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#### Citation Information

Pierre Schlag, *The Anxiety of the Law Student at the Socratic Impasse - An Essay on Reductionism in Legal Education*, 31 N.Y.U. REV. L. & SOC. CHANGE 575 (2007), available at <https://scholar.law.colorado.edu/faculty-articles/343>.

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Citation: 31 N.Y.U. Rev. L. & Soc. Change 575 2006-2007

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# THE ANXIETY OF THE LAW STUDENT AT THE SOCRATIC IMPASSE—AN ESSAY ON REDUCTIONISM IN LEGAL EDUCATION

PIERRE SCHLAG\*

Law school teaching has a pervasive centralizing, homogenizing tendency. This pervasive, centralizing, homogenizing, tendency—I will call it centrism—registers its effects in ideology, but also more broadly in the student's intellectual life, her career choices, and her psychological orientation.

Centrism celebrates moderation, reasonableness, good judgment, avoidance of extremes, following the norm, judicial minimalism, the passive virtues, balancing, and the middle of the bell curve. Centrism pulls to the center (not because the center has any particular content, but because, well . . . it is the center). Described in this way, law school centrism exerts influence on any political spectrum one might imagine as being in place (no matter how skewed to the left or the right one might consider this spectrum might be).

But centrism is not just (nor perhaps even mainly) an ideology. It is not just a constellation of beliefs that are invoked repeatedly as the prisms or templates or frames through which reality is described and experienced. Centrism is also a set of practices, institutional norms, and behaviors.

What follows is a brief description of a few related law school training processes that combine in various ways to yield this centralizing and homogenizing effect. At the outset, it's important to recognize, of course, that law school also has broadening and even polarizing tendencies. And it would be interesting to investigate the mechanisms that yield polarizing tendencies. A more complete picture would require such an inquiry, along with the more interesting exploration of how the polarizing and centralizing tendencies are related: opposition, symbiosis, parasitism, dialectical progression, cycling? But here, in this preliminary sketch, I wish to focus on its narrowing effects (which strike me as generally important but undernoticed). For the most part, law school teaching is organized around the review, dissection and assimilation of judicial opinions. For the student, this will mean reading (or at least, assuming responsibility for) approximately 10,000 cases<sup>1</sup> over a three-year period.

There are many justifications for this massive exposure to case law, some of which are even persuasive. But opening up thought processes and stimulating imagination are probably not chief among them. Those are not *the ends* to which

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\*© by Pierre Schlag. Byron R. White Professor of Law and Associate Dean for Research, University of Colorado Law School. Much of this essay has previously appeared in an online version at <http://agora.stanford.edu/agora/volume2/schlag.shtml>.

1. Actually if one discounts note cases, the number assigned is probably closer to four or five thousand, but why quibble?

judicial opinions are written. On the contrary. The *sine qua non* of the judicial opinion—one of the things that makes it an opinion as opposed to say, a poem or an essay—is that it is supposed to shut down thought. The judicial opinion is organized in terms of that crucial moment where the court declares: “It is so ordered,” or “judgment reversed,” or some such thing. An opinion brings into play a whole network of canonical meanings, performances, power relations, institutional mechanisms and genuflections that lead most of the relevant readers (for instance, the parties) to actually heed the order and do something fairly close to what the opinion seems to require.

These opinions, strategic though they may be, do have moments of intellectual curiosity and imaginative openness. And indeed, upon first coming to law school, the law student may often be surprised to discover—through the reading of a judicial opinion no less—that a problem once thought simple is in fact complicated, ethically ambivalent, and, perhaps, even tragic. The student may learn something about the vulnerabilities and orientations of his or her own beliefs.

Some of the best judicial opinions do indeed traffic in thoughtfulness and self-reflection, and they do so in ways that are often far more sophisticated and more serious than, say, analytical moral philosophy. There is much to be learned from judicial opinions. Nonetheless, it is important to remember what these texts are designed to do and what role they play. The moment of openness and imagination is in service of the moment of closure, not the other way around. If judges seek out complexity and edification (and often they do), it is not because these things are valued for their own sake. They seek out complexity and edification, all the better to bring about a successful closure that will put the issues to rest.

In the study of law and in law school training this dialectic of openness and closure is repeated in a homologous set of well-entrenched, recurrent tensions, including:

- Legal formalism v. Legal realism;
- Law as professional school v. Law as graduate school;
- Neutral decisionmaking v. Contextual decisionmaking;
- Theory v. Anti-theory;
- Law as rules v. Law as judgment;
- Law as science v. Law as craft;
- Formalization of law v. Deformalization of law;
- Legal dogmatics v. Legal rhetoric;
- Rules v. Standards.

Law students and law professors often take explicit “stances” on these oppositions—arguing in favor of a move towards one side or the other or striving to subsume or envelop one within the other. Indeed, a great deal of law school discussion occurs within the terms described by these oppositions. In taking stances within these oppositions, law students internalize the tension. No law student or law professor is ever fully at one end or the other. On the contrary, they are torn to varying degrees between the pull of one side and the other. Later, as lawyers and judges, the law students will become the walking-talking sites through which these tensions are mediated.

Significantly, the poles of the tensions are not accorded symmetrical value. In law school, the ideal of law is, by and large, associated with formalism, theory, science, and neutrality, etc. By contrast, their opposed members arrive on the scene in a supporting or critical role. Legal realism, contextualism, de-formalization, and anti-theory, etc. arrive on the scene of legal education as protestant tendencies, as efforts to moderate and reform the legal ideal.

In the law student, the tensions are reproduced as a movement from openness to closure:

From relatively wide-ranging class discussions to the black letter issue-spotting exam;

From reading the cases (first semester) to reading the outlines (thereafter);

From critique of the case law to assimilation of the doctrine;

From class participation to passive listening;

From passive listening to solitaire;

From open-ended job futures to interviewing with firms on campus.

These movements are in turn a mimesis of the movement from college to law school. Having learned to become open via the “mushy thinking” of undergraduate education, the student then learns to be closed via the hardheaded rigor of law school. In college the student has been groomed in the great humanistic texts. But in law school, this openness (mushy-headed thinking/tolerance) will effectively be brought towards closure (rigor/narrowness).<sup>2</sup>

The effect is to centralize and homogenize the law student’s intellectual possibilities. Once the tensions, asymmetry and all, have been internalized, the law student becomes a kind of human funnel—the medium that regulates the traffic between openness and closure. This capacity will, of course, be immensely useful in practice. Indeed, one of the crucial tasks of lawyering and

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2. See Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1589–90 (1990) (describing closure as a key function of legal rhetoric).

judging is to organize the chaos of facts into the ordered patterns of law. Judges and lawyers often deal with intractable social economic and political disputes. Their ability to translate these intractable and often very messy disputes into a uniform and ostensibly univocal language is what enables resolution.

The movement from openness to closure is not the only tendency in law school: there are obviously broadening tendencies as well. However, it is difficult to resist the sense that the broadening effects are peripheral—affecting only a limited number of law students, and then not very profoundly.

### CASE LAW POSITIVISM<sup>3</sup>

At many law schools, jurisprudence is a small elective course. It is often viewed by other law professors as (1) the repository for all the failed theories of law expounded in the last 2000 years (with special attention to the Hart/Dworkin debates); and/or (2) a specialized province where some of the minor analytical kinks in the nearly perfected edifice of American law can be worked out; and/or (3) specialized provinces where certain client groups (ethnic minorities, women, analytical philosophers, and gays) are enabled to theorize their limited partial perspectives on law.

All this is by way of saying that in the American law schools, a particular school of jurisprudence has already won out. The triumph of this school of thought is so complete, so pervasive, that it is not even seen as a school of jurisprudence, but as “law,” pure and simple. I will call the school that has won out “case law positivism.” By way of elaboration, simply imagine here a kind of ALI Restatement of Law (Generally).

#### **214 Law (Generally):**

Law is principally what courts say it is. Or to put it conversely: By and large, it is law if the courts have announced it as such. Courts construct law from artifactual forms known as doctrines, rules, policies, principles, opinions and holdings—all of which can be moderately modified by reference to each other in approved ways.

Judges interpret these artifactual forms to produce a normatively right result. Sometimes the judges succeed. Sometimes they fail. Unless the result is normatively very, very wrong, what the judges say is law.

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3. The name and the concept are inspired by Jefferson Powell's expression, “Court-positivism.” See H. Jefferson Powell, *Constitutional Law as Though the Constitution Mattered*, 1986 DUKE L.J. 915, 915 (1986) (reviewing WALTER F. MURPHY, JAMES E. FLEMING & WILLIAM F. HARRIS, II, *AMERICAN CONSTITUTIONAL INTERPRETATION* (1986)) (“‘Court-positivism’—the almost automatic assumption that the Constitution is indeed ‘what the judges say it is.’” (citations and footnotes omitted)).

Law is limited in scope and substance by realpolitick considerations (e.g., the expenditure of the court's capital) and the identity of judicial personnel (e.g., the Rehnquist Court). In certain situations (particularly in constitutional law or in other subject matters residing in the vicinity of the grundnorm) it is permissible to appeal to natural law-like considerations, but only sparingly.

Law is relatively determinate at the core/center, but there is some uncertainty/vagueness/indeterminacy at the periphery/penumbra. In the latter cases, it is politics, good judgment, common sense, realpolitick, etc. that help produce a decision.

Now, this is a very crude vision of law, and few legal professionals would admit that it is their view of law. Nonetheless, I think this is a fair account of the unconscious, default—the background-normal—view of law often operative among many law students and law professors.

Among the many reasons that this crude view of law is not generally recognized is that attention is directed elsewhere. This crude vision of law is often manifested in a highly evolved, extremely intricate, complicated version—otherwise known as “court watching.” Many legal academics are court watchers. They dutifully monitor the output of the courts in a particular subject matter area: bankruptcy, First Amendment, etc. Since there is so much material to learn, master and integrate, this enterprise is extremely time-consuming and difficult. If one is going to engage in court watching and try to organize/reduce the output of the courts into something that looks like a body of knowledge, it will help considerably to have a simplified understanding of the identity of law. Uniform units of analysis (doctrine, policy, principle), uniform objectives (deterrence, compensation, retribution) and uniform argument types (rule/standards, rule/exception) are extremely helpful.

If, as a law professor or law student, one is focused on mastering the growing corpus of cases, one may (helpfully) fail to notice that amidst the tremendous intricacy and variegation, the underlying jurisprudential vision is often fairly crude. Court watchers cannot be faulted for this: if one is going to engage in court watching, it is difficult to imagine how anyone could perform such an encyclopedic endeavor without a simplifying/simplified jurisprudential vision.

Still, the automatic default status of case law positivism has a reductionist and homogenizing effect—politically, ethically, psychologically and intellectually. It takes real effort for both law professor and student to realize that case law positivism is not simply and obviously “law” but merely one vision of law among others.

There is an important intellectual and political significance to the dominance of case law positivism. Not only does case law positivism effectively canonize a certain jurisprudential vision, but it generally marks out the boundaries within which classroom discussion will occur. For instance, given the present case law,

a constitutional law teacher might well counterpose *Roe v. Wade*<sup>4</sup> with *Planned Parenthood of Southern Pennsylvania v. Casey*.<sup>5</sup>

By contrast, it is extremely unlikely that much class time will be spent criticizing the opinion in *Roe v. Wade* for curtailing the woman's right to choose in the third trimester. The bounds of class discussion are thus often set by stereotypical devices such as:

Majority opinion v. Dissenting opinion

Present opinion v. Previous opinion

Majority rule v. Minority rule

Rule v. Exception

The disputes before the courts—in light of their probable beliefs—largely define the intellectual, aesthetic, and political spectra within which classroom arguments occur.<sup>6</sup>

#### THE ANXIETY OF THE LAW STUDENT AT THE SOCRATIC IMPASSE

Much of the time, working within the regime of case law positivism can be extremely tedious. However, working in this regime is not—definitely not—entirely dead or deadening.<sup>7</sup> In law schools one learns strategies for the organization and mastery of data, for the production and manipulation of belief, for the tracing of consequences, and for the questioning of truth—all of which are quite simply invaluable. Case law positivism contains many difficult puzzles that can be interesting to figure out. Furthermore, one can encounter ethical and political dilemmas in ways that are at once salient and chilling. There can be lots of great—truly great—things learned in law school.

And yet, it seems undeniable to me that legal education reduces cognitive and intellectual possibility in important ways. The overwhelming triumph of case law positivism is one culprit. But there is another as well: a lot of what one learns in law school is nonsense—albeit organized nonsense.<sup>8</sup>

4. 410 U.S. 113 (1973).

5. 505 U.S. 833 (1992).

6. See, e.g., Phyllis Goldfarb, *Pedagogy of the Suppressed: A Class on Race and the Death Penalty*, 31 N.Y.U. REV. L. & SOC. CHANGE 547 (2007) (arguing that by enmeshing judicial opinions within their pertinent historical, doctrinal, cultural and human contexts, the tendency of legal doctrine to quash progressive thought can be overcome).

7. Though one can argue quite colorably that the doctrinal project (*qua* intellectual endeavor) was exhausted a long time ago. See generally John Schlegel & Alfred Konefsky, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833 (1982). I have to say, it's been a long time since I've encountered a new doctrinal move—a new way of drawing a distinction, a new test to reconcile oppositions. It's pretty dead out there.

8. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591 (1982).



In the early days of the Critical Legal Studies movement, much effort was aimed at showing the ways in which legal thought was nonsense. In particular, Critical Legal Studies thinkers spent a great deal of time demonstrating that legal process jurisprudence, the neutral principles school, grand normative theory and contemporary versions of doctrinal formalism were incoherent.<sup>9</sup> Today one still encounters nonsense—in law school classes, judicial opinions, and law review articles:

Speculative assertions (“this rule will deter . . .”) are presented as if they were knowledge already acquired.

Ad hoc judgments (“this consideration outweighs . . .”) are advanced as if they were the products of a secure methodology.

Ungrounded prudential judgments (“judicial restraint will avoid backlash . . .”) are put forward as if they were inexorable entailments of social wisdom acquired through long years of practical experience.

Flips between incompatible jurisprudential visions (for example, between realism and formalism, deontological ethics and consequentialism) often occur in the space of a single paragraph, sometimes a single sentence.

Parts are torn from the seamless web of law as if they were careful definitions of a discrete scope of inquiry.

Parts are analyzed without reference to their wholes.

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9. Representative works include: Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Mary J. Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377 (1985); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984); Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984); John Henry Schlegel, *Notes Toward an Intimate, Opinionated and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Peter Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25 (1980); Alan David Freeman, *Legitimizing Racial Discrimination through Anti-discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–41*, 62 MINN. L. REV. 265 (1978); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975); ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975).

Parts are analyzed without recognition that they belong to many different wholes.

Partial/personal perspectives are announced as if they were universal or transcendental truths about the human condition.

One could go on.<sup>10</sup> What is nonsensical about these procedures is not so much their substance—who after all is free from tearing into the seamless web?—but rather in the ways these procedures are offered up. Often these procedures rest on no more than beliefs or judgments or hunches. And yet they are routinely offered up in law school classes as if they were secure productions resting on truths and knowledge already acquired.

But enough of this. On to a different question: what does it do to the law student to internalize nonsense—to believe as truth or knowledge what is merely technique or belief?

There is a wonderfully iconic moment that marks this threshold event—a moment that is experienced by many law students. Typically, it occurs sometime during the first semester of law school, and it goes something like this. The law student is sitting in class, following the argument. Things are going really smoothly, until the professor says something that seems to make no sense to the student at all. It could be the idea that “tort damages function to make the victim whole.” It makes no sense to the student, yet she, along with the rest of the class, is asked to believe it. And to believe it not simply as a fiction, but as truth. Or more subtly, she is asked to believe this as a fiction and then by repetition throughout the semester, she comes to believe the fiction as a truth. But back to the crucial moment now: even though the idea that “tort damages function to make the plaintiff whole,” makes no sense to her, she does not raise her hand. She does not say, “I don’t understand. How can it be that . . . ?” She does not say it because she does not want to look stupid. Or perhaps she figures she missed something or . . . whatever.

This is the iconic moment of truth: the anxiety of the law student at the Socratic impasse. My guess is that many (most?) law students will react to this anxiety with complacency. The student will say to herself: “Well, that’s just the law and that’s the way things are done here in the law, even if it doesn’t make sense.” Now, there are two interesting versions of what she’s telling herself. She could be saying: “Well that’s just the law, and how screwed up is that? I’ll just go along with it, but I’m not going to believe it for a second, and I’ll do my own analysis, thank you very much.” Or she could be saying: “Well that’s the law, and it has its own reasons, and I’m going to just go with it because, well, it’s the law.”

Now if she does the latter, and my best guess is that many (most?) law

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10. For a more thorough review of this type of legal nonsense, see Al Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 *BUFF. L. REV.* 383 (1979).

students do, she has surrendered . . .<sup>11</sup> From that point forward, she will play a Socratic game that in many ways asks/invites/compels her to believe a lot of nonsensical things, and—perhaps even more important—to believe them as if they were truth or knowledge already acquired.

In order to continue believing those nonsensical things, she will have to avert her gaze, avoid certain inquiries, and discount certain arguments. She will have to ignore all kinds of things. Now, we all do that to varying extents in many aspects of our lives. And indeed, all academic disciplines need to do that to get off the ground. But we should be concerned about the fact that in law school, this is occurring because she is in an institution that is designed to funnel her experience along a trajectory designed not to edify or illuminate, but to shut things down.

She will dumb down. She will start answering questions like:

“Is this case correctly decided?” when she should be asking back, “Correctly decided by reference to what?”

“Does this rule work?” when she should be asking back, “Work for whom?”

“Is this consistent with . . . ?” when she should be asking back, “What’s consistency got to do with it?”

“Which aspect or factor is predominant, primary, or more important here?” when she should be asking back, “How could I tell? How could you tell? How could anyone tell?”

Repeatedly, she will be asked and will answer some version of that quintessentially juridical question: “How can something whose essential identity is to be two or more things at once be in fact just one of those things?”<sup>12</sup> This, by the way, is very nearly always the issue to be resolved in an appellate opinion (though, it is rarely presented that way).

She will learn a series of ways of answering the question:

On balance, predominantly, primarily, principally, taking all the considerations into account, in the totality of circumstances, it is

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11. . . . for the time being. She can, of course, reverse her decision. Maybe a 2L course in some obscure subject will help. Maybe a random experience will jolt her out of her complacency. Or maybe it will be the not-so-gentle therapeutic effects of law practice that will prompt an awakening. Lots of things can happen. But my point is that there is a pre-scripted, already-institutionalized pathway prepared for her. It may not be determining, but it is unmistakably there for her.

12. With apologies to Thomas Reed Powell who is reported to have said, “If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind.” THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 101 (1935).

more one thing than the other.

It was intended to be one thing, not the other.

It cannot reasonably be said to be the one thing, therefore it must be the other.

Traditionally, customarily, historically, or internationally, it has been treated as one thing and not the other.

The majority rule says it is one thing and not the other.

The better view says it is one thing and not the other.

It will be more practical, useful, efficient, or fair to treat it as one thing rather than the other.

A comparative impairment analysis shows that we ought to treat it as one thing and not the other.

Blackstone says it is one thing.

I am not saying that it is wrong to teach such things. In one sense, it is absolutely necessary to teach such things: it is part of law-talk. But law professors should not present techniques as if they were established truths, nor beliefs as if they were already acquired knowledge.