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# Pre-Figuration and Evaluation

Pierre Schlag†

*In this response to Professor Rubin, Professor Schlag argues that a prescriptive theory of evaluation does not free an evaluator from the bias inherent in his own pre-figurations. On the contrary, the belief that better evaluative criteria will advance the cause of fairer evaluation is itself an effect of flawed and unrationalized pre-figurations of conventional legal thought. Professor Schlag argues that the evaluation question and its attendant disputes arise from a more significant development—the unravelling of the dominant paradigm of legal thought, the decomposition of normative legal thought.*

Evaluation is hard to do. It is hard to separate what one projects into, or out of, the texts of others from what the authors invest in the texts themselves.<sup>1</sup> If you are not convinced, consider the following sample evaluations:

What Gadamer says of Habermas:

The concept of reflection and bringing to awareness that Habermas employs (admittedly from his sociological interest) appears to me, then, to be itself encumbered with dogmatism, and indeed, to be a misinterpretation of reflection.<sup>2</sup>

What Habermas says of Foucault:

Foucault cannot adequately deal with the persistent problems that come up in connection with an interpretive approach to the object domain, a self-referential denial of universal validity claims, and a normative justification for critique.<sup>3</sup>

What Foucault says of Derrida:

*[O]bscurantisme terroriste.*<sup>4</sup>

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1. It is particularly difficult to do evaluation once the cultural and conceptual reifications that establish the boundedness, location, and identity of “author,” “text,” and “reader” have dissolved.

2. HANS-GEORG GADAMER, *PHILOSOPHICAL HERMENEUTICS* 34-35 (David E. Linge trans., 1977).

3. JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES* 286 (Frederick Lawrence trans., 1987).

4. That is: “The text is written so obscurely that you can’t figure out exactly what the thesis is (hence ‘obscurantisme’) and then when one criticizes it, the author says, ‘*Vous m’avez mal compris; vous êtes idiot*’ (hence ‘terroriste’).” John R. Searle, *The Word Turned Upside Down*, N.Y. REV. BOOKS, Oct. 27, 1983, at 74, 77 (reviewing JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1983)).

What Derrida says of Gadamer:

Does not this way of speaking, in its very necessity, belong to a particular epoch, namely, that of a metaphysics of the will?<sup>5</sup>

These statements evince significant intellectual disagreement. How are we to evaluate these evaluations? Does this "situation" present a problem? Maybe. It depends on how this "situation" has been pre-figured. For Jean-François Lyotard, the French postmodern philosopher, this "situation" might be understood as an instantiation of a very serious problem, whereas for Hans-Georg Gadamer, the German Heideggerian, it would likely not.

For Lyotard, the "situation" here could be likened to a "differend." According to Lyotard, a differend arises when the regulation of a conflict is done in the idiom of one of the parties—an idiom in which the claims and arguments of the other party cannot be expressed and thus do not register.<sup>6</sup> For Lyotard, our institutionalized idioms, our verification procedures, our mechanisms for adjudicating truth, are pre-establishing the realities whose truth we then assert.<sup>7</sup> If this is the kind of pre-figuration at work in the evaluation of scholarship, then our "situation" is a serious intellectual and political problem.

While Lyotard describes a highly problematic kind of *pre-figuration*, Gadamer's take is far more congenial to the confident self-image of conventional legal thought. For Gadamer, the recognition that we interpret texts through our own anticipated meanings and fore-structures of understanding is not a problem at all. Rather, understanding is a process of revising one's preconceptions as one proceeds in the reading.<sup>8</sup> The structure of understanding is thus circular. This hermeneutic circle is not something to complain about; it is rather an ontological aspect of understanding itself.<sup>9</sup>

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5. Jacques Derrida, *Three Questions to Hans-Georg Gadamer*, in *DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER* 52, 53 (Diane P. Michelfelder & Richard E. Palmer eds., 1989).

6. JEAN-FRANÇOIS LYOTARD, *THE DIFFEREND* 9-10 (Georges Van Den Abbeele trans., 1990).

7. There is a differend, therefore, concerning the means of establishing reality between the partisans of agonistics and the partisans of dialogue. How can this differend be regulated? Through dialogue, say the latter; through the agôn, say the former. To stick to this, the differend would only perpetuate itself, becoming a sort of meta-differend, a differend about the way to regulate the differend about the way to establish reality.

*Id.* at 26.

8. Gadamer writes:

A person who is trying to understand a text is always performing an act of projecting. He projects before himself a meaning for the text as a whole as soon as some initial meaning emerges in the text. Again, the latter emerges only because he is reading the text with particular expectations in regard to a certain meaning. The working out of this fore-project, which is constantly revised in terms of what emerges as he penetrates into the meaning, is understanding what is there.

HANS-GEORG GADAMER, *TRUTH AND METHOD* 236 (Garret Barden & John Cumming trans., 2d ed. 1975).

9. Gadamer writes:

If we were to think of evaluation in terms of Lyotard's "differend," we would get a different vision of evaluation than if we thought about it in terms of Gadamer's "hermeneutic circle." For Lyotard, the appropriate response is

[t]o give the differend its due[; that] is to institute new addressees, new addressors, new significations and new referents. . . . What is at stake in a literature, in a philosophy, in a politics perhaps, is to bear witness to differends by finding idioms for them.<sup>10</sup>

For Gadamer the appropriate response is

to be aware of one's own bias, so that the text may present itself in all its newness and thus be able to assert its own truth against one's own fore-meanings. . . . It is not, then, at all a case of safeguarding ourselves against the tradition that speaks out of the text but, on the contrary, to keep everything away that could hinder us in understanding it in terms of the thing.<sup>11</sup>

The important point to recognize here is that the divergent responses of Lyotard and Gadamer have already been pre-scripted in their divergent aesthetic *pre-figurations*. To generalize the point: *normative prescription is largely already a matter of aesthetic pre-scription*.<sup>12</sup>

What to do? Is the question here who should *we choose* to help us think about evaluation—Gadamer or Lyotard or someone else? Maybe. But then again, framing the question in terms of a "choice" is itself another idiomatic *pre-figuration*, one that is so conventional in American legal thought that we can barely notice that in speaking of "choice," something rather contestable has been authorized, something which, in all its self-evident simplicity often denies the significance of *pre-figuration*.<sup>13</sup>

It would seem, then, that there is no getting away from *pre-figuration*. Pre-figuration is already reflexively happening everywhere.

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The circle, then, is not formal in nature, it is neither subjective nor objective, but describes understanding as the interplay of the movement of tradition and the movement of the interpreter. The anticipation of meaning that governs our understanding of a text is not an act of subjectivity, but proceeds from the communality that binds us to the tradition. But this is contained in our relation to tradition, in the constant process of education. Tradition is not simply a precondition into which we come, but we produce it ourselves, inasmuch as we understand, participate in the evolution of tradition and hence further determine it ourselves. Thus the circle of understanding is not a "methodological" circle, but describes an ontological structural element in understanding.

*Id.* at 261.

10. LYOTARD, *supra* note 6, at 13.

11. GADAMER, *supra* note 8, at 238-39.

12. See generally Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991).

13. See generally Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1443 (1990).

Habermas,<sup>14</sup> Gadamer,<sup>15</sup> Foucault,<sup>16</sup> Derrida,<sup>17</sup> and Lyotard<sup>18</sup>—different as their pre-figurations and their accounts of pre-figuration may be—would each in his own way agree.

Once one recognizes this relentless logic of pre-figuration, it becomes interesting to consider just how theories of evaluation or evaluative criteria can forestall the kind of bias, prejudice, and abuse of power in scholarly evaluation that Professor Rubin condemns in his Article. Indeed, just how will the evaluative criteria, the theory of evaluation, escape the pre-figurations that lead to bias, prejudice and abuse of power? Professor Rubin writes: "A theory of evaluation that provides alternative criteria for defining boundaries and regulating debate can serve as a means of *controlling* ideological bias."<sup>19</sup> The question is how?

Within the conventional pre-figurations of contemporary legal thought the answer is obvious: in Professor Rubin's words, "[a]n articulated, coherent theory of evaluation provides a means of *disciplining* these reactions."<sup>20</sup> Now to many legal thinkers this claim will seem sim-

14. Habermas writes:

Communicative action takes place within a lifeworld that remains at the backs of participants in communication. It is present to them only in the prereflective form of taken-for-granted background assumptions and naively mastered skills.

JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 335 (Thomas McCarthy trans., 1984).

15. Gadamer writes:

We are always within the situation, and to throw light on it is a task that is never entirely completed. This is true also of the hermeneutic situation, i.e. the situation in which we find ourselves with regard to the tradition that we are trying to understand. The illumination of this situation—effective-historical reflection—can never be completely achieved, but this is not due to a lack in the reflection, but lies in the essence of the historical being which is ours.

GADAMER, *supra* note 8, at 269.

16. Foucault writes:

Expressing their thoughts in words of which they are not the masters, enclosing them in verbal forms whose historical dimensions they are unaware of, men believe that their speech is their servant and do not realize that they are submitting themselves to its demands. The grammatical arrangements of a language are the *a priori* of what can be expressed in it.

MICHEL FOUCAULT, *THE ORDER OF THINGS* 297 (1970).

17. Derrida writes:

[O]ne cannot do anything, least of all speak, without determining (in a manner that is not only theoretical, but practical and performative) a context. Such experience is always political because it implies, insofar as it involves determination, a certain type of non-"natural" relationship to others . . . . Once this generality and this *a priori* structure have been recognized, the question can be raised, not whether a politics is implied (it always is), but which politics is implied in such a practice of contextualization. This you can then go on to analyze, but you cannot suspect it, much less denounce it except on the basis of another contextual determination every bit as political.

JACQUES DERRIDA, *Afterword: Toward an Ethic of Discussion*, in *LIMITED INC.* 111, 136 (Samuel Weber trans., 1988).

18. Lyotard writes:

Nothing can be said about *reality* that does not presuppose it.

LYOTARD, *supra* note 6, at 32 (emphasis added).

19. Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CALIF. L. REV. 889, 900 (1992) (emphasis added).

20. *Id.* at 895 (emphasis added).

ply just true—in the manner one's own pre-figurations always seem simply just true. But the questions remain: How will evaluative criteria discipline biased reactions? How will these evaluative criteria escape the partisan contaminations of those who do the evaluating?

The answer again is in the pre-figuration. Professor Rubin, true to conventional contemporary legal academic form, pre-figures his evaluative criteria as *separate* and *distinct* from those who do the evaluating (you, me, etc.). The evaluative criteria gain their integrity, their protection from partisan contamination, by virtue of this separation.

But how has this separation been effectuated? Professor Rubin writes: "These criteria, *interposed between* the reader and the text, *create the distance* necessary to evaluate a familiar work in some conscious and coherent fashion."<sup>21</sup> Here there is a conventional metaphor at work—one so commonplace in legal thought that we might not even recognize the metaphor or the aesthetic it enacts. And yet it is this spatial arrangement of reader/criteria/text which creates the *distance* and the boundaries *between* the evaluative criteria and those who do the evaluating.<sup>22</sup> And it is through the creation of these separate bounded domains that the evaluative criteria gain their apparent integrity and their apparent conceptual security from the partisan contaminations of the evaluators.

Now as helpful as this spatial aesthetic appears to be in securing the integrity and conceptual security of evaluative criteria from the actions of evaluators, it nonetheless presents a signal difficulty for Professor Rubin's enterprise. The difficulty is that this spatial aesthetic is inert. If evaluative criteria are somehow to "control" ideology or "discipline" biased reactions, then some additional imagery must be introduced to motivate or create this "controlling" or "disciplining" action.

In Professor Rubin's Article, an instrumentalist framework structures this action. Professor Rubin repeatedly describes his evaluative criteria as *means* designed to promote the *end* of sound evaluation. In his own words, a coherent theory of evaluation provides "*a means* of disciplining"<sup>23</sup> evaluative reactions; "*the means* by which a discipline reassesses its own evaluative criteria";<sup>24</sup> and "*a means* of controlling ideological bias."<sup>25</sup>

So we have *means* (evaluative criteria) and we have *ends* (sound evaluations) and together these means and ends are supposed to regulate the evaluation of scholarship. But notice that even with this instrumentalist framework to structure the action we still need something more to

21. *Id.* at 910 (emphasis added).

22. See Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 686-87 (1990) (demonstrating Stanley Fish's use of spatial metaphors).

23. Rubin, *supra* note 19, at 895 (emphasis added).

24. *Id.* at 892 (emphasis added).

25. *Id.* at 900 (emphasis added).

motivate, to animate the action. What is missing? Answer: A subject, an agent—the evaluator. But the evaluator is not here. Where is he?

Professor Rubin does not write very much about this subject, this agent, this evaluator. The reason is simple: this subject, this agent, this evaluator is something of an intellectual embarrassment. It is he, after all, who is supposed to be “disciplined” and “controlled” by means of the evaluative criteria. And yet now, it turns out that it is precisely through him, through his pre-figurations, that the *means* and the *ends* of evaluation discussed by Professor Rubin will acquire their actual significance and meaning. It is his pre-figurations that make the evaluative criteria mean something in the first place.

In both the figure of the evaluator as well as Professor Rubin’s pre-figuration of the problem of evaluation, there is thus a tension. This tension, which remains unresolved throughout conventional legal thought, emerges in full form in this passage:

Ideology has the interesting attribute of making opposing normative beliefs seem incorrect—not as a matter of normative debate, but as a matter of objective truth. The comprehensive quality of ideology, moreover, means that those who subscribe to it do not perceive it as an ideology at all, but simply as the proper way to view the world. . . . A theory of evaluation that provides alternative criteria for defining boundaries and regulating debate can serve as a means of controlling ideological bias.<sup>26</sup>

No sooner does Professor Rubin affirm, quite appropriately, the invisibility of ideology to those who are within its grip, than he sets this insight aside to claim that a theory of evaluation can provide “alternative criteria . . . as a means of controlling ideological bias.”<sup>27</sup> The question is how? How can *evaluative prescription*, in and of itself, modify *aesthetic pre-figuration* if the former is always already shaped and understood *through* the latter?

Once one recognizes the importance of pre-figuration to evaluation, the integrity, conceptual security, and transcendence that conventional legal thought typically accords to prescription, normative discourse, and evaluative criteria dissolve. Prescription, normative discourse, and evaluative criteria are just as susceptible to the practice of bias, intolerance, authoritarianism—even cruelty, if you want—as any other kind of human discourse. Prescription, normative discourse, and evaluative criteria are not self-determining; they do not, indeed cannot, rest on their own bottom. They can be used to do anything—anything at all so long as it is enabled by the aesthetic, rhetorical, and social pre-figurations of those involved.

This means (among other things) that the ritualized and professionalized *advocacy* of virtue so characteristic of conventional legal thought

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26. *Id.*

27. *Id.* See generally STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989).



does not necessarily, or even presumptively, coincide with or advance the *practice* of virtue.

Now my guess is that for many legal academics—particularly those most enthralled in the formulation, justification, and evaluation of normative prescriptions—this is not an entirely welcome realization. It is destabilizing and disorienting. But do not let this distract you. It's happening.

\* \* \* \* \*

In Professor Rubin's Article, as in conventional legal thought itself, the logic of pre-figuration is represented as subordinate to the logic of normative prescription.<sup>28</sup> But as we have just seen, this subordination of pre-figuration to evaluation is itself an ironic aesthetic entailment of the conventional pre-figurations deployed in Professor Rubin's Article.

To generalize the point: one might say that the whole focus on "evaluation" in Professor Rubin's Article, as in contemporary debates about legal thought, is itself a conventional pre-figuration—one that disables recognition of the problematic state of conventional legal thought. Indeed, I think "evaluation" is the conventional way of simultaneously taking cognizance and avoiding recognition of a much more sweeping, much more significant problem—namely, the ongoing breakdown of conventional legal thought and the systemic denial of this breakdown.<sup>29</sup> "Evaluation" is the delimited conceptual site where professional academic anxieties over loss of standards, loss of meaning, loss of power are expressed, registered, and ultimately defused in a ritualized re-enactment of standard-form legal arguments about merit, standards, bias, and so on. Framing the problem as one of evaluation and lack of evaluative criteria pre-figures it in such a way that the problem already appears amenable to resolution with ordinary juridical means (*a better* theory, *new* criteria, *clearer* standards). This enables a performative confirmation that the dominant paradigm and its conceptual moves are still capable of doing work, still capable of providing solutions after all these years. Indeed, if the problem is one of evaluation, we, as legal thinkers, will have no problems transposing all the arguments, the rhetoric we have developed in our writings on the closely related subject of adjudication.

Similarly, the focus of attention on "theories," "methods," and "criteria" enables a comforting location of the problem, its analysis, and its resolution in a safe place—in stabilized object-forms ostensibly external to legal thinkers. We are thus relieved from recognizing that the

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28. See *supra* text accompanying notes 19-21.

29. I do not mean by this that there is no bias, prejudice, or abuse of power in the evaluation of legal scholarship. There is. A great deal. In all sorts of ways. But this bias, prejudice, and abuse of power do not arise fundamentally from a problem of evaluation. They arise from a much more sweeping, much more significant, much more endemic problem.

problems of bias, prejudice, and abuse of power lie closer to home—in *us*, in *our pre-figurations*. Perhaps more important, this relieves us from recognizing that the conventional jurisprudential and political matrices that make our positions, our stances, our normative projects at once intelligible and meaningful are unraveling, are decomposing.

But what is it that is unraveling, that is decomposing? It is the sort of thought that Professor Rubin considers virtually exhaustive of legal scholarship:

Legal scholarship generally consists of normative statements about the way that government decisions should be made. These statements can be understood as prescriptions addressed to the relevant decisionmaker: most frequently a judge, but also a legislator or administrator. The scholar may not literally be addressing the decisionmaker . . . . The notion of a prescription addressed to a particular decisionmaker describes the conceptual structure of the work, the way in which its arguments are formulated.<sup>30</sup>

Now what Professor Rubin describes here as a kind of thought, a genre of scholarship, I describe more broadly as a social and rhetorical practice, as “normative legal thought,”<sup>31</sup> as the contemporary form of the “Langdellian paradigm.”<sup>32</sup> Normative legal thought establishes the appropriate roles, activities, rhetorics, aesthetics, personas, and concerns of legal academics. This practice is so well internalized that until recently it was not noticed,<sup>33</sup> much less questioned.<sup>34</sup> Normative legal thought was simply what one did.

But now that this practice is decomposing, we notice it. We even notice how it is decomposing. It is decomposing in the manner in which social practices usually decompose—the participants can no longer sustain the beliefs, or suspensions of disbelief, necessary to make the practice meaningful to them or to others.<sup>35</sup>

Indeed, Professor Rubin’s own description of this sort of thought *itself* already reflects the signs of disenchantment and demoralization. Consider one of Professor Rubin’s statements above: “The scholar may not *literally* be addressing the decisionmaker.”<sup>36</sup> But why not *literally*? The answer is obvious: There is no apparent instrumental or intrinsic value in doing so. By and large, neither judges nor any other bureaucratic decisionmakers are listening to academic advice that they are not already prepared to believe. There is thus very little instrumental value

30. Rubin, *supra* note 19, at 903-04 (footnote omitted).

31. See generally Schlag, *supra* note 12.

32. See generally Schlag, *supra* note 13.

33. For elaboration, see Schlag, *supra* note 12, at 808-11.

34. But it is in question. See Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801-1075 (1991); see also Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

35. Cf. JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986).

36. Rubin, *supra* note 19, at 904 (emphasis added).

in addressing judges or any other bureaucratic decisionmakers. As for the intrinsic value of addressing judges, it is rather weak. To write to judges entails the adoption of their idioms, their aesthetic, their rhetoric—in short, their discursive practices. Are the discursive practices of these bureaucratic state agents somehow intellectually edifying? Morally enlightening? Aesthetically enlivening? Doubtful.

And thus it is no surprise that many legal academics have already abandoned “*literally* . . . addressing the decisionmaker.” Instead, they address their own idealized decisionmaker—their own Hercules, their own version of Dworkin’s mythical appellate judge. This is, however, a weak and transitional practice. It strives to retain for itself the sense of power and authority made possible by the conventional paradigm at its zenith, while at the same time trying to enact a discourse of some intellectual integrity. But ironically, in trying to achieve both, it achieves neither. It pretends to an authority and a power that it self-evidently lacks, while at the same time foreclosing itself from pursuing more interesting intellectual possibilities.

What is more, this transitional practice provides only a false and momentary security, for it is the kind of self-deception that already knows itself to be a self-deception. Why write to an imaginary or idealized judge when it is obvious that imaginary or idealized judges can be whatever one wants them to be? Professor Rubin writes: “The notion of a prescription addressed to a particular decisionmaker describes the conceptual structure of the work, the way in which its arguments are formulated.”<sup>37</sup> Exactly so. But why would one want to engage in such a practice? How could it be meaningful to argue within constraints one already knows to be a projection of false necessity?<sup>38</sup> One can understand why law students do moot court. Law students are on their way to becoming lawyers. They are learning rhetorical skills. How do we explain, however, fully-grown legal academics playing moot court? How do they explain this to themselves?

One may talk in false and ugly idioms when justified by sound instrumental reasons (some kinds of litigation, for example). One may also talk in instrumentally ineffectual idioms when the practice of the talk is its own end (some kinds of philosophy, for example). But when the idiom is false and ugly, and when it secures no valued instrumental goal at all, it is difficult to see why anyone would engage in it at all.

That is precisely our situation—the situation of normative legal thought. The surfacing of these questions has left the practice of normative legal thought increasingly demoralized and disenchanting. The questions do not go away. They multiply. Indeed, a multitude of new questions are now surfacing that make the practice of normative legal

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37. *Id.*

38. ROBERTO M. UNGER, *FALSE NECESSITY* (1987).

thought appear increasingly artificial—a kind of flimsy, ineffectual, and often quite self-righteous posturing. Consider just two such questions.

First, why should legal thinkers unreflectively identify (at any level of abstraction) with an actual or idealized *state agent*—the judge? There seems to be no sound political or moral reason why legal thinkers should *a priori* adopt and identify with the concerns, idioms, and power perspectives of judges or any other “public” decisionmakers. Such an unreflective self-identification seems particularly unwarranted and unjustified after the conceptual and material collapse of the public and private spheres and the accompanying politicization of the agencies of the state, including the judiciary. Indeed, the self-identification of the legal thinker with the actual or idealized judge yields a professional rhetoric that legitimizes the courts, the legal profession, and the positive law. In reinterpreting legal materials “to make them the best they can be,”<sup>39</sup> legal thinkers in effect serve as a kind of P.R. firm for the bureaucratic state. Why would intellectuals unreflectively enlist their minds to support such an unspecified, and potentially objectionable, enterprise?<sup>40</sup>

Second, why should academics adopt the intellectual perspectives of actual or idealized judges and legislators? Such borrowing commits the legal academic to running well-traveled analytical mazes through archaic metaphysical conceptions of intent, causation, choice, free will, authorship, and the rational self, to name a few. To adopt the perspectives, stances, idioms, conceptual schemes, and social aesthetics of actual or idealized judges yields a highly impoverished intellectual universe. Again the questions for the legal thinker are: Why would one do this? How could it be meaningful?

For legal thinkers of past generations, these questions did not and could not arise. They could not arise because those legal thinkers were so successfully self-identified with a projected image of the actual or idealized appellate judge.<sup>41</sup> Indeed, for those legal thinkers, this epic self-identification was constitutive of their very being, their very activities as legal thinkers.

But today, this role conflation is revealed to be role confusion, and with this revelation, the legal thinkers sense of his own intellectual significance and of his own worldly power dissipates. The figure of the appellate judge—much as we legal thinkers romanticize him (think: Hercules)—is nonetheless not a cultural nor an intellectual giant. On the contrary, this is someone whose vision and understanding of actual cases and controversies is sharply delimited and highly stylized. This is someone whose access to the “facts” of the case is mediated by two or more

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39. RONALD DWORKIN, *LAW'S EMPIRE* vii (1986).

40. Lawyers often have to represent “clients” they don’t like. We, as legal thinkers, do not. Why not then be a little bit more astute in our political and intellectual allegiances?

41. See Schlag, *supra* note 13, at 1732-36 (describing the Langdellian paradigm of the legal thinker).

professional actors whose very *raison d'être* is to coax, manipulate, and coerce the court into reaching a predetermined outcome. This is someone invested with significant power to make very difficult decisions that entail serious consequences on the basis of very little information under extreme time pressure. This is the figure of authority.<sup>42</sup> The one authorized to close the dialogue with a very monological *ipse dixit*.<sup>43</sup> Let us not deceive ourselves. This is not the sort of persona likely to produce a particularly open, searching, or intellectually curious rhetorical practice.<sup>44</sup> Not at all:

“Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispatic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.”<sup>45</sup>

Not surprisingly, those legal thinkers with the most serious intellectual inclinations try to take distance from this core persona.

But given the pervasiveness of the core image throughout our jurisprudential pre-figurations, our rhetoric, and our selves, “taking distance” turns out to be difficult. True, we often claim to “take distance” from our conscious identification with the figure of the appellate judge. But such conscious stance-taking typically leaves our own pre-figured unconscious self-identification with the appellate judge unnoticed, undisturbed, and unreconstructed—still shaping our jurisprudence, our thinking, our very selves. The result is that philosophy, social science, literary criticism, economics, and linguistics are transformed (and denatured) into a set of pat authorities—footnote material for the legal thinker’s brief in support of her “positions” or his “stances.”<sup>46</sup> Even deconstruction is

42. “Hercules, Dworkin’s mythic judge, is a loner. He is much too heroic. His narrative constructions are monologues. He converses with no one, except through books. He has no encounters. He meets no otherness. Nothing shakes him up. No interlocutor violates the inevitable insularity of his experience and outlook.” Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 76 (1986).

43. None of this, by the way, is intended as criticism of the character or role of appellate judges. That would be utterly beside the point. The point here is that the role, the job description, the possibilities of the appellate judge are significantly different from those of a legal thinker. The latter loses much in pretending to be the former.

44. *But see* Michelman, *supra* note 42, at 76 (drawing attention to “what seems the most universal and striking institutional characteristic of the appellate bench, its plurality”).

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

46. As Roberto Unger put it:

History they degraded into the retrospective rationalization of events. Philosophy they abused 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. 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).

degraded into a series of legal reasoning moves for lawyers.<sup>47</sup>

Indeed, there is nothing at all—no body of knowledge, no learning, no insight, no emotion, no critique—that the legal academic will not transform (and denature) into a source of prescription, into a regulatory device, into a norm, into more grist for the normative legal thought mill.

The simultaneous decomposition of normative legal thought along with its continued hold on our jurisprudential imaginations yields two seemingly contradictory, yet reciprocally parasitic tendencies. The first, which has already been described, is a kind of flattering out, a homogenization of our thought. The second is an accelerating proliferation of difference, differentiation, and pluralism.

The more legal thought embraces difference, differentiation, and plurality, the more it stays the same. The celebration of difference and the embrace of plurality are neutralized by the homogenizing rhetoric of normative legal thought—a rhetoric which the champions of difference, differentiation, and plurality (various self-identified pragmatists, contextualists, postmodernists, feminists, and others) self-defeatingly believe they have already overcome.

This gruesome homogenization, this implosion of intellectual possibility, this flattening of the jurisprudential universe, in turn, prompts an excited and sometimes desperate search for something else, for some intellectual perspective that will provide some “purchase on,” or some “escape from,” our “situation.” It is thus in the conscious or unconscious responses to the decomposition of normative legal thought that the fragmentation of legal thought proliferates.

All of these forces—the self-identification of the legal thinker with the appellate judge and the unraveling of this self-identification; the homogenizing rhetoric of normative legal thought and the proliferation of difference in legal thought; the decomposition of normative legal thought and the denial of this decomposition—produce bias, prejudice, and abuse of power in the evaluation of legal thought.

The self-identification of the legal thinker with the projected image of the actual or idealized appellate judge yields a kind of authoritarian pre-figuration of evaluation. It establishes the evaluator’s idiom, rhetoric, and knowledge base as a court of reason—entitled to rule and beyond challenge, except in the most narrow, already pre-scripted ways. The unraveling of this self-identification, on the other hand, leaves the evaluator without a stable sense of professional identity. The evaluator is thus left without anything other than the self’s unrationalized preferences as an evaluative frame.

The homogenizing rhetoric of normative legal thought leads to a

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47. See Pierre Schlag, “*Le Hors de Texte, C’est Moi*”: *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990).

flattened intellectual universe—the night in which all cows are black.<sup>48</sup> The proliferation of difference, on the other hand, makes it difficult for any legal thinker to understand why any other legal thinker would be asking the kinds of questions he is, presumably, trying to answer.

The decomposition of normative legal thought means that there is no sound shared understanding for making evaluative decisions. The denial of this decomposition means that this decomposing paradigm nonetheless continues to reproduce itself unconsciously through its evaluative criteria and its evaluative decisions.

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If this is an apt description of our present situation, then the sorts of abuses we experience or witness in the evaluation of legal scholarship—the under- or over-valorization of certain kinds of scholarship—are hardly going to be avoided by the prescription of evaluative criteria. Instead, this focus on evaluation will relieve legal thinkers from recognizing a much more serious and pervasive problem—the unraveling of the conventional paradigm, the decomposition of normative legal thought.

Ultimately, if we want to be serious about evaluation, we have to be serious about trying to understand our own pre-figurations—the pre-figurations that shape our selves, our thinking, and our intellectual and political orientations. In this respect, perhaps the most pervasive problem with Professor Rubin's theory of evaluation is that it presumes, both in its substance and in its form, that the currently dominant practice of legal thought—namely, normative legal thought—has some redeeming social or intellectual value. This once-uncontroversial assumption is now very much in need of some serious intellectual defense.

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48. GEORG W.F. HEGEL, *THE PHENOMENOLOGY OF MIND* 79 (J. Baillie trans., 2d ed. 1949).