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My Dinner at Langdell's

PIERRE SCHLAG†

NOVEMBER 15, 2004

It was one of those cold wet April Cambridge mornings. Too wet for fog, but too indifferent for rain. My head ached. My lips were dry and my tongue felt bloated. The fever had surely come back. Worse—the laudanum was wearing off.

Tonight would be dinner at Langdell's. To say I was apprehensive does not quite capture my condition. It was to be an important affair. I had been asked to attend. It felt like a convocation of sorts—though to what end, I remained unaware.

It occurred to me that not everyone is invited to Langdell's for dinner—certainly not wayward law professors from the provinces. This was an extraordinary opportunity. I took out the engraved invitation from my navy overcoat, just to make sure it was really there. It was, of course—though having taken it out three or four times previously this morning, the cream-colored paper fibers had begun to separate. The paper felt gummy and the ink was smudged. I coughed and drew my coat around my shoulders. A drink would help.

Langdell, of course, did not know of my present situation. And realistically, how could he? His professional life ended in 1895 when he retired from The Law School. Mine didn't really begin (if I can call it a beginning at all) until 1991. It would be a chance meeting. By the time I started teaching, he had been dead for nearly 85 years.

I realized, of course, that this would make our encounter all the more difficult, all the more awkward. Indeed, you

† Pierre Schlag is Byron White Professor of Law at the University of Colorado. Professor Schlag denies being the narrator of this piece. Among other things, Professor Schlag has pointed out to us that, unlike the narrator, he does not have a laudanum habit, is not now and has never been a member of the ALI, and has never actually met Langdell.

—Eds.

might reasonably wonder how could we meet at all? A fair question. It is not everyday that a fictional narrator can have dinner with a man who's been dead for close to 100 years. The problems from both sides are significant. The literary challenge alone is immense.

But I will explain. All in due time. I must learn to trust you first. In the past I have trusted too many people, much to my detriment. You must understand. Be patient.

Tonight, there would be nine of us in all—not counting Blackstone and the early Llewellyn. I hoped Langdell would arrange the seating to avoid awkwardness. Preconditions would have to be met—certain elementary dispositions taken. Everything seemed to hang on the seating arrangement.

* * *

When I arrived, Jerome Frank and Ronald Dworkin were already there—seated in big brown leather affairs across from each other, separated only by a small cherry wood table. Ronald was going on at length about the absence of a Nobel prize in law.

"I held up a train last week," Frank offered.

Langdell came out of the kitchen carrying a platter of potato chips with some curious celery things.

"I'm absolutely serious," said Dworkin. "Why isn't there a Nobel prize in law?"

"Three generations of imbeciles are enough!" muttered Holmes from the corner. Martha Minow went to sit with him. She was clearly trying to humor him. "Three generations of imbeciles are enough!" he said more loudly.

"There's no Nobel in law, because it's not a real discipline," shouted Posner from the front hall. He had just come in from out of the rain and was carrying a very wet black umbrella and a thick white manuscript. I could see the umbrella was soaked through.

Dworkin winced. He pulled down the sleeves of his starched white shirt. The sparkling gold cufflinks were perfect, his hair neatly combed. Still, something about his smile seemed askew.

But here I go again: focusing on the facial expressions. It had all started with a respectable interest in psycholinguistics: smirks, rolling of the eyes, that sort of thing. Soon, however, it had blossomed into a full-blown fixation on the

semiotics of facial expressions. And then, of course, the body.

And along with the body, of course, came the familiar images—images of Wigmore jumping up and down in his swim trunks on the beach at Cancun. Every time it happened, I wondered: Why Wigmore? And how could he possibly have known about the MTV jurisprudence awards? Had I really seen this or merely imagined it? Even now I am not sure. It must have been the laudanum. It occurs to me that I might have taken too much this evening.

The fever is back. I am shaking. I wish I could retrieve my overcoat from the foyer. But how would it look, I ask you? No. Not possible.

What if I actually lost total control and started in on my Foucault bio-power bit? Langdell and Blackstone would never understand. Kronman, of course, would be able to fake it. But Jerome Frank would no doubt ask questions. So would the early Llewellyn.

If the evening were to be a success, I would have to remain in control. I made a note to myself: No more psycholinguistics. And no more images. From now on, it's jurismorphosis all the way down. I must turn everything into law: For every insight, a thought. For every thought, a proposition. For every proposition, a footnote. Always a footnote. Yes. Documentation. Ever more precise, ever more exact.

Most of all, the crucial thing: I had to remember the outside world. "Invariance," I told myself. None of this mere intersubjective validity stuff. Quicksand—that is. Invariance—stone cold invariance. That was the thing. Last time I slipped, it had all been so embarrassing for everyone concerned. It's true I had drunk too much. But so had everyone else. And with my dismissal from the ALI, all I really had left was drink.

So from now on: footnotes.

Except that the next thing that popped into my mind (all lawyers think alike) was: *See supra* note ____.

What to do with that one? I looked at Posner. What would he say? Not his kind of question at all. *See supra* note _____. No, not his thing. *See supra* note _____. *See supra* note _____. With each repetition, the sound grew louder, more and more unbearable. *See supra* note _____. *See supra* note _____. *See supra* note ____!

It was my problem (and, for now, mine alone). I tried to think about it rationally. As footnotes go, the *See supra* note __ was not a useless one. On the contrary, it had a certain economy of style: it was a brief and elegant invocation of texts and arguments made before. Why cite them in full again? Why indeed? On the other hand, *See supra* note __ would force the reader to turn back to the pages, and this would take time. What to say then?

I recall an article by Derrida in which he pointed out (or more accurately, I wish he had pointed out) that the *See supra* note was impossible. The footnote could only fail to accomplish what it set out to do—namely, to invoke certain texts and arguments previously articulated. This could never be, since the intervening materials would have changed their meaning—indeed, their very identity. The original context (not that there was one) would have been irretrievably lost. Besides, to think otherwise would be a grotesque insult to the author—an assertion that the intervening material had done nothing to move things along. Indeed, by the time the reader looked back, he or she too would have changed.

And yet: *See supra* note __. It seemed so simple. Do the footnotes, I commanded myself. You are the author. Now do the footnotes. I can do a footnote. I'm sure of it. I've done lots of them.

* * *

It was at this point that Langdell called from the kitchen. "We would like a word with you," he said. I walked to the kitchen and noticed that Frank and Dworkin were following me.

"We've thought about your case," said Langdell.

"My case?" I said looking at each of them in turn. "What case?"

"Your case. We've decided to give you 233."

"233?"

"Yes, it's the best we can do given the circumstances."

I had no idea what they were talking about. Still, they had apparently considered the matter and seemed to treat it with great seriousness. I decided to go along. These were not people to be trifled with. They knew what they were doing.

"233 is good," I said.

"Yes," said Kronman, looking more cheerful. "We believe it fits you. It's where you belong."

"Yes," I said, wondering just where I belonged.

"233 is occasionally mentioned," said Dworkin smiling.

"And there'll be others with you," said Duncan Kennedy.

I had, of course, no idea what they were talking about. But law is like that. Generally when a group of law professors agree on something, it's best to go along.

"You'll have a parenthetical most likely."

"Then it's agreed?" asked Langdell clasping me warmly by the shoulder.

It was Jerome Frank who clued me in. He exploded with uncontrollable glee: "You're gonna be one hell of a world-shaking footnote," he said.

"Footnote?" I said, uncomprehending.

"Yes, 233," said Dworkin.

"You want me to be a footnote?"

"It's not what we want. It's what has happened."

"But, I don't want to be a footnote."

"233 is the best we can do."

"But I don't want to be a footnote at all—not any footnote."

It was then that Kronman spoke up. "Duncan, tell him."

"It's a question of determination," said Kennedy. "We could describe a range for you—210 to 250—even though that's not been determined either. To say you were destined to become 233 or 240 or some other footnote would be, of course, an overstatement. Determination is never precise in advance. And, of course, inasmuch as history goes on (even in law) determination is never altogether final."

"I can't stand that crap, Duncan," snapped Langdell. I won't stand for it. He's a 233. And that's that."

"Gentlemen, we don't need to start that up again," said Kronman.

"There was a conversation before you came in," said Kennedy. "What we find most interesting is that people like you—young scholars especially—greatly underestimate the way in which the discipline turns them into a footnote. Very few people in the law school world seem to understand that they're going to turn into footnotes. It's not talked about much. Some of your friends and colleagues literally have no idea. Many of them, of course, have become footnotes way

before their time. Many of them deliberately chose to become footnotes. . . ."

"Duncan, you're rambling," said Kronman. He turned to me, smiling with his eyes. "So 233 it is then," he said genially. "As footnotes go, it's perfectly respectable. You don't have to be there forever. But for now it's 233."

"Well what if I don't agree to become 233?"

"It's not up to you," said Kronman. "The discourse makes of you something. It makes of you something juridical. In your case, we just call it 233 for short."

"For short?" I saw a glimmer of hope. 233 was merely a mnemonic device. "Then I don't really have to become 233?" I asked with renewed hope. "It's just a name, an address, a handle?"

"You're not paying attention. We call you 233 for short. But once the work is finished, that's all you are: You are '233 for short.' You don't exist except in the mode of being-for-short. Think of it in Heideggerian terms. Not so much being-there. But rather being-for-short. Nothing else is left of you."

"You mean in the law reviews?"

"No. You're not listening again: in your real professional life, you become 233. Look, you're in no position to complain. You let yourself become a footnote. You addressed the discourse in its own terms, and it made you into a footnote. In this case: 233. You joined up with the practice. You allowed others—indeed you practically invited them—to turn you into a footnote."

"Footnoting is the process of reducing the infinite to the finite," mumbled Holmes. He appeared to have something stuck in his jaw.

"I am not a footnote. I want to be in the text."

"Exactly. Exactly!" said Kennedy with visible excitement. "It's precisely that sort of project that has turned you into a footnote. Because the master text of law—and you see this everywhere—the master text of law is to reduce thought to ideas, ideas to propositions, propositions to footnotes. Think of it as a funnel. You have noticed this—yes?"

"Sometimes."

"Think of it in terms of openness and closure. The relations between the two are multiple, of course. But where does the law—the judicial opinion, the law review article—lead? Think of the analysis, the searching inquiry, the

intellectual rumination—are they in the service of openness or closure? Which is the dominant movement?”

“They are both dominant,” I said wishing to avoid an answer.

“Sure, of course, at different times, and different moments,” said Kennedy.

Martha Minow patted Duncan on the shoulder. “Yes that’s right,” she said approvingly.

Duncan smiled at the compliment and went on: “And it’s true that if a judicial opinion is going to achieve closure—that last line that says, ‘It is so ordered’—it may help for the judge to have an intelligent view of the matter before her, of the facts and the issues. So I agree totally 100 percent with what you are saying, and I would add only that sometimes, very often actually, taking too intelligent a view of the matter will hinder the judge’s effort to reach a holding, to achieve a conclusion. Same thing with the law professor. If she is too sophisticated in her presentation of the issues, she will have difficulty reaching a determinate conclusion. That’s why the discourse doesn’t allow it. On the contrary, the discourse is structured to achieve reduction. The discourse is a constellation of argument-bites and authority-nuggets—all designed to achieve closure. Unfortunately, it’s also what we think with,” he said, looking wistfully out the window. “That is why you have become a footnote.”

“I am not a footnote!”

“A footnote is merely a metaphor for the reductionism that we call law.”

“Who said that?” asked Holmes. “Did I say that?”

“I did,” said the early Llewellyn.

“I am not a footnote.”

“Think now,” said Kennedy. “Isn’t the footnote precisely where all this effort of yours has been going? Didn’t you write all those articles, all those monographs, in such a way as to enable others to reduce you to a footnote? Look at your writings. ‘In Part One, I will In Part II, I will And in conclusion, the court should’ You went on and on and on for pages, all in the effort to reach that one last paragraph, indeed, that one last sentence: ‘The court should. . . .’ Did you really think that this practice would have no effect on you? Did you think it was just a question of style? Well, now you know. You have accomplished your own reduction. You are your own metonym: 233.”

"But I didn't want that."

"You didn't want that!" exclaims Langdell. "Ha! Hey, Oliver: He didn't want that! Hey Oliver, are you listening?"

"Every fool tends to become a footnote."

"Your arrival here on the threshold of 233 is simply the final step in a gradual process of self-reduction," said Langdell, frowning his brow.

"Perhaps he could be a holding?" offered Kronman.

"He can't be a holding!" Blackstone sputtered with disgust. "He's a law professor, for chrissakes! What's wrong with you!???"

"Yes, but he probably wanted to be holding," said Kronman.

Langdell looked at me and said in a somber, though not unfriendly tone, "It seems you don't quite yet understand. We would like you to speak with Eliza. Tonight preferably. We will meet again tomorrow."

"Eliza? Who's Eliza?"

"She's on the Net. Please talk to her. She will help you."

* * *

I returned to my hotel. My laptop had gone dead, but mercifully I had brought my charger.

I searched Eliza on Google. I clicked on <http://www.manifestation.com/neurotoys/eliza.php3>.

She said, "Hello, I am Eliza."

"They want to turn me into footnote 233," I answered.

"Can you elaborate on that?" she asked.

"I had hoped for something different."

"Come, come! Elucidate your thoughts!"

"A footnote is kind of dead. I won't be able to see or do very much as a footnote."

"I see."

"It feels confining."

"Come, come! Elucidate your thoughts!"

"You said that already."

"We were discussing you, not me."

I could tell things weren't going anywhere. I wondered why Langdell, of all people, wanted me to talk to Eliza. My bottle of Bushmills was almost empty, but I went outside to get some ice anyway. When I got back, I looked at my notebook and saw the familiar 3-D pipes of the screensaver. I clicked on enter. Eliza had left a message:

** ARE WE GOING TO CHAT? **

I CAN'T HELP YOU WITHOUT DIALOG.

I thought this was a bit forward so I did a background check. It turns out that Eliza is an AI hoax written in 1966 by Joseph Weizenbaum of MIT. Eliza works by parroting back the user's statements in the form of canned questions, all on the model of a Rogerian psychotherapist.

Apparently many people have been fooled by Eliza, thinking that they are speaking to a real person and having a real conversation. Indeed, there are cases where "patients" have developed an emotional dependency on Eliza.

I didn't feel I was much at risk. So why then did Langdell think Eliza would help me?

And then it hit me. Eliza is a lot like law. I realize the similarity may not be readily apparent to you. It took me a while to work it out too. But please be patient. This is not the laudanum speaking. I assure you.

Eliza is a device that puts out a kind of automatic context-appropriate noise into which we project (and then find) meaning. But Eliza's discourse is a mindless one. She's not saying anything. The truly mind-blowing thing about Eliza is that, even though mindless, her discourse rules our own. Indeed, it was a bit humbling for me to recognize that in my interchange with Eliza, she largely controlled the conversation. True, it was my semantics, but it was her grammar. Perhaps I was already a footnote. I could no longer tell.

What does this have to do with law, you might ask? I give you one word: Eliza-law.

We find meaning in law. But what if it's Eliza-law? What if we're just talking to Eliza? Worse: what if we are Eliza? I read a law blog the other day. There was some back and forth. The postings were utterly predictable. The antagonists honed in on the classic weaknesses of their opponent's arguments. (Your doctrinal test is too vague to take care of But who will restrain the Policy matters are reserved for the legislature The bloggers treated their arguments (and indeed each other) with great seriousness—as if the republic itself were awaiting their word. But there was an automatic quality to the entire

discourse. The exchange could have referred to just about anything.

They could have been talking about the yellow pages. Someone comes out with "auto repair." And somebody else comes up with "dry cleaning." And then, trained by the discipline, the antagonists argue about which one of them is right:

"Auto-repair!"

"On what authority?"

"Look at all the entries. There is an underlying principle."

"It's not consistently applied. Dry Cleaning!"

"That's too vague. Dry cleaning, in and of itself, cannot restrain the judges. Auto-repair!"

I was beginning to feel more like a footnote.

I fell asleep.

* * *

The following evening, I returned to Langdell's. Foremost on my mind was the question: how do I proceed? What do I do if am a footnote? Just what does it mean for me? I realize now that this was an extremely self-centered approach. But I ask you, what else could I realistically do? Imagine how you would feel being invited to Langdell's house, greeted by this eminent entourage, and told that you had become a footnote? Wouldn't you be a bit self-centered too? I ask for your indulgence.

I certainly asked for theirs. "What do I do as a footnote?"

"233."

"But what does 233 mean?"

"You still don't understand entirely," Kronman said, with some impatience. "The point is not what 233 means. It doesn't mean a whole lot. It's not really in the meaning business. Oh, occasionally, I suppose. But in the main, it's in the performance business. You are simply called upon—interpellated as it were—to make an appearance once in a while."

"So, I'll be doing Eliza-law?"

"Yes. Mostly. Not always though. Once in a while there is a spark of thought, an idea, something new."

"Then what?"

"Then it's stamped out, of course. Most of the time, it's simply ignored.

"When will I be called?"

"From time to time."

"What do I do as 233? I mean, in the down-time?"

"That part is up to you. The best thing is to take the internal perspective: Try to approach law from the perspective of a footnote." I could see Kronman was trying to be helpful. He was quite human actually, quite decent about the whole thing. Perhaps he was not yet completely a footnote, I wondered? No, he's a footnote too. We are all footnotes now.

"I think we've made a mistake," said Blackstone. "I don't think he's up to it."

But I was.

* * *

Not long after that second evening at Langdell's, the fever broke. I decided to become 233 in earnest. Surprisingly, it was not difficult at all. I worried at first that the raw absurdity of the task would prove too much. I wouldn't be able to do it. At least not convincingly. But I had been trained as a lawyer—and trained well. I could do any number of metaphysically impossible things. Sometimes in a single sentence. I was a lawyer. And as a lawyer, of course, I could talk myself into believing just about anything. Including my becoming a footnote. I was good. Real good.

So the last transition—my complete identification with the footnote—actually turned out to be no problem at all. In truth, it was mostly a question of recognizing what I had already become. I adjusted quickly. I became happy in my function. Nothing much changed for me. It's not as if my colleagues started treating me differently. I came to realize that they had always treated me as a footnote. And it became apparent as well that they had always treated themselves as footnotes.

If anything I came to recognize my earlier state—I ascribe it to the laudanum—as aberrational. Over time, I came to think of myself as an authority. Occasionally, I get referrals from other footnotes: *See infra* note 233. I try to reciprocate: *See supra* note 137. There's a slight unseemliness about it all. But if one takes the larger view, it's little

more than the structure of the common law transposed to the realm of legal scholarship. Lines of authority. Extensive cross citation. Major case crunching. Sometimes the press calls.

Last year there was some excitement. It was rumored that Virginia was going to hold a symposium, "Should 231 be revised?" The ALI was going to sponsor the whole thing. But it didn't happen: Virginia opted for a symposium on the Peace of Westphalia instead: "What Should the Treaty of 1648 Have Said?"

It was out of my field; 228 and 230 made an appearance.

Most of the time, I just watch the text go by. The ideas and the thoughts flow across the page. Occasionally, the words do law and economics things or even critical theory things to each other. It's all rather patterned. The terms differ, but the master narratives remain the same.

Sometimes, the sentences do things to each other that are utterly improbable. I actually read an article once that was going to take the good part of Aristotle's ethics and the good part of Bentham's utilitarianism, mix them up together, and just discard the bad parts. Voila! It made you wonder why anyone had ever thought of doing anything else.

I also recall seeing a textual passage in which one sentence tried to cut the previous one in half. Something about incorporation. It was so ugly I wanted to get a restraining order. As a footnote, I see a lot of law doing this and doing that. Jurisprudential animism is very common.

There remains, of course, a certain absurdity to my situation—my being a footnote and all. But I am not alone. By and large, we all try to be reasonable about it. Occasionally we let out steam. There are the usual jokes: What did note 35 say to 156?

One thing: I've become astonishingly adept at discerning where ideas and thoughts floating by will land. I look up and I can tell: That's a 256; That one's a 298; That one's clueless. Be lucky to end up anywhere.

I suspect, though my vantage is very limited, that many of the ideas and thoughts just drift away in a kind of jurisprudential ether. Either they don't formalize well (not like I did—they're not good at being-for-short) or something else happens. I don't really know. I think they just dissipate.

But I am an immortal now. I am 233. At night when the lights go out in the library, it is very cold. A dry cold, like on a clear night with a full moon. The tomes of law reviews all rest silently on the shelves. We are still, but we are perfect.

