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Pierre Schlag

University of Colorado Law School

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A BRIEF SURVEY OF DECONSTRUCTION

*Pierre Schlag**

INTRODUCTION

A brief recollection of Derridean deconstruction (as if in a dream):

The dangerous supplement

Différance

The absence of the Transcendental Signified

The myth of origins

Sous Rature

Play

(And so on)

A brief description of the background-normal view of positive law operative among American legal professionals (as if in an ALI restatement):

§ 214 Law

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.

Law is limited in scope and substance by realpolitick considerations (e.g., the expenditure of the court's capital) and the identity of

* Pierre Schlag is Associate Dean of Research and Byron R. White Professor of Law at the University of Colorado. For comments and criticisms, I wish to thank Sarah Krakoff and Bert Westbrook.

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.¹

Given the juxtaposition above, it would be a wonder if deconstruction had ever had anything of value to say to the champions of positive law. The projects of deconstruction and positive law, as juxtaposed above, seem so starkly different, so obviously askew to each other, as to preempt any significant encounter—beyond perhaps an immediate reciprocal repulsion.

And yet in various regions of the American legal academy—regions not quite free of the gestures of positive law, yet not entirely beholden to positive law either—some attempts at negotiation did occur. That is what I will focus on here. I want to suggest that some important things were learned in these encounters. Deconstruction, of course, never made much headway in the American legal academy. It was at most an irritant. And yet in the effort to neutralize this irritant, American legal thought revealed itself—its structure, its fundamental operations. It was not pretty, but it was illuminating.²

Not only were the aesthetics of deconstruction and positive law discordant, but the gestures of deconstruction were utterly askew to the practice of legal thought in the American legal academy. One major problem for the advent of deconstruction in law was a function of deconstruction's apparent lack of any transparent normative or political content. American legal thought was relentlessly normative in character. The *pièce de resistance* in legal scholarship—the law review article—was a display of advocacy (modeled more or less loosely on appellate argument) and aimed at prescribing some rule, method, theory, or the like to a judge or a judge-surrogate. The end-line of this prototypical artifact was, “And therefore the court should, or we should

¹ This is a very crude vision of law. Few (if any) legal professionals would describe their view of law in this way. But there is a big difference between what one describes as one's view of law and the view of law one actually deploys when one is ostensibly doing legal exegesis. The former, not surprisingly, tends to be far prettier, far more sophisticated and coherent than the latter. Here I am more interested in the latter. For elaboration, see Pierre Schlag, *Ten Thousand Cases Maybe More—An Essay on Centrism in Legal Education*, 3 AGORA (2002), <http://agora.stanford.edu/agora/volume2/schlag.shtml>.

² See Peter Goodrich, *Pierre the Anomalist: An Epistemology of the Legal Closet*, 57 U. MIAMI L. REV. 791 (2003).

or somebody should. . . .”

Not all law review articles were normative in this literal sense. As with all prototypes, there were significant departures or variations—attempts by legal scholars to provide descriptive accounts, to do history or sociology or the like. But even then, the question haunting such efforts was still: What should the court do; what should we do? The fact of the matter is that *the practice* of American legal thought was relentlessly normative.

Moreover, even in the case of interdisciplinary or transdisciplinary work, the rhetoric of legal thinkers continued to be ruled by the essentially norm-focused rhetoric of the appellate brief. When legal thinkers did “theory” they tended to do it as an appellate advocate might do theory. To be sure, the nature of the citations changed—from U.S. Reports to “Philosophical Investigations”—but the rhetoric (not to mention the blue book symbols) remained much the same.

The advent of deconstruction in the legal academy thus required a certain negotiation with the settled practice of normative legal thought. Some of the negotiations displayed a certain self-awareness of the difficulties and some clearly did not. Over all, it’s safe to say that most legal academics who thought at all about deconstruction received it in such a way as to leave their own normative and political commitments intact—indeed, unquestioned. How this happened is the rest of the story.

I. CLS AND DECONSTRUCTION

It was thinkers associated with Critical Legal Studies (“CLS”) who played the major role in introducing deconstruction to law.³ Much of CLS scholarship had been, following Duncan Kennedy’s example, structuralist in character. Much early CLS work charted the recurrence of certain “contradictions” (rules vs. standards, altruism vs. individualism, public vs. private, etc.) within various discrete local regions of positive law.

Given Derrida’s well-known deconstruction of structuralism,⁴ the background for the introduction of deconstruction had already been

³ See Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1277-96 (1984); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); David Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251 (1985). Later came Jack Balkin, who wrote an article explaining deconstruction to legal academics. See J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929 (1988).

⁴ JACQUES DERRIDA, *Structure, Sign and Play in the Discourse of the Human Sciences*, in WRITING AND DIFFERENCE 278 (Alan Bass trans., 1978).

established. Moreover, the challenge posed by deconstruction to the very idea of law made deconstruction appealing to the anti-legalist strand of CLS thinkers. Then, too, a number of the new entrants into the legal academy had been trained in poststructuralism during their undergraduate educations. The advent of deconstruction in American legal thought was thus, as we used to say, overdetermined.

In much of the CLS literature, deconstruction was transposed into the already well-honed rhetorical space of critical analysis.⁵ Deconstructive moves were used as a way to reveal the lack of coherence and conceptual integrity of doctrinal fields.⁶ Deconstruction used in this way tended to be highly conceptualist in character—engaging doctrine at its own highly formalistic level. This effort was a product of a deliberate choice among many CLS thinkers to engage doctrine and doctrinal argument on their own turf.

Doctrine was engaged at a formalistic level in the sense that CLS thinkers deployed deconstruction on law in the books, not law in action. Hence, the texts subjected to deconstruction were, by and large, appellate judicial opinions, legal doctrine, the ALI Restatements, normative doctrinal scholarship, and normative legal theory.⁷ As critical analysis of this corpus juris, deconstruction was used to reveal the terms suppressed by legal discourse; to recover the suppressed terms and to re-introduce them into the discourse. Deconstruction was used as a kind of ground-clearing exercise. Leftist political commitments though, were generally left intact—beyond the reach of deconstruction.

The deployment of deconstruction, of course, could not itself furnish any argument as to the political content of norms or ideals. This realization led to the perception of a kind of schismatic or disjunctive quality to CLS deconstructive work: the deconstructive tendency did not self-evidently conduce in any clear way to the CLS advocacy of leftist politics. The connection between the two required an ungrounded existentialist leap of faith. Some critics of CLS took this to be a fatal problem for critical thought (almost always without any supporting argument). Meanwhile, some CLS thinkers readily acknowledged, indeed affirmed, the *aporia*. Admittedly, it was occasionally odd to see someone engaged in deconstruction of an aspect of law and then, suddenly, jump ship and advocate for his or her preferred norm in all its

5 In one sense, deconstruction is not critical analysis at all. It is instead a type of interpretive practice or activity used to show how texts produce their meaning. When, however, this interpretive practice or activity reveals conceptual or rhetorical operations that do not conform to the regulative ideals of the genre (a genre like law, for instance) then deconstruction also emerges as critical analysis.

6 See Frug, *supra* note 3; Dalton, *supra* note 3; Peller *supra* note 3.

7 These canonical texts were generally read by CLS thinkers as a typical law professor might read them (as propositional truth-claims about law) rather than as a lawyer might read them (as tools for the strategic behavior: leveraging, coercing, threatening, inducing and so on).

logocentric grandeur. It was particularly bizarre as seen from the perspective of deconstruction. The deconstructionist, after all, was letting loose an unlimited infrastructural critique. To borrow a metaphor from Duncan Kennedy, deconstruction was “viral.” There was no internal reason for the epidemic to stop.

Nonetheless, the CLS thinkers did attempt to stop the play of deconstruction. They attempted to stop the play, precisely at the point where the deconstruction had reconceptualized the field so as to enable the advocacy of a preferred political prescription. In this, the CLS thinkers followed a familiar pattern in American legal thought—one in which a critique is launched and then artificially arrested at precisely the point where the rhetorical terrain has been reconfigured to enable the articulation of a positive normative program.⁸ The realists did this. CLS did it too. The Federalists do it still.

In all candor, it is very hard (impossible?) not to do this *at some point*. Nietzsche warns of what lies at the end of the line:

Imagine the most extreme example, a person who did not possess the power of forgetting at all, who would be condemned to see everywhere a coming into being. Such a person . . . sees everything in moving points flowing out of each other, and loses himself in this stream of becoming. He will, like the true pupil of Heraclitus, finally hardly dare any more to lift his finger.⁹

If it were possible for deconstruction to go on forever, it certainly wouldn't be very appealing. But then again, going on forever in this way is not really an option. As one of my friends put it, sometimes we have to break for lunch.

The real risk, I think, is that the deconstruction is terminated too soon. And in this respect, one can certainly fault American legal thinkers for being too hesitant, too fearful, in pursuing deconstruction wherever it might have led. Deconstruction was, from the very start, offered too small and too miserly a field of play.

II. THE NON-ENGAGEMENT OF THE LIBERAL LEGAL ACADEMY

As an intellectual matter, the legal academy's response to Derrida and deconstruction was a study in dismissiveness and non-engagement. If one looks back at the mainstream legal literature addressing deconstruction in the 80s and 90s, the question is not so much whether the mainstream critics of deconstruction read Derrida well, but whether they read him at all.

⁸ Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1729-30 (1991).

⁹ FRIEDERICH NIETZSCHE, ON THE USE AND ABUSE OF HISTORY FOR LIFE (Adrian Collins trans., 2d ed. 1957).

Whatever the answer to that question, Derrida did excite some professional anxiety. Even if he wasn't read by the mainstream critics, many of them obviously felt some compunction to dismiss him and his followers.

Why?

My best guess is this: "Deconstruction" was understood or misunderstood to be whatever it was CLS thinkers did. In turn, what CLS thinkers did was threatening to the legal academy because it rendered mainstream legal scholarship an essentially meaningless enterprise.

To appreciate the point, one must think about CLS themes not jurisprudentially, but instead psychologically—that is to say, in terms of what the CLS themes portended for the career of a mainstream legal thinker. To say, as CLS thinkers did, that law was "*indeterminate*" was to say that the arguments of mainstream legal scholars were essentially gratuitous. To say that law was "*incoherent*" or "*contradictory*" was to say that law was not really an academic discipline fit for the university. And to say that law was *politics*—perhaps the most cutting claim of all—was in effect to render the mainstream legal thinker's self-abnegation before the edifice of an objective law a transparently ridiculous gesture.

All of this could have been played out as comedy or satire. Only it didn't. And to understand why, we must imagine the mainstream legal thinker in his office, slowly and painstakingly sifting through endless judicial opinions, exercising magisterial self-restraint, carefully marshalling arguments in favor of some modest legal proposition. All that effort. All that sober work. And if the CLS themes are right—all for nothing.

III. DECONSTRUCTION AS TOOLKIT

Another way of negotiating the reciprocal repulsion of positive law and deconstruction was to frame deconstruction as a technique, a method, an analytical instrument for the lawyer's toolkit. Jack Balkin was pre-eminent in this framing of deconstruction.¹⁰ In one sense, this was a genial way to render deconstruction useful to the academic elaboration of positive law. Since deconstruction had no normative agenda and since law was supposed to be "neutral," why not consider deconstruction a kind of all purpose reasoning tool, ready for use to anyone? In this view, deconstruction would need (just like other forms

¹⁰ See Balkin, *supra* note 3, at 743-44, 764-67. As Balkin put it, "[d]econstruction by its very nature is an *analytic tool*." *Id.* at 786 (emphasis added).

of legal reasoning) a supplemental normative orientation to give it direction. And this normative supplement would be furnished by the normative projects of the legal thinker.

This was a plausible strategy—though problematic in a few ways. First was the obvious fact that to treat deconstruction as a tool, technique, method, etc., flew in the face of Derrida's expressed views.

As Derrida stated, deconstruction allows

for (no) *method*: no path leads around in a circle toward a first step, nor proceeds from the simple to the complex, nor leads from a beginning to an end We here note a point/lack of method . . . : this does not rule out a certain marching order.¹¹

Or more bluntly: "Deconstruction as such is reducible to neither a method nor an analysis (the reduction to simple elements)."¹² And understandably so: to accord deconstruction the status of a tool, technique, or method would be to encase and subordinate deconstruction within a logocentric architecture. In law, to treat deconstruction as a tool would in effect subordinate deconstruction to some normative project chosen by an autonomous individual subject with all the usual attendant metaphysical presuppositions. It would relegate deconstruction to the choices of an autonomous individual subject who could use it for any and all normative ends. This, of course, would be contrary to Derrida's express views:

[Deconstruction is an] incision, precisely [because] it can be made only according to lines of force and forces of rupture *that are localizable in the discourse to be deconstructed*. The *topical and technical* determination of the most necessary sites and operators—beginnings, holds, levers, etc.—in a given situation *depends upon an historical analysis*. This analysis is *made* in the general movement of the field, and is *never exhausted by the conscious calculation of a "subject"*¹³

Whether or not Balkin's reading of Derrida was plausible or right is not really the main issue here. Nor, ironically, was it the main issue in my earlier piece—where I argued that Balkin's understanding of Derrida was mistaken and symptomatic of the stereotypical operations of the dominant form of American legal thought.¹⁴ That Balkin might have misunderstood Derrida was not (and is not) interesting in and of itself. Indeed, why should we care? What was interesting, as I saw it, is that Jack misunderstood Derrida in a way that was deeply stereotypical

¹¹ JACQUES DERRIDA, DISSEMINATION 271 (Barbara Johnson trans., 1981).

¹² JACQUES DERRIDA, *The Almost Nothing of the Unpresentable*, in POINTS . . . INTERVIEWS, 1974-94, at 78, 83 (Elisabeth Weber ed., Peggy Kamuf trans., 1995).

¹³ JACQUES DERRIDA, POSITIONS 82 (Alan Bass trans., 1981) (third and fifth emphasis added).

¹⁴ Pierre Schlag, "Le hors de texte, c'est moi": *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990).

of the practice of American legal thought. The interesting thing, then, is not that Jack might have had Derrida wrong, but rather that the way he got Derrida wrong so aptly revealed the stereotyped infrastructure and operations of American academic legal thought. For me, it was a kind of *a fortiori* moment. Here was this practice (deconstruction) that was implacably resistant and antagonistic to norm advocacy and here was this legal thinker (Jack) who unselfconsciously read this practice as a technique, a tool, for norm advocacy. If this could happen—and Jack was a smart guy—then what we had *a fortiori* was a truly remarkable and powerful professional ideological practice in place. It was that practice—normative legal thought—I then set out to explore and describe.¹⁵

I also argued against Balkin's interpretation because at the time, it seemed to me that his reading of Derrida could help to shut down deconstruction. As I saw it, deconstruction offered an entry into a more radical interrogation of the practice of American legal thought. But Balkin's approach helped to reprieve legal thinkers, progressives and liberals from encountering this more corrosive deconstruction. And many American legal thinkers were only too happy to land upon some account of deconstruction that enabled them to avoid such a radical interrogation.

This was unfortunate, not only for the prospects of deconstruction (whatever those prospects might have been). It was unfortunate as well for liberals and progressives. Indeed, it is conceivable that if liberals and progressives in the legal academy had been less hostile and more intellectually serious in their encounters with Derrida and postmodernism generally, they might have developed a more *salient understanding* of our postmodern legal/political situation. But it didn't

¹⁵ Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN L. REV. 167 (1990). I set out to explore this practice quite conscious of the fact that I was situated within the practice. I could easily have claimed to be "outside" this practice—a kind of freestanding observer exempt from the shortcomings of the practice I was diagnosing. But that would have been silly: a cheap rhetorical trick (albeit one that is terribly common in law review scholarship). I wanted to explore the practice of normative legal thought from the inside as it were. So I situated myself quite consciously within the practice of normative legal thought (although hardly as a paradigm case).

Jack Balkin, among others, seized on this to describe my work on normative legal thought as contradictory or paradoxical as if somehow, this were sufficient to impugn its merits or contributions. But Jack has yet to make the argument that my work is indeed contradictory or paradoxical in any interesting sense. (If I say that I both love and hate English, this is hardly a problematic contradiction.) And Jack has yet to show that the contradictions or paradoxes are fatal—that is to say, that something really, really bad for me or my work follows from any of this. Among the choices available to Jack here would be to say (1) that my work is unintelligible (but I don't think Jack believes that), (2) that my work is dishonest and disingenuous (but I am nothing if not straightforward about what I am doing), (3) that my work fails to comply with commonly accepted disciplinary forms and protocols (yes, and this is news?), and/or (4) that my work is wrong (and here I'd like to see the argument).

happen.

In the end, Balkin's reading of deconstruction as toolkit helped produce an arrested deconstruction. It left the practices of American legal thinkers—their habits, orientations, procedures, protocols, etc.—intact. By confining deconstruction to the rhetorical space of “an analytical tool” this vision did not even preserve the tension between deconstruction and positive law—which the CLS thinkers had, in some measure, maintained as a live problem.

IV. HEEDING THE CALL OF THE OTHER

Yet another negotiation between deconstruction and the enterprise of positive law was facilitated by Derrida himself. This we could call “the later Derrida” and it seems to me that whatever value the later Derrida might have had in the other humanities (we all have different protocols) it was of very little value in the American legal academy.

At the conference at the Cardozo School of Law in 1989, Derrida proclaimed that “[d]econstruction is justice.”¹⁶ Like deconstruction, “[j]ustice is an experience of the impossible.”¹⁷ It is the call of a certain ethical and political relation to “the other”—one that cannot ever fully be realized in law or laws, one whose demands always exceed any reduction to law and laws.

This vision was championed by Drucilla Cornell who wrote:

Deconstruction keeps open the “beyond” of currently unimaginable transformative possibilities precisely in the name of Justice. And so, we are left, as I have argued, with a command, “be just with Justice,” and an infinite responsibility to which we can never close our eyes or ears through an appeal to what “is”¹⁸

Heeding the call of the other—being open to the other—is a responsibility that is in one sense consonant with the early Derrida—that is, with deconstruction. Inasmuch as deconstruction exposes the “suppressions” of the text by which the text attempts to establish its meaning, it allows the retrieval of the excluded, marginalized aspects of the text. If one transposes this sort of gesture to the ethical or political plane, it is easy to see that deconstruction would warrant a certain solicitude for the suppressed other whose voice and views are excluded from the text of positive law.¹⁹

¹⁶ Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”*, 11 CARDOZO L. REV. 919, 945 (1990).

¹⁷ *Id.* at 947.

¹⁸ DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* 182-83 (1992).

¹⁹ See, e.g., Peter Goodrich, *Europe in America: Grammatology, Legal Studies and the Politics of Transmission*, 101 COLUM. L. REV. 2033, 2040 (2001) (likening Derrida's intervention at Cardozo in 1990 to *Of Grammatology*).

This vision of justice as being open to the other was for a time congenial to identity politics. The “other” in this context was understood to refer explicitly to the usual client groups—persons of color, women, gays, etc. Ironically, however, this reduction of the other to a starkly limited set of reified social identities along lines of race, gender and sexual orientation threatened to neutralize openness to the other “others”—those who fell through the cracks, those who registered in different categorial planes, those simply left off the list. In an ironic turn-around, an enterprise aimed at retrieving a suppressed other suddenly turned into a rigid delimitation of the other to a few stark socio-political reifications.

In one sense, such a delimitation was readily understandable. If being open to the “other” did not refer primarily to certain stereotyped social identities, a different problem arose: the other became rather indefinite. Being open to the other is no doubt an elegant, albeit somewhat precious, idea—as far as it goes. But to urge this as some sort of meaningful program for those engaged in the enterprise of positive law is at once trivial and problematic. Positive law (such as we know it) has a vigorous drive for closure—for decision, for categorization, for ordering and so on. And positive law is precisely the enterprise that undertakes the task of deciding how much to be open to the other and which kinds of others to be open to (women, Jehovah’s witnesses, Subchapter S corporations, the disenfranchised, Donald Trump, etc.).

So, in the context of law, the injunction to be “open to the other” turns out to mean something quite different from what it might initially have seemed. What it means is something like this: Be open to the other in a way that is also closed to the other. In other words, it doesn’t mean much of anything at all. As Stanley Fish might say, it is advice one cannot fail to heed. Indeed, one cannot help but be open to the other (in some ways) as well as closed to the other (in other ways).

Now, it is conceivable that, in a specific context, the notion of being open to the other might mean something. For instance, after an altercation between two friends, you might counsel one of them to be more “open to the other.” But here the character of the altercation and the identity of the two friends give meaning to the phrase. After all, you could have said something entirely different such as “Hey, he really does owe you an apology.” Or “just wait, time will help.” Or “I don’t think you two should talk about this anymore.” But to offer up the notion that one should be “open to the other” in general, as a kind of universal advice, is not only meaningless; it is the sort of thing that cannot possibly help. It is simply a re-enactment of the intractable tolerance-intolerance dialectic: One should be tolerant of others except to the extent that they are the kind of others to which one should be

intolerant, and so on and so forth.

Moreover, being open to the other frames the problem in terms of a self-other relation. But for those engaged in the enterprise of positive law, the problem usually takes on a triadic form. The question is how one should relate to *two different and opposed, or even antagonistic, others*. This triadic form is hardly unique to law, but one can say that in positive law, this triadic problematic is at once frequent and intense. Given the highly constrained adversarial character of adjudication and its insistence on closure (i.e., a result), being open to an other almost always entails being closed to another other.

Being “open to the other” in law does not and cannot mean very much. On the one hand, as a formula (which Derrida surely did not intend) the notion is virtually empty. Not only is it nearly empty, but the very enterprise of positive law contradicts this injunction. A positive law without closure would not only be infernal—think of the ALI as “being open to the other”—but it would not be law.²⁰ Moreover, one cannot become open to the other simply by giving one’s self general normative instructions.

CONCLUSION

All these efforts in the American legal academy to negotiate the relations of deconstruction to law and positive law were problematic. Deconstruction was received in the legal academy within a well entrenched institutionalized practice that fashioned legal thought as a kind of normative advocacy deployed by relatively autonomous individual subjects engaged in the enterprises of norm-selection and norm-justification. Nothing, so far as I can tell, has displaced the centrality and dominance of that practice—not deconstruction, not postmodernism, not inter- or trans- disciplinarity, not cultural studies.

As a psycho-social matter, the resilience of normative legal thought in the American law school is entirely predictable. Its continued vitality is, as we use to say, overdetermined.

Existentially, however, the continuation of the practice remains puzzling. Let’s be candid here: normative legal thought may well be difficult to do. And it may be especially difficult to do well. But it is still of no great *intellectual* value. And it remains *aesthetically* compromised. And at least for progressives and liberals (which is to say, the vast majority of legal academics) the practice remains *politically and normatively* ineffectual.

²⁰ At least not as most of us presently understand law. Note that I am not being a semantic imperialist here, but merely making a *contingent empirical presumption* about how most of us understand positive law.

So at the existential level, joining with this practice remains puzzling. Why do this? One person once answered me, laughing nervously: "Because, it's what we do. It's our job." But that's not true: it's not your job unless you make it so.