1993

Clerks in the Maze

Pierre Schlag
University of Colorado Law School

CLERKS IN THE MAZE†

*Pierre Schlag**

It must be very difficult to be a judge — particularly an appellate judge. Not only must appellate judges reconcile often incommensurable visions of what law is, what it commands, or what it strives to achieve, but judges must do this largely alone. What little help they have in terms of actual human contact, apart from their clerks, typically takes the form of two or more advocates whose entire raison d'être is to persuade, coax, and manipulate the judge into reaching a predetermined outcome — one which often instantiates or exemplifies only the most tenuous positive connection to the rhetoric of social purpose, legal doctrine, and moral value deployed by the advocates.

These are difficult — one might say, unusual — working conditions. What makes them even more difficult is that, despite the origins of litigation in incommensurabilities, in contraries, and in contradictions, the judge must end on a note that is often monistic: judgment affirmed; judgment reversed. True, sometimes there is the possibility of deferral — as in, for instance, that last line of the opinion that reads, "remanded." But even this is a qualified deferral — a time-bound deferral, a temporary reprieve from final judgment. The judge is thus a monistic figure — one who says what *the* law *is.* And this law is always announced in the singular: there is always, at the end, from the judge's perspective and the parties' perspective, just *one* law.[1] The mysteries of these metamorphoses, of these transformations, have something to do with violence.

The violence of judging. Not only do judges conclude their work on a note of violence — a death sentence, an incarceration, a compulsory wealth transfer — but, as Robert Cover observes, the entire ritualized process of argument over which judges preside is itself fraught with violence. Judges arrive at their decisions by killing off rival conceptions of law. As Cover puts it, "[c]onfronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and de-

* Professor of Law, University of Colorado. — Ed. For comments and criticisms on earlier drafts, I wish to thank Paul Campos, Richard Delgado, Bill Goldberg, Josh Friedes, Brett Lilly, Bob Nagel, Richard Posner, Jack Schlegel, David Skover, and Steve Smith.

1. It may, of course, not be the same law that the parties or the judge read into the judicial opinion. But, in each of their interested perspectives, they will each read one law.

stroy or try to destroy all the rest."[2] Judges must destroy the worlds of meaning that others have constructed. Now, none of this, as Robert Cover himself cautions, is a criticism of judges or judging.[3] Indeed, to criticize judging because it involves violence is to misunderstand, or deny, the character of judging; it is to criticize judging because it is not busy being something else — some other more pacific activity. But even as it is inappropriate to criticize judges and judging for *this* implicit violence, and even if nothing can be done about *this* irreducible violence, this does not mean that we should overlook the law's violent character.

On the contrary, it is important to think about the violence implicit in judging because it greatly affects what judges construct as "law." Indeed, once we recognize the violence implicit in the enterprise of judging, we are poised to understand that judges, far from having a "neutral" or a "detached" perspective on law, have instead a highly interested, partial perspective on law. Indeed, what judges take to be "law" is but a romanticized and inflated shadow image of all that law is and all that law does. Once we appreciate this point, we might even come to understand that the very elementary forms of the law of judges — the forms commonly known as "rules," "doctrines," "principles," and so on — are themselves already highly self-interested constructions.

The self-interested character of the law of judges may seldom be acknowledged in our public professional fora, but its existence is hardly surprising. On the contrary: it is obvious. Indeed, if, like a judge, one is continually engaged in destroying the worlds of meaning of others, if one is continually engaged in a practice fraught with violence, then one's authorization and legitimation needs are likely to be intense. Judges quite understandably want their juridical identities, their roles, and their actions to be authorized. They want authorization in several senses. In one sense, judges want their own identities to be underwritten by a greater, grander power — a legitimating power like "The Text," "The Framers' Intent," "Justice," or, less grandly, "Doctrine." Not only do these "authoritative sources" help legitimate — a nonpejorative term here — the exercise of judicial power, but they help diffuse and distribute judicial responsibility. It is in virtue of these authorities that the actions of the judge become the actions of the community. In a second and closely related sense, judges seek au-

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

3. Cover says that the balance of terror is pretty much the way he would want it. Robert M. Cover, *Violence and the Word,* 95 YALE L.J. 1601, 1608 (1986).

thorization in that they want a script to follow — a script which delineates as clearly as possible who they are and what they must do. Such scripts — and here we can think of the doctrinal script as an example — do not just guide and legitimate the actions of judges; they fashion the judge's very identity, perhaps even detailing his exact lines. The appeal of such a steady script in a rhetorical situation, often fraught with uncertainty, unknowns, and violence, is clear.

Now again, and I want to insist on this point, there is no criticism of judges or judging here. But there is the beginning of a question as to whether judges are particularly well suited or well situated to think critically or deeply about law. Indeed, the identity, the role, and the job tasks of the judge do not typically lead to asking questions in any intellectually sustained manner about the character of law — what it is, how it works, what it does, or how it should be. The only questions of this kind that can be asked from a judge's perspective must be formulated in such a way that the questions, the answering, and the answers do not threaten the validity or the value of the judge's own sources of authority. From the subject formation of the judge, the terminus of legal inquiry — whether concrete or theoretical — is always and already a foregone conclusion: there must be a noncontradictory answer, a satisfactory solution, which, however formulated, preserves and maintains the integrity of the "authoritative sources" and the "authoritative methods." There is, thus, a very real sense in which the judge *wants not to see, wants not to understand, wants not to pursue certain lines of inquiry*. Indeed, the very construction of judges — that which enables them to be judges at all — will lead them in important senses not to see, not to understand, not to pursue certain lines of inquiry.

All of this suggests that "law," as constructed from the perspective of the judge, may well be a rather limited intellectual production — that is, one whose internal configurations and potential turn out to be intellectually rather limited. Now, what makes this "law" intellectually limited is not the abstract fact that there are certain things it does not want to see or understand or pursue. Indeed, all disciplines — including the most fertile — are constituted by a kind of formative forgetting. What is different about this "law" of judges is that the formative forgetting is given shape not by a desire to produce knowledge, insight, or understanding, but rather by that "law's" desire to hide from itself its own violent character.

* * *

The reason I mention all this is that it has been precisely the judge's perspective that has dominated and organized American academic legal thought for more than a century. Indeed the persona of the judge has served as the single, unitary subject formation that enables the American legal academic representation of "law." The prototypical legal academic has a strong identification with this judicial persona. For many legal academics this identification is cemented in the venerated and gateway tradition of the judicial clerkship. In this tradition, the young law graduate, soon to become an academic, is initiated in his first "real" law job by a judge who reveals to him what was withheld in law school: the "real" process of crafting a judicial opinion and a "real," even if exaggerated, experience of the power of the judge. For many legal academics, the clerkship is a defining moment — one from which they never recover. They become clerks for life.

* * *

Not surprisingly, the "law" of the academy bears the marks of the subject formation, the judge, through which this "law" is metaphorically, allegorically, and aesthetically constructed. This is true in an obvious, even if seldom acknowledged, sense: in the law school classroom, as in the casebook, as in the prototypical law school exam, as in the prototypical scholarly work, all kinds of law — statutory, administrative, customary, institutional — are presented and explored through the focused aesthetic and the specific problematics of the judicial opinion.[4] The judicial opinion and the judicial persona provide the implicit framing and orientation for the presentation and elaboration of the "law" of the academy. This point itself is rather obvious, but its implications are not. The consequence of the legal academic's identification with the persona of the judge has very serious implications for the construction of the "law" of the academy. As will be seen, the "law" of the academy is characterized by a profound tendency to destroy cultural, intellectual, and thus, legal meaning. Moreover, the "law" of the academy is constantly preoccupied with refashioning the rationalization of "law's" violence in such a way that reckoning with this violence is continually deferred.

Indeed, the obvious dissonance between the "law" of the academy and the law practiced by lawyers has nothing in particular to do with

4. JAMES B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 108-12 (1985).

the embrace of "theory" or the abandonment of "doctrine" in the academy. It has everything to do with the fact that lawyers understand the violent, instrumental, and performative potentials of any given law while legal academics strive mightily — whether they are doing "theory" or "doctrine" — to avoid such recognition. A lawyer looks at doctrine and sees a tool, a vehicle, an opportunity, a threat, a guarantee. A legal academic typically sees only a propositional statement.

* * *

The violence of the "law" of the academy is often not immediately visible. In part, that is because the strategies that have been deployed to distance this violence and to defer reckoning with this violence have already achieved success. Yet, for those willing to notice, the violence implicit in the law of the academy is easily retrieved — if only because it is inscribed everywhere.

Consider, for instance, the brilliant though destructive radical reductionism of Christopher Langdell's famous preface to his first contracts casebook. In that preface, Langdell reduces the "law" to a compendium of "certain principles or doctrines."[5] Along the way, common law cases are reduced to mere vehicles for studying the true essence of law, namely, "certain principles or doctrines." The result of such formalist efforts is that the pluralism of common law narratives is rudely reduced to certain "essential doctrines."[6]

The legal academy does, of course, recover somewhat from this foundational destruction and, at various times, recognizes law to be something more than mere propositional statements — for instance, a craft, a skill, a cognitive capacity, a social formation, an aesthetic, a politics, a social steering mechanism, a dispute resolution process, and so on. But the recovery has been only partial. All these different perspectives on law, for all their potential richness, have nonetheless typically remained focused on rationalizing the Langdellian legal ontology of "certain principles or doctrines." The Langdellian destruction continues.

Indeed, this ongoing historical destruction of cognitive and interpretive possibility has become institutionalized in the law student's education. The first year of law school, as it is traditionally conceived, consists largely in imparting cognitive deficits to law students — an almost physiological incapacity to read "authoritative texts" in any

5. CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS at vi (Boston, Little, Brown & Co. 1871).

6. *Id.* at vii.

but the highly delimited authoritative manner.[7] Karl Llewellyn, in 1930, described the first year in revealingly brutal terms. The physicality and violence of his nouns, verbs, and adjectives are almost palpable:

> The first year . . . aims *to drill* into you the more essential techniques of *handling* cases. . . . The hardest job of the first year is to *lop off* your commonsense, *to knock* your ethics into *temporary anesthesia.* Your view of social policy, your sense of justice — *to knock these out* of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a *body of materials* that is given, to see, and see only, and *manipulate,* the machinery of the law.[8]

It is no wonder, of course, that this sort of "training" produces the sense in many students that the Socratic method is "an assault."[9] As one former law student put it, "[t]he observation that students often respond physically and emotionally to questioning as though they were in the presence of a profound danger is simply *true.*"[10]

In jurisprudence, this violent and destructive tendency is often given expression and force in the famous distinction between the "internal perspective" and the "external perspective."[11] Here, the distinction is rendered by 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.
>
> . . . .
>
> 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 view-*

7. I make no claims here about whether this first-year violence is functional or not. Within a functionalist framework, one could easily see the impartation of cognitive deficits as serving to create a class of professionals guaranteed to interpret any and all texts in the most highly delimited and stereotyped manner. People with such cognitive deficits could then be counted upon to produce a relative stability or certainty in the fashioning and interpretation of legally significant acts.

8. KARL N. LLEWELLYN, THE BRAMBLE BUSH 102 (1930) (emphasis added).

9. Duncan Kennedy, Note, *How the Law School Fails: A Polemic,* YALE REV. L. & SOC. ACTION, Spring 1970, at 71, 72-73.

10. *Id.* at 73 (footnote omitted).

11. H.L.A. Hart, for instance, believed that it was useful to distinguish two points of view on legal rules. The external point of view is that of the "observer who does not himself accept" the legal rules, whereas the internal point of view is that of the "member of the group which accepts and uses them as guides to conduct." H.L.A. HART, THE CONCEPT OF LAW 86 (1961). For Hart, the external point of view can be useful to predict the behavior of members of the group. What it cannot do, however, is reproduce "the way in which the rules function in the lives of certain members of the group." *Id.* at 88.

> *point* . . . because judicial argument about claims of law is a useful paradigm for exploring *the central, propositional* aspect of legal practice.[12]

As Dworkin's telling and indeed representative statement reveals, the "internal perspective" is used to reduce "law" to the usual Langdellian object — forms — what Dworkin calls "the *central, propositional* aspect of legal practice" — and to eliminate perspectives that might advance any troublesome learning not consonant with "the judge's viewpoint" or his authority. Indeed, no sooner does Dworkin invoke the distinction than he immediately presses it into service to relegate "history" and "sociology" to the realm of the external, somewhere outside the realm of law.

This use of the internal-external perspective distinction is prototypical. Indeed, the distinction is typically used to patrol the borders of *Law's Empire.*[13] It is used to rule out of bounds any perspective on law that is not consonant with what the judicial persona already takes to be "law." In this uncritical deployment of the internal-external perspective distinction, the law is simply presumed to be separated from the rest of the world by a border that neatly divides the two into an inside and an outside. In this same move, the wielder of this distinction typically bestows upon himself the authority to declare what belongs on the inside and what belongs on the outside. It is as if the legal academic could usefully pronounce on the value of an intellectual enterprise in the same way that a judge can rule from the bench on a motion to exclude evidence. Sometimes the internal-external perspective distinction is deployed in even cruder ways. Indeed, the destructive and violent effects of the academy's judge-centered vision is perhaps most easily seen in those academic writings that strive to rid the intellectual scene of certain inquiries or points of view by simply *declaring* them to be "nihilistic."[14]

While these kinds of brutal and blunt actions are one way in which the law of the academy exhibits its violent and profoundly antiintellectual character, they are certainly not the only way. Much of the violence of the "law" of the academy is more subtle. Much of this violence involves the forced recasting of intellectual and cultural insights from other disciplines into *forms* and *uses* that accord with the aesthetics of the judge: the legal brief, the legal opinion, the 1,000-

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

13. For an elaboration of the role and aesthetic composition of the internal-external perspective dichotomy, see Pierre Schlag, *Normativity and the Politics of Form,* 139 U. PA. L. REV. 801, 916-29 (1991).

14. (Many citations omitted.)

footnote law review article. It is in this way that deconstruction is reduced to a legal reasoning technique. It is in this way that hermeneutics is crystallized into a method for advancing progressive legal thought. It is in this way that [. . .] is degraded into [. . . .] Foreign disciplines and their insights do gain admittance to law, but only to the extent they are recast to conform to the normative instrumental projects of the "law" of the academy. In general, foreign disciplines are to the "law" of the academy as expert testimony is to litigation: a largely instrumental display or simulation of intellectual authority and competence. This sort of normative instrumentalization of other intellectual traditions destroys the intellectual, perceptual, and aesthetic resources and capacities through which we (you and I) might make sense of our world and our law. At the level of the individual, this normative instrumentalization destroys *cognitive capacity,* the ability to think in a wide variety of different interpretive, aesthetic, and cognitive frames. At the level of the social, this normative instrumentalization destroys *cultural and intellectual memory.* It puts cultural and intellectual resources beyond retrieval. It turns legal subjects into pawns. It makes the legal world flat — as if all truths worth knowing about law could be stated in the aesthetic, in the linguistic forms, in the normative persuasional grammar of the legal brief, the legal opinion, or the 1000-footnote law review article.[15]

* * *

The reason I mention all this violence at the heart of the "law" of the academy is that it would seem to present significant difficulties for constituting or maintaining law as a vital intellectual discipline. With this sort of generic destructive orientation at the very heart of law, it is difficult to see how this discipline can achieve very much in the way of knowledge or insight. Its attitude toward the world and itself does not seem terribly open, or curious, or searching, or anything else that one might associate with a vital intellectual endeavor.

With so much violence at the heart of law, the discipline of law is, in some sense, constantly driven to try to escape from or deny its own violent ontology. Law is thus constantly in flight from itself — seeking to represent itself as some highly purified, chastened, idealized, or redemptive version of itself. This is why in the "law" of the academy we get so much *happy talk jurisprudence* — promises of law as "a grand conversation," promises of law as subservient to "progressive

15. This argument (with specific reference to deconstruction) is elaborated 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).

legal thought," promises of law as responsive to the imperatives of "efficiency," promises of a law that is always already one way or another becoming the very best it can be. Of course, this desire for flight from the violent character of law is also why legal thinkers continually confuse and conflate *"really good"* legal thought with legal thought that makes them *feel really good.* Making the law feel really good — or, in more technical terms, "making the law the best it can be" — is not some mere side effect of legal academic enterprise: it *is* the legal academic enterprise. It *is* the perfected expression of a law that is in flight from its own violent ontology.

This same pattern is also enacted when we move from the normative celebrations of law to the normative criticisms of law. Indeed, the constitution of law as in flight from its own violent and destructive character helps account for why normative protests that law should be more self-conscious, more empathic, more moral, more sensitive to context, and so on, always resonate with the academic audience and simultaneously always already miss their mark. These claims always resonate because law is always lacking in the humane qualities to which its academic custodians aspire. In this endlessly repeated observation, the academic custodians of the law could not be more right. But the claims also always already miss their mark because, as mere normative or epistemic criticisms, they leave the violent ontology of law completely untouched. Hence, whether cast as celebration or as criticism, the normative prescriptions of the "law" of the academy generally end up as part of the cheerful, happy, self-congratulatory celebration of a law whose violence and destructiveness thus become obscured.

All of this suggests great problems for the construction of "law" as a vital intellectual discipline. Indeed, if the generic generative gesture that gives rise to the "law" of the academy lies in transforming law into an idealized image of itself — whether as "doctrine," or "theory," or whatever — then we will have an academic discipline constituted as a continual attempt to escape from its own object.[16] Its very object of study will have been constituted as cheerful, idealized, purified simulation of the ostensible object of study. Hence, instead of studying law, legal academics will be studying "doctrine" which, of course, they will

16. Indeed, much of academic law can be seen as successive attempts to enact and institutionalize precisely this escape. The "pure theory" decried by Judge Edwards can be seen, as he does, as one such attempted flight. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). But, of course, precisely the same claim can be made about what he calls "doctrine" or "legal process." Doctrine is simply yesterday's successful theory. What it has going for it is that it has achieved success. What it has going against it is precisely the same thing.

call "law." Instead of studying decisionmaking, legal academics will be studying judicial opinions which they will call [. . .] Instead of studying [. . .] (and so on). The critical ontological entities — rules, doctrines, principles, opinions, policies, and so forth — will have been from the very start treated as "real" law despite their obvious collective incompleteness and their radical individual underspecification. What regularity or groundedness these terms will offer over the course of centuries, decades, or the next fifteen minutes will depend upon the legal academic's formative identification with the persona of the judge — a persona ineluctably given to acts of elaborate self-rationalization. Now, again, none of this is offered here as a criticism of judges or judging. It does, however, make one wonder whether this is a sound constitutive matrix for the construction of a vital intellectual discipline.

Not only is this arguably not an auspicious beginning, but it does not get any better than this. On the contrary, the destructive tendencies of the "law" of the academy, together with its sustained drive to rationalize and legitimate what is already considered "law," make it virtually impossible for the "law" of the academy to learn or produce anything new. Nor is this formative orientation likely to change easily. For one thing, the "law" of the academy cannot easily take cognizance of its own destructive and violent character because, like its organizing source-persona, the judge, it is constituted to deny this destruction and violence. Moreover, any chance encounters with intellectual or cultural insights that might enable the "law" of the academy to recognize its own violent character, and its tendencies to rationalization and legitimation, are immediately judged to be "external" to law or are otherwise slated for destruction.

The "law" of the academy — glittering with all sorts of normatively glowing representations of itself — is thus defensive and authoritarian. Indeed, what else could it be? Given the intellectually unstable character of the "law" of the academy as in flight from its own violent character, as in flight from its own object, all there is to protect this "law" from intellectual challenges is the disciplinary power of its constituting, organizing source-persona, namely, the judge. Thus, when the "law" of the academy encounters new intellectual currents — everything from hermeneutics, to poststructuralism, to anthropology — the first contact tends to exhibit a sort of violent adjudicatory character. Typically there is no serious intellectual engagement. Instead, what we typically get is the academic equivalent of a ruling from the bench on whether the foreign insight or idea is or is

not useful to law's empire.[17] It does not augur well for an intellectual discipline if its constitutive disposition is basically to avoid, so far as possible, learning anything new. This is not the sort of disposition that one would expect to produce a vital intellectual practice.

Now, if the law of the academy is prompted by a desire for flight from its own object, from its own violent character, and if its destructive and violent tendencies are manifested in an ongoing desire not to see, not to understand, not to pursue certain lines of inquiry then what have legal academics been doing all these years? This seems like a difficult question — until, of course, we realize that the answer has already been given. In their identification with the organizing source-persona of the judge, legal academics engage in the legitimation and rationalization of judicial opinions. In the first instance, it is the violence of judges and judging that they rationalize and legitimate. In the second instance, when these legitimations and rationalization have taken hold, and the violence of judges and judging have receded from view, legal academics simply rationalize the rationalizations and legitimate the legitimations and so on reflexively. This practice is not as esoteric as it may first seem. On the contrary, it is downright commonplace. Consider, after all, that the prototypical doctrinal law review article is itself a legitimation of other legitimating artifacts — namely, judicial opinions. Consider also that the bulk of "law and . . ." work as well as of "theory" is itself often little more than a particularly abstract kind of mimesis of the legitimating strategies of lower order legitimating artifacts such as "doctrine" or "case law."

Nor is it the case that the legitimating strategies of the academy are particulary illuminating — intellectually or otherwise. On the contrary, two rather simple legitimating strategies account for much of the "law" of the academy. The first legitimating strategy is that of *constrain and control.* For more than a century, legal thinkers have sought to fashion "doctrine" or other object-forms of law that would not merely inform, but *constrain and control* the actions of the judge. This legitimating strategy can be understood as a response to the implicit violence of judging. If the judge is not constrained and controlled, then the violence of judgment may well be wrought in completely illegitimate ways upon nondeserving parties. The perennial focus of legal thinkers on "constraint," "restraint," "binding doctrine," "objectivity," and so on is an attempt to rationalize the violence of the law of judges by constraining it a priori to selected identifiable instances of legitimate use. Similarly, the fascination with

17. (Citations omitted.)

observing procedural regularity, with the meticulous dissecting examination of what procedural regularity has produced, with gapless demonstrations of an unbroken chain between a decision and its origins in some canonical text or act or institution is also an attempt to secure, a priori, the rationality of the violence of judges and judging. This fascination with pedigree and provenance is inscribed everywhere — from sophisticated expression in the great works of the legal positivists, to the ordinary practice of stare decisis, to the internalized observance of exquisitely detailed, "authoritative" hierarchies in legal academic hiring, publication, and professional recognition. Not surprisingly, this strategy of *constrain and control* produces a constricted form of thought. The attitude of this legal thinker is that of a sculptor working cautiously and carefully on the monument of law. He dare not have a creative idea, certainly not a big idea, lest it chip or crack the monument of law in an irretrievable manner. The attitude is one of self-abnegation. Ironically, despite the constricted form of thought produced through this legitimation strategy of *constrain and control,* there is one aspect in which it knows no limits, no restraint at all: that is in the unfettered attempt to dissect and differentiate its own minute contributions to the edifice of law into even tinier analytical pieces.

The second strategy is one of *justify and redeem.* This strategy attempts to articulate the justifications or the redemptions that are to guide the development and deployment of law. Again, this strategy can be understood as a response to the implicit violence of judges and judging. If there are no justifications or redeeming virtues for law, then the violence of the judge may well remain unjustified. The perennial focus of legal thinkers on justification, on the offering of reasons and on the formulation of normative prescriptions is an attempt to rationalize the violence of the law of judges by limiting its use to the achievement of good, widely shared ends. Similarly, the fascination with the question, "what should the law be?" and the fascination with the constant advocacy of goodness, rightness, and justice are also attempts to ensure that there is never a moment when the normative validity or the ethical identity of law might actually be in serious question. This fascination with moral totems is inscribed everywhere — from sophisticated expression in the philosophical theories of moralist thinkers like Ronald Dworkin, to the mundane practice of policy and principle justification in judicial opinions, to the idolatrous worship of sacred signifiers like "The Constitution," "Rights," "Progressive," or even "Transformative Action," among legal academics. It is inscribed in the very aesthetic structure of the usual law review narrative, which typically proceeds in a cheerful progression from inefficiency to effi-

ciency, iniquity to goodness, oppression to liberation, or, to put it in generic terms, from insuperable illegitimacy to general moral wonderfulness. This moralizing tendency is inscribed as well in the political-intellectual syndicalism that organizes and regulates faction fights on faculties, hiring decisions, and the like. The *justify and redeem* strategy thus produces a conventionally politicized environment in which normativity is used to police or extinguish thought — all, of course, in the name of the very best values, the most worthy objectives. In the *justify and redeem* strategy, nothing can be said or thought about the law unless it demonstrably tends to advance conventionally sanctioned descriptions of the good, the just, the right, and so on. Not surprisingly, with the moral stakes so high, the legal thinker in the grips of this kind of legitimation strategy tends to worry a lot. For this legal thinker, the world and the law are things to wring one's hands over. In the *justify and redeem* legitimating strategy, the surface recognition of the potential of law for violence thus results in great angst-ridden displays of guilt and contrition. This is often accompanied by grand demonstrations of profound and tragic moral concern often accompanied by self-righteous and indignant outrage, which ironically (though predictably enough) yields a kind of self-congratulatory feel-good jurisprudence. Like the *constrain and control* strategy, then, there is also one way in which the *justify and redeem* strategy knows no limits. It has an absolute and absolutely remarkable faith in the use and the usefulness of "law" and legal argument for the achievement of the good, the just, the right, and so on.

As legitimating strategies, *constrain and control* as well as *justify and redeem*, of course, have very appealing aspects. Hence, *constrain and control* can be seen as an entirely appropriate response to the potential of law for violence. The strategy recognizes that the law enforced by judges is not an appealing medium, that it is destructive, and that therefore it must be used sparingly, in the most limited and carefully monitored situations. The *constrain and control* strategy thus finds its most perfected expression in standard conservative politics, which seek to minimize the use of "law" to regulate human affairs. If law is a destructive, undesirable, and painful mode of human association, then there is a certain amount of sense in trying to limit its use and its jurisdiction. How then does this legitimating strategy go wrong? It goes wrong in imagining that there is still some sector of life — some "private" sector — that remains relatively separate from, and impervious to, the mediating and regulative categories and grammar of the bureaucratic state. This is not our situation. Hence, the choice *is not,* as conservatives would want it, between use of law to regulate

human affairs, on one hand, and reliance on some idealized vision of private initiative untainted by legalism, on the other. And, because, contrary to the political desires of conservatives, this *is not* the choice, *constrain and control* cannot effectuate a selection between a destructive legalism and something else. All it can do is effectuate a selection between one kind of destructive legalism and another.

The *justify and redeem* strategy can also, at first, be seen as an appealing response to the problem of violence. Whereas *constrain and control* abandons the possibility of humanizing law and thus strives to restrict its use and jurisdiction, *justify and redeem* abandons the possibility of restricting law's use and jurisdiction and instead strives to humanize the law. If law has become America's civil religion, if it is all pervasive, if it has become a critical source of communal meaning and organization, then it might make some sense to strive to humanize this law. How, then, does this legitimating strategy go wrong? It goes wrong in imagining that, by substituting the language of moral philosophy, of values talk, for the more technical language of doctrine and legal authority, the law might become more humane. Again, this is not our situation. Law, as it is practiced by lawyers, does not become more humane simply because they learn to use nicer, warmer signifiers (like "love" or "care"). Lawyers can be forced — a term deliberately used — to use nicer-warmer signifiers, but they will, of course, use these nicer-warmer, kinder-gentler signifiers in the same old coercive ways, to accomplish the same old performative tasks they were hired to do. The mistake here is roughly, not exactly, the same as that of the *constrain and control* strategy. The *constrain and control* strategy imagines that there is some prelegal world of culture or self that is at once untainted and resistant to the bureaucratic state. The *justify and redeem* strategy imagines that there is a set of signifiers — signifiers usually associated with moral philosophy or value talk — that are not only impervious to, but that in fact will transcend, the instrumentalist grammar of the bureaucratic state. This mistake is presently characteristic of the academic liberal-left. What the academic liberal-left does is heat its own favorite signifiers — signifiers like "politics" or "progressive legal change" — as somehow mysteriously exempt from social construction and still fully context-transcendent after all these years.

Notice that both the *constrain and control* strategy and the *justify and redeem* strategy go wrong in much the same way. They both take their (intellectually antiquated) political desires as descriptive of their own situation. Neither is to be faulted for this. On the contrary: the institution of such deception, of such self-deception, is precisely what

legitimating strategies are all about. Indeed, what else is to be expected from a legitimating strategy? The critical question is: how well are they doing it? The answer is not very well at all. Rather than experiencing either or both of these legitimating strategies as ethically generative or intellectually vital, our experience is altogether different.

Both of these legitimating strategies are, of course, quite constricting. They are both institutionalized forms of thought control. Not only do they limit what can be thought or asked about law, but in fact they organize and institute legal thought as a tedious repetition of — what else? — themselves. This is why, in the "law" of the academy, we seem always to be rediscovering the same old truths. This is why, in the "law" of the academy, if you have an idea, it is probably not "law," and why, if you are doing "law," you probably have no ideas. This is why one often gets the feeling at legal conferences that virtually nothing is being said. That is because nothing really is being said. Instead, legal thinkers are, for the most part, enacting the strategies of *constrain and control* and *justify and redeem.* They are sticking very closely to the approved, cautious, incrementalist methods of *constrain and control* and very closely to the conventionally sanctioned, normative narratives of *justify and redeem.* In the *constrain and control* strategy, legal thought is protected by elaborate burdens of proof, copious disclaimers, and very careful delimitations of the operative jurisdiction. In the *justify and redeem* strategy, legal thought is wrapped in an extensive padding of normatively wonderful signifiers and moral self-congratulation. Indeed, with all this institutional and rhetorical constriction and all this aura of destruction, the presentation of legal thought is framed very defensively. This is why legal thinkers are always taking "stances" and trying to "defend" their "positions." Indeed, with all this aura of destruction around, could one really expect anything else?

Now, so far, I have described the world of academic law as (1) constituted by a desire for flight from its own violent character, (2) constructed so as to avoid learning anything new, and (3) given to rationalizing its own rationalizations. As a constitutive matrix for an intellectual discipline, this is, to say it again, not an auspicious start. But note that, in this presentation, what I have done is simply trace the implications of the legal academic's primal identification with the persona of the judge. The three tendencies discussed above have thus been presented in a static frame. In order to understand our situation, it is necessary to present the matter dynamically. We need to consider what happens over time when both legal academics and judges are fashioned with these destructive, world-denying motivations and these

rationalizing tendencies and are then asked to train each other, to see and construct "law" in terms of the perspective of the other. Does law work itself pure?

This is not an idle inquiry. Consider that, on the academic side, we get some of the very brightest people of each generation to work within this medium of the "law" of the academy. What happens when very intelligent people are asked to operate within this discursive world constructed as a flight from its own object, a discursive world given to elaborate, self-referential layers of self-legitimation and self-rationalization, a discursive world bent so far as possible on not learning anything new and reaffirming itself as the same? What happens when extremely intelligent people are asked to perform within this sort of discursive universe and are constructed through disciplinary power to observe this institutionalized and cognitively embedded etiquette? What do they do? What do they write? What is to be expected?

Fortunately, we are not answering these questions in the hypothetical. We have over a hundred years of answers to examine. Mostly what these extremely intelligent people do, it turns out, is construct extremely intricate and elaborate structures and then try to rationalize these structures. In short, they build mazes. Most of the time these schemes turn out to be something that might be called "doctrine"; sometimes they look more like what might be called "theory."[18] Either way what we get is an extraordinarily variegated law — a law which is internally differentiated in multilayered self-referential ways. What we get are a series of increasingly specific rationalizations linked to other rationalizations via an orderly system of rationalizations. Now, to the extent one is operating within any of the currently available rationalization programs — efficiency analysis, ad hoc doctrinalism, ad hoc policy instrumentalism, ad hoc pragmatism, ad hoc whatever — the "law" of the academy makes a certain amount of sense. Indeed, it is extremely difficult to disprove the validity or value of any of these rationalization programs. It is difficult because, at this late date, the hypertrophy of self-referential rationalization has obscured most of what might be called the referents from view. And since the logic of this self-referentiality consists mostly of self-congrat-

18. To me it does not really matter much: this doctrine-theory distinction is vastly overstated. Much of what passes for "theory" in the academy is a kind of normative or normatively driven theory. It is in short, a kind of metadoctrine, doctrine in waiting, doctrine wannabe. It is, a doctrine of the doctrine — which is, of course, entirely fitting given the age-old self-image of the legal academic as the judge of the judges. As for doctrine itself, its claims to be separate from theory are overstated as well. Doctrine is simply yesterday's theory successfully transubstantiated into an authoritative juridical artifact. Doctrine is simply the activity of theory reduced to an artifactual status.

ulation, the rationalization programs are well defended. What is more, these programs are constructed in ways that authorize and legitimate the destruction of new nonconforming views and their relegation to the oblivion of the external perspective. How then could these rationalization programs possibly go wrong?

In some senses, it seems as if they cannot. These mazes built of massively overwrought doctrine, of sacred historical text fragments, of multilayered bureaucratic processes and sundry dominions of expertise, of massive economic or moral theoretical structures deployed to resolve picayune legal problems, are the mazes that legal academics run. While these mazes are all different, they are all aesthetically very much the same: they are constructed of repeated exercises of *constrain and control* and *justify and redeem.* What these mazes have going for them is that, over time, they produce certain cognitive and aesthetic deficits. They produce subjects — legal subjects — who are so caught up in the rationalizations and the legitimations that they systematically conflate:

> the regulative ideal of thoughtful, searching, and comprehensive judicial opinions
>
> with
>
> the regulatory bureaucratic noise of contemporary Supreme Court opinions;
>
> the eternal form of law
>
> with
>
> the formative jurisprudential experience of their youth — [. . .];[19]
>
> engaging in transformative or progressive political action
>
> with
>
> writing passionate law review articles in favor of transformative or progressive political action.

Each of these conflations is in an important sense the *same* conflation, the *same* confusion — a confusion that arises when the legal academic subject becomes so immersed in and so suffused with the legitimations and rationalizations of the "law" of the academy that he or she has become incapable of distinguishing the referent from the simulation. In this discursive world, the *identity* and the *ontological* status of the

---

19. Pick one and insert as appropriate:
a) legal process
b) formalism
c) moralism
d) taking over the administration building
e) (as yet unnamed).

main terms and the main grammar are at once almost always beyond question, and yet almost always dramatically underspecified.[20] As a partial preliminary list of such terms, consider the following:

The Law
The Rule of Law
Objective
Common Sense
Good Judgment
Transformative Action
Transformative potential
Rights
The Constitution
The First Amendment
The Text
The Intent of . . . .
Nihilism
Progressive Legal Change
Change
Contextual
Maximize
Deter
Cause

Now, among the appropriate legal academic audience, the invocation of these terms, in accordance with their usual accompanying grammar, will, with surprising frequency, *simply arrest thought upon impact.* This dramatic arresting effect is part of the legitimation or delegitimation value of these terms. The terms are either so obviously true and good or so obviously false and wrong that their identity and ontological status are not and need not be questioned. Instead, whatever these terms may be missing in intellectual content — which, of course, is usually everything — is always already compensated through the legitimating or delegitimating projections of the appropriate legal academic audience.

The sort of desperate attempts that we see currently among leading legal academics to infuse vitality into these virtually empty signifiers — everything from "The Rule of Law" to "Progressive Legal Change" to "Politics" — is a testimony to their vacuity. The vacuity of these vain terms should not surprise for their accmpanying grammar is generally so vacuous as well. Indeed, consider that a great deal of the legal academic conversation can be understood as little more

20. Could we be talking about God substitutes again? Sure. *See* KENNETH BURKE, A GRAMMAR OF MOTIVES 355 (1945) ("For a God term designates the ultimate motivation, or substance, of a Constitutional frame."). For my part, I call these little items, "theoretical unmentionables." For a description of their structure and function, see Pierre Schlag, *Contradiction and Denial*, 87 MICH. L. REV. 1216, 1222-23 (1989) (reviewing MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987)).

than an ongoing debate between generally conservative-right proponents of *constrain and control* and generally liberal-left proponents of *justify and redeem.* It has been, in short, a very long conversation carried on between two impossible visions, neither of which could possibly register in our present social circumstances — except, of course, as legitimations. Legitimations of what? Legitimations first and foremost of themselves. Legitimations secondarily of each other, for if one part of the opposition drops out, the other makes little sense: No Dworkin without a Bork. No Radin without an Epstein. No [. . .] without a [. . .], and so on. Thirdly, what these legitimating strategies are legitimating is their own unconscious construction of an extraordinarily florid bureaucratic legalism that knows no limits in its internal differentiation nor in its territorial acquisition of new subject matter to be submitted to the regimes of "The Rule of Law," or "Progressive Legal Change," or "Politics," or whatever. In short, these legitimations are legitimations of the maze.

Is this surprising? Is it surprising that one day the grand legitimating strategies of law should appear vacuous? Is this surprising — given the constitutive desire of the law of the academy not to see, not to understand, not to pursue certain lines of inquiry? Is this surprising given the legal academy's sustained construction of mazes upon mazes of rationalizations of rationalizations? Is this surprising, given the formative core of destructiveness and violence at the heart of the "law" of the academy? Is it surprising that the "law" of the academy should consume itself in this way — find itself one day in an extraordinarily extensive maze not knowing what to do or where to go and with only the most self-congratulatory versions of extradisciplinary knowledges available to help? Is this surprising?

No.

What might be, in one sense, surprising — though, not according to this essay — is that the "law" of the academy, a law which has been bent on so much destructiveness and so much denial of its own destructive impulses, has been able to portray itself and its various mazes as somehow constructive. One can see how this claim is itself constructed if we look at the recent argument offered in Judge Edwards' article.[21] Judge Harry Edwards complains that various parties in the legal academy are contributing to the ethical corruption of young lawyers by supposedly abandoning "doctrine" in favor of "theory." Now, this too might seem to be a surprising claim. Indeed, before the theorists or any of the younger intellectuals appeared on the legal scene,

21. Edwards, *supra* note 18.

legal academics of Judge Edwards' generation and those before had been representing law as an idealized ordering of clean propositional statements, known as "certain doctrines and principles." They had developed an extremely intricate system of doctrines and cases and legal interpretation that successfully eclipsed the destructiveness and violence of law and judging. In order to maintain this intricate system of interconnected doctrines and rationalizations, they, of course, had to destroy the cognitive, aesthetic, and intellectual capacities of generations of students. They tried, as much as possible, to establish a system that would run by itself, a system which, through the legitimation strategies of *constrain and control* and *justify and redeem,* would severely limit the need for individual ethical judgment. They sought to transpose ethics from the realm of cognition and practice to what they saw as more lasting and universal form — the form of rules, standards, doctrines. They worked on projects like the Restatements and the ABA Code of Professional Responsibility. They sought to transform law and legal ethics into elaborate schedules of carefully drafted propositions. This was said to be "constructive."

But now that they see what they have wrought, now that all their best intentions have turned into endless corridors of bureaucratic legalism riddled with instrumentalist opportunism, they blame their jurisprudential failures on their offspring. This is sad. These observations, of course, could easily be developed into a normative response to Judge Harry Edwards. In some sense, his inflammatory claims invite and prefigure such a response. But it is important to resist this sort of normative impulse. For one thing, it would just be another exercise in normative feel-good jurisprudence. For another, in its normative destructiveness, it would simply be an expression of law's sameness. Besides, there is something more important to do here than simply return Judge Edwards' missiles back to sender. That something is to illustrate, yet one more time, a key argument of this essay: when an entire discipline like the "law" of the academy is constructed as a series of legitimations and rationalizations designed to avoid taking cognizance of its own violent and destructive character, when it is designed in such a way as to destroy indiscriminately new, nonconforming thought, it is easy to become ethically disoriented. One becomes ethically disoriented precisely because one has already lost the aesthetic and cognitive capacities to appreciate what is going on. One becomes ethically disoriented because one has become just another clerk lost in the maze.

I do not want to make a normative argument against the maze. I do not know about you, but in my experience making normative argu-

ments to social practices or to psychological formations to try to convince them to reform their own being is just not a terribly successful strategy. I have several views as to why this is.[22] At least one of them is completely contrary to what is routinely taken for granted throughout virtually all contemporary American legal thought. This view — one which has been described in this essay — is that *deficits in ontological condition will prompt epistemological and normative endeavors as compensation for those ontological deficits, and simultaneously render these normative and epistemological endeavors entirely ineffectual in correcting those ontological deficits.* Now, so long as this point is not understood, the normative and epistemological endeavors can keep going for a very long time — decades at least, and possibly centuries. Of course, it is also true that if this point is not understood, those normative and epistemological endeavors will then seem, for inexplicable reasons, increasingly repetitive and increasingly boring.

This view is completely contrary to what virtually all contemporary American legal academics take for granted. If one takes seriously what they write and what they say, American legal academics seem to believe something like the opposite. It is not exactly the opposite, however, because it is not just a belief. Indeed, among American legal academics, the presupposition that normative or epistemological prescription is somehow competent to address and redress deficits in ontological condition is not merely a belief, nor even a sacred truth: it is a constitutive aspect of their very being as legal academics. Similarly, this constitutive aspect is critical to the construction of the legitimating strategies of American legal thought described above. In the context of this essay, it is easy to see why. If it were the case that normative and epistemological endeavors were not capable of transforming the ontology of law, then we, as legal academics would be stuck with, and implicated in, what would then appear as the irreducible and unmediated violence of judges and judging. That, I take it, is something that American legal academics are constituted through and through to find absolutely intolerable, absolutely unacceptable. Hence, they believe that this violence can be transformed through *constrain and control* or *justify and redeem* into something else — into something more palatable, like doctrine, or normative theory, or grand dialogue or neopragmatic sensitivity or [. . .]. That, in short, is how we (you and I) get into and help propagate the maze.

Now, you can tell where this is going. I have been postponing the conclusion for some time now.

22. These views are elaborated in Schlag, *supra* note 15.

* * *

There is, of course, a way out. And it has been described throughout this essay. The difficulty with this way out, for most legal academics, is that it does not, indeed it cannot, reduce to *a prescription* or *a recommendation* or *a solution* or even *a criticism.* So, to the extent that one keeps looking for a prescription or a recommendation or a solution or a criticism, one will remain in the maze.[23]

But for those who find the way out, this is an extraordinarily exciting time in American legal thought. The social formations, the institutional norms, and the professional hierarchies that embody and enforce the orthodox jurisprudential strategies of *constrain and control* and *justify and redeem* seem to be losing some of their hold. Accordingly, for those who have the inclination and the capacity, the study of law provides extraordinary opportunities for intellectual creativity — opportunities that go way beyond the usual "Law and . . ." strategies of reducing law to some foreign discipline or reducing some foreign discipline to the role of supporting cast for the reconstruction of the same old law. For those with the inclination and the capacity, there are a tremendous number of questions to answer — questions that, in virtue of the *constrain and control* and *justify and redeem* strategies, no one has *yet dared* to ask.

---

23. Of course, from within the maze there are any number of very "moral" rationalizations available for remaining in the maze. But, despite these rationalizations, remaining in the maze is far from ethically admirable. Consider that what the academic experiences as the dreariness of the 1000-footnote doctrinal or "interdisciplinary" law review article is echoed in the dreariness of contemporary Supreme Court opinions which is echoed in the dreariness of the contemporary lawyer's bureaucratic practice which is echoed in the dreariness of the bureaucratic mazes through which citizens must strive to push their lives. There is nothing ethically admirable about these massive self-referential corridors of rules, doctrines, or theories.

Why then do legal academics remain in the maze? Why do they extend it? Ironically, it is in part because they have an admirable disposition which leads them to want to help, to want to do something constructive. But, of course, *as an ethic,* this disposition is woefully incomplete. The thing to try to think about is help *whom?* Construct *what?*