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Jeffrey M. Lipshaw

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CONTRACT FORMALISM, SCIENTISM, AND THE M-WORD: A COMMENT ON PROFESSOR MOVSESIAN'S UNDER-THEORIZATION THESIS

*Jeffrey M. Lipshaw**

Professor Mark Movsesian has proposed an interesting thesis on the similarities and differences between classical and contemporary contract formalism.¹ He compares the work of Samuel Williston, exemplifying the classical formalism of the early twentieth century, with contemporary contract formalism, which arises primarily out of an academic consensus that contract law should be directed to economic efficiency, and formalism, which at least in most circumstances, promotes efficiency and welfare maximization. The most significant difference is what Professor Movsesian describes as the under-theorization of classical formalism. Perhaps to oversimplify, classical formalism was concerned with the pragmatic resolution of doctrinal disputes, and the development of a coherent body of contract law as a self-contained body, proceeding, by and large, by means of deductive or inductive logic, from case to case to case. Contemporary formalism, by comparison, is theorized because legal scholars now attempt through cross-disciplinary study to explain why formalism, normatively, is preferable to the alternatives.

Professor Movsesian's essay strikes tantalizingly close to the broader problem: Just what is it that contemporary law professors are doing when they theorize? We see this in the discussion of the changing relationship between the law faculty and the rest of the university

* Associate Professor, Suffolk University Law School; Visiting Associate Professor, Tulane University Law School. I am grateful for the kind encouragement and helpful comments from Mark Movsesian, Chris Cotropia, Frank Snyder and Nathan Oman. More importantly, I am grateful for Professor Movsesian's scholarship on Williston, particularly the long view of the way legal scholars fit into their times.

1. See Mark L. Movsesian, *Formalism in American Contract Law: Classical and Contemporary*, 12 IUS GENTIUM 115 (2006) [hereinafter Movsesian, *Formalism*]. For an even more thorough analysis of Williston's jurisprudence, see Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005) [hereinafter Movsesian, *Williston*].

community: Williston and his contemporaries thought of themselves more as lawyers than as members of the broader university; in contemporary legal academia, the rhetoric, if not the reality, is now clearly reversed.² I want to suggest, however, an area in which there is a consistency to the under-theorization between the classical and the modern contract formalists, and that is the extent to which theorization in anything that approaches metaphysics is, and has been, consistently anathema.

In the same way that academic philosophy has, over the last hundred years, retreated from an emphasis on morality to an emphasis on analytics³—and, I suspect, has also lost most of the audience outside the academy for serious but accessible philosophy—so too legal theorizing—at least in my area, that concerning business—has turned away from philosophical inquiry into the intuitions on which practitioners rely, looking instead to social science analytics as the primary tool of research.⁴ If we accept social science methodologies as the means of theorizing, Professor Movsesian is undoubtedly correct. Compared to the output of contemporary scholars, the classicists were wildly under-theorized. But there is a consistency as well: Williston helped institutionalize the revulsion for metaphysics in the law, and contemporary formalists have no apparent interest in reviving the M-word subject.⁵

I agree with Professor Movsesian: Much of what contemporary formalists have developed in the study of private law is rich. We do ourselves and our students a disservice, however, when we fail to question the normative assumptions that necessarily must underlie the theorizing. Hence, the only philosophical grounding of formalism has come—implicitly or explicitly—from the pragmatists, a school of thought that only developed about the same time that Williston was writing on contract law. Economics and pragmatism both take practical and instrumental reasoning towards ends as the primary focus; neither—for different reasons—wants to spend time contemplating whence comes the end.

It is hardly surprising that Williston's formalism and contemporary formalism each reflect a predominant philosophical world view of their

2. See Movsesian, *Formalism*, *supra* note 1, at 141-42.

3. See Catharine Pierce Wells, *Why Pragmatism Works for Me*, 74 S. CAL. L. REV. 347, 350-51 (2000).

4. So, for example, intuition might be studied as "heuristics" under behavioral economics.

5. Credit to Nathan Oman for the use of the term "M-word" for metaphysics in a talk to the Wake Forest faculty in the fall of 2005.

times.⁶ Williston sought to make contract law coherent by identifying through induction the correct principles that informed judicial opinions.⁷ The great pragmatist John Dewey wrote: “The striving to make stability of meaning prevail over the instability of events is the main task of intelligent human effort.”⁸ Williston described law as a pragmatic science and “one that must be judged by its real world application”;⁹ Dewey as well saw the resolution of contingencies not in philosophical speculation, but in the work of science:

Philosophies have too often tried to forego the actual work that is involved in penetrating the true nature of experience, by setting up a purely theoretical security and certainty. The influence of this attempt upon the traditional philosophic preference for unity, permanence, universals, over plurality, change and particulars is pointed out, as well as its effect in creating the traditional notion of substance, now undermined by physical science.¹⁰

Indeed, Williston expressly cautioned against the mixing of law and metaphysics.¹¹

As Professor Movsesian correctly observes, the predominant world view of the legal academy today is centered in the social sciences, and particularly economics.¹² Moreover, the preeminent spokesman for law and economics has been Richard Posner; behavioral and institutional economics as applied to the law are largely reactions to perceived limitations of Posner’s rational choice model.¹³ Posner’s world view is not just economic, it is scientific, and based in a kind of post-modern “pragmatic skepticism” that is frankly derisive of metaphysical contemplation.¹⁴ Moreover, the alignment of science and pragmatism is

6. Williston taught at Harvard from about 1890 to about 1950. See Movsesian, *Formalism*, *supra* note 1, at 127.

7. See *id.* at 133-31.

8. JOHN DEWEY, *EXPERIENCE AND NATURE* 50 (Dover Publ’ns 1958).

9. Movsesian, *Formalism*, *supra* note 1, at 128 (citation omitted).

10. DEWEY, *supra* note 8, at xi.

11. See Movsesian, *Williston*, *supra* note 1, at 213 n.36.

12. Movsesian, *Formalism*, *supra* note 1, at 126. For a general discussion of the turn to social scientism, see Bongo Adi et al., *Rational Choice, Scientific Method and Social Scientism* (Sept. 7, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799584.

13. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473 (1998) (advancing “an approach to the economic analysis of law that is informed by a more accurate conception of choice, one that reflects a better understanding of human behavior”).

14. I have previously discussed pragmatism generally, as well as Judge Posner’s brand of pragmatism, and his disdain for metaphysical speculation, at length. See Jeffrey M. Lipshaw, *Contingency and Contracts: A Philosophy of Complex Business Transactions*, 54 DEPAUL L. REV.

no coincidence: “[P]ragmatists are thoroughgoing empiricists and therefore find traditional epistemological questions nonsensical.”¹⁵

Pragmatism is defined by its lack of adherence to any particular dogma; its normative principle is that one should do whatever works to accomplish the end one wants to accomplish. Compared to the subjective musings of philosophy, the inquiries of science that reach objectively into nature are better, “because reached by method which controls them and which adds greater control to life itself, method which mitigates accident, turns contingency to account, and releases thought and other forms of endeavor.”¹⁶ The goal is commendable, particularly in today’s world: Better to avoid the dangers of philosophic contemplation of truth—with its inherent tendency to find absolutes and extremes—and simply act in this world to make things better.¹⁷

Still, even if one is not an absolutist or extremist, one might still be interested in contemplating the possibility of universals. Pragmatism hails its own lack of interest in the determination, much less discussion, of that subject. Indeed, it is a world view that has a hard time making clear just what it stands for, and an even harder time generating passion around it.¹⁸ Legal pragmatists, like their philosophical antecedents, believe knowledge is “contextual”—embodied in language, experience, culture and practice—and “instrumental”—it is meaningful only as a tool to solve real problems.¹⁹ As a general statement, pragmatists employ a methodology toward resolution of legal issues that rejects the grounding of law in any single overriding value, doctrine, policy, or set of principles.²⁰ They look to “practical reason,” but not the practical reason that Kant holds may access *a priori* moral imperatives. It is instead “intersubjective understanding through ‘dialogue, conversation, undistorted communication, communal judgment, and the type of rational wooing that can take place when individuals confront each other

1077, 1109-13, 1120-25 (2005). I think Judge Posner’s point is that the ultimate questions with which metaphysics concerns itself can never be resolved, and hence it is a useless and wasteful endeavor.

15. Wells, *supra* note 3, at 356. To her credit, Wells offers a sympathetic, if to me unsatisfying, defense of pragmatism.

16. DEWEY, *supra* note 8, at 70.

17. *See id.* at 52-77.

18. To take a historical example, we are stirred by the passion of a Patrick Henry on liberty or a Nathan Hale on love of country, but one great American is known because he was the embodiment of pragmatism. Yet, can anyone remember anything that Senator Henry Clay of Kentucky, the Great Compromiser, actually said?

19. *See* Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2075-79 (1996).

20. *See id.* at 2082-85.

as equals and participants.”²¹ And legal pragmatists reject sharp distinctions between ends and means:

[G]oals themselves are never final; “they are at best momentary resting points whose attainment has further foreseeable consequences desirable or undesirable; hence they must themselves be evaluated as means relative to those consequences.” Similarly, the means we select to accomplish our ends are not exclusively instrumental; “activities, however instrumentally conceived, are to be evaluated by their intrinsic satisfactions or frustrations as well as by their consequences.”²²

Our students will face *ex ante* questions of not just legal but moral choice, and what concerns me is whether we have armed them—either as lawyers or human beings—with any theoretical basis for grappling with those questions other than the tools of doctrine and the descriptive observations of social science. The problem is our long-standing discomfort with metaphysics, and the resulting default to an implicit philosophy of scientism—perhaps it is simply not our job to provoke our students on issues of moral ends, and theorizing on that subject is not our department. It is certainly the case that we are unlikely to find determinate answers. Indeed, the Kantian scholar Christine Korsgaard has captured the sense of futility and indeterminacy that leads us away from metaphysical contemplation and toward science (either physical or social): “It is the worry that nothing will count as reflective success, and so that the work of reflection will never be done.”²³ So the study of intuition, judgment and choice becomes not the philosophical inquiry into free will and determinism,²⁴ but the current flurry around the relationship of brain science and the law.²⁵

21. *Id.* at 2087 (quoting RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 223 (1983)).

22. *Id.* at 2093 (quoting Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 854-55 (1989)).

23. CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* 94 (1996).

24. See Donald Davidson, *Mental Events*, in *ANALYTIC PHILOSOPHY* 252, 252-62 (A.P. Martinich & David Sosa eds., 2001); see also Donald Davidson, *Actions, Reasons, and Causes*, in *ANALYTIC PHILOSOPHY*, *supra*, at 332, 332-41.

25. On the scientific side of the ledger, see DANIEL C. DENNETT, *BREAKING THE SPELL: RELIGION AS A NATURAL PHENOMENON* (2006); LAURENCE R. TANCREDI, *HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY* (2005); DANIEL M. WEGNER, *THE ILLUSION OF CONSCIOUS WILL* (2002); Daniel M. Wegner, *Précis of The Illusion of Conscious Will*, 27 *BEHAV. & BRAIN SCI.* 649 (2004); Peter Westen, *Getting the Fly Out of the Bottle: The False Problem of Free Will and Determinism*, 8 *BUFF. CRIM. L. REV.* 599 (2005); Owen D. Jones, *On the Nature of Norms: Biology, Morality, and the Disruption of Order*, 98 *MICH. L. REV.* 2072, 2102-03 (2000) (reviewing FRANCIS FUKUYAMA, *THE GREAT DISRUPTION: HUMAN NATURE AND THE*

What does this have to do with contract formalism? Only that we are fooling ourselves if we think scientific theories of the law, whether grounded in classical doctrine or contemporary social science, are ever going to be instructive to lawyers making a decision about what to do when faced with moral or legal choice. As Professor Korsgaard responded to the scientific determinists in *The Sources of Normativity*, it is not to deny the possibility one might have predicted that I was bound to choose the way I did, but to suggest that knowing that my decisions are predictable will not affect the way I choose.

The Scientific World View is a description of the world which serves the purposes of explanation and prediction. When its concepts are applied correctly it tells us things that are true. But it is not a *substitute* for human life. And nothing in human life is more real than the fact we must make our decisions and choices “under the idea of freedom.” When desire bids, we can indeed take it or leave it. And that is the source of the problem.²⁶

I can speak from years of experience in the law firm and corporate world: Lawyers and business clients are no more interested, on the whole, in philosophical theories of human behavior than they are in scientific theories. Practicing lawyers do not think about philosophy in their work any more than they consider microeconomics, game theory, chaos theory or other scholarly attempts to make sense of, and predict, what they do and why. It is a pragmatic world out there, particularly with respect to ideas: They are meaningful to the extent that they are useful. And, by and large, deep theory, whether metaphysical or economic, is not useful, any more than understanding the computer science theory underlying Microsoft Word has any use to me as I am typing right now.

But I do see a connection between moral philosophy and the real world. Contract law in its broadest sense has to do not just with economic efficiency, but with solving problems, with getting along, with facing uncertainty, and is merely one way human beings go about

RECONSTITUTION OF SOCIAL ORDER (1999)). On the other side, see Brian Leiter & Michael Weisberg, *Why Evolutionary Biology Is (So Far) Irrelevant to Law* (Univ. of Tex. Sch. of Law Pub. Law & Legal Theory, Research Paper No. 89, 2006), available at <http://ssrn.com/abstract=892881>; John Mikhail, *Aspects of the Theory of Moral Cognition: Investigating Intuitive Knowledge of the Prohibition of Intentional Battery and the Principle of Double Effect* (Georgetown Univ. Law Ctr. Pub. Law & Legal Theory Working Paper Series, Paper No. 762385, 2002), available at <http://ssrn.com/abstract=762385>; Leon Wieseltier, *The God Genome*, N.Y. TIMES BOOK REV., Feb. 19, 2006, at 11 (reviewing DENNETT, *supra*).

26. KORSGAARD, *supra* note 23, at 97 (quoting IMMANUEL KANT, THE METAPHYSICS OF MORALS 6:378 (Mary J. Gregor ed., 1991) (1785)).

dealing with each of those issues. Going beyond the descriptive, or challenging the implicit normative in what passes as explanatory, can take us uncomfortably close to M-word issues, like the issues of freedom and autonomy Williston put aside and to which we as an academic discipline have largely not returned. The richness comes about because we do not all have to or want to speak from the same world view, but there are world views, particularly around ethical issues in the face of what passes as rational self-interest, that are as under-theorized as ever.

I am not comfortable with a world in which the only theorization around contract language is that which looks to economic efficiency—or even reconciles efficiency with fairness. I am even less comfortable with one in which law students who will enter the business world simply accept ends—whether or not reflected in the contract language—or are pragmatically skeptical as to any expression of ends, or see their place in the world as nothing more than sources of instrumental reason by which one argues for a particular interpretation of the formal contract language. The academy is not alone in its move to the cross-disciplinary; modern business recognizes as well that boundaries and barriers between disciplines, like law and engineering and accounting and manufacturing, impede speed and productivity. A business lawyer advising a technology start-up, or acting as a member of the executive team of a large corporation, can no longer—at least if she is to be effective—maintain what in Williston's era was, no doubt, a professional distance from the client.²⁷ Hence, it is not surprising that Williston believed classroom discussion of political economy, sociology, and philosophy would detract from subjects of “more direct professional importance.”²⁸ Yes, contract law is more theorized now than in Williston's day, but it is overwhelmingly theorizing of a particular form: dispassionate social science inquiry into how we tick, rarely questioned but implicit norms shaped solely around the utilitarian, if not material, consequence of choices, all seasoned by the occasional post-modern expression of futility and desperation around the indeterminacy of moral issues. It does not address the way we might think about solving the problem outside of

27. See generally NOEL M. TICHY, CONTROL YOUR DESTINY OR SOMEBODY ELSE WILL: HOW JACK WELCH IS MAKING GENERAL ELECTRIC THE WORLD'S MOST COMPETITIVE CORPORATION (1993) (discussing among other things Jack Welch's concept of “boundarylessness” in business).

28. Movsesian, *Williston*, *supra* note 1, at 228 n.148 (quoting Samuel Williston, Book Review, 43 HARV. L. REV. 972, 974 (1930) (reviewing J.H. LANDMAN, THE CASE METHOD OF STUDYING LAW (1930))).

the formal models—whether classically or economically based—of the law.²⁹

One of the most articulate and accessible legal metaphysicians at work currently is Professor Steven D. Smith. His book *Law's Quandary*³⁰ poses the question why, if we all acknowledge we are now legal realists, and the law is the product of social, personal and political influences, do we, as lawyers and judges, continue to speak of the law as though it were there to be discovered, à la Langdell or Williston, pre-existing but untapped, the work of some unnamed Author? I think it is clear from Smith's final chapter that he wants to believe there is an Author—God.³¹ His careful dance around the subject was the point of Justice Scalia's review of the book.³² As I have made clear in previous writing, I am willing to live with the paradox that it feels like there are universals to be discovered; nevertheless we will only approach and never reach understanding of them. Professor Smith recognizes the frustration in coming to terms with perpetual perplexity.³³ I too am afraid that the dominance of scientism and pragmatism are a way to justify the complete abdication of the struggle.

Debating contract law not just in the context of pragmatics of instrumental reason, but as part of a broader inquiry into and struggle with the ends to which any endeavor is directed, seems to me one of the most important things we can do “to help prepare our students for the world of the professional lawyer.”³⁴ To quote the Ethics of the Fathers in the Talmud: “You are not required to finish the task but neither are you at liberty to desist from it.”³⁵ And perhaps, if we expand our theorizing so as to unpack the normative from the putatively descriptive, permit just a smidgen of metaphysical inquiry into the ends and means of making commitments to each other, we might well find an area of high theory in which even practitioners are interested.

29. I want to distinguish my criticism of wholly scientific world views, in which we somehow come to believe that life should approximate the model (in this case, contract law), from what I think is a far more fruitless endeavor: an attempt to ground the social institution of contract law in metaphysics. See my article *Duty and Consequence: A Non-conflating Theory of Promise and Contract*, 36 CUMB. L. REV. 321 (2006). It is not surprising that Williston disdained any “attempt to derive the principles of contract law from metaphysical philosophy. Such an approach would be a waste of time—an excursion into cloud-land.” Movsesian, *Williston*, *supra* note 1, at 232-33 (quoting SAMUEL WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* 203 (1940)).

30. STEVEN D. SMITH, *LAW'S QUANDARY* (2004).

31. *See id.* at 176-79.

32. Antonin Scalia, *Law & Language*, FIRST THINGS, Nov. 2005, at 37, 46 (book review).

33. *See* SMITH, *supra* note 30, at 179.

34. Movsesian, *Formalism*, *supra* note 1, at 144.

35. PIRKEI AVOT, ETHICS OF THE FATHERS, 2:21.