1995

Anti-Intellectualism

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The teachers of law today have an increasing influence, and one which is comparable in degree with the part played by the judges, in the development of the law; and their power to mould professional opinion is likely to increase in the future more rapidly than that of the judges.[1]

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There is a recurrent sameness to American legal thought. It is the sameness that comes from saying over and over again what the law is and saying it, of course, in a way that conforms with the law itself.

But this is what American legal thinkers understand to be their role. Their role, as they understand it, is very much like the role of judges: it is emphatically to say what the law is.

And when American legal thinkers understand themselves authorized to say what the law is, it is not merely in a descriptive sense. Legal thinkers do not understand themselves merely to be astute observers of some practice called law; they understand themselves to be participants in the practice of law. They understand themselves authorized to say what law is in a prescriptive sense. In other words, they think that if their arguments are "good," if their reasoning is right, if their sources are correct, then their account of the law, their prescriptions, ought to be recognized by courts of competent jurisdiction. And the term "ought" here is not merely an external moral "ought," but an authoritative juridical ought: as they see it, their prescriptions ought to be followed as a matter of the internal requirements of law.

This rather pervasive attitude among legal thinkers is often *represented* as "the internal perspective"—namely, the perspective of a participant in the practice of law. Typically, the perspective of this participant is depicted as the perspective of the judge.[2]

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1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 40 (1935).

2 Here is the internal perspective, as rendered by Professor Ronald Dworkin: People who have law, make and debate claims about what law permits or forbids . . . . This crucial argumentative aspect of legal practice can be studied *in two ways* or *from two points of view*. One is the *external* point of view of the sociologist or historian . . . . The other is the *internal* point of view of those who make the claims. . . .

. . . .

As an intellectual matter there are serious—quite possibly intractable—difficulties with this concept of "the internal perspective."[3] One of the great strengths, however, of the "internal perspective" is that it renders these difficulties imperceptible. Indeed, to the extent that one is already within the internal perspective, no questions seriously disruptive of the internal perspective can be asked. The reason is simple: the internal perspective rules out disruptive questions. This is not surprising. On the contrary, it is to be expected that any participant's perspective on his own practice will include the rhetorical means for the self-preservation of the practice. The "internal perspective" is an excellent rhetorical means. It serves at once as a theological guide for the faithful and as a disciplinary mechanism to police the boundaries of law's empire.

Among American legal thinkers, the internal perspective is a particularly persuasive device. Its persuasive force, as an intellectual re-presentation, stems precisely from its articulation of a primal and largely unnoticed self-identification of the legal thinker with the figure of the judge. It is this self-identification that leads American legal thinkers to consider law to be identical to "law" as it is re-presented from the perspective of the judge. Indeed, what American legal thinkers consider to be law is what the figure of the judge—a real judge, a sitting judge, a good judge, a smart judge, a politically enlightened judge, a composite judge—would consider to be "law."

The judge, accordingly, is not a monolithic figure—there are variations. And correspondingly, there are variations in what American legal thinkers consider "law." But it is the self-identification with the figure of the judge that establishes the pathways, limits, concerns, procedures, and preoccupations of American legal thinkers. Indeed, this self-identification of the legal academic with the subject-formation of the judge has been crucial to the construction of the "law" of the academy in several ways.

> This book takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face. We will study formal legal argument from the judge's viewpoint . . . because judicial argument about claims of law is a useful paradigm for exploring the central, propositional aspect of legal practice.

RONALD DWORKIN, LAW'S EMPIRE 13-14 (1986) (emphasis added).

[3] For my elaboration of some of these difficulties, see Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 916-26 (1991).

First, it is this self-identification that has enabled legal thinkers to construct and formalize something called "law" that, at the very least, simulates the appearance of an intellectual discipline. It is this identification that enables and sustains the fundamental formal ontology of law—the notion that law comes in object-forms such as rules, doctrines, principles, precedents, methods, models, theories, and so on. It is this identification as well that establishes what modes of "interpretation" or "reasoning" are deemed appropriate. In short, it is this self-identification that enables the tacit formalization of the field of law—a formalization that has itself served as the grounds for inquiry and disagreement by apologists and critics of law alike.

Second, it is this self-identification that establishes the intellectual orientation of American legal thinkers. Judges are supposed to produce decisions that maintain the rule of law, advance efficiency, keep the peace, produce justice, or achieve some such desired normative goal. In achieving these objectives, judges are supposed to show "good sense," "good judgment," or "reasonableness." In short, they are supposed to honor the norms, values, and beliefs that generally hold in the relevant authoritative community. The task of judges is very often to show that their judgment, opinion, or ruling is always already linked in some desired way with the best, the truest, the most faithful, the most progressive, the most lawful, the most [. . . .] account of the relevant authoritative community's norms, values, and beliefs. In their self-identification with judges, legal thinkers take on the same orientation. The result is that intellectual inquiry is subordinated to and guided by normative starting points, channels, and end-goals that are presumed to hold within the relevant authoritative community. Now, of course, a great deal of American legal thought is quite "critical" in tone—aimed at criticizing specific opinions, doctrines, statutory schemes, methods, theories, and so on. But it is important to remember that this criticism occurs along very narrow lines and that the vast majority of this criticism does not trouble the fundamental ontological forms, the formal order, or the desirable eschatology widely assumed to underlie American law.

Third, this self-identification with the subject-formation of the judge establishes a set of intellectual tasks for legal academics—namely the tracing of law back through its authoritative materials, the policing and normalization of new forms of legal thought, the recognition and conceptualization of new juridical problems, the expulsion of spurious or subversive jurisprudential tendencies, and

the perfection and general improvement of existing formulations of law. All this is done, of course, in the idioms, within the forms of reasoning and interpretation practiced by judges. Indeed, the *pièce de résistance* in the academy (the law review article/the Harvard Foreword) is a morphological mimesis of the legal brief, of the bench memo. Even where the substance of this *pièce de résistance* may seem far removed from traditional legal concerns or traditional legal materials, its "form" will bear an uncanny resemblance to the aesthetics of the legal brief, the bench memo, and ultimately, the opinion. It is true that the academic production may be expected to show a higher degree of reflexivity, or self-consciousness, than its juridical counterpart, but not so much as to actually pose a serious threat to the fundamental ontological forms, the formal order, and the desirable eschatology always already assumed to underwrite American law.

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The self-identification of the legal thinker with the figure of the judge is in many senses wearing thin. It is becoming somewhat abstract. And it is fragmenting as well. Indeed, as legal thinkers take intellectual, aesthetic, or political distance from the present work product of the courts, the image of the judge with which they identify becomes increasingly removed from the possible identities of sitting judges. And for some legal thinkers, their self-identification becomes more beholden to client-groups or political causes than to the figure of the judge. In these ways, the self-identification of legal thinkers with the figure of the judge seems to be disintegrating. The appellate judge is losing intellectual status as the central organizing subject formation of American legal thought. But even as the self-identification of legal thinkers with the figure of the judge is becoming increasingly strained and increasingly improbable, legal thinkers are still living its history. The self-identification survives at the level of the aesthetics, the fundamental ontological forms, the normative orientation of American legal thought.

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Unfortunately, the self-identification of the legal thinker with the figure of the judge is fatal. It is intellectually fatal. In part that is because the judge is not an intellectually curious or intellectually open figure. The judge, as Robert Cover has pointed out, is a jurispathic figure. "Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to

destroy the rest."[4] Rather this is a figure whose legitimation needs, in many ways, lead him not to see—not to want to see—the violence and destruction of his own actions.[5]

The "law" produced by judges is not a disinterested, neutral, detached version of law. It is, on the contrary, a partial, highly interested construction. This "law of judges" is a law designed to deny and legitimate the violence necessarily implicit in the act of judging. The law of judges is thus given shape, not by a desire to produce insight or understanding, but rather by that law's desire to hide from itself its own violent and destructive character.[6] All of this suggests that the figure of the judge may not be a terribly helpful self-identification for the legal thinker. Indeed, the self-identification of legal thinkers with judges institutes aesthetically, socially, and rhetorically all manner of assumptions, attitudes, and beliefs constructed to close off inquiry, constructed to shut down thought.

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This self-identification with the figure of the judge has resulted in producing a law of the academy with certain pervasive intellectual deficits. I will mention two here. The first is the *radical simplification of law*. The second is *the juridification of legal thought*.

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The self-identification of the legal thinker with the judge reduces various interactions among different subject formations—lawyers, clients, judges, citizens, witnesses, experts, and so on—to the perspective of one actor, the judge. This singular perspective is then simply assumed to be regulative of all that might be considered "law." This identification with the subject-formation of the judge produces the (relative) singularity of perspective that allows all that might be called "law" to precipitate and crystallize into a (seemingly) stabilized ontology of "rules," "doctrines," "principles," "methods," and so on that seem verily as if they exist independently of any subject. It is the legal academic's identification with the subject-formation of the judge that produces the belief that these object-forms (rules, doctrines, principles, methods) have an existence independent of any subject's beliefs. It is, in short, this identification and the resulting limited perspective of the judge

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[4] Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 53 (1983).

[5] These themes are elaborated in Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053 (1993).

[6] *Id.*

that yields the usual precritical positing of fundamental ontological forms that thereby enable most of what American legal thinkers call "law" to even occur.

The identity of this one actor—the judge—is typically such that he is presumed to have tremendous (even if typically undetermined) power to declare what relations will regulate the behavior of the other actors. The judge, in the courtroom as on the law teacher's blackboard, occupies a superior, an elevated position—as if he were somehow above the other actors, ontologically endowed with a great power over the actions of the others.

To identify with the figure of the judge yields a kind of *double incapacitation*. In one sense, the identification with the judge truncates the perspectival possibilities to a singular perspective and thus misses *ab initio* much of what is interesting (and problematic) about law—namely, its genesis from the different perceptions, actions, and re-presentations of various different actors: judges, lawyers, clients, witnesses, press, etc. To enshrine one's self in the position of the judge is to miss almost entirely the processes of juris-genesis—the processes by which law comes to be formed as law. It is to assume into existence an entire juridical world of artifacts like "rules" and "doctrines" and "principles" and "methods," whose identities are not only already ontologically secure, but that are, supposedly, already ruling, already "in force," as it were. In short, the self-identification with the judge assumes away much of what is interesting and mysterious about law.

The identification with the figure of the judge is incapacitating in another sense. In addition to its blinding effect, it also produces a sense of false empowerment. The judge is a figure who believes *ab initio*, as a matter of social aesthetics, in the effectiveness of law. This is someone who believes, as a matter of course, that "law" has certain obvious and nonproblematic regulative relations to its field of application—relations that bear names like "deterrence" or "facilitation." This is someone who is given to believing fairly frequently, and often rather improbably so, that because the law decrees something, it will in fact be so. This is someone who believes that juridical concepts like specific intent or linear causation or individual autonomy are valid, not merely as juridical concepts, but as descriptions of social life. Indeed, the self-identification of the legal thinker with the figure of the judge yields the belief that juridical concepts—concepts such as consent, coercion, public, individual, and so on—actually map onto the social world in relatively obvious, nonproblematic ways. The self-identification with

the figure of the judge thus precludes any critical appreciation of the character or identity of the categories and relations of law. And it is precisely the resulting false empowerment that leads legal thinkers to have wildly utopian assessments about the normative consequences of their own legal thought and law in general.

The self-identification with the figure of the judge is precisely what leads legal thinkers to believe that they are not only studying law, but that they are in fact "doing" law. It is indeed this conceit that underwrites the otherwise rather odd, though widespread, belief among American legal thinkers that *prescribing* solutions, methods, or even attitudes is somehow a useful or effective way to alter the behavior of legal actors—most particularly, judges. This belief in the effectiveness of normative *prescription* among legal thinkers is an unconscious mimesis of the judge's belief in effectiveness of judicial orders. The judge concludes the opinion with the phrase, "It is so ordered." The legal thinker imitates the gesture by concluding the scholarly work with "And therefore, the court should . . . ." Or, "We should . . . ." Or, "Somebody should . . . ."

It is in such ways that *the radical simplification of law* is achieved.

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The self-identification of legal thinkers with the figure of the judge also yields what might be called *the juridification of legal thought*. It is through this self-identification that all manner of habits, rhetorics, even forms of social organization proper to judges become part of American legal thought. The intellectual vehicle for this transposition is the internal perspective. But again, it is the implicit self-identification of the legal thinker with the judge that produces the results—many of which are radically anti-intellectual.

As one example, the self-identification of legal thinkers with judges enables legal thinkers to rule from the bench. Hence, legal thinkers routinely dismiss entire forms of thought as if they were dismissing an appeal, as if they were rejecting an appellate argument. There are numerous examples of this practice.[7] Over time, this tendency of American legal thought to receive intellectual currents through the adjudicatory medium and judicial habits of thought is not only anti-intellectual but self-destructive. Indeed, if legal thinkers systematically fail to deal *seriously* with new intellectual currents, then it cannot be expected that the law of the acad-

[7] This argument is developed at greater length in Pierre Schlag, *"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990).

emy will learn much of anything new. Nor can it be expected that it will remain vital. On the contrary, this arrogation of the imperial rhetoric of the appellate judge so as to rule from the bench on the value of intellectual currents precludes engagement. Ultimately, what this habit of thought can be counted on to produce is a law that is in a state of arrested development—incapable of learning anything new, incapable of generating new inquiries or new insights—a law that cannot do anything except reaffirm itself as always already the same—even as it crafts new names for itself.

Another aspect of the juridification of legal thought lies in the subordination of inquiry to normative commitments associated with or at least compatible with the rule of law. Normative commitments define the starting points, the frame, and the permissible end points of legal thought. Thus, if a line of intellectual inquiry poses a threat to "law" or to its fundamental normative commitments, then the line of inquiry is susceptible to being called "nihilistic." The further implication is that therefore the line of inquiry should not be pursued. The upshot is that if one is engaged in legal thought, one is obliged to re-present the practice of "law," however degraded its actual condition may be, as nonetheless *essentially* justified, coherent, rational, and good. Not only is this orientation profoundly anti-intellectual, but, indeed, it is the mark of a degenerative enterprise—one that prefers its pleasing baubles of moralistic self-congratulation to any serious reckoning with its own identity and actions. One suspects that phrenologists, too, must once have been quite opposed to the "corrosive" character of "critical" thought.

Another aspect of the juridification of legal thought is the aesthetic subordination of intellectual and cultural insights. Indeed, before they gain admission to law's empire, intellectual and cultural insights from other disciplines must be recast in the forms and the uses that accord with the aesthetics of the law of the judge: the legal brief, the bench memo. It is in this way that deconstruction is reduced to a legal reasoning *technique*, that hermeneutics is crystallized into a *method* for advancing progressive legal thought.[8] It is in this way that [. . . .] is degraded into [. . . .]. To the extent that those who do law in the academy constantly degrade intellectual insight and resources by transforming them into "legal authorities," "methods," "techniques," and the like, they are erasing cultural and intellectual memory. They are destroying cognitive capacity. They are destroying the vantage points from which one might pur-

[8] *Id.*

sue a critical appreciation of law. This erasure of perspective, this collapse of opposition, this destruction of scale produces an intellectually flattened legal universe. It produces the night in which all cows are black.

Still another aspect of the juridification of legal thought is the reliance on "magic words." Students, during their first year of law school, learn that in some legal contexts certain words are magic, in that their mere invocation can be guaranteed to induce certain effects upon legal actors. Such words might include "notice," or "possession," or "strict scrutiny." Legal thinkers often exhibit a haughty derision for the magic words—treating them as unfortunate (though perhaps necessary) legacies of formalism. Nonetheless, legal thinkers clearly have their own set of magic words—words like "values" and "rights" and "reason."[9] These are words which, when accompanied with their usual grammar, will simply arrest thought upon impact.

"Reason" may well be the most universal of these words. As in various kinds of earlier shamanistic practices, legal thinkers will often repeat the terms "reason" or "reasonableness" over and over again as if the mere repetition of the terms will make reason and reasonableness themselves appear.[10] This is the same rather bizarre, though widespread, confusion that enables legal thinkers to believe that in virtue of *advocating* reason, goodness, or moral wonderfulness, they are themselves engaged in an enterprise that is reasoned, good, or morally wonderful. At the limit, it is this confusion that enables them to believe that, in virtue of their *advocacy* of reason, goodness, or moral wonderfulness, they are themselves reasoned, good, or morally wonderful. This kind of immensely self-flattering belief is quite widespread among legal thinkers. It is also a non sequitur.

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But these are all small-scale examples of the anti-intellectual implications of the legal thinker's identification with the figure of the judge. The more serious implication is a large-scale one. The identification with the figure of the judge is an intellectual betrayal. It is an intellectual betrayal because in important ways the judge cannot speak the truth, must routinely dissemble, in fact has taken oaths that require subordination of truth, understanding, and in-

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9 *See* Pierre Schlag, *Rights in the Postmodern Condition*, *in* THE PARADOXES OF RIGHTS (Tom Kearns & Austin Sarat eds., forthcoming 1995); Pierre Schlag, *Values*, 6 YALE J.L. & HUMAN. 219 (1994).

10 *See* Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814 (1994).

sight, to the preservation of certain bureaucratic governmental institutions and certain sacred texts. To be self-identified with the subject formation of the judge is thus to be intellectually compromised. It is to be beholden to a rhetoric, an aesthetic, and normative commitments that are pervasively anti-intellectual—that are in fact destructive of intellectual endeavor.[11]

Sadly, the legal thinkers of many generations have had to labor under the signs of a law that confused and conflated advocacy with scholarship.[12] For perhaps a very few—those who sought and obtained appointment to this or that court or agency—this may have been a successful enterprise. But for all the others, they compromised intellectual possibility to exercise a shadow juridical power—a power they manifestly never had. A few were judges in waiting. Some were appointed. Most waited. As for the rest, it must have been one very long session of moot court.

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[11] As Roberto Unger puts it:

> The legal academy that we entered dallied in one more variant of the perennial effort to restate power and preconception as right. . . . Having failed to persuade themselves of all but the most equivocal versions of the inherited creed, they nevertheless clung to its implications and brazenly advertised their own failure as the triumph of worldly wisdom over intellectual and political enthusiasm. History they degraded into the retrospective rationalization of events. Philosophy they abased into an inexhaustible compendium of excuses for the truncation of legal analysis. The social sciences they perverted into the source of argumentative ploys with which to give arbitrary though stylized policy discussions the blessing of a specious authority.
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> When we came, they were like a priesthood that had lost their faith and kept their jobs.

Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 674-75 (1983).

[12] *See* Paul F. Campos, *Advocacy and Scholarship*, 81 CAL. L. REV. 817 (1993).