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Jurisprudence Noire

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JURISPRUDENCE NOIRE

*Pierre Schlag**

INTRODUCTION

You don't know Robinson. But here's what Robinson said:
Do you know what fucking amazes me? . . . What simply fucking amazes me? How little anyone who isn't a lawyer really knows about what comes down. I am simply fucking amazed. They all watch their lawyer TV shows, read these shitty legal thrillers, like it's one big, suspenseful, meaningful endeavor—some intricate mystery with a hidden truth revealed at the end of the final chapter. They hate lawyers more than anyone else in the world—but law? Law! They love the fucking law! (Pp. 14–15.)

This is what Robinson said. But who is Robinson to say such things? What do we really know about Robinson? Actually, not a lot. Robinson is one of the lawyers Lawrence Joseph interviews in his book, *Lawyerland*. Maybe Robinson is real and maybe he's not. Joseph isn't totally straight with us on that score. In the first sentence of the book, in the "Note to the Reader," Joseph tells us: "This is a work of nonfiction." Sure it is. Except that in the very next sentence, Joseph says "the names, circumstances, and characteristics of the persons and places portrayed [in short, virtually anything at all] have been changed." Now, if you're a lawyer, or at least a good one, this shouldn't bother you too much; you're accustomed to navigating in a world where you often don't know who's who or what's what—a world where the fiction/nonfiction distinctions don't cut very far. Put it this way: *Lawyerland* is as real as any fiction you're already living (or vice versa).

Meanwhile, Robinson is hurling these epithets at you. Actually, it's not really at you. Technically, Robinson is talking to the narrator. But since Robinson is on a jag and the narrator recedes into the background, you are the only person Robinson could be talking to. He must be talking to you. There's nobody else here.

Then too there is the sheer intensity of Robinson's talk both in form (the man is fond of exclamations) and substance (one insight trips off the page after another). Robinson is almost abusive. Here he goes again:

They love the fucking law! You see it in the jurors' faces—even the most sophisticated and street smart. They're not only intrigued—they're impressed! Reasonable doubt—they go fucking bananas! Just say the words and their eyes change. . . . The same thing with intent. Mens-fuckin'-rea! God, how jurors love mens-fucking-rea! (P. 15.)

* Byron White Professor of Law, University of Colorado School of Law. I owe the title of this piece to David Luban's observations about the noirish flavor of *Lawyerland*.

Robinson is manic. He's a ranter. Barely in control. Prose tinged with violence too. He's the first lawyer you encounter in *Lawyerland*. You'll encounter many lawyers in *Lawyerland*—high-powered lawyers, street lawyers, cause lawyers, tort lawyers, and more. They talk about all sorts of things—deals, settlement negotiations, failed prosecutions—all in the midst of digressions about chemotherapy, a white lace bra, Kafka's employment record, book-a-month Posner, and boola boola. Did you know Learned Hand was a manic-depressive?

But I keep digressing (a bit like Joseph's lawyers). Back to Robinson. Lawrence Joseph gives us the barest description of Robinson: a physical description and a resume. Physical description: "medium height," "thin and wiry," "a shock of unkempt black hair," "arctic blue eyes . . . set deep in his face." Resume: Graduate Queens College, drafted into the army, saw action in Vietnam, Michigan Law School, clerked for a judge in Brooklyn, assistant D.A. in New York County (pp. 5–6). That's it—your introduction to Robinson. And the other lawyers are described the same way, as if this is all we need to know. Joseph's description of his lawyers evokes the clipped prose of those seedy 1930s crime novels, where characters are identified by their most representative attribute: "the suit," "fatman," "legs." Except that here it's "boola boola," "White Tooth," and "Phi Beta Kappa."

In lit crit terms, this is the reductionism of metonymy. It's not nice; it has an aura of violence. There's a great deal of violence in *Lawyerland*. Like many of the other characters, Robinson is the vocalization of violence. There is no moral to Robinson's diatribe. And Robinson offers little himself. There's no didactic punctuation—just the anguish of a dark violent vision.

I. THE ANTIDEPOSITION

Lawyerland is a kind of antideposition. The interrogation is not hostile, the witnesses have not been coached, they ramble on, and no one cuts them off when they lose track of the questions. It's not even an attempt at discovery; to say that *Lawyerland* is a fishing expedition would be an overstatement. Even in a fishing expedition, you have some idea of what you're trying to find.

In *Lawyerland*, the disjunctions are sharp and unpredictable. "Who was it who said politicians can keep two completely contradictory things in their heads at the same time? Two! I know lawyers who can keep fifty or sixty in their head, actively, yet talk as if there's no contradiction at all" (p. 221).

Lawyerland's lawyers are walking identity crises. And some of them know it too. There's even a psychiatric diagnosis for it: "schizogenesis." Apparently it's "reproduction by fission." The lawyer self is constantly splitting, and the split gets replicated in every area of life (p. 40).

So what are you suppose to do with this? And it's not just dissonance. It's these raw unmediated reality bits. Nothing's cooked here. It's jurisprudence tartare. Here, eat this:

Which reminds me A conversation I had last week with a federal prosecutor. I was dropping my usual "fuck-this's" and "fucking-that's," when he says to me, "I'd appreciate it if you wouldn't be so vulgar." This piece of shit—he's like, twenty-eight years old, some Harvard former Second Circuit clerk, whose daddy, who's a partner at Ellis Parkman, got him the job. The little twit interrupts me—he'd *appreciate* it if I wouldn't be so vulgar. I live in a society where there are how many? Twenty thousand murders a year? That's two hundred thousand murders a decade! . . . Now, that's not vulgar, is it? Do you know how many children every day are getting smacked to death? How many skulls are being fucking crushed? (P. 12.)

That's Robinson again. But it could easily have been another of *Lawyerland's* lawyers. The stories, monologues, and diatribes are raw, unfinished, unrationalized. This is flesh without skin—neurons without sheathing. You are exposed. And there is no mediation (remember, the narrator has vanished) to protect you.

But as antideposition, *Lawyerland* is also a kind of deposition. *Lawyerland* is a record—an archival entry on the life of New York lawyers circa 1990. Some fifty years from now, when the archeologists of the twenty-first century look back at American law (fin de siècle), they will find:

Law's empire is defined by attitude, not territory or power or process. . . . It is an interpretive, self-reflective attitude addressed to politics in the broadest sense. . . . Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction.

Ronald Dworkin,
Law's Empire 413 (1986).

There's been an astronomical increase in the number of law-suits. It's a service business now. Other than the margins—government, which pays so shitty—that's what it is. Partnership isn't worth shit. You do business with a partner or an associate to the extent to which you get more from them than what you're giving. They start sucking too much off you and you're out of there.

Lawrence Joseph,
Lawyerland 49 (1997).

The archaeologists of the late twenty-first century will have to negotiate *Law's Empire* and *Lawyerland*. Meanwhile, lacking the archaeological vantage of the late twenty-first century and having to actually live out much of the intervening period, what are we supposed to do with *Lawyerland*?

It's a bit of an unfair question. It's a question that the lawyers in *Lawyerland*, like Mr. Joseph, do not answer. *Lawyerland* is a state of suspended animation—filled with reflection, talk, idle chatter, and, frequently enough, stark insight.¹

But for all its frenetic intensity, nothing happens in this book. There is no redemption, no loss, no realization, nothing that makes the talk at the end of the book different from the beginning.² There is no progress. The characters do not develop. They do not learn anything about themselves or others. They complain and attack one another. And they reflect on their chosen profession and each other with incomprehension, disbelief or wistfulness. But they've got nowhere to go. They have no future different from their present.

At the beginning of the book, Joseph quotes an epigram from Rainer Maria Rilke: "Don't be confused by surfaces; in the depths everything becomes law." But in *Lawyerland*, the surfaces are the depths. This is not hell; this is purgatory. A purgatory without purging. A purgatory without the promise of an eventual promotion. An endless purgatory.

For these lawyers, it's a purgatory of their own making. Most of these lawyers are not happy with their lot in life. They complain, but they seem completely unwilling to do anything about it. In fact, as David Luban points out, these characters are strangely well adjusted to their situation.³ They are, as Sarah Krakoff suggests, at home in their alienation, comfortable in their anomie.⁴ It's unsettling.

I'd like to take the transcript of Joseph's antideposition, pump his characters with a few beers and ask them: "Look, this is what YOU said about YOUR job, about what YOU do. This is what you said on page 49. Why do you do this? Do you think you have an extra life to spare? Do you think this one doesn't count? Or what?" But I doubt I would get a straight answer. Most of them would say something like: "What do you mean why do I do this? It's what I do. It's what I AM. You're asking me 'why aren't you somebody else?' What the fuck kind of question is that?"

Now this, this is the flawless logic of timelessness. Indeed, there is an absence of time in Joseph's book and in the lives of his characters. This is not to say that they don't have a history or a past. But their past—often reduced to simply a job resume—only matters as a context for the present. And as for their future—the only promise it holds is more of the present. Luban says they have no hope.⁵

1. Robin West's essay reveals that amidst the anger, violence, and sheer noise of *Lawyerland*, its lawyers actually know quite a few things—profound things. Robin West, Joseph in *Lawyerland*, 101 Colum. L. Rev. 1775, 1775 (2001).

2. Except for the return of the narrator.

3. David Luban, *The Art of Honesty*, 101 Colum. L. Rev. 1763, 1772 (2001).

4. Sarah Krakoff, Does "Law and Literature" Survive *Lawyerland*?, 101 Colum. L. Rev. 1742, 1747–48 (2001).

5. Luban, *supra* note 3, at 1771.

Yes. But it's not just hope that is missing. More than that, *Lawyerland's* lawyers are missing any emotion that would map onto a future. Any emotion cast in the logic of expectation or anticipation is absent from their thoughts. They have no fear, no dread (though many of them live in worlds filled with fear and dread).

In part, this is why the lives of *Lawyerland's* lawyers can seem so meaningless. The finitude of time is crucial to meaning. In her novel *All Men Are Mortal*, Simone de Beauvoir describes the life of a man who is immortal.⁶ He cannot die. His life is a succession of challenges, of love affairs, of watching others age and die. The upshot is that life has no meaning for him. Nothing counts for him because there is no future that is not already the same as the past and the present; everything is gratuitous because nothing changes. It's death, finitude, that gives meaning to one's actions. If life is an endless present, then every action becomes gratuitous and life meaningless. Many lawyers—and not just those in *Lawyerland*—seem to live in this interminable present.

In *Lawyerland*, this is odd because in one sense the lawyers are very much aware of death. They know about crushed skulls, murder, pancreatic cancer. But they are in denial. They may be worried about death on the edges, but basically they talk as if they had lives to spare or as if this one were endless.

How did they get to be this way? How did they let themselves get to be this way? Was it a character flaw? Was it the greed or the lust for power? Were they just unlucky? Or is it the fatal effect of living in the law? Ironically, these are precisely the kinds of questions one cannot answer if the present is all there is.

Time has stopped, but make no mistake: there is not a shred of postmodernism in Joseph's book. There's certainly none of that too-glib-to-be-hip, nothing-new-under-the-sun, relax-and-go-with-the-flow, why-ask-why, jaded-pomo posing here. In fact, even the Gen-X'ers are skittish:

Six months into his clerkship he says—he's quite agitated about it—that there no longer is a nation. What is really going on is that we're in a state of civil wars. . . . What kind of law, what kind of lawyers, do you have when your civil order is, in fact, in a state of civil wars? (P. 81.)

In *Lawyerland*, everything jars, the masks of identity drop one by one, and meaning splinters out like glass shards. But this is not postmodernism. It's more like high modernism. There is something ominous, slightly out of kilter, with Joseph's lawyers. You get the sense that things can't go on like this. It's too painful and too absurd. Now, that is a quintessentially high modernist sensibility.

But of course, *things can go on* like this (absurd or not; painful or not). Since when is absurdity a good argument against anything? Many

6. Simone de Beauvoir, *All Men Are Mortal* (Leonard M. Friedman trans., The World Publishing Co. 1955) (1946).

of *Lawyerland*'s lawyers know this. And this too is part of the quintessential high modernist sensibility—one of the ruling principles of the genre noir: No matter how bad things get, that is no reason they should get any better.⁷

II. LAW IN THE AIR

Well, what about law?

Well, what about it? *Lawyerland* is law at the operator level. For *Lawyerland*'s lawyers, law is something they live on the way to doing something else—serving a client, putting someone in jail, or ruling on a motion. Law is just a part of what you use to get things done. Here, the law is mundane. It inspires neither celebration nor awe.

This is a law very different from the law of the law school, the legal theory workshop, or even the classroom. I'd like to say that the law is more personal here—that the lawyers of *Lawyerland* have a more intimate attachment to law.

In part, of course, this is because the lawyers' stories, monologues, and riffs are informal—"off duty," as it were. Maybe you could catch law students in the hall or law teachers in the lounge speaking about law in roughly the same way. But not many and not often.

Even in their informal habitats, law students and law teachers deal with law apart from its worldly implications. There is a gratuitous character to the law of the law school, the classroom, the law review article. Think about the classic Professional Responsibility hypothetical. Here goes:

You are an associate in a mid- to large-size firm in the litigation department. Your partner has lied to the court about the need for a motion for continuance. He has claimed illness in his family when, in fact, he's just late. Would you report him to the bar committee if it meant that you would be passed over for partnership?

The student raises his hand, "I would report him, because . . ." What does that mean? Why not just simply ask the totally meaningless version of the question: "In coming up against a difficult situation would you do the right thing, or would you do the thing that is in your personal interest?" "Oh, I would do the right thing. . . ." The converse answer, which is almost never given, is also utterly gratuitous: "My asking price is . . ." I once had a torts student who, in response to my question (it was not a nice question), declared that she would be willing to sell off her left foot for a million dollars. I thought: "She doesn't know what she's talking about." It's not just that sincerity may be lacking here. It's the fact that

7. That is one important difference between *Lawyerland* and the genre noir. In the genre noir, typically things start off pretty bad and then they just get worse—a lot worse. See, e.g., Jim Thompson, *Pop. 1280* (Vintage Crime 1990) (1964). In *Lawyerland*, things remain the same.

nothing turns on the student's answer to the hypothetical, and so she is lacking the real stakes that will: 1) motivate her to deploy all her resources to find an answer that is true for her, and 2) give her a sound basis for actually heeding her own answer should the difficult situation come up. One could even say that it is immoral to heed moral conclusions when these have been formulated outside the realm of a real situation with real stakes.

Lawyers and judges face real stakes (however mediated these may be). Their words are hooked up with, and they bring into play, institutional arrangements that visit legal acts on clients, parties, and third parties. The acts do land on somebody. The law of the academy, by contrast, is law in the air. It's free-floating. It doesn't land. Much as law teachers may want to pretend otherwise, their words in the classroom, in the law review article, or at the conference panel do not engage an already-in-place legal machinery.

The thing about law in the air is that, having no strong institutional connection with the earthly workings of the legal machinery, it becomes available for all sorts of academic fantasies. What we get typically is a kind of law that is stunningly attentive to correct thinking, remarkably responsive to normative argument, and astonishingly inspirational.

Now this describes not just a certain kind of jurisprudence. It describes the rhetorical form within which virtually all academic legal thought happens. Academic legal thought, *as a matter of its own form*, characteristically represents law as formal, ideational, appellate court focused, judge-centric, and normatively inspired. Law is, of course, understood to deviate (for good or bad reasons) from these characteristics, but the implicit representation is that law essentially is or essentially should be consonant with these characteristics.

By contrast, the very style of *Lawyerland*, its informal language, its focus on self and context, its grim and accursed visions, its compromised moralities, and its flamboyant emotional registers all lead away from the ways in which academic legal thought frames and represents law. Indeed, that's why some of Joseph's narrations are so disturbing. They are in your face—without rhyme, reason (or moral). *Lawyerland* is, *as a matter of its form*, already an attack on, a repudiation of, an antidote for the legal academic representation of law as a formal system composed of and self-regulated by ideas.⁸

III. O.K.—THEN WHAT?

What are legal academics to do with *Lawyerland*? The question first occurred to me at a panel discussion of *Lawyerland* at the Annual Association of American Law Schools (AALS) in January 2000. The panel, ac-

8. For a discussion of the forms of American law, see Pierre Schlag, *The Aesthetics of American Law*, 115 *Harv. L. Rev.* (forthcoming Feb. 2002) (on file with the *Columbia Law Review*).

ording to informal hallway conversation, was well received. The audience laughed, heads nodded along the desired axes, yawns were at a minimum, and the speakers were insightful and entertaining. In short, everything worked about as well as could be hoped for.

But then the panel ended. Now what? Here's a disturbing thought: The audience just rambles off to the next panel—where they discuss the new Restatement 3d design defect test or the original understanding of the Fourth Amendment or whatever. *Lawyerland* turns out to be just a two-hour hiatus in an outpouring of case law analysis, theory proliferation, endless bouts of Dear Abby jurisprudence, and the usual academic conference fare.

O.K. Now what? I didn't ask this question at the AALS panel, but I did in my jurisprudence class on *Lawyerland*. The students reacted to *Lawyerland* with an array of widely dissonant reactions: "The book is a slow motion car wreck." "I hope I'm never like these lawyers." "No, these people are fascinating. They have all sorts of insights." "They are self-reflective." "You think so!!!!?" "Everybody talks that way in New York. It's about New York lawyers." "No it's not." "It's about high-powered lawyers." "No it's not." "All these lawyers are in denial." "No they're not." "They're self-absorbed." "Well, of course, they are; they've been asked to talk about themselves."

Towards the end of class, I asked:

Well, so what is this class? On March 15, 2000, one morning during three years of law school, we had a class where we discussed *Lawyerland*. Then we went off to UCC or corps and ad-law and the like for another year and a half? Is that it? And where does *Lawyerland* fit into this jurisprudence class? Just a sliver of raw reality wedged between Law and Economics and Neo-pragmatism?

The questions went unanswered.

IV. A FEW MORE THOUGHTS

I'm not sure the questions can be answered. Oh sure, it's possible to suggest that *Lawyerland* be included in legal ethics or professional responsibility, or in jurisprudence. Perhaps it could be taught in a cultural studies or law and anthropology course. And this would surely be a good thing. It could even be taught in the first year of torts or criminal law. But these suggestions do not take care of the problem. The vexing possibility remains that even though *Lawyerland* comes to be included somewhere in the curriculum or on the syllabus, it nonetheless comes to be included as a sharply delimited event—an insular contrapuntal moment (confined to quarters and soon forgotten).

The dominant ethos of legal thought in the classroom and the law review article entails the mimesis of the judge's perspective—the appellate judge, a "real" appellate judge, an ideal composite appellate judge, but almost always some kind of judge. The result of the overwhelming

dominance of the juridical perspective in legal education is a narrowing of the gaze, and a certain anti-intellectualism.⁹ It is at any rate an institutional perspective that is not particularly hospitable to a work such as *Lawyerland*.

One could, in trying to guard against this, strive to integrate *Lawyerland* into more traditional forms of legal thought. One could try to articulate the insights of *Lawyerland* (whatever these might be). But in the translation, there would be a metamorphosis—and it would not be to the benefit of *Lawyerland*. To translate *Lawyerland* into the more familiar rhetorical space of “idea” or “theory” or “critique” would betray the work and diminish its value. There is a risk here of deformation and domestication. The cheery technicality and the utopian transports of academic legal thought are, as a matter of form, inhospitable to the genre noir. How then could one faithfully *integrate* the noir of *Lawyerland* into such forms? It would just have to be spit back out again.

Yet, the mere fact that *Lawyerland* confronts these challenges (and risks) does not counsel against trying. On the contrary, real thinking in law, as elsewhere, occurs at the edge of what is possible to think—where one bumps up against the limits of language and the discipline.

Remarkably, *Lawyerland* is at once the edge of what it is possible to think in law school and yet also a faithful reflection of much legal practice. Now, how does that happen? Or as Robinson would say, “HOW DOES THAT HAPPEN?” It is an odd conjunction.

And as this essay closes, a parallel and equally odd conjunction surfaces. Remarkably, it seems at once necessary to offer reasons why *Lawyerland* should be taught in law schools and yet the argument seems so obvious, so conventional.

Here goes. Legal academics have some obligation to prepare law students for law practice. At a minimum, this would include not deluding or misleading them with highly romanticized or sanitized visions of law and lawyering. People who imagine that law is, in and of itself, a noble enterprise that elevates our moral community have a minimal obligation to warn law students that this imagined law—this law of beautiful souls—does not have much to do with contemporary American law practice. Beyond honoring such minimal disclosure requirements, one could, of course, go further and actually try to expose law students to some of the realities of law practice. But academics tend to shun the ugly sides of law—to the detriment of their students. Arguably, there is something ethically obtuse in sending law students out into lawyerland equipped with only a copy of *Heracles’ Bow* or *Law’s Empire*, miscellaneous ALI fragments, a few hundred statutes, ten thousand appellate cases, and a cheery graduation speech.

9. Pierre Schlag, *Anti-Intellectualism*, 16 *Cardozo L. Rev.* 1111 (1995).