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WRITING FOR JUDGES

PIERRE SCHLAG*

In 1975, Herbert Wechsler told my constitutional law class that, as a student at Columbia in the late 1920s, he and his classmates treated the latest Holmes and Brandeis dissents as virtually sacred texts to be read and studied.

Comments of Steven Winter ¹

I despise the current Supreme Court and find its aggressive, willful, statist behavior disgusting.

Comments of Guido Calabresi
Dean, Yale Law School ²

[W]e have better things to do with our time.

Comments of Sandy Levinson ³

Since the days of Christopher Columbus Langdell it has been incumbent upon American legal academics to invest the signifier “law” with a relatively autonomous identity, a certain degree of internal complexity and at least a modicum of reproducible regularity. What was required was the creation of a discipline entitled to recognition within the American university. This, of course, was Langdell’s program:

I have tried to do my part towards making the teaching and the study of law in that school worthy of a university. . . . To accomplish these objects, so far as they depended upon the law school, it was indispensable to establish at least two things—that law is a science, and that all the available materials of that science are contained in printed books.⁴

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1. Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1461 n.93 (1990).

2. Guido Calabresi, *What Clarence Thomas Knows*, N.Y. TIMES, July 28, 1991, § 4, at 15, as cited in Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or Why, and to Whom, Do I Write the Things I Do?)* 63 U. COLO. L. REV. 389, 404 (1992).

3. Sanford Levinson, *The Audience for Constitutional Meta-Theory (Or Why, and to Whom, Do I Write the Things I Do?)* 63 U. COLO. L. REV. 389, 406 (1992).

4. Christopher Columbus Langdell, *Harvard Celebration Speeches*, 3 LAW Q. REV. 118, 123-24 (1887).

This Langdellian program has been remarkably successful. It was realized by means of a brilliant and radical reductionism—one whose effects are still shaping the actors, the action and the scene of the legal academy even today.

Two aspects of the Langdellian reduction were absolutely critical.⁵ First was the reduction of all that might be called “law” to a formalizable order of jurisprudential object-forms otherwise known as “doctrine” and “principles.” This reduction enabled the formalization of “law” into a system of self-referential propositional statements.⁶ This systemic formalization enabled legal academics to stabilize and close off that which we call “law” and to insulate this domain from the other humanities.

The second critical aspect of the Langdellian reduction was the confinement of the intellectual range and interest of the legal academic to that of an imagined, highly idealized and much celebrated alter ego—the persona of the appellate judge. The self-identification of the legal academic with the appellate judge provided the legal academic with a respectable and detached audience—one that would echo and legitimate the legal academic’s own professional ambition to portray law as (at least) relatively autonomous. Equally important, this reductive self-identification with the persona of the appellate judge provided the legal academic with a sense of professional importance and purpose. Indeed, legal academics could understand themselves to be doing something important because they understood themselves to be important to the work of judges who in turn were portrayed by legal academics as very important.⁷

This then, in egregiously abridged form, was the Langdellian program. It worked. To a large extent, it continues to work—successfully extending and rehearsing its own aesthetic, its own rhetoric, its own ontology even in such purportedly dissident knowledge-practices as legal realist functionalism, contemporary neo-pragmatism, feminist jurisprudence and even deconstruction.⁸ This appropriation and neutralization of dissident knowledge-practices within the Langdellian aesthetic has been extraordinarily effective. The Langdellian para-

5. For a more complete description of the Langdellian reduction, see Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1632-62, 1726-43 (1991).

6. The perfected contemporary expression of this genre can be found in the various Restatements of the ALI, various learned treatises or Gilberts.

7. The most florid contemporary expression of this professional self-aggrandizement can be found in RONALD DWORKIN, *LAW'S EMPIRE* (1988) (projecting the self-image of the legal academic onto the persona of the appellate judge and then portraying the latter as “Hercules”).

8. See generally, Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991); Pierre Schlag, “*Le Hors de Texte, C'est Moi*”: *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990).

digm has shown a remarkable capacity to colonize and domesticate all sorts of purportedly "novel" and "disruptive" "critical" knowledge-practices.⁹

How much longer Langdellianism will continue to organize, motivate, and police the thinking practices of legal academics is becoming an increasingly interesting question. While it would be (and indeed repeatedly has been) a mistake to underestimate the power of Langdellianism in shaping the knowledge-practices of legal academics, there are, nonetheless, some hopeful signs.

Sandy Levinson's essay is one such hopeful sign. As Sandy's essay at once demonstrates and explains, the prototypical Langdellian practice of writing for judges is increasingly beset by a kind of demoralization—a sense of futility and aimlessness.¹⁰ This demoralization of the prototypical Langdellian practice is fueled by a complex of related and mutually reinforcing recognitions. Here, I will mention three recognitions that seem increasingly widespread among legal academics and particularly important to the demoralization of the Langdellian practice.

One recognition, aptly illustrated in Sandy Levinson's essay, is the realization that judges are not listening to academic legal thinkers.¹¹ It is becoming increasingly apparent that the image of the judge who conscientiously reads relevant academic literature is an aberration, not the general rule. Judges simply do not have the time to engage in such exercises and it is doubtful that many have the interest. For legal academics, one entailment of this recognition is the loss of any instrumental pay-off in writing for judges. Indeed, the possibility of influencing (as opposed to merely tracking, anticipating or legitimating) judicial decision-making is now increasingly understood to be extremely remote.

A second recognition also damaging to the prototypical Langdellian practice of writing for judges is the dissolution of our shared romantic image of the judge as a jurisprudential giant. Indeed, against the current cast of characters on the Supreme Court, Dworkin's Hercules seems increasingly out of place¹²—no longer does the appellate judge appear to us as the contemporary equivalent of a Cardozo or a Holmes or a Brandeis. Rather, the image that comes to mind is more that of a harried bureaucrat caught in an endless doctrinal maze. The

9. See generally, Schlag, "Le Hors de Texte, C'est Moi," *supra*, note 8; Schlag, *The Problem of the Subject*, *supra*, note 5.

10. Levinson, *supra* note 3, at 404-06.

11. *Id.* at 405-06.

12. RONALD DWORKIN, *LAW'S EMPIRE* (1988).

resulting disaffection in the academic and the student audience is increasingly apparent:

[W]e need note only that to the extent the writing of the judicial branch, or of the lawyer giving advice on what the law is, is the outcome of bureaucratic processes, to that extent it is in danger of losing its claim upon us and failing to leave us with a sense of obligation and willing obedience after we read and hear it. . . .¹³

A third recognition that is also damaging to the prototypical Langdellian practice of writing for judges is the rather widespread disenchantment with the mind-numbing, doctrine-centered idiom used in appellate opinions. Robert Nagel, for instance, describes the prevalent style of constitutional doctrine as emphasizing

formalized doctrine expressed in elaborately layered sets of "tests" or "prongs" or "requirements" or "standards" or "hurdles." The judicial opinions in which these "analytical devices" appear tend to be characterized by tireless, detailed debate among the Justices.¹⁴

This disaffection with the contemporary doctrinal idiom is echoed by David Kennedy:

Doctrinal argument seems increasingly complex and ever less able to determine outcomes. The normative moorings of the most basic doctrinal discourse by lawyers, scholars and judges seem infirm. . . . The more diverse the sphere of an argument's application, the thinner it seems to become until its manipulability becomes more apparent than its persuasive clout. The result has been ever more polarized arguments, ever more sophisticated doctrinal diversity, and ever more narrowly applicable holdings.¹⁵

Richard Posner sums up these kinds of observations rather succinctly: the opinions of judges and the writings of legislators are, he says, "essentially mediocre texts."¹⁶

In sum, the academic practice of writing for judges increasingly appears as a degraded art-form used to communicate with personas who are not listening in order to achieve nothing very much whatsoever. One might reasonably conclude that this social practice is not doing very well.¹⁷

But what is interesting about these observations and what merits

13. Joseph Vining, *Law and Enchantment: The Place of Belief*, 86 MICH. L. REV. 577, 594 (1987).

14. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985) (footnote omitted).

15. David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209, 211-12 (1986).

16. *Id.*

17. Levinson, *supra* note 3, at 404, 405-06.

serious inquiry is not so much how the academic practice of writing for judges has fallen on hard times, but rather the reverse: What requires inquiry is how it is that this Langdellian practice could have sustained and reproduced itself so successfully for so long. I think this is a question that warrants serious thought—because in the answers that emerge, we might have the *beginnings* of an understanding of what “law” is and how “law” maintains itself.

