987); see also *USX Corp. v. United States*, 12 C.I.T. 205, 210 (1988).

<sup>184</sup> These facts help to explain some of the paralysis and cacophony in contemporary legal theory, especially in contemporary American legal theory.

C. *Critique of Realist Legal Method*

Rather than arguing within the presumption that economic value is the only value, or the only objective value, methodological critiques of economic analyses are more effective when they question the epistemology upon which balancing tests are founded. An epistemological critique of the realists and post-modernists is possible because truth negationist epistemology is incorrect. True statements do in fact exist. It is true that not all arguments are verifiable and that not all arguments are falsifiable. It is also true, however, that some arguments may be verified, or at least falsified, and that not all arguments that are falsifiable necessarily imply a verifiable contrary position. Thus, the critiques of formalism may not be as strong as commonly believed. Further, we can use formal logic to question the validity of balancing tests. Are balancing tests objective or predictable? If they are not, are they manipulable? What does that imply for the rule of law?

Limiting the inquiry here to the mechanics of legal balancing tests, the first question is whether the balancing tests proposed by realists are, or can be, on solid empirical foundations. When balancing tests are applied by relativists, they lose their material foundation. Even with a proper material foundation, however, balancing tests are still questionable. Are balancing tests truly objective? Do they lead to foreseeable, predictable outcomes? The manipulability even of empirically justified balancing tests arises in the answers to two questions: (1) Which factors are chosen to be balanced? (Note that a pure economic analysis will exclude certain factors and privilege others); and (2) What weight are the chosen factors given?<sup>185</sup> The strength of economic analysis is its ability to provide an objective standard by which to weigh various factors in balancing tests—if we assume that markets exist and clear, goods are fungible, and there are no significant externalities, all of which are large assumptions. However, sometimes some or all of those assumptions are true. But more often than not, one or more of those criteria will be lacking in any market analysis.

The answers to the questions “which factors” and “what weight” are ultimately determined not by democratic process (which at least would support intersubjectivism), but rather by judicial decision. One of the principled reasons for judicial reluctance to intervene in political issues

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<sup>185</sup> Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1254 (1999).

prior to 1937 was that judicial decisions are un-democratic. Court judgments were seen as legitimate prior to the realists because they were the product of logic. But if logic and judicial decision-making are unconnected or unconnectable, then judicial decision-making is just an undemocratic exercise of raw power. If judicial willpower (as opposed to objective reasoning) determines “which factors” and “what weight,” then we are brought out of the pseudo-objective world of intersubjectivism into exactly the legal world the realists predicted and criticized – one in which reason is rationalization. Realism thus scores at least two own-goals: first, it opens the door to law and economics, and, second, it is a self-fulfilling prophecy and reduces legal decision to mere rationalization. However, while legal realism’s prophecies may appear self-fulfilling, they are not. A monist materialism approach would lead to objectively verifiable and foreseeable outcomes.

Another methodological critique of realism and its progeny looks within realism to compare “vague,” “manipulable,” and “teleologically blind” outcomes, generated by supposedly flawed formalism and categorical analysis that (supposedly) ignore substantive justice, with the outcomes generated by balancing tests.<sup>186</sup> In fact, we can see that balancing tests are no less vague and, in fact, more manipulable than so-called “bright-line tests” and “talismans.” Balancing tests imply multiple poles of interest and more terms of analysis, and thus provide greater room for the exercise of *de facto* legislative power – by judges. Realism represents no progress toward objectivity.

Despite these facts:

- (1) The realists’ epistemology can be defended, though only in a qualified manner. Truth negationism is inadmissible, but truth skepticism is permissible.
- (2) The realists’ preferred methodology, balancing tests, can be just as objective as categorical bright-line analyses if, and only if, factors are specified and objectively weighed.

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<sup>186</sup> See, e.g., *Balancing Tests*, *Legal Theory Lexicon*, [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/02/legal\\_theory\\_le\\_1.html](http://lsolum.typepad.com/legal_theory_lexicon/2004/02/legal_theory_le_1.html) (last visited Feb. 14, 2007); Iddo Porat, *The Transformation of American Constitutional Balancing: The History of Constitutional Balancing from Holmes to the Present Day* (2005), (unpublished article), available at <http://law.bepress.com/expresso/eps/733/>.

(3) The realists' methodology is no more capricious than categorical analyses because it is empirically grounded upon data which are often, though not necessarily, quantifiable and verifiable.

This explains why so much super-structural foment has had so little actual affect on relations of production within the United States. In the 1930s, America faced an economic crisis that, with the exception of hyperinflation, was just as serious as that facing Germany at that time.<sup>187</sup> The democratic response to the economic crisis was less effective than the fascist response. The war fought and won, trends already begun in 1917—the feminization of the workplace<sup>188</sup> and the civil rights movement—intensified. Yet, these massive social movements had only little influence on the law. Likewise, the counterculture protests of the 1960s were also a radical change in sexual and race relations—with few formal legal impacts, especially when viewed in the long term.<sup>189</sup> “Black is beautiful,” “affirmative action,” and “women’s liberation” have all been contained and defanged as bases for radical critique of the American empire, which is bad for Americans because the only critique possible is the critique of the gun carried out by the Intifadah, by Hamas, the insurgents, and those labeled terrorists. Is a boy throwing stones at a tank in his neighborhood a terrorist? What about the jet jock 10,000 feet up raining death down on him and his relatives? Today we see the same types of radical protest gathering that rocked the world in the 1960s. If

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<sup>187</sup> From 1930 to 1940, federal spending tripled in volume as new programs were created and old ones expanded in a costly effort to revive the collapsing economy. As a share of the gross domestic product (GDP), federal spending rose from 3.4 percent in 1930 to 9.8 percent in 1940. Yet, despite this unprecedented surge in spending, America’s GDP fell by 27 percent part way through the decade and by 1938 was less than two percent above its 1929 level. For American workers, the failure of this spending spree to do anything more than expand the deficit and bureaucracy was devastating. The number of unemployed more than doubled from 2.8 million at the beginning of the decade to 6.9 million in 1940.

Dr. Ronald D. Utt, *Lessons on How NOT to Stimulate the Economy* (2001), available at <http://www.heritage.org/Research/Budget/BG1495.cfm>.

<sup>188</sup> George Mason University, “Continued Employment after the War?”: *The Women’s Bureau Studies Postwar Plans of Women Workers*, <http://historymatters.gmu.edu/d/7027/> (last visited Feb. 14, 2007).

<sup>189</sup> E.g., Daniel Gutman & Tyler Lewis, *In the Wake of Proposal 2’s Passage, Affirmative Action Supporters Look to the Future* (Dec. 21, 2006), available at <http://www.civilrights.org/issues/affirmative/remote-page.jsp?itemID=29141557>. “With the passage of Proposal 2, Michigan becomes the third state after California and Washington to ban via ballot initiative affirmative action and equal opportunity initiatives in state contracting, education, and employment.” *Id.*

they are to have any impact on the legal system, then they require a correct theoretical base on which to found arguments and make demands of the system that profits from oil wars.

Under the right circumstances, these subsurface waves of conflict break out into tempests in the "real world" of *praxis*. The war in Iraq and the abject failure of the United States government to do anything but squander resources may provide those circumstances. Conditions are aligning, which are going to force people into asking radical questions. Why is the United States fighting wars for oil? Why does it not consider alternatives, such as ethanol, bicycles, and trains? The real question of 9/11 is not who knocked down the towers, but rather *why* the towers were knocked down. The real question in Iraq is not how to win an unwinnable war. The real question is why is the United States fighting a war in a country that not only did not regard bin Laden as an ally, but also saw him as an enemy and did not fund him? An even tougher question that deserves to be asked is why the C.I.A. funded bin Laden in the first place? These facts show that the United States military industrial complex is beyond civilian control and must be reined in, which requires fundamental reordering of American intellectual discourse around the idea of natural law. This Article has attempted to show just how that can be done.

#### V. CONCLUSION: BEYOND LEGAL REALISM

This Article explains some of the foundations of contemporary legal method and shows how post-modernism tends to take these theories too far. It also shows that contemporary understandings of Hume go too far in attributing positions to him that he did not enunciate. Hume never refutes the existence or possible existence of morality, either as a concept or an object of cognition. Rather, Hume "merely" seeks to place the burden on whoever seeks to express moral choice to show the connection between normative and positive statements. However, that is a trap because the transition cannot be proven in Hume's dualistic universe. Hume's trap, while devastatingly subtle, is founded on a false dualistic postulate, which he presents as self-evident, that there be a fundamental difference between statements of fact and statements about fact (i.e., between "is" and "ought"). Hume is one more example of dualism creating false dichotomies, "man/woman," "master/slave," "man/animal," "self/other," etc. Hume's dualist ontology and

1682 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 41

epistemology<sup>190</sup> (“is”/“ought”) parallels Descartes’ ontological dualism (god:man::man:animal) and Plato’s epistemological dualism (form>matter).

The bitter irony is that the very people who claim to recognize and wish to end the problem of suffering arising out of dualism are doing exactly what they should not. Post-modernism and legal realism, instead of concentrating on the dualism that is the source of the problem of alienation and oppression, contents itself with ineffective and self-defeating gambits that backfire by unknowingly replacing moral values with economical ones.

The cognition of moral values as statements of social fact (i.e., that X persons in Y region believe in the truth of statement Z) is a better explanation of how statements such as “there is insufficient food in Ireland” and “thus we must donate food” can escape from enthymeme and become well formed practical syllogisms. Hume does not overtly reject Aristotle’s practical reasoning (*phroonesis*) and the practical syllogism that embodies it. Instead, Hume sets a trap for the unwary: he places the burden of proof that a normative or practical syllogism is well-formed squarely on the shoulders of he who presents it—where it belongs—and leaves open the relativist possibility as a gambit. Post-modernism took that gambit and falls into his trap. This explains why the heir to legal realism, Critical Legal Studies, is going nowhere.<sup>191</sup>

The implication of these theoretical positions for legal methodology is that legal methods predicated upon overly-broad interpretations of Nietzsche and Hume, such as legal realism and post-modernism, must be reconsidered. The post-war rise of legal balancing and the pejorative characterization of objective logic as “formalism” are errors in legal methodology, which rob law of objectivity and open it to accusations of perpetrating systemic injustice. Such accusations are often well-founded. But to identify a problem correctly (unfair laws) does not necessarily mean that one has also identified the correct solution (rejection of formal logic). Such was the case of the legal realists and the

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<sup>190</sup> “According to Hume, all mental activities are perceptions. Perceptions are of two kinds, impressions and ideas. . . . Reason is of two kinds: comparing ideas (relations of ideas) and inferring matters of fact . . . .” Capaldi, *supra* note 34, at 126. It is exactly this dualism which the author regards as the source of conflict in Western theory and praxis.

<sup>191</sup> Critical Legal Studies (“CLS”) failed due to a lack of radical commitment. CLS theory was closet Marxism and so went nowhere because it did not commit to Marx and was decimated by the same relativism that undercut realism. See, e.g., E. Dana Neacsu, *CLS Stands for Critical Legal Studies, if Anyone Remembers*, 8 J.L. & POL’Y 415 (2000).

2007]

*Beyond Legal Realism*

1683

post-modernists. Without the correct tools to combat injustice, no progress would be possible.

To develop correct legal methods tools we must first understand and reject dualism and philosophical idealism (platonian formalism and its *eidos*). Platonism is the usual root of natural law thinking, but not a necessary one. We must develop an objective axiology based on a monist-materialist foundation. With correct epistemology and axiology, we can then examine legal methodology as it manifests in cases and constellations of cases to determine the best methods to attain both transactional (arithmetic) and social (geometric) justice. Undoubtedly, new legal methods will arise and old ones are reformed or rejected. Consequently, theory will be put into practice in the interests of justice. That is a much greater task than could be outlined in this Article, but it is a first step to attaining that goal.