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Pierre Schlag

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Normative and Nowhere to Go

Pierre Schlag*

There is nothing quite like the exhilarating experience that comes from reading a provocative new piece of legal thought. Of course, at some point this exhilaration will give way to ennui as the new piece of legal thought unravels—ultimately to be classified as yet another possibly clever, perhaps thoughtful, but nonetheless utterly failed contribution. One characteristic feature of our own postmodern condition is the breakneck speed with which the second experience succeeds the first. From exhilaration to failure, the distance has been reduced to a couple of sentences.

Take the 1980s, for instance. Last I remember, it was 1979 and I was beginning my career. I had these incredible utopian visions and these absolutely uncontrollable yearnings to prescribe these normative visions to large numbers of strangers. I tried to find suitable employment where I could indulge these uncontrollable prescriptive impulses. So I became a cabbie in New York City.¹ Sometime during my third week on the job, one of my fares told me that I'd never make the grade. Oh sure, he said, I was normative enough—downright utopian. But I had no political sense. My timing was off, way off—not just by a couple of street lights, but by entire centuries. He called me a “liberal humanist.” I didn't know what this meant, but his unmistakably derisive tone indicated that it was not something I was supposed to like. So I quit—a failed cabbie.

And I became a legal academic instead.² The possibilities for normative

* © 1990 by Pierre Schlag. Professor of Law, University of Colorado. J.D., UCLA School of Law; B.A., Yale College. For comments, suggestions, and criticisms of this essay, I am grateful to Jean Braucher, David Carlson, David Clark, Richard Delgado, David Eason, Deborah Maranville, Bob Nagel, Steve Smith, and Steve Winter.

This essay is part of a larger enterprise—an attempt to understand the character and status of contemporary normative legal thought. For other installments, see Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. — (forthcoming 1991) (tracing the role and effects of normative legal thought); Pierre Schlag, “*Le Hors de Texte, C'est Moi*”—*The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. — (1990) (forthcoming) [hereinafter Schlag, “*Le Hors de Texte*”] (demonstrating the ways in which the unquestioned and unexamined aesthetic of contemporary legal thought coopts and defuses critical approaches such as deconstruction); Pierre Schlag, *Legal Nihilism* (demonstrating the ways in which contemporary normative legal thought produces nihilism).

1. [Editor's Note: *The Stanford Law Review* has been unable to confirm the author's assertion here. The evidence we have suggests that in 1979, the author was employed as an associate with a large law firm in Washington, D.C. The author assures us, however, that the taxi driver/associate distinction is vastly overstated, and in some senses, is actually much more tenuous than might first appear. Cf. ELISABETH HYDE, *HER NATIVE COLORS* 20-37 (1986) (depicting the associate as a human resource and information dissemination vehicle).]

2. For further elaboration, see R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1957).

speculation seemed endless. I would write for the Warren Court . . . forever . . . and no one would dare call me on it.³ Yes. And I would write the great American utopian chain novel—each chapter more morally appealing than the last.⁴ I would argue that in the future, we should all be *really* moral . . . for even more than fifteen minutes.

Things were going really well and really morally. I was a real normative—deep into *norm-selection* and *norm-justification*. And then this guy—the same guy who interrupted my promising career as a taxi driver—showed up again, out of nowhere. Just like that, right in the middle of my text. No transition at all.⁵ In fact, here he is. And he's saying that he's a postmodernist now and that he wants to continue my text. Imagine my embarrassment. I tell him that this is an outrageous provocation, a scandal. He agrees. I tell him in no uncertain terms that I am the author and that I won't stand for this behavior, and that neither will the reader, nor the AALS. He says that I sound like "the interpretive turn" and that the interpretive turn has already turned into footnotes.⁶

3. Many "progressive" legal academics are still writing articles for the Warren Court and those "liberal" federal courts. This raises a very difficult question about the current composition of the Supreme Court and other federal courts.

I think it is important that we not jump to conclusions too hastily. It does seem, however, at least as a preliminary hypothesis, that some evidence suggests that the Warren Court is no longer sitting. Moreover, it appears that there may have been somewhat of a change in the composition of the federal courts in what might be called a right wing direction. If this were true—and I advance this claim only hypothetically—then it could be argued that addressing the federal courts to achieve "liberal" or "progressive" ends might no longer be as effective as it once was. But clearly, it's too soon to jump to such conclusions. *Contra* Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189 (1988) (reckless young upstarts claim Warren court no longer sitting, that federal courts are dominated by right wing, and that liberal legal scholars should address their scholarship to other addressees); Steven Winter, *Indeterminacy and Incommensurability in Constitutional Law*, — CALIF. L. REV. — (1990) (forthcoming) (brazen young provocateur actually argues that federal courts may well no longer be totally receptive to "progressive" scholarship).

4. See *ambivalently* RONALD DWORKIN, *LAW'S EMPIRE* (1986).

5. Well, actually that's not entirely true: He did drop a footnote to FRANZ KAFKA, *THE METAMORPHOSIS* (1935) (Gregor Samsa wakes up one morning embarrassed to discover that his ontological condition no longer conforms to his own epistemic self-image).

6. And so here I was all of a sudden—reduced to a supporting role. This was *my* text—and somehow I had landed in the footnote. How awful. This was worse than anything Gregor Samsa ever had to put up with. See note 5 *supra*. My normative text was totally out of control. I was outraged. I told the postmodernist, "You can't just walk into other people's text like this. This is an outrageous provocation." He said, "You've already said that. You repeat your self a lot." For elaboration see text accompanying notes 20-26 *infra*.

I pleaded, "But you can't just simply walk into other people's text like this and take over." And he said, "Yes I can. What's more, all your interpretive protests can be relegated to a footnote. Consider it done."

Of course, as you can understand, it didn't suit me to be here at all. "But, this is my text," I protested. "I don't want to be in the footnotes." I tried to think of the sorts of arguments that I could make. I had the clear sense that this was my property and that it would be inappropriate for the postmodernist to take it away from me. I made the argument that this invasion of my text was an assault not just on property, but also on its underlying values—the autonomy and dignity of the individual. I argued that if this sort of thing became public and widespread, authors would be unlikely to invest much effort in writing.

Finally, I became angry and stated the fundamental predicate assumption for all these arguments flat out: "I am the author, and it was not *my* intention to let you in. Now, move us back to

So I tell him that if he's a postmodernist, he couldn't possibly have anything to contribute to morality or ethics or politics, and that therefore he doesn't belong in my text.⁷ "Not at all," he said. "Postmodernism is already in this text. Postmodernism is here to do the charts on the normative articles of the eighties." "The charts?" I said. "What do you think this is? Top 40 radio? You can't do that. Normative articles are not the top ten, you know."

the text right now." The postmodernist chuckled and said, "Bad move, dude—you've just made your intention iterable."

And I said, "So?" And he said that because intention was iterable, it was always already mediated by the text (see virtually anything that Jacques Derrida has written) and/or by interpretive communities or practices (see virtually anything, not about Milton, that Stanley Fish has written). Hence, the role (if any) of author's intention would always already be adjudicated (if at all) within our interpretive practices or our texts. He said that the canonical legitimacy of author's intention as a theory of meaning would invariably find itself nested where it really did not want to be: In the very non-canonical contingent character of the text or of the interpretive practices of the community. The postmodernist noted that this would be a somewhat inhospitable place for any self-respecting transcendental signified such as author's intent.

This was too much. Not only had this stranger appeared uninvited in my text, but I had this uncanny suspicion he was about to dismiss me as the author. This was unacceptable. I would report the incident to the AALS committee on academic freedom. I would sue. I would But the more I wrote, the worse things became.

And he didn't miss the chance to point it out. Soon it became apparent that the author/reader distinction would go the way of all worldly things, and me along with it. And that's precisely what happened. The postmodernist taunted, "I suppose you still think you're an author, don't you?" And I said, "Yes." He said, "Not you. I don't mean you. I'm not talking to you." "Oh," I said, and then I realized much to my horror, gentle reader, that it was you he was addressing in such disrespectful tones. And so I told him in no uncertain terms that he could not treat the reader—you, dear gentle reader—in this outrageously disrespectful manner. I said, "The reader won't stand for it."

And it was precisely at this point that the postmodernist chose to inform me that I was no longer the author. He told me, much as I had feared, that I was more of a reader than an author—that in fact, I was responding to the claims, the arguments, the discourse of postmodernism. "Look at your last five sentences," he said. "Each of them is a response to the postmodern text. Postmodernism is writing your text. And you are reading it furiously—hanging on to determine what it will say next."

I made a last-ditch effort. I pointed out that if this outrageous departure from accepted legal form continued, this text would never get published—and neither of us would be heard from. I suggested that the text would lose some of its cadence, some of its aesthetic appeal, its coherence. I cited Dworkin. (R. DWORKIN, *supra* note 4). I said I was the author and that postmodernism wouldn't fit with what I had already written. He said that postmodernism was already in the text and he pointed to my first paragraph. He said that I had not written that paragraph—that postmodernism had. He said this was a postmodern text as much as it was mine—that, by this point, authorship was utterly undecidable.

7. *But see* Schlag, "Le Hors de Texte," *supra* note * (on the politics of deconstruction). Many commentators see postmodernism as lacking any particular politics. In fact, however, they are unable to recognize or identify the politics of postmodernism because they try to locate postmodernism within the orthodox matrices of a very traditional conception of politics—a conception that accepts at face value the traditional characterizations of right and left, a conception that implicitly and automatically equates politics with making value choices. *See, e.g.,* Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*. — CARDOZO L. REV. — (1990) (forthcoming). Within the matrices of this traditional—indeed *fundamentalist*—conception of politics, it is easy to miss the politics of postmodernism precisely because the politics of postmodernism are to decenter and displace this traditional conception of politics.

THE TOP TEN

#10 HAVE A NICE (REALLY ELEGANT AND TOTALLY ABSTRACT) DAY

This type of normative legal thought, a holdover from the seventies, is still very popular today. Typically, it takes some truly wonderful normative value, like justice or liberty or equality or whatever, and then tries its damndest to give the abstract value a content that is as determinate and concrete, and yet as encompassing, as possible. While not necessarily deductive in structure, this sort of thought typically suffers from the same problem found in deductive legal thought. That problem is that in the movement from the abstract to the concrete, the mediations between the two are either not to be found, or they are found to be utterly unconvincing.

For those who like abstract value talk but don't want to traffic in the concrete at all, there is another option, particularly useful for those scholars who have figured out what should be done—e.g., we should all be *really* nice to each other—but haven't the foggiest idea of how we should go about doing it. The thing to do is to name what should be done in a way that makes it look like a normative value—something that has life, force, and direction. This is not so much reification as it is animism, but it really does work, too.⁸ The next step is to argue very pontifically, with whatever drama liberal humanism can still muster, that we should all do or be more like the normative value. This kind of talk is often vacuous, but given sufficient self-righteousness, pomposity, pseudo-sophistication, or status in institutional affiliation, no one will notice. What's more, this sort of thought doubles really well as a graduation speech.

Recently, many legal academics have come to recognize that this abstract value talk actually excludes many members of the audience.⁹ In the formal structure of its discourse, abstract value talk pre-scripts the answers to many politically controversial questions. This point has been made forcefully by feminist and critical legal studies scholars.¹⁰ I think this negative point is right and important. Unfortunately, it has yielded a positive program that appears to, but in fact does not, follow (logically or politically, or strategically) from the negative one. To say that abstract value talk is illegitimately exclusionary in no way suggests that . . .

#9 WE SHOULD TALK AND TALK AND TALK ABOUT TALK AND JUST KEEP ON TALKING

Given the rather obvious bankruptcy of abstract value talk, the talk-talk genre has become very popular recently. My guess is that this strategy was created by some legal academics circling over Chicago's O'Hare Airport

8. A lot of work.

9. In fact, it has a real tendency to turn them into members of the audience (as opposed to participants) in the first place.

10. See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515 (1982); Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985).

waiting to land. The main point of this strategy is to make normative legal thought really small—so small that it will contribute next to nothing to legal discourse. For example, notice that this strategy does not even talk in a new way.¹¹ This strategy simply argues in all the old ways that we should talk the new talk. It is the jurisprudence of the holding pattern. Variations on old/new talk include the following: We should talk . . .

more normatively,
 more contextually,
 more like economists,
 more like civic republicans,
 more like narrative,
 more like normal (doctrinal) science,
 more like pragmatists,

or in that hopeful humanist way until we figure out what the hell we're doing up here 30,000 feet from earth arguing about how we should land.

One interesting thing about the talk-talk genre is that its basic question, "How should we talk?" assumes that how we talk is somehow *our* choice—that we (you and I) are already intellectually and politically enabled to decide, one way or another. Such an assumption, of course, is routine and uncontroversial within the dominant tradition of contemporary normative legal thought—namely, the epiphenomenological tradition.

And yet one begins to suspect that epiphenomenology cannot be the whole story. One begins to suspect that the answers given to the question "How should we talk?" may well have been already scripted by as-yet unarticulated answers to questions such as: On what or whose terms are we already talking? What is making us talk? And who or what gets to stop the talk? One might begin to have these suspicions when one recognizes that even though the prescriptions for how we should talk all seem to vary considerably (and never seem to get adopted),¹² the process, the form, the rhetoric of the argumentation that supports these prescriptions stays pretty much the same.

Some people, of course, get impatient with all this talk. It's too process-oriented. It seems too far removed from what they see as the rightful focus of our normative attention on "substance." For those who are unhappy with the ultra-mediated character of the talk-talk genre, there is the self-announcedly more "substantive" formula:

#8 X—GOOD/Y—BAD

This is an extremely old and venerable genre—but still very current today. It has classic conservative lines and is always in good taste. Examples of this sort of thought include the following:

11. That might actually contribute something to the dialogue (or whatever it is that is going on).

12. Except maybe in seriously degraded form.

Rule of Law—good/Legal Realism—bad

Civic Republicanism—good/Liberalism—bad

Feminist Jurisprudence—good/Critical Legal Studies—bad

Not all normative legal thought is as simple or as transparent in its normative structure as the above genres suggest—though, of course, Sometimes, however, the normative structure of the thought is difficult to discern because it is better dissimulated. For instance, it just might be the case that

#7 THE ZEITGEIST IS GOING MY WAY¹³

In this sort of thought, the author and the arguments subtly recede into the background of the text. This thought strives to efface the author. Instead, an impressive compendium of trends, thoughts and authorities drawn from (virtually) every discipline just happen to coincide (in the footnotes, of course) to support a text which, in turn, that just happens to support the normative program of the author's choice. The great advantage of this form of normative thought is that the inexorable force of the entire culture appears to be supporting the author's favorite normative program. Not only is the culture behind the author every step of the way, footnote to footnote, but fortuity is on the author's side as well. Invariably, it will appear that the culture has already moved substantially down the author's preferred normative path. In this best of all possible worlds, what ought to be is already becoming so—every day in every way.

One signal difficulty with this sort of all-points meteorological report is that the zeitgeist generally doesn't fit very well in footnotes. Maybe it's because the text/footnote distinction is so relentlessly Cartesian in character and thus inhospitable to the Germanic dynamism of the zeitgeist. Or maybe it's because the zeitgeist just doesn't believe in fine print. These are both possibilities. My sense, however, is that the real problem is that the zeitgeist is simply un-American: It simply is not willing to think of itself as some supporting accessory to our individual projects.¹⁴

In any case, it invariably turns out that in this kind of thought, significant parts of the zeitgeist seem to be left out. This sometimes creates problems for the author, but it is seldom a problem for the zeitgeist. On the contrary: The excluded portions of the zeitgeist are virtually guaranteed to feature in another work, typically one that takes a diametrically opposed normative stance.

One of the striking things about these meteorological zeitgeist reports is that they rarely seem to pick up on postmodern currents. Striking, but not

13. Sinatra does Hegel. (His way, of course.)

14. "We believe in the dignity, indeed the sacredness, of the individual. Anything [like the zeitgeist, for instance] that would violate our right to think for ourselves, judge for ourselves, make our own decisions, live our lives as we see fit, is not only morally wrong, it is sacrilegious." RICHARD N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER & STEVEN M. TIP-TON, *HABITS OF THE HEART* 142 (1985).

exactly surprising: Normative legal thought is structured not to recognize these kinds of currents. Indeed, normative legal thought is always already launched in the sort of interpretive enterprise guaranteed to read postmodernism right off the charts.¹⁵ This, of course, brings us to yet another venerable form of normative legal thought, which is none other than

...

#6 POSTMODERNIST SHADOW-BOXING

This form of legal thought is squarely within the liberal humanist tradition. It offers maximum opportunities for righteous self-declamation about the moral wonderfulness of normative legal thought, as well as the moral wonderfulness of its author. Likewise, it offers tremendous possibilities to "fight the good fight" by warning of the utter amorality and irreducible evil of any intellectual current critical of liberal humanism—including, quite topically, postmodernism.

Postmodernism questions the integrity, the coherence, and the actual identity of the humanist individual self—the knowing sort of self produced by Enlightenment epistemology and featured so often as the dominant self-image of the professional academic.¹⁶ For postmodernism, this humanist individual subject is a construction of texts, discourses, and institutions. The promise that this particular human agent would realize freedom, autonomy, etc., has turned out to be just so much Kant. And the humanist individual subject has turned out to be Dan Quayle.¹⁷ Indeed, for postmodernism, the humanist individual subject has now become one of the main disciplinary vehicles by which bureaucratic institutions stylize, construct, organize and police their clientele. To inhabit the rhetorical space of the humanist individual subject, is to be—like Dan Quayle—subject to a variety of bureaucratic monitoring practices that, quite paradoxically but very effectively, transform the human being into the intellectual and social equivalent of a doe staring into the headlights. Liberal humanist talk of freedom, autonomy, choice, and so on seems, at least in this context, greatly out of place.

For postmodernism, the production of intellectual work that participates—in theory or in practice—in the ideology of this individualist humanist self is at best normatively ambivalent. On the one hand, such work may help achieve some desirable concrete end; on the other, the very performance of such work reproduces precisely the form of thought, the very rhetoric by which bureaucratic institutional practices re-present, organize, and reproduce their own operations, their own performances as the choices of

15. See Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 *TEX. L. REV.* 1195 (1989).

16. For an elaboration of the character of this self and its rhetorical supports, see Schlag, "*Le Hors de Texte*," *supra* note *.

17. Dan Quayle is wonderfully emblematic of what is at once the awesome success and the utter defeat of the Enlightenment—the point at which the individual, autonomous subject and his rationality are so institutionally and socially ingrained that it has become virtually impossible for this subject to be or to think in any other way.

autonomous, rational agents.¹⁸ Accordingly, the participation of normative legal thought in this liberal humanist ideology has become, *in terms of the very best values liberal humanism has to offer, morally ambivalent, if not immoral.*¹⁹

18. As it is doing here, postmodernism often treads very close to issuing some normative judgments of its own. Indeed, perhaps it very often does. One of the tricks of some postmodernist writers is to avoid explicitly making normative statements, knowing full well that the reader will read the language in a normative way and that, in a pinch, the reader can always be blamed for having read those "normative" judgments into the text. This approach strikes me as missing important aspects of the postmodern condition.

The normatively charged vocabulary and grammar are pervasive and cannot be "intentionally" avoided by something so decentered as a lone author. Moreover, the problem for postmodernists (not to mention everybody else) is that while the normative vocabulary and grammar are no longer an acceptable currency for intellectuals to use in advancing claims for human beings, there is no other vocabulary, no other grammar, as of yet.

That does not mean that the normative vocabulary and grammar of liberal humanism wins by default. On the contrary, that vocabulary, that grammar, is, as a normative matter (not as a social matter), increasingly irrelevant to our situation. See text accompanying notes 27-65 *infra*.

To describe things as I am doing now invites a series of predicaments and paradoxes. To a large extent, postmodernism recognizes and embraces these predicaments and paradoxes. See, e.g., Jacques Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *WRITING AND DIFFERENCE* 280 (A. Bass trans. 1978) ("There is no sense in doing without the concepts of metaphysics in order to shake metaphysics. . . . [W]e can pronounce not a single destructive proposition which has not already had to slip into the form, the logic, and the implicit postulations of precisely what it seeks to contest.") Postmodernists are quite unlikely to take the demonstration of a paradox in their text as in and of itself evidence of weakness or flaw. Quite the contrary. One significant advance that postmodernists have made is to recognize that thought and the thinker (you and I) themselves operate within what economists call a *second best world* (see note 2 *supra*) and that the *first best world* of traditional legal, social, and philosophical thought which routinely insists on naive rationalist conceptions of coherence, consistency, elegance, etc., is largely the product of disciplinary hubris and the inertia of academic bureaucracy.

Indeed, what is at stake in the struggle between postmodern and more traditional thinking is very much a dispute over the criteriology of thought and knowledge. For a description of (not an argument about) the character and criteriology of postmodern thought, see JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (G. Bennington & B. Massumi trans. 1984). For an argument using traditional legal reasoning to demonstrate the systemically paradoxical character of contemporary legal thought, see Pierre Schlag, *Cannibal Moves: An Essay on The Metamorphoses of the Legal Distinction*, 40 *STAN. L. REV.* 929 (1988) [hereinafter Schlag, *Cannibal Moves*].

My effort here, as elsewhere, is to try to displace, decenter, and weaken this system of normative legal thought. That does not mean that I should, will, or am even capable of demonstrably standing outside of this system. I could, of course, draw a distinction so that I could claim to stand outside of this system, and thus claim to avoid paradox, but this rationalist artifice would be unhelpful. It would beg the exceedingly interesting question of where the boundaries (if any) of this system of normative legal thought are located and whether this system can even be adequately conceptualized as having a determinate or localizable inside and outside. These are complex and interesting questions, and I am not about to close them off prematurely simply because the rationalist aesthetic of traditional legal thought abhors paradox. Besides, *in some senses*, such a conceptualist closure wouldn't work. For further thoughts, see Schlag, *Normativity and the Politics of Form*, *supra* note 2; see also note 19 *infra*.

19. Postmodernism can identify these bureaucratic practices in straightforward normative terms as coercive—extinguishing human freedom, choice, autonomy, etc. But although such a traditional normative condemnation might (in a paradoxical way) seem helpful politically, it would nonetheless miss something of what is going on.

What such a straightforward normative condemnation misses is that it is not so much a question of our freedom, autonomy, or choice being taken away. Rather, it is that bureaucratic, institutional, and linguistic practices construct us as beings for whom the liberal humanist understandings of freedom, choice, autonomy are not structural possibilities *in the first place*. The ironic kicker here is that while normative legal thought is heading straight for normative bankruptcy (see text accompa-

Normative legal thought as a local legal variant of liberal humanism has correctly understood that it, too, is targeted by postmodernism. And so very courageously, normative legal thought has met the challenge head on. The very first move of normative legal thought has been to assume automatically, *as a matter of its own form*, that it is authored by and addressed to an autonomous, coherent, integrated, rational, originary self, receptive to moral argument through a medium of language that is itself weightless and neutral. In other words, no sooner does normative legal thought begin to address postmodernism than it rhetorically assumes into existence precisely the sort of individual humanist subject—the very sort of author and reader—that postmodernism calls into question.²⁰

This, of course, is a really terrific move.²¹ Indeed, once normative legal thought rhetorically populates the world with these individual humanist subjects, the rest of the rejoinder to postmodernism is child's play. If the world is always already populated by such autonomous rational, morally competent individual subjects, then postmodernism is a lunatic and immoral effort to silence our last best hope for doing good in the world. The conclusion then follows effortlessly: If postmodernists want to contribute something to law or legal thought, they should first develop a normative vision.²² Here liberal humanism courageously converges with the Thumper school of jurisprudence: "If you can't say anything nice, don't say anything at all."²³

nying notes 45-65 *infra*), it remains rhetorically and socially operative. Indeed, the bureaucratic and institutional practices we inhabit, in the legal academy and elsewhere, re-present, organize, and reproduce their own operations, their own performances, within the normative vocabulary and grammar.

20. And the important thing to note is that even as normative legal thought is willing to entertain as a substantive proposition that the notion of an individual humanist subject is an overstatement or a fiction, it will do so only within its own rhetorical form—the very form that tacitly establishes the author and reader as already-constituted autonomous individual subjects. See Schlag, "Le Hors de Texte," *supra* note *.

One of the things that makes normative legal thought's attempts to deal with postmodernism typically uninteresting is that the discussion inevitably comes down to a couple of autonomous individual subjects sitting around talking about whether they exist or not. Not surprisingly, the conclusion is utterly predictable. It's kind of like asking God to decide whether Nietzsche is right.

21. And, of course, from the normative perspective, this move seems totally legitimate. It seems totally legitimate because, normative legal thought systematically eclipses the rhetorical contributions that its own form makes to its own end products. And thus, not surprisingly, normative legal thought does not even have a glimmer of the way in which it rigs the game. See *id.*

22. It is amazing how quickly the champions of normative legal thought—experts in the logic of responsibility and obligation—scribe blame to postmodernists for an ostensible failure to develop a *postmodern normative* vision. This is a bizarrely pre-Coasean, a strangely unidirectional, allocation of blame. Indeed, one wonders why the normative thinkers do not blame themselves for having failed to develop a *normative postmodern* vision?

My sense is that if normative legal thinkers were not so busy still putting the finishing touches on normative theories grounded in eighteenth century understandings of epistemology, the self, human agency, human reason, etc., perhaps they might actually have time to think about how to construct a kind of normative thought appropriate to our ultra-bureaucratized postmodern condition.

But no. Not at all. On the contrary.

23. *Bambi* (Walt Disney Studios 1942). See generally *id.*

The Thumper school of jurisprudence, like virtually all other jurisprudential schools, has taken a rather decisive instrumentalist turn lately. Accordingly, in the legal academy, Thumper's transcendental value in niceness has been transformed into the more instrumentalist value in being "con-

If all this sounds like a series of winning moves, that's because in a sense—in a very solipsistic sense—it is. This is one of the beauties of disciplinary solipsism: If you never allow “the other” (i.e., here, postmodernism) the possibility of changing your consciousness, your thought patterns, your cognitive or affective disposition, your text, etc., then you will always already be able to defeat “the other.”²⁴ You will always already win. Solipsism really does work . . . it does a lot of work.²⁵ It has worked really well for a really long time in legal thought.²⁶ But notice three things about solip-

structive.” Thus, it is widely held among legal thinkers that one should not merely criticize or destroy, but try to be constructive as well.

I find this sort of position perplexing—even on modernist terms. Consider a graphic example: If you take someone's neurosis away, are you being *destructive* (of that person's way of doing things) or are you being *constructive* (of a new organically healthy person)? If you were being destructive when you took away the person's neurosis, are you then obliged to do something more afterwards—something constructive? What would this additional constructive moment look like, and how would it help? Indeed, how often does a “cured” patient terminate therapy with the statement, “Yes, I understand I'm fine now. There's just one more question, doctor: What should I do?”

But consider this instead: Just what is it that the academic routine is telling us when it advises legal thinkers to prescribe solutions? What is this—law and pharmacy? Are latent Langdellian science metaphors still channeling our thoughts? Should the AALS investigate? Should normative legal thought be registered under the Controlled Substances Act, 21 U.S.C. §§ 801-904 (1982 & Supp. 1987)?

24. See Pierre Schlag, *Contradiction and Denial* (Book Review), 87 MICH. L. REV. 1216 (1989). This is the structure of James Boyd White's main objection to Richard Posner's recent exploration of law and literature. James Boyd White argues that in a very real sense Richard Posner has not encountered the works of literature that he reports to have read:

One way to put what is troubling is to think of what is missing from [Posner's] book. As I, at least, read through it I have no sense of the kind of life one associates with the reading of literary texts: no sense of a mind responding and learning, no sense of puzzle and illumination, no sense of joy or pleasure in the reading itself, no sense indeed of the presence of another mind with whom the author is engaged And there is something similar in the way his own text assumes that it will be read: it has the structure of an argument supported by examples, not that of a mind reaching out to another mind. It all seems a kind of display, a proof of something.

James Boyd White, *What Can a Lawyer Learn from Literature?* (Book Review), 102 HARV. L. REV. 2014, 2014-15 (1989).

25. See Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989) (tracing the disciplinary solipsism of legal thought to the convention-reinforcing character of research indexes and classification systems).

26. Stanley Fish knows this. See generally STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989). Stanley Fish keeps showing how legal (and other) academics are at once caught within the rhetorical structures of their own professional expertise and at the same time quite oblivious to the way in which these rhetorical structures constrain and enable their thought. He keeps showing this over and over again.

But, in rhetorical conformity with Stanley Fish's point, (virtually) nobody gets “it.” And since they don't get “it,” they all attack Stanley Fish from within the disciplinary structures of their own professional expertise. Ironically, this serves only to confirm the very point Stanley Fish is making. Indeed, you can even hear him at this very moment, saying, “Of course that's what they are doing. What else could they do?” *Id.* at 372-98.

And in a sense, Stanley Fish is right—right in a socially contingent sort of way. An incredibly astute observer of academic practice, Stanley Fish has noticed that much of academic practice is simply a series of exercises in disciplinary solipsism. So Stanley Fish quite cleverly lays out language games in which the practitioners of the various disciplinary solipsisms are rhetorically prompted or trapped, as the case may be, into performatively confirming their own disciplinary solipsism. See *undecidably* Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J.

sism. *First thing:* The routine assumption of disciplinary solipsism that it is in control of its own intellectual or rhetorical situation seems somewhat overstated. *Second thing:* It gets to be rather boring to repeat the same old moves. And boredom is not something to be ignored. It is not something to be trivialized. Boredom is the structure's way of telling you something. It's telling you, "Yoo hoo, over here—I'm the structure, and boy, do I have your life down pat." *Third thing:* If you really think you are a self-directing, autonomous, liberal humanist subject, you really do have to wonder why it is you just always happen to "choose" to repeat the same old boring moves.

* * *

So much for the top ten of normative legal thought in the eighties. Now you may have noticed that there are only five entries in the top ten. That is because the rhetorical situation of normative legal thought is even more desperate than I had initially imagined. To be sure, one could add other entries to the list, but then the redundancy quotient would rise intolerably and things would become rather repetitive and boring.

But then again, that is precisely one of my points. And there is no point in overdoing it—normative legal thought is overdoing it all by itself, getting more repetitive all the time, asking "What should we do? What should the law be? What do you propose?" over and over again.

In fact, even as you read and even as I write, normative legal thought is busy urging us (you and me) to ask these very same questions of this very essay at this very moment. "What should we do? What's the point?" asks normative legal thought. "If normative legal thought isn't going anywhere, what should we do instead?" "What do you propose?" "What's the solution?" These familiar questions are usually asked in searching, serious, somber tones. There is no trace of irony in their articulation—no self-consciousness at all. It is as if the intellectual legitimacy, the political import, of the questions were themselves self-evident, beyond question.²⁷ "Yes, yes—but what should we do? How do these observations help?" Usually, the questions are asked with such earnest, self-assured self-certainty that it is as if the body of knowledge that enables the questions to be stated in the first place were somehow outside the problem, outside the difficulty—already intellectually whole, already politically competent to provide the answers.²⁸

37 (1987) [hereinafter Schlag, *Fish v. Zapp*] (demonstrating how Fish's "interpretive communities" functions as a kind of black box in which academics project their favorite meaning structures).

For a brilliant critique of Stanley Fish's work that engages Fish on his own turf and thus largely escapes this solipsism, see Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990).

27. But soon the import of the questions will be put in question. See *Symposium: The Critique of Normativity*, 139 U. PA. L. REV. — (forthcoming 1991).

28. It is precisely this disciplinary hubris that postmodernism is out to deflate. Postmodernism is out to intensify the critical reflexivity that is already present in and marks the relative evolutionary achievements of rationalist and modernist thought. Postmodernism is simply more serious in pushing the bounds of critical thought. And as these bounds are pushed, much of what previously appeared to be very "serious" thought, very "serious" work, very "important" work, no longer seems that way anymore.

"Right, right, but the question is, what should we do with all this?"

Now you'll notice that here the "What should we do?" is an *interruption*. It is an interruption posing as an origin. It poses as an origin in that it takes itself to be the original motivation for engaging in legal thought.²⁹ And yet here, the "What should we do?" interrupts the process of trying to understand what enterprise we, as legal thinkers, are already engaged in. It interrupts the process of attempting to reveal the character of our disciplines and our practices as legal thinkers. "O.K., O.K., but how would such revelations help us decide what we should do?"

You'll notice that here (as elsewhere) normative legal thought has a very pressing and urgent tone. It wants to know right away what should be done. Right away. And true to its name, normative legal thought wants to engage right away in the enterprise of *norm-selection*. Normative legal thought wants to decide as quickly as possible which norm (which doctrine, which rule, which theory) should govern a particular activity.

Now as intellectually stifling and politically narrow as the enterprise of *norm-selection* may be,³⁰ it still offers legal thinkers *some* residual possibility of posing interesting philosophical, social, psychological, economic, or semiotic inquiries about law. Yet normative legal thought can't wait to shut down these intellectual and political openings as well. It cannot wait to envelop these inquiries in its own highly stylized ethical-moral form of *norm-justification*. Normative legal thought cannot wait to enlist epistemology, semiotics, social theory or any other enterprise in its own ethical-moral argument structures about the right, the good, the useful, the efficient (or any of their doctrinally crystallized derivatives). It cannot wait to reduce world views, attitudes, demonstrations, provocations, and thought itself, to norms. In short, it cannot wait to tell *you* (or somebody else) what to do.

In fact, normative legal thought is so much in a hurry that it will tell you what to do even though there is not the slightest chance that you might actually be in a position to do it. For instance, when was the last time *you* were in a position to put the difference principle³¹ into effect, or to restruc-

29. And in one sense, the "What we should do?" does appear to be an originary motivation. There is little doubt that many legal academics, like my cabbie (*see* text accompanying notes 1-6 *supra*) entered the legal academy motivated in significant part by a laudable interest in bettering the law through normative prescriptions addressed to courts and other legal actors.

But before we call this motivation originary, we ought to recognize that this particular motivation is itself socially and rhetorically constructed—that it is itself a product of three years of law school training and of the wider culture. We also ought to consider that the rubric of motivation generally, its scope, reach, and depth, are themselves socially constructed. As Lenny Bruce put it, "But I'm not original. The only way I could truly say I was original is if I created the English language." THE ESSENTIAL LENNY BRUCE 102 (J. Cohen ed. 1967).

30. The urgency of normative legal thought masks the narrowness—both intellectual and political—of the norm-selection enterprise. Indeed, to engage effectively—that is, successfully—in norm-selection implies choosing a norm that will not require significant alteration of the audience's belief system. Only those kinds of norms that already conform largely to the audience's belief system are likely to meet with any sort of wide-scale approval. It is thus no surprise that the ready-made conceptualization of the scholarly project as one of norm-selection is one that ends with the validation of the norm-selection and norm-justification process of the audience.

31. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

ture the doctrinal corpus of the first amendment? "In the future, we should . . ." When was the last time you were in a position to rule whether judges should become pragmatists, efficiency purveyors, civic republicans, or Hercules surrogates?

Normative legal thought doesn't seem overly concerned with such worldly questions about the character and the effectiveness of its own discourse. It just goes along and proposes, recommends, prescribes, solves, and resolves. Yet despite its obvious desire to have worldly effects, worldly consequences, normative legal thought remains seemingly unconcerned that for all practical purposes, its only consumers are legal academics and perhaps a few law students—persons who are virtually never in a position to put any of its wonderful normative advice into effect.³²

If there's no one in charge at the other end of the line, why then is normative legal thought in such a hurry to get its message across?³³ And why, particularly, is it always in such a hurry to repeat the same old boring moves? There is an edge to these questions. And the edge comes in part from our implicit assumption that normative legal thought is a kind of thought and that, as thought, it is in control of its own situation, its own form, its own rhetoric.

But it isn't so. If normative legal thought keeps repeating itself, and if it is incapable of understanding challenges to its own intellectual authority, that is because it is not simply or even fundamentally a kind of thought. Normative legal thought is in part a routine—our routine. It is the highly repetitive, cognitively entrenched, institutionally sanctioned, and politically enforced routine of the legal academy—a routine that silently produces our thoughts and keeps our work channeled within the same old cognitive and rhetorical matrices.³⁴ Like most routines, it has been so well internalized

32. The possibility that a significant number of judges might actually be reading significant quantities of this academic literature is undemonstrated and unlikely. The possibility that judges might actually be persuaded by this academic literature to adopt a position not their own is even more undemonstrated and even more unlikely.

The only kind of normative legal thought that might actually be having some significant and authentic normative effect on judicial decisionmaking (and here again, it is difficult to know which way the causal lines would run) is the work of the treatise writers. But, this treatise work cannot really be seen as having much effect, since much of it is simply a reflection (an encyclopedic collection) of the modes of thought and norms already extant in the courts.

33. One answer is precisely that normative legal thought conceives its own linguistic situation in just this unproblematic manner: "getting its message across." Normative legal thought establishes and sees itself as transmitting important "substance" through already existing, relatively unobstructed channels of legal communication. This conception of language as an empty, neutral, already extant conduit for thought is itself linguistically embedded in our metaphorical understanding of language. See Michael J. Reddy, *The Conduit Metaphor—A Case of Frame Conflict in Our Language about Language*, in *METAPHOR AND THOUGHT* 284 (A. Ortony ed. 1979). Unfortunately, as Reddy demonstrates, this conception greatly overestimates the possibility of successful communication and greatly underestimates the need for active intervention on the part of the participants in constructing communication. *Id.*

34. For a provocative discussion of the importance of routine in social interaction, see P.C. Wohlmut & L.J. Goldberg, *The Significance of Routine in the Operation of Human Regulatory Systems: Reexamining the Relationship of ADR to Law*, in *DISPUTE PROCESSING: LEGAL AND ANTHROPOLOGICAL PERSPECTIVES* (B. Aginsky, M. Lowy, V. Rohrl & D. Wesckstein eds.) (forthcoming 1991).

that we repeat it automatically, without thinking. And like most routines, it remains unseen and unobserved—which is why it is so powerful.³⁵ It is an aspect—a significant aspect—of the unnoticed and untroubled overarching epistemic economy within which (virtually) all contemporary legal thought is produced. In terms somewhat misleading but more familiar to legal thinkers, normative legal thought is the latest incarnation of the Langdellian legacy, the latest variation on formalism³⁶—*normative formalism*.³⁷

Normative legal thought, of course, does not consider itself a formalist enterprise.³⁸ And from the normative perspective, indeed, it is not. From the normative perspective, the formalist character of normative thought is not visible.³⁹ The very *form* within which normative legal thought re-

35. See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 49-50 (1983) ("[C]ategorical schemes have a power that is greatest when it is least noticed. They channel the attention of those who use them, structuring experience into the focal and the peripheral. In so doing, they influence judgment much as the agenda for a meeting influences the results of its deliberations.").

36. For a critique of the formalist tendencies of some kinds of normative legal thought, see Joseph William Singer, *Legal Realism Now* (Book Review), 76 CALIF. L. REV. 465 (1988).

37. For an elaboration of the formalist character of normative legal thought, see Schlag, *Normativity and the Politics of Form*, *supra* note *.

38. Quite the contrary. One important conventional understanding within the legal academy treats normative legal thought as being opposed to formalism. This conventional understanding of normative legal thought is much narrower than my use of the expression in this essay. In conventional terms, normative legal thought has been associated with a group of left-liberal legal scholars who favor open-ended forms of value talk and argument in the courts and in the academy. Their theory of legal legitimacy and legal meaning depends heavily and very rapidly on the explicit moral justification of legal decisions. The normative legal thinkers understand themselves to be opposed to a second group consisting of center-right scholars: the doctrinalists. The doctrinalists are committed to more technical forms of legal argument that they claim to be distinctly legal—different and separable from the general cultural run of moral or political argument. Their theory of legitimacy and legal meaning inclines heavily and very rapidly toward legal positivism. The two sides of this conventional dispute are aptly personified by Ronald Dworkin and Robert Bork, respectively. Compare R. DWORKIN, *supra* note 4, with Robert Bork, *Neutral Principles and the First Amendment*, 47 IND. L.J. 1 (1971).

This conventional dispute has been extremely influential in fashioning the legal academy's understanding of normative legal thought. Indeed, throughout the legal academy, normative legal thought is often conventionally associated with the left-liberal plea for open-ended value talk and is typically opposed to technical doctrinalism. Because the left-liberals have charged the doctrinalists with formalism and authoritarianism (see, e.g., Robin West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988)), the prevalent understanding in the legal academy is that normative legal thought stands in opposition to formalism.

This essay tries to get beyond this conventional understanding of the dispute. Both sides are caught up within their own formalism and both sides are pervasively normative. The claim here is that both old-style doctrinalism and normative thought can most helpfully be understood as two related moments within the same practice of normative legal thought—two related moments that are highly reminiscent of the classic rules vs. standards dispute. Indeed, one side emphasizes the need for closure, certainty, and generality, while the other emphasizes the need for openness, flexibility, context, etc. As with the classic rules vs. standards dispute, each jurisprudential moment collapses into and produces the other—and both are related to each other in the manner of an arrested dialectic. See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 426-29 (1985).

39. "When unreflective discourse prevails, such as common sense, it is as if the lens has become the world, rather than the portal through which it takes shape." Roger Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 795 (1988).

Because . . . assumptions and beliefs are internalized as the very grounds of consciousness, they are largely imperceptible to the conscious subject. These conceptualizations are trans-

presents the world prevents it from recognizing its own formalism. Normative formalism, like other formalisms, is its own best self-defense. It is its own best self-defense in the sense that whenever normative legal thought is intellectually challenged, it *unconsciously* re-establishes in the very *form* of the intellectual struggle, its own fundamental understanding of the agenda, the issues, the legitimate forms of argumentation, the criteria of failure and success, and so on.⁴⁰ Self-defense, of course, is what disciplinary solipsism is all about.⁴¹

Admittedly, as solipsistic enterprises go, normative legal thought is pretty nice—or at least, it looks pretty nice. For instance, it's really nice to think that we are all self-directing, coherent, integrated, rational, ordinary selves who are engaged in a rational conversation in which we aim to resolve disagreement by resort to normative dialogue. It's really nice to think that our political disagreements turn upon our own self-conscious commitments to different "values." It's nice to think that law and politics can be subservient to a grand conversation about who we think we should become.

It is all very nice. It is also absolutely unbelievable. What is more, the unbelievable character of normative legal thought is becoming increasingly

parent in the sense that they act as a cognitive filter through which the subject sees the social world. As long as the subject remains unreflective, this transparency will project the mutual entailment of the epistemic and the political in a way that will be experienced as "objective."

Winter, *supra* note 3, at —.

40. This point echoes Alasdair MacIntyre's claims about the character of liberalism: Liberalism . . . does of course appear in contemporary debates in a number of guises and in so doing is often successful in preempting the debate by reformulating quarrels and conflicts with liberalism, so that they appear to have become debates within liberalism, putting in question this or that particular set of attitudes or policies, but not the fundamental tenets of liberalism with respect to individuals and the expression of their preferences. . . .

It is then unsurprising that in contemporary debates about justice and practical rationality one initial problem for those antagonistic to liberalism is that of either discovering or constructing some institutional forum or arena within which the terms of the debate have not already predetermined its outcome.

ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 392-93 (1988).

And as Derrida cautions, "[T]he simple practice of language ceaselessly reinstates the new terrain on the oldest ground." JACQUES DERRIDA, *The Ends of Man*, in *MARGINS OF PHILOSOPHY* (A. Bass trans. 1982).

41. This is why if one seeks to disrupt a disciplinary formalism—normative or otherwise—one cannot simply argue "politely" against it. "Polite" argument is precluded because the very protocol of disciplinary engagement is always already rigged. It has to be: It wouldn't be a discipline if its very form were not already structured so as to preserve the discipline and to derail subversive lines of inquiry. What distinguishes disciplines from mere points of view, sets of ideas, or assortments of theories is that disciplines are linguistically, cognitively, and institutionally entrenched. Disciplines achieve security from challenge by constituting the very self of the disciplinary thinker as a series of rhetorical, cognitive, psychological defenses against troublesome or subversive lines of inquiry. To master or even participate in a discipline is not just to learn an assortment of ideas, techniques, authorities, etc. It is to become a certain kind of thinker, and hence, a certain kind of person.

When a discipline is then challenged (as it is here) disciplinary thinkers are very likely to experience this challenge as an attack on the self—their selves. It is thus not surprising that when disciplinary thinkers are confronted with challenges to their discipline, they react personally and dismissively. They experience challenges as "a way of fighting over whether our lives have been wasted." Calvin Trillin, *A Reporter at Large: Harvard Law*, *NEW YORKER*, Mar. 26, 1984, at 53, 83 (quoting a Harvard Law School professor).

This is perfectly understandable. It is also unfortunate.

evident. And as legal thinkers become increasingly aware of the fantastic character of normative legal thought, the enchantment of normative legal thought weakens and withers. Here, I'm just trying to help this disenchantment process along.

Of course, it's not as if this disenchantment process requires a great deal of help. On the contrary, we are just this far [. . .] away from recognizing that contemporary normative legal thought is a particularly shallow language game: "language game" in the Wittgensteinian as well as in the ludic sense,⁴² and "shallow" in the sense of . . . well, shallow. The normative jurisprudential world, built of arguments upon arguments upon arguments—just hanging there on the threads of normative structures marked out with concepts like fairness, consent, oppression, neutrality, and policed by aesthetic criteria like coherence, consistency, certainty, elegance—is about to crash. More accurately, it has already crashed,⁴³ and it is just a matter of time before the entire legal academy takes notice. Now, of course, it may take considerable time for the academy to notice.⁴⁴ Indeed, it is one of the vexations of our condition in the legal academy, as elsewhere, that various kinds of thought remain socially and institutionally operative (in fact dominant) long after their intellectual vitality has dissipated. And so it is with normative legal thought. It remains socially and institutionally operative within the legal academy, though it is a jurisprudential world that has already crashed. The significant question is when and how the legal academy will take notice.

In an attempt to help this process of recognition along, what follows is a

42. I am borrowing the term "ludic" from Arthur Leff. See Arthur Leff, *Law And*, 87 YALE L.J. 989, 999 (1978).

43. For arguments and demonstrations that legal thought is in the midst of an epistemic crisis, see Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 217 (1979) ("The history of legal thought in our culture is the history of the emergence of . . . [the] legal version of the liberal mode, its progressive abstraction and generalization through the 19th century until it structured all legal problems, and its final disintegration in the early 20th century."); Schlag, *Cannibal Moves*, *supra* note 18 (tracing the gyrations of the crash through the unstable and paradoxical character of contemporary legal thought); Winter, *supra* note 26, at 669-81 (arguing that the legal academy is experiencing an epistemic crisis presaging a Kuhnian paradigm shift).

Perhaps this footnote means that at least part of the zeitgeist is going my way. Maybe. It's more likely the other way around.

44. Even though the legal academic community is, as a matter of self-image, steeped in liberal humanism, much of its organization and intellectual reproduction is arranged along more feudal lines. Feudalism, of course, is not known for its social speed.

Feudalism tends to reproduce itself in its own static image. This is true in the legal academy as well. And it helps explain why legal thought tends to be (at least) one generation out of time. It helps explain, for example, why some young legal scholars are even now, still legitimating the Warren Court after all these years—or attempting to transpose its same old jurisprudence to other institutions such as the legislature or state constitutions. Ironically, even these observations are themselves déjà vu:

Some institutions . . . have found words and rules serving them as midwife or even as ancestor; but in the main it is action which comes first, to be followed by delayed perception of that action, then by rationalization of the action delayed still longer, and finally by conscious normatization of what has been perceived or rationalized. Before these latter processes have been worked out, the lines of the action commonly have shifted. Veblen's eyes were keen: "A man's ethics are modelled on the conditions of his grandfather's time."

Karl Llewelyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 17 n.30 (1934).

capsule description of the degeneration/development of normative legal thought. This degeneration/development proceeds in, and can be understood as, an increasing awareness by normative legal thought of its own role and character. As this degeneration/development unfolds, the meanings, the identities, and the grammatical relations of recurring terms such as "thinker," "thought," and "normative" change as well.

* * *

To begin with, consider a crude but illustrative example: If I call something "justice," this means that this something (whatever it is) is a good thing and that you too will want to be in favor of that thing. It also means that, if you do not want to be in favor of that something, then you will want to find some principled reason why the something I have called "justice" is not justice. This game can be played with other terms like "oppression," "choice," "consent," etc. What is truly wonderful about normative legal thought, then, is that it immediately compels people to take certain roughly predictable steps in the dialogic game: "You're evil." "No I'm not." And so on (except with more argumentative flourish).

Admittedly, normative legal thought is more complex than these examples would suggest, but nevertheless, its rhetorical situation and the point remain the same: What is becoming increasingly evident to many legal thinkers is that "justice" and "oppression" and "coercion" and "consent," etc., and the grammar accompanying this vocabulary are all part of a normative language game. It is important not to make too much of this recognition. Just because some legal enterprise becomes identified as a language game does not necessarily mean that the participants in the game will stop or lose interest in playing that language game.⁴⁵ The term "language game," after all, is not pejorative . . . ⁴⁶

Still, something interesting occurs with the recognition that normative legal thought is a kind of language game. Legal thinkers become aware that normative legal thought is largely a performative enterprise⁴⁷—one that uses

45.

The upshot of Wittgenstein's view of language is that all of our language has meaning only within the language games and "forms of life" in which they are embedded. One must understand the use, the context, the activity, the purpose, the game which is being played. . . . There are many important lessons here for law, but skepticism is not one of them.

Brian Langille, *Revolution Without Foundation: The Grammar Scepticism and Law*, 33 MCGILL L.J. 451, 495-96 (1988).

46. . . . except, of course within certain select language games that make the expression pejorative. For instance, in the language games of the legal academy, the argument that some or most of legal academic production must be understood in social terms—that is, as a kind of language game—is routinely understood as some sort of impermissible and illegitimate insult.

47. I am using the Austinian distinction between the performative and the constative. Austin tried to establish a heuristic dichotomy between *constative* and *performative* utterances. A constative utterance describes a state of affairs and is either true or false. An example might be "The sun is out today." A performative utterance, by contrast, has operative significance, performs as an action, and is neither true nor false. An example might be the declaration "I do" at a marriage ceremony. One of the interesting contributions of Austin's work is his rejection of the possibility of classifying utterances as either entirely constative or entirely performative. Utterances are mixed cases of the

normative words and normative grammars instrumentally to induce specific kinds of social action. While this recognition may be obnoxious for some unreconstructed normative thinkers who insist upon maintaining the pure, transcendent character of normative thought, most legal thinkers will readily accept and accommodate themselves to this recognition. Indeed, the notion that normative legal thought is instrumentally effective not because of any so-called "intrinsic" normative authenticity, but rather because of its rhetorical facility for manipulating the self-image, and thus the self, of the reader is something that most normative legal thinkers can readily accept. Few care *how* normative legal thought does its work, so long as it does work.

Of course, once it is widely recognized that normative legal thought is a technique of rhetorical manipulation, the recognition itself begins to produce certain performative effects. Once legal thinkers understand that the significance of the normative categories and the normative grammar is largely performative, they assume a new stance towards normative rhetoric. They see it as an instrumental vehicle for achieving their favorite political or moral ends.⁴⁸ Consequently, normative rhetoric becomes subject to rather intense pressure. For example, consider the normative word "freedom." This particular word has a certain exchange value in our rhetoric and in our discourse. It is well known, for instance, that at present, "freedom" of [. . .] enjoys a certain rhetorical advantage over "security" of [. . .]. That is to say, at present, "freedom" is rhetorically superior to "security."⁴⁹ As legal thinkers come to recognize this point, they try, of course, to associate "freedom" with their favorite values, leaving "security" as the word for competing or interfering values. Thus the exchange value of the "freedom" word rises in the rhetorical economy of legal thought. However, the rise in the exchange value of such normative words typically yields an inflationary spiral. Sooner or later everybody is using the "freedom" word. For a while, the political charm of the "freedom" word can survive accelerated circulation. The word remains important. It remains important because it remains performatively effective. It is perceived as a tool, a rhetorical lever. But precisely because the "freedom" word remains performatively effective, it is immediately pressed further into all sorts of instrumentalist enterprises, thereby further diffusing its constative significance. After a while, the "free-

performative and the constative, varying with and depending upon the context. Hence, this is a distinction that has already collapsed. The collapse of the distinction is not a problem here. On the contrary, the collapse of the distinction helps make my point.

For further elaboration see JOHN LANGSHAW AUSTIN, *HOW TO DO THINGS WITH WORDS* (1975). My discussion of the performative character of contemporary normative legal thought and its increasing loss of performative significance also tracks with Lyotard's discussion of modern and postmodern science. See generally J.F. LYOTARD, *supra* note 18.

48. This is precisely the point at which traditional legal thinkers voice the fear that judges and other legal actors will impose their own "personal values." At this stage in the degeneration/development of normative legal thought, we are still operating within the fantasy that individual legal thinkers are somehow autonomously in control of their own thoughts and moral values.

49. For an interesting discussion of the relations between the rhetoric and the moral value of our legal terms, see Peter Westen, "Freedom" and "Coercion"—*Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 592.

dom” word doesn’t mean much of anything. It isn’t even a reliable rhetorical tool to get people to act, or to be or to say various things. On the contrary, everybody knows the trick: Freedom’s just another word for getting you to do something you don’t want to do.

Now this linguistic metamorphosis is hardly limited to the “freedom” word. Rather, the linguistic devaluation affects the entire normative currency.⁵⁰ In fact, it affects the entire grammar of normative legal thought. Hence, entire structures, entire complexes of normative legal thought become increasingly vacuous—their purchase on the world, descriptive and regulatory, less and less credible. Even the performative value of these structures and complexes becomes weakened as legal thinkers come to recognize that their constative significance has been devalued.⁵¹

As the normative currency is devalued, the relation between normative structures and complexes, on the one hand, and the practices to which they ostensibly correspond, on the other, becomes weakened, attenuated. No longer is it possible to maintain a naive idealism or materialism where normative conceptions such as “justice,” “liberty,” “consent,” or “community,” either determine or are determined by the practices to which they ostensibly correspond. The language of determination, and even its softer, more nuanced dialects, no longer provide an adequate understanding of the situation of normative legal thought. Here, the point is *not* that normative legal thought has now become indeterminate, as opposed to some previous or possible state of determinacy. Rather, the point is that determination is no longer *the* appropriate frame of reference for charting the relation between normative legal thought and the practices it ostensibly addresses.

It is at this point that the legal thinker recognizes that the value (if any) of normative legal thought does not depend so much on its relation to the practices it seeks to describe or govern. It now becomes evident that the value (if any) of normative legal thought depends on a decentered economy of bureaucratic institutions and practices—such as those constituting and traversing the law school, the organized bar, the courts—that define and represent their own operations, their own character, their own performances, in the normative currency. Indeed, at this point, normative legal thought takes on a completely different character. It becomes the mode of discourse by which bureaucratic institutions and practices re-present themselves as subject to the rational ethical-moral control of autonomous individuals (*when indeed they are not*), just as normative legal thought constructs us (you and me) to think and act as if we were at the center—in charge, so to speak—of our own normative legal thought (*when indeed we are not*). Nor-

50. This devaluation is reflected in the accelerating velocity with which virtue and vice words are replaced in legal thought.

51. Now this recognition does not mean that normative legal thought is immediately rendered powerless. On the contrary, there is an entire academic authority structure (largely feudal in character) that organizes itself and its own academic reproduction in terms of the categories and grammar of normative legal discourse. It cannot be expected that this authority structure will automatically fold even if it recognizes that its claims to intellectual legitimacy are vacuous.

mative legal thought can no longer be seen to govern, regulate or even describe human activity.

In fact, as a further step in this degeneration/development, it now appears that it is very difficult to discern any significant difference between normative legal thought and the operation, performance, reproduction, and proliferation of bureaucratic practices and institutions. The two collapse into each other. At this point, normative legal thought has become the operation, performance, reproduction, and proliferation of bureaucratic practices and institutions.

Normative legal thought is effective—very effective—but not in any way it imagines itself to be. Its significance can no longer lie in its specific prescriptions or conclusions (which are rarely adopted or even capable of being adopted). Normative legal thought—this form of thought so concerned with producing normatively desirable worldly effects—has, ironically, become its own self-referential end.⁵² And that end is coextensive with the operation, performance, reproduction, and proliferation of bureaucratic practices and institutions.

Welcome to the crash. My sense is that when legal thinkers recognize that normative legal thought is an economy of self-referential instrumentalist rhetorical structures run from elsewhere and gradually seeping themselves of meaning, both constative and performative, playing this language game of normative legal thought will lose a great deal of its moral and intellectual cachet. It is one thing to understand one's self as engaged in a normative enterprise aimed at improving the moral or political or economic performance of the legal profession or the courts through normative argument. It is quite another to understand one's self as a bureaucratic vehicle for the proliferation of a mode of discourse (normative legal thought) that is coextensive with bureaucratic practice and institutional inertia. As self-images go, my sense is that the latter is not really great. It is likely to lead to a certain degree of disenchantment. And my sense is that the disenchantment of normative legal thought is already well on its way.⁵³

Now, one reaction a normative legal thinker might have to all this is that it is all perfectly horrible—and that we should all try to preserve our normative universe by using words more carefully and by arguing very morally against instrumentalism and the instrumentalization of law (and so on). But

52. This point of extreme reflexivity is suggested in analogous contexts by Jean Baudrillard when he writes:

And what if all advertising were the apology not of a product, but of advertising itself? What if information did not refer back to an event, but to the promotion of information itself as event? What if communication no longer referred back to a message, but to the promotion of communication itself as myth?

JEAN BAUDRILLARD, *LA TRANSPARENCE DU MAL: ESSAI SUR LES PHENOMENES EXTREMES* 56 (1990) (author's translation).

53. "We possess indeed simulacra of morality, we continue to use many of the key expressions. But we have—very largely, if not entirely—lost our comprehension, both theoretical and practical, of morality." "What we possess, if this view is true, are the fragments of a conceptual scheme, parts which now lack those contexts from which their significance derived." ALASDAIR MACINTYRE, *AFTER VIRTUE* 2 (2d ed. 1984).

this argument misses the point again. This is history—not dialogue among disembodied Cartesian selves. And it doesn't do much good to make normative arguments against history—especially not if you keep misidentifying your own addressee, your agent of change, your subject. Unfortunately, that is precisely what normative legal thought keeps getting confused about. It keeps thinking that it is addressing some morally competent, well-intentioned individual who has his hands on the levers of power.⁵⁴ The pervasiveness of this metaphysical confusion—its routine character within the legal academy—is precisely what engenders the more socially situated confusions of “liberal” and “progressive” legal academics as to whether or not the Warren Court is still sitting.⁵⁵

* * *

All of this can seem very funny. That's because it is very funny. It is also deadly serious. It is deadly serious, because all this normative legal thought, as Robert Cover explained, takes place in a field of pain and death.⁵⁶ And in a very real sense Cover was right. Yet as it takes place, normative legal thought is playing language games—utterly oblivious to the character of the language games it plays, and thus, utterly uninterested in considering its own rhetorical and political contributions (or lack thereof) to the field of pain and death. To be sure, normative legal thinkers are often genuinely concerned with reducing the pain and the death. However, the problem is not what normative legal thinkers do with normative legal thought, but what normative legal thought does with normative legal thinkers. What is missing in normative legal thought is any serious questioning, let alone tracing, of the relations that the practice, the rhetoric, the routine of normative legal thought have (or do not have) to the field of pain and death.

And there is a reason for that: Normative legal thought misunderstands its own situation. Typically, normative legal thought understands itself to be outside the field of pain and death and in charge of organizing and policing that field. It is as if the *action* of normative legal thought could be separated from the *background* field of pain and death. This theatrical distinction is what allows normative legal thought its own self-important, self-righteous, self-image—its congratulatory sense of its own accomplishments and effectiveness.

All this self-congratulation works very nicely so long as normative legal

54. This is a quaint and endearing image of law. It is so entrancing that it could easily mystify. As a gentle reminder, consider a multiple choice question: The image of the morally competent, well-intentioned person with his hands on the levers of power is an accurate description of:

- a) every judge
- b) every other judge
- c) every other legal academic's view of every judge
- d) the Wizard of Oz
- e) answers (c) and (d).

55. Still no definitive word on this one.

56. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

thought continues to imagine itself as outside the field of pain and death and as having effects within that field.⁵⁷ Yet it is doubtful this image can be maintained. It is not so much the case that normative legal thought *has effects* on the field of pain and death—at least not in the direct, ordinary way it imagines. Rather, it is more the case that normative legal thought *is* the pattern, *is* the operation of the bureaucratic distribution and the institutional allocation of the pain and the death.⁵⁸ And apart from the leftover ego-centered rationalist rhetoric of the eighteenth century (and our routine), there is nothing at this point to suggest that we, as legal thinkers, are in control of normative legal thought.

The problem for us, as legal thinkers, is that the normative appeal of normative legal thought systematically turns us away from recognizing that normative legal thought is grounded on an utterly unbelievable re-presentation of the field it claims to describe and regulate. The problem for us is that normative legal thought, rather than assisting in the understanding of present political and moral situations, stands in the way. It systematically reinscribes its own aesthetic—its own fantastic understanding of the political and moral scene.⁵⁹

Until normative legal thought begins to deal with its own paradoxical postmodern rhetorical situation, it will remain something of an irresponsible enterprise. *In its rhetorical structure*, it will continue to populate the legal academic world with individual humanist subjects who think themselves empowered Cartesian egos, but who are largely the manipulated constructions of bureaucratic practices—academic and otherwise.⁶⁰

To the extent possible, it is important to avoid this kind of category mistake. For instance, it is important to understand that your automobile insurance adjuster is not simply some updated version of the eighteenth century

57. Yet note, ironically, that this depiction of the situation of legal thought is used recurrently by Stanley Fish—in his characteristically uncongratulatory way—to demonstrate the futility and inadequacy of legal theories. See Schlag, *Fish v. Zapp*, *supra* note 26, at 55-56; Winter, *supra* note 26, at 661-62 (container metaphor).

58. This conceptualization of normative legal thought and violence is suggested in Rosemary Coombe's comments on Cover's essay:

Cover made a crucial and too-often evaded point when he claimed the priority of the fact that legal interpretation is essentially related to the legitimated practice of political violence. . . . But . . . [h]is discussion proceeds under the assumption that legal interpretation takes place in a context of violence, because it signals or occasions the potential for violence, and violence (be it capital punishment, imprisonment, being deprived of one's children or property) is the likely *result* or *consequence* of such interpretation.

What Cover might have argued, and what most critical modern social theory implies, is that legal interpretation is not something joined with the practice of violent domination, but an example of that practice.

Rosemary Coombe, "Same as It Ever Was": *Rethinking the Politics of Legal Interpretation*, 34 MCGILL L.J. 601, 649 (1989).

59. And it is important not to assume that simply because we recognize that normative legal thought is in a degenerative state, this recognition allows us to get beyond it. On the contrary: "We should fall victim to a disastrous self-deception if we were to take the view that a haughty contempt is all that is needed to let us escape from the imperceptible power of the uniformly one-sided view." MARTIN HEIDEGGER, *WHAT IS CALLED THINKING?* 34 (F. Wieck & S. Gray trans. 1968).

60. (Not me, of course.) See notes 18 & 59 *supra*.

individual humanist subject. Even though the insurance adjuster will quite often engage you in normative talk—arguing with you about responsibility, fairness, fault, allocation of blame, adequacy of compensation, and the like—he is unlikely to be terribly receptive or susceptible to any authentic normative dialogue. His normative competence, his normative sensitivity, is scripted somewhere else. It is important to be clear about these things. The contemporary lawyer, for instance, may talk the normative rhetoric of the eighteenth century individual humanist subject. But make no mistake: This normative or humanist rhetoric is very likely the unfolding of bureaucratic logic. The modern lawyer is very often a kind of meta-insurance adjuster. And that makes you and me, as legal academics, trainers of meta-insurance adjusters.

This is perhaps an unpleasant realization. One of the most important effects of normative legal thought is to intercede here so that we, as legal academics, do not have to confront this unpleasant realization. Normative legal thought allows us to pretend that we are preparing our students to become Atticus Finch⁶¹ while we are in fact training people who will enter the meta-insurance adjustment business.

For our students, this role-confusion is unlikely to be very funny. It will get even less so upon their graduation—when they learn that Atticus Finch has been written out of the script. For us, of course, it is a pleasant fantasy to think we are teaching Atticus Finch. When the fantasy is over, it becomes one hell of a category mistake. And in the rude transition from the one to the other, Atticus Finch can quickly turn into Dan Quayle. In fact, if you train your students to become Atticus Finch, they will likely end up as Dan Quayle—cognitively defenseless against the regimenting and monitoring practices of bureaucratic institutions. Atticus Finch, as admirable as he may be, has none of the cognitive or critical resources necessary to understand the duplicities of the bureaucratic networks within which we operate. Apart from the fantasies of the legal academy, there is no longer a place in America for a lawyer like Atticus Finch. There is nothing for him to do here—nothing he can do. He is a moral character in a world where the role of moral thought has become at best highly ambivalent, a normative thinker in a world where normative legal thought is already largely the bureaucratic logic of institutions.

But don't worry—be normative. My bet is that when normative legal thought takes note of the crash, it will argue against it . . . on normative grounds, of course.⁶² The argument will be structured in terms of the determination of the epistemic by the normative.⁶³ Or in simpler terms: "There is no crash . . . because to acknowledge a crash (in law) would bring about

61. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

62. And Stanley Fish haunts me here, because I don't want him to be right, but still, here he is, saying, "But of course, they'll argue on normative grounds. What else could they do?" See generally S. FISH, *supra* note 26, at 372-98.

63. Actually, the argument has already been made—in fact several times. It's part of the routine. We can even pretend the citations are here. They are.

terrible social consequences, a loss of meaning, etc. . . . Therefore, there can't be any crash. Therefore, there isn't any crash." Another winning argument.

This argument will likely be accompanied by great and moving efforts to revive normative legal thought through the teaching of ethics and morality.⁶⁴ What else? Actually, one other thing. Normative legal thought, this local offshoot of liberal humanism, can be expected to do its usual conservative collapse move, and to mourn, in a nostalgic sort of way, the passing of the normative world. "In the old days, when people were moral . . ."

Now, other than these sorts of responses, I think it would be unrealistic to expect anything else of normative legal thought *at present*. Normative legal thought simply does not possess the sort of cognitive or critical resources to recuperate from the crash. From the perspective of normative legal thought, either the crash does not exist, or if it does, it is simply an unaccountable, inexplicable intellectual and cultural catastrophe. Indeed, in static terms, the existing categories, the existing grammar of normative legal thought, are utterly incapable of providing any sort of sophisticated account for the crash. Viewed dynamically, normative legal thought could conceivably begin to apprehend the crash and respond. But, of course, that's not where the energies of normative legal thought are dedicated. On the contrary. Normative legal thought, like liberal humanism more generally, is spending (virtually) all of its intellectual and psychic resources fueling a denial of the crash.

Liberal humanism and normative legal thought are both very good at denial.⁶⁵ They ought to be. They are the routine. They are in place. They are institutionally and cognitively embedded.

By way of example, consider the scholarly exchanges among normative legal thinkers. They all differ about all sorts of things. They differ about "important" issues such as what should be the appropriate mix of community, liberty, freedom, equality, empowerment, efficiency, etc. And while normative legal thinkers differ about these "important" normative issues, there is one thing that they all agree upon, over and over again . . . without even having to think about it. What they all agree upon, in this implicit unexamined sort of way, is that they are all autonomous, rational, morally competent individuals who are having a meaningful, important, and effective discussion about how society or some subdivision thereof should be organized.

This pleasant fantasy is harmless enough, except that it reproduces legal academics and law students (and hence lawyers) in the image of humanist individual subjects. This, too, is a harmless self-indulgence, except that it provides instrumentalist bureaucracies with an absolutely marvelous and

64. As Baudrillard puts it: "The effects of moral conscience, of collective conscience are entirely mediated effects, and one can read in the therapeutic ardor with which we try to resuscitate this conscience, how little life it retains." J. BAUDRILLARD, *supra* note 52, at 97 (author's translation).

65. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1988).

captivating rhetoric that defines, organizes, routinizes, and services their clientele. It's all really neat. 7-11 sells freedom (which you can find in their Slurpees). Pepsi brings you the downfall of the Berlin Wall. And normative legal thought guides the development of the law.

