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### ARTICLES

#### NORMATIVITY AND THE POLITICS OF FORM\*

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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 Schlag, *“Le Hors de Texte, C’est Moi”: The Politics of Form and the Domestication of Deconstruction*, 11 *Cardozo L. Rev.* 1631 (1990); Schlag, *Normative and Nowhere to Go*, 43 *STAN. L. REV.* 167 (1990); Schlag, *The Problem of the Subject* (forthcoming 69 *TEX. L. REV.* (1991)).

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If the sociology of the system of education and the intellectual world seems to me to be fundamental, this is because it also contributes to our knowledge of the subject of cognition by introducing us, . . . to the unthought categories of thought which limit the thinkable and predetermine what is actually thought: I need merely refer to the universe of prejudice, repression and omission that every successful education makes you accept, and makes you remain unaware of, tracing out that magic circle of powerless complacency in which the elite schools imprison their elect.<sup>1</sup>

What should be done? How should we live? What should the law be? These are the momentous questions. These are the hard questions. These are the questions that animate virtually all of contemporary legal thought--from the most modest doctrinal reform proposals to the most ambitious utopian speculation. In our classes and in our writings, we speak ceaselessly of ways to improve law.

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<sup>1</sup> P. BOURDIEU, IN OTHER WORDS 178 (1990).

We seek to bring law into greater consonance with moral value, or the public interest, or justice, or some other worthy conception that celebrates its own take on the social good.

Because we are constantly engaged in this great prescriptive effort to better law, our thought often appears extraordinarily ennobling. Indeed, our contributions to legal thought routinely affirm that we are working on the side of the good, the right, or the just—at least as we understand those concepts. We are part of a laudable enterprise, and in our teaching and writing we seek to enlist others, our students and colleagues, in this enterprise—in the notion that law can be perfected, can be improved through reasoned argument about the good, the right, the just, and the like.

It must thus come as quite a shock to discover (as one invariably does) that this passionate normative life of the law has no readily apparent relation to the actual structure or content of legal practice.<sup>2</sup> For our students, the transition is extremely abrupt. For three years, the talk is of bringing law in accord with purposive reason, of refining the efficiency calculus, of being very pragmatic and oh so contextual. Rudely, however, these three years are brought to a close by the vulgar reality principle of the bar exam. This is quickly followed by one (quite possibly) last, exceedingly hedonistic vacation.

This vacation typically ends badly with the law student finding himself confined in a small cool cubicle with a window, a couple of diplomas, one potted plant, and a very bad view. From that cubicle, law begins to seem far less genteel, far less intellectualized, and, most of all, far less respectful of its own inner normative text than it did in law school. In that cubicle (and in tens of thousands like it), the student-become-lawyer will learn and learn quickly that law is a power game. In that cubicle, doctrine, arguments, causes of action, defenses, and the like will undergo an almost magical metamorphosis. They will be recast as the rhetorical moves that allow lawyers, clients, and courts, to get more of what it is they want. In legal practice, the noble values immanent in positive law will lose much of their moral sheen. They will be recognized for what they effectively are: part of the arsenal of rhetorical levers by which institutional authorities can be instrumentally summoned to visit coercion on selectively named parties.<sup>3</sup> The normative values

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<sup>2</sup> Normative legal thought has some relations to the content and structure of legal practice, but these relations are not the readily apparent ones.

<sup>3</sup> For a graphic demonstration, see Yablon, *Forms*, 11 CARDOZO L. REV. 1348

embedded in law will become part of the prime cultural set pieces by which lawyers manipulate the self-image of jurors, clients, judges, and other lawyers to get more of what it is the lawyers ostensibly want. For many students-become-lawyers, this will seem a very glamorous and exciting game—one that smacks of real consequences, real power, and real life. And it will continue to seem glamorous and exciting at least so long as the student-become-lawyer continues to believe that he is in control of the power game. It will not be until much later (if at all) that the student-become-lawyer will recognize that it is more likely the other way around.

If this seems like an unusually dark vision of the practice of law, it is likely to be so only for those whose understanding of law is informed principally by the dreamy normative visions that issue routinely from the legal academy. Practicing lawyers, by contrast, are likely to find this vision unexceptionable: practicing lawyers experience law as a complex network of bureaucratic power arrangements that they have learned to manipulate.<sup>4</sup> That is what legal practice is about. Words get used, arguments get made, institutional pressure builds, situations become increasingly intolerable, somebody gives, and a settlement is reached, or a contract is signed, or a jury comes back with a verdict. It's law. It's power.

Against this backdrop of bureaucratic power games, it becomes an interesting question just what all of our passionate and very moral normative conversation does or does not contribute. Against the backdrop of this power game of law, our normative conversation can seem exceedingly polite—given to a rather unbelievable romanticization of the enterprise we call “law.”

Many legal thinkers understand this dramatic conflict in terms of an opposition between the “realities” of practice and the “ideals” of the legal academy. For these legal thinkers, it will seem especially urgent to ask once again: What should be done? How should we live? What should the law be? These are the hard questions. These are the momentous questions.

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(1990).

<sup>4</sup> As Sarat and Felstiner observe, a common understanding of professional power is “based not on rules but on local knowledge, insider access, connections, and reputation. Lawyers often suggest that their most important contribution is knowledge of the ropes, not knowledge of the rules; they describe a system that is not bureaucratically rational but is, nonetheless, accessible to its ‘priests.’” Sarat & Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1685 (1989) (footnotes omitted).

And they are the wrong ones.

They are wrong because it is these very normative questions that relieve legal thinkers from recognizing the extent to which the cherished "ideals" of legal academic thought are implicated in the reproduction and maintenance of precisely those ugly "realities" of legal practice the academy so routinely condemns. It is these normative questions that allow legal thinkers to shield themselves from the recognition that their work product consists largely of the reproduction of rhetorical structures by which human beings can be coerced into achieving ends of dubious social origin and implication. It is these very normative questions that allow legal academics to continue to address (rather lamely) bureaucratic power structures as if they were rational, morally competent, individual humanist subjects. It is these very normative questions that allow legal thinkers to assume blithely that—in a world ruled by HMOs, personnel policies, standard operating procedures, performance requirements, standard work incentives, and productivity monitoring—they somehow have escaped the bureaucratic power games. It is these normative questions that enable them to represent themselves as whole and intact, as self-directing individual liberal humanist subjects at once rational, morally competent, and in control of their own situations, the captain of their own ships, the Hercules of their own empires, the author of their own texts.

It isn't so.<sup>5</sup> And if it isn't so, it would seem advisable to make some adjustments in the agenda and practice of legal thought. That is what I will be trying to do here. Much of what follows will no doubt seem threatening or nihilistic to many readers. In part that is because this article puts in question the very coherence, meaningfulness, and integrity of the kinds of normative disputes and discussion that almost all of us in the legal academy practice.

One question will no doubt recur to the reader throughout this article: "But what should we do?" That question is not going to receive a straightforward answer here, and I would like to explain why at the outset. Suppose that you are walking on a road and you come to a fork. This calls for a decision, for a choice. So you ask your companions: "Which fork should we take? Where should we go?" You all begin to talk about it, to consider the possibilities, to

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<sup>5</sup> See Schlag, "*Le Hors de Texte, C'est Moi*": *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990) [hereinafter Schlag, "*Le Hors de Texte*"]; Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990) [hereinafter Schlag, *Normative and Nowhere to Go*].

weigh the considerations. Given these circumstances, given this sort of problem, the questions, "Where should we go? What should we do?" are perfectly sensible.<sup>6</sup>

But now suppose that it gets dark and the terrain becomes less familiar. You are no longer sure which road you are on or even if you are on a road at all.<sup>7</sup> So you ask, "where are we?" One of your companions says "I don't know—I think we should just keep going forward." Another one says, "I think we should just go back." Yet another says "No, I think we should go left." Now given the right context, each of these suggestions can be perfectly sensible. But not in this context. Not anymore. On the contrary, you know very well that going forward, backward, left or in any other direction makes no sense unless you happen to know where you are. So, of course, you try to figure out where you are. You look around for telltale signs. You scan the horizon. You try to reconstruct mentally how you got here in the first place. You explore. You even start thinking about how to figure out where you are.

Meanwhile, if your companions keep asking "But what should we do? Which road should we take?," you are likely to think that these kinds of questions are not particularly helpful. The questions (Where should we go? Which fork should we take?) that seemed to make so much sense a short time back have now become a hindrance. And if your companions keep up this sort of questioning (Which road should we take? Which way should we go?), you're going to start wondering about how to get them to focus on the new situation, how to get them to drop this "fork in the road" stuff and start using a different metaphor.<sup>8</sup>

<sup>6</sup> Notice that the generative metaphorical schema at work here is what Lakoff calls the "source-path-goal schema." G. LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 275 (1987). The basic logic of this recursive schema is to go from a *source* to a *destination* on a *path*. *Id.* As Lakoff puts it, "[p]urposes are understood in terms of destinations, and achieving a purpose is understood as passing along a path from a starting point to an endpoint." *Id.*

Much of normative legal thought can be understood as structured by this source-path-goal schema. Teleological ethics are destination-oriented, requiring the travelers on the journey to act in ways appropriate to achieve the destination. Deontological ethics by contrast are backward looking and source-regarding, requiring the travelers to refer back to what has already transpired on the journey in order to decide what to do at each point.

<sup>7</sup> I think it's been a while since any of us have seen jurisprudential pavement. See Schlag, *Cannibal Moves: The Metamorphoses of the Legal Distinction*, 40 STAN L. REV. 929, 930 (1988).

<sup>8</sup> The "fork in the road" metaphor for normative legal thought is very much one of problem solving: "Which way should we go?" For an argument that the "essential

Now one metaphor that recurs throughout this essay is that of the theater.<sup>9</sup> Now, you might reasonably think that it's a bit difficult to get from the "fork in the road" metaphor of normative legal thought to the metaphor of law as theater. But actually, it's not that difficult—especially not if you understand at the outset that those individuals who keep saying "Where should we go? What should we do?" are themselves *already doing* a kind of theater. They are engaged in a particular kind of dramatic action appropriate for a particular kind of scene, *agon*, and actors. They are doing the kind of theater that is particularly appropriate for forks in the road.

Now, one problem with normative legal thought is that it is constantly representing our situation as a fork in the road—calling, of course, for a choice, a commitment to this way or that way. Now, you might think: well, this is not so bad. At least we get to choose. We are free and we can choose which way to go. But, of course, we are not free. The rhetorical script of normative legal thought is already written, the social scene is already set and play after play, article after article, year after year, normative legal thought requires you to choose: "What should we do? Where should we go?" We are free, but we must choose—which is to say that we are not free at all. On the contrary, we (you and I) have been constituted as the kind of beings, the kind of thinkers who compulsively treat every intellectual, social, or legal event as calling for a choice. We must choose.

What should we do? Where should we go? These questions are not helpful now. It's time to do a different kind of theater. And the first thing to do is figure out where we are and what we're doing. What we're doing, of course, is normative legal thought.

difficulties in social policy have more to do with *problem setting* than with problem solving," see Schön, *Generative Metaphor: A Perspective on Problem Setting in Social Policy*, in METAPHOR AND THOUGHT 254, 255 (A. Ortony ed. 1988).

<sup>9</sup> Theater features as an important metaphor in the work of Kenneth Burke and Erving Goffman. See K. BURKE, *GRAMMAR OF MOTIVES* (1969); E. GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1983). In those works, and in this article, theater is not used as metaphor in the usual weak sense of metaphor. The claim both there and here is not the weak notion that life or law is *like* theater; the claim is that life and law are already theater, are already invested in and invested with theater.

For one of the early precedents of theater in legal thought, see Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975).

## I. (VIRTUALLY) ALWAYS AND ALREADY NORMATIVE

The orientation of American academic legal thought is pervasively and overwhelmingly normative. For the legal thinker, the central question is "what should the law be?" Or, "what should the courts do?" Or, "how should courts decide cases?" Or, "what values should the ubiquitous (and largely non-referential) 'we' (i.e., us) believe?" Or, "how should . . ."

These questions and their doctrinal derivatives constitute, organize, and circumscribe the tacit agenda of contemporary legal thought. The key verb dominating contemporary legal thought is some version of "should." Sometimes this "should" does not quite rise to the moral "ought," and remains merely an instrumental, technical, or prudential "should." Sometimes it is a covert "should"—hidden beneath layers of legal positivism. But the fact remains that "shoulds" and "oughts" dominate legal discourse. And the question of whether any given "should" is a true moral "ought" or another instrumental "should" turns out to be just another internecine squabble among competing normative perspectives.<sup>10</sup>

The normative orientation is so dominant in legal thought that it is usually not noticed. No doubt the very pervasiveness and dominance of this thought has enabled it to escape conscious thematization.<sup>11</sup> Indeed, while the concept "normative legal thought" is hardly unknown or unintelligible to American legal thinkers, its precise significance, its precise movements in social or intellectual space, remain largely unrecognized and undetermined. Indeed, the understanding (or rather understandings) of normative legal thought within the legal academy are not nearly as refined or contested as the understandings, for instance, of legal formalism, legal realism, legal process, law and economics, critical legal studies (cls), or the like.

Nonetheless, normative legal thought does not arrive on this scene without meaning, without a history. On the contrary, normative legal thought arrives an already loaded term—one that has already been engaged in jurisprudential skirmishes with conceptualism, positivism, and nihilism. Indeed, our image of normative legal

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<sup>10</sup> For instance, the running feud between deontological and teleological ethics. For an early and sophisticated instantiation of this clash in the legal literature, see Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

<sup>11</sup> Strikingly, normative legal thought is so confident of its own position, its own importance, that virtually no one has bothered to ask just how it is that normative legal thought produces its effects.



thought is already a product of some cognitively and professionally sedimented distinctions<sup>12</sup> between normative legal thought and:

- (a) descriptive thought (as in, for instance, the opposition between descriptive and normative law and economics);<sup>13</sup>
- (b) conceptualism (as in, for instance, the claim that normative legal thought is value-conscious, open-ended, and non-authoritarian in contrast to conceptualism);<sup>14</sup> or
- (c) nihilism (as in, for instance, the claim that either law is a normatively meaningful enterprise or we face the abyss of a bleak and chaotic nihilism).<sup>15</sup>

These distinctions and the patterns of argument structures associated with these distinctions have played significant roles in fashioning our pre-conscious, pre-reflective understanding of the character and location of normative legal thought. It is important to attend to these pre-reflective understandings lest they shape our conceptualization of normative legal thought in ways that turn out to be unhelpful. We want to avoid as much as possible "positing" a model or "proposing" a definition of normative legal thought.

For us, then, normative legal thought is already a social construction, already having meaning and significance. We want to reveal our own sedimented, pre-reflective images and conceptualizations of normative legal thought so that in the process of revealing,

<sup>12</sup> "Sedimentation" is a concept that arrives on the legal scene from Steven Winter, from Maurice Merleau-Ponty, from Husserl:

[Sedimentation] expresses the way meanings and assumptions build up within the subject and, once internalized, operate without the subject's conscious awareness.

....

Sedimentation is the "deposit" of the subject's past interactions with its physical and social situation. It operates as a gestalt that, once integrated, can be invoked without being fully reactivated.

See Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1487-88 (1990).

<sup>13</sup> See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 20-22 (3d. ed. 1986) (discussing the distinction between positive and normative economics).

<sup>14</sup> See *infra* text accompanying notes 27-74.

<sup>15</sup> This is what Bernstein calls "the Cartesian anxiety." R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* 18 (1985) ("Either there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos."). For expressions of this anxiety, see Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

we might learn something about how these pre-reflective conceptualizations will help or hinder the inquiry undertaken here.

Indeed, it will turn out that our pre-reflective images and conceptualizations of normative legal thought in some senses help and in others obstruct our attempts to understand normative legal thought. They help in the sense that they are socially and cognitively operative among legal thinkers and thus allow us to get some shared "fix" on what we mean by normative legal thought. At the same time these images and conceptualizations are unhelpful because once we make their argumentative logic intellectually explicit, they collapse. On the one hand, the three distinctions remain socially and cognitively operative—not only in the actual production of contemporary legal thought, but in our very representation here of that legal thought;<sup>16</sup> on the other hand, they collapse whenever serious intellectual attention is turned their way.

This may seem paradoxical. I prefer to think of it as a dislocation between what has to be true for us as an intellectual matter and what nonetheless often remains cognitively operative for us (despite our intellectual ambitions). We are the ones whose thinking continues to be shaped by formative effects of the distinctions—even as we recognize that the distinctions collapse under inspection.<sup>17</sup> This situation may seem somewhat intellectually vexing to many legal thinkers, but surely that is no reason to pretend it does not exist. On the contrary, I think that recognizing that the aesthetic structures or our own legal thinking are far less coherent, far less stable, and far less advanced than we legal thinkers typically represent them to be is itself a genuine intellectual advance.<sup>18</sup> At any rate, acknowledging these conditions seems to me more consonant with intellectual "seriousness" than rehearsing the same old discourse moves that unconsciously constitute us as mindless choosers at a fork in the road.

By exploring the distinctions, their argumentative logic and their collapse, I hope to accomplish several tasks. First, I hope to reveal the ways in which we already conceptualize normative legal thought. Second, I hope to destabilize some of our pre-reflective understand-

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<sup>16</sup> See *infra* notes 285-322 and accompanying text (describing how conceptual distinctions become cognitively, professionally, and materially embedded through the processes of "slippage" and "resonance").

<sup>17</sup> I am overstating the case somewhat here. Indeed, many of us are not in the dislocation at all, but ensconced in a world in which the vulnerability (let alone the collapse of) the distinctions is not even discernible.

<sup>18</sup> For my demonstration of this point, see Schlag, *supra* note 7.

ings of normative legal thought. In particular, I am interested in demonstrating that while we tend to think of normative legal thought in opposition to descriptive thought and conceptualist jurisprudence, the latter are pervasively normative and must also be considered as normative legal thought.<sup>19</sup> Third, by considering our pre-reflective understandings of normative legal thought and by tracing their collapse, I hope to avoid the kinds of serious intellectual problems created by the routine objectivist habit of legal thinkers to “apply” or “posit” “models,” or “ideal types,” or “definitions.”

Now, as you might guess, this is preliminary clean-up and set-up work. It’s not particularly fun or funny; but given the present composition of the scene and the present constitution of the actors (you and I), it has to be done.

#### A. *Normative Legal Thought v. Descriptive Legal Thought*

The opposition between positive and normative thought harkens back to a Weberian dream (or nightmare) of establishing a value-free social science.<sup>20</sup> At present, the supposition that descriptive or positive research can be value free is only barely intelligible. Still, within certain select contexts, the claim can make sense. Within the common academic language game that privileges *the context as given* and accords determinate effect to the autonomous intent of the individual thinker, it is possible to discern differences in the degree to which the thinker *intentionally allows* her own moral or political inclinations *consciously to affect* her thought process or conclusions. Within this language game, we can all make judgments about the ways in which the work of particular thinkers appears to be motivated by overriding moral or political inclinations.

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<sup>19</sup> As will be seen later, legal positivism, technical doctrinalism, and court-centered legal thought are not at all excluded from normative legal thought. See *infra* text accompanying notes 27-74 & 89-114.

<sup>20</sup> Weber explained:

What is really at issue is the intrinsically simple demand that the investigator and teacher should keep unconditionally separate the establishment of empirical facts (including the “value-oriented” conduct of the empirical individual whom he is investigating) and *his* own practical evaluations, i.e., his evaluation of these facts as satisfactory or unsatisfactory (including among these facts evaluations made by the empirical persons who are the objects of investigation.).

M. WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 11 (1949). As Bernstein points out, Weber “insisted on an ultimate and unbridgeable gap between the Is and the Ought, between what science can teach us about the world and our ultimate moral norms.” R. BERNSTEIN, *supra* note 15, at 14.

But the status of the language game that allows such determinations has come under question. Indeed, if we look at the italicized phrases above, it becomes clear that, far from enabling non-problematic distinctions between the descriptive and the normative, they are themselves normatively charged. The qualification, within *the context as given*, assumes the normatively controversial claim not just that a context has been given, but that the particulars of this specific context have been given. The question whether the legal thinker *intentionally allows* the moral or political inclinations *consciously to affect* her work presumes the normatively controversial claims that the legal thinker's intent is somehow the relevant parameter—that she is in control of her own moral or political inclinations.<sup>21</sup> This puts beyond question the ways in which the context and the legal unconscious already perform normative work in selecting, establishing, and organizing the so-called “descriptive” categories deployed in legal thought. The major problem, then, in stabilizing the grounds for a distinction between the descriptive and the normative is that we know very well that the very constitution of those grounds is already in part charged with normative implications.<sup>22</sup>

There is another sense, however, in which this distinction between descriptive and normative thought remains intelligible: normative thought can be understood to aim at the recommendation or prescription of a particular course of action, whereas descriptive or positive thought reaches its intellectual terminus in explanation or understanding. Certainly, understood in this way, the distinction between descriptive and normative legal thought indicates something of a practical difference among various styles of legal thought.

Arguably, much of the thought of law and society, law and economics, and legal history could be described as aimed solely at reaching explanation or understanding. But before we accept the claim that this kind of thought is somehow beyond or outside normative legal thought, it is important to consider the extent to

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<sup>21</sup> This conventional understanding of the privileged status of intention for deciding on the political character of actions is echoed by Robert Bork: “Constitutional philosophies always have political results. They should never have political intentions. The proper question is not what are the political results of a particular philosophy but, under that philosophy, *who chooses* the political results.” R. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 177 (1990) (emphasis added).

<sup>22</sup> See Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1265 (1985).

which this work—its objects of inquiry, its methodologies, its argument structures—may themselves be selected by, parasitic upon, or supportive of, normative legal thought or particular normative projects.

That such work may support normative projects is not even in contention.<sup>23</sup> That such work may be parasitic upon normative projects is evident from the fact that many of the categories uncritically adopted in such work are already normatively charged. For instance, in law and economics, routine assumptions are made about the identity of markets based on uncorroborated and unexamined assumptions that the dominant (legal) culture's description of what is being traded in the relevant transactions is indeed accurate.<sup>24</sup> In law and society work, conceptual categories identifying institutions and institutional processes are often borrowed from the legal culture or the wider culture to describe or explain human behavior without the slightest question ever being raised as to their identity, integrity, or constitution. Likewise, the dominant (legal) culture's conceptualizations of the subject, of agency, of causation, of motivation, etc., are often borrowed uncritically and pressed into scholarly service.

Moreover, much of law and society, law and economics, and legal history work is not only parasitic upon a normatively charged discourse, but is itself selected by the discourse. For instance, much work attempting a purportedly descriptive reconstruction of the intent of the framers of the constitution often appears to be selected by an unspoken, unarticulated, but deeply assumed norm that the framers' intent should be followed. Similarly, law and economics work that identifies "efficient" rules or legal mechanisms often taps into an unspoken norm that efficiency should be promoted. In both history and law and society work, the research agendas are guided significantly by the extent to which empirical evidence is available. In turn, this data-dependence results in an (unavoidable) privileging of the conceptual categories, the information retrieval systems of the very social and cultural systems being studied. Likewise, much of law and society work is organized

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<sup>23</sup> Not even Robert Bork, the champion of neutrality in constitutional adjudication, challenges the notion that "neutral" principles can have normative or political effects. See *supra* note 21.

<sup>24</sup> See R. POSNER, *supra* note 13. For a demonstration and critique of this tendency in economic thought, see Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661 (1990).

around orthodox assumptions about which key social and political actors might act to remedy a perceived problem.

Indeed, one might be tempted to ask: how could it be otherwise?<sup>25</sup> That is, how could social science, economics, or history even get started if it were not already engaged in an uncritical deployment of some already embedded matrix of discourse? The short answer is: it could not, and that is exactly the point here. It is utterly preposterous to believe that one can through careful and diligent attention avoid the always already normatively charged character of language and culture.

If this is true, the mere fact that much of this economic, social science, and history work does not explicitly issue ethical or moral judgments or prescriptions can hardly suffice to place such work outside normative legal thought. On the contrary, it would be only the most extreme stylistic formalism that would allow the exclusion of works that avoid any explicit invocation of a prescriptive and normative "should" from the ambit of normative legal thought.

Thus, while the distinction between normative and descriptive legal thought may at times be experienced as retaining some intelligibility, it is a context-bound intelligibility—one that in some of our contexts (including this one) disintegrates very easily.<sup>26</sup>

### B. *Normative Legal Thought v. Conceptualism*

In the legal academy, the distinction between the descriptive and the normative has been re-inscribed in a more local, equally recursive dispute. Typically, in this dispute one side emphasizes the need for considering and elaborating the moral and ethical dimension of law and the other side emphasizes the need to insulate and protect law from external moral and ethical concerns. While this dispute has been carried on under different names and with slightly different twists within legal thought, what is of interest here is its recursive self-sameness.<sup>27</sup>

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<sup>25</sup> This is one of Stanley Fish's favorite questions—one he pulls, true to form, when his point has already been made. What could you, the reader, do, except agree with Fish? See generally S. FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989).

<sup>26</sup> For those who still resist this conclusion and wish to adhere to the notion that somehow it is possible for thinkers to strive sincerely for pure description in their work, there is this puzzle: just what does it mean to strive *sincerely* for pure description in the context of a language, a discourse that is itself already normatively charged?

<sup>27</sup> And because of its recursive self-sameness, the chances are good that this

One early version of the dispute pits the legal realist insistence on making explicit ethical value judgments about how the law should be against a more traditional conceptualist effort to restrain the influence of ostensibly exogenous value judgments in stating what the law is. The legal realist position is eloquently articulated by Felix Cohen.<sup>28</sup> Cohen criticized the ways in which the reifications and personifications of conceptualist legal argument eclipsed the ethical and value judgments inherent in adjudication. For Cohen, conceptualism had supplanted the sort of searching examination of social life necessary to make meaningful value judgments. As Cohen put it:

When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.<sup>29</sup>

Not only did conceptualism produce decisions on unconsidered and irrelevant grounds,<sup>30</sup> but it eclipsed and supplanted the "real"<sup>31</sup> ethical, political, or economic grounds for decision. When conceptualist jurisprudence and its attendant reifications and personifications had done their work, it was as if legal decisions flowed inexorably from the canonical meaning of the legal concepts themselves. What the law is appears to require no value judgment whatsoever. The law appears to emerge from the *is* without ever encountering a conscious, explicit *ought*.

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debate plays a very important role in our pre-conscious understanding of what we call normative legal thought.

<sup>28</sup> See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

<sup>29</sup> *Id.* at 812.

<sup>30</sup> Cohen argued that the tendency of scholars and judges to reify or personify legal concepts or legal relations like "corporations" had noxious effects. One noxious effect for Cohen was that reification and personification produced decisions informed by unexamined, unconsidered, and often irrelevant concerns—as indeed he graphically illustrated in his famous commentary on Cardozo's opinion in *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917). Cardozo had ruled on the amenability of a Pennsylvania corporation to suit in New York state. Much of Cardozo's opinion turned, according to Cohen, on the assumption that corporations, like persons, either were or were not "present in" the state. For Cardozo, "the essential thing" was that "the corporation shall have come into the state." *Id.* at 268-69, 115 N.E. at 918. But as Cohen argued, to accept Cardozo's view of the matter was already to buy into the notion that the corporation (this set of legal relations) was somehow to be treated like

For Cohen and other legal realists, conceptualism was as unbelievable as it was ethically obtuse. Much of the work of the legal realists was thus devoted to developing the jurisprudential brief for a more candid recognition of the importance of practical and ethical judgment<sup>32</sup> in legal decision-making.

But, of course, the realist call for candid and practical ethical judgment was not received without objection. It prompted a lively dispute with responses along two major lines. One prototypical response was that conceptualist jurisprudence did encompass practical and ethical judgment, but that these ethical and practical judgments had already been internalized in conceptualist doctrine itself.<sup>33</sup> The other major response was that the realist call for

a person. Cohen put it succinctly:

In actual practice I have never found it necessary or useful to assume that a corporation is anything more than a bundle of legal relationships between actual human beings. The bundle of relationships exists, in a very real sense, but it is not a human being. It does not travel from state to state, and when eminent judges say that it does, they do reverence to a language habit that helps to obscure important issues of social policy.

Letter to the Editor from Felix S. Cohen, 5 *FORDHAM L. REV.* 548, 549 (1936) (responding to Kennedy, *Functional Nonsense and the Transcendental Approach*, 5 *FORDHAM L. REV.* 272 (1936)).

<sup>31</sup> "Real" here is obviously quite a problematic expression. One can agree with Cohen that the treatment of the corporation as a person is a fiction produced by metaphor—specifically, the metaphor of personification. In what sense, however, are Cohen's "real" ethical, political, or economic concerns any less fictional, any less metaphorical, any more "real" than Cardozo's fiction? For exploration of this question, see Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 *U. PA. L. REV.* 1105 (1989).

<sup>32</sup> Joe Singer puts it this way: "The legal realists wanted to replace formalism with a pragmatic attitude toward law generally. This attitude treats law as made, not found. Law therefore is, and must be, based on human experience, policy, and ethics, rather than formal logic." Singer, *Legal Realism Now* (Book Review), 76 *CALIF. L. REV.* 465, 474 (1988). Many legal thinkers understand legal realist ethics as consequentialist or instrumentalist in character. See generally Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 *CORNELL L. REV.* 861 (1981) (elaborating as pragmatic instrumentalism the ethical/legal theories of a group of thinkers commonly associated with the label legal realism).

<sup>33</sup> As Walter Kennedy's response to Cohen put it:

The advantage of stare decisis—its safety valve and brake—is that it is a system which accumulates the wisdom and experience of the past and offers it to the judges of the present as a substitute for, or a warning against, precipitate, individualized and arbitrary action . . . . The present rule that the foreign corporation may be sued when it is "doing business" in the distant state was not the special "brain child" of the New York Court of Appeals. This well considered principle of today evolved slowly, painfully and after many pauses . . . . Surely the realists do not insist that each time



practical and ethical value judgments would itself destroy law and order, that it would lead to an explosion of restraints on the development and articulation of law and that it would deprive law of its meaning.<sup>34</sup>

This dispute between a realist functionalism bent on expanding the role of ethical judgment in law and a formalist conceptualism bent on maintaining the authoritative status of conventional legal concepts and reasoning has played a significant role in forming our understanding of normative legal thought: We tend to treat normative legal thought as opposed in some sense to conceptualism and legal formalism. And indeed, the argumentative logic of this sedimented opposition continues to organize a much more recent dispute that pits normative legal thought, but which, to avoid confusion, I will call "moralist jurisprudence," against a traditional "technical doctrinalism."

In our time, this dispute is aptly personified by the opposition of Ronald Dworkin to Robert Bork,<sup>35</sup> or Robin West to Henry Monaghan,<sup>36</sup> or Michael Perry to William Van Alstyne.<sup>37</sup> In this more recent dispute, not surprisingly, the relationship of the arguments between moralist jurisprudence and technical doctrinalism bear a striking similarity to that between functional realism and conceptual formalism.

the court repeats this principle it must likewise repeat in a fulsome manner all the previous arguments collectable out of past decisions.

Kennedy, *Functional Nonsense and the Transcendental Approach*, 5 FORDHAM L. REV. 272, 292-94 (1936).

<sup>34</sup> This somewhat hysterical response slides into the next distinction—the opposition of normative legal thought to nihilism. Note that within a rationalist cognitive mode, still operative today in many sectors of the legal academy, this otherwise hysterical response makes perfect sense. See Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1195-1200 (1989).

<sup>35</sup> Compare Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) with R. DWORKIN, *LAW'S EMPIRE* (1986).

<sup>36</sup> Compare West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988) with Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

<sup>37</sup> Compare M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982) with Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983).

And then compare the sort of oppositions described *supra* notes 35-37, with the opposition set forth in Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), and Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). It is striking how much these disputes and these stances all echo one another from different regions of jurisprudence.

The moralists are an assortment (not quite a group) of legal thinkers, usually self-identified as left-liberal, who favor open-ended forms of value talk and argument in both the courts and the academy. Their theory of legal legitimacy and legal meaning depends heavily and very rapidly on the explicit justification of legal decisions in terms of moral or political values.<sup>38</sup> The moralists hold that law is dependent upon moral or value choices, that law is not neutral, or otherwise exempt from the contestable, value-laden character of politics generally. Beyond asserting that law is political in this sense, the moralists also affirm that this is a good thing, that law should be political,<sup>39</sup> and that the legal community (legal academics, law students, lawyers, and judges) should acknowledge that law is politically charged and should engage in frank political argument.<sup>40</sup>

The moralists understand themselves to be opposed to a doctrinalist tradition dominant both in the academy and in the courts. Hence, the moralists argue that legal thought is not sufficiently normative; that, indeed, legal thought is too inclined to accept arguments from authority, too steeped in convention.<sup>41</sup> In this kind of argument, moral thought and normative deliberation are represented as opposed and preferable to an authoritarian style of doctrinal argument.<sup>42</sup> In constitutional law, for instance, it has

<sup>38</sup> See, e.g., R. DWORKIN, *supra* note 35.

<sup>39</sup> See R. DWORKIN, A MATTER OF PRINCIPLE 146 (1985) ("Law . . . is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory.")

<sup>40</sup> For example, this sort of argument has found expression in R. DWORKIN, *supra* note 35; Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888 (1988); Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989); Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256 (1989); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); West, *supra* note 36.

<sup>41</sup> See, e.g., West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 678-79 (1990) ("Thus, progressives conclude, political and jurisprudential conservative thought rests not only on attitudes of deference to a community's normative authority, but also on attitudes of deference toward the social power that underlies it.")

<sup>42</sup> For instance:

The devastating effect in *Bowers* of a judicial posture of deference to external authority appears in the majority's assumption, plain if not quite explicit in its opinion, that public values meriting enforcement as law are to be uncritically equated with either the formally enacted preferences of a recent legislative or past constitutional majority, or with the received teachings of an historically dominant, supposedly civic, orthodoxy. I will call such a looking backward jurisprudence *authoritarian* because it regards

been argued that it is very different to ask what the Constitution *means* as opposed to what it *should* mean.<sup>43</sup> The former question is seen as text-based and intrinsically authoritarian whereas the latter question is portrayed as less text-focused and non-authoritarian.<sup>44</sup> The structure of the claim here is very much an echo of Felix Cohen's earlier complaint that conceptualist thinking, in its very structure, not only precludes ethical value judgment, but eclipses the sense that ethical value judgments are even needed.<sup>45</sup>

Things look a bit different from the perspective of the technical doctrinalists, who, far from seeing themselves as dominant, represent themselves as defenders of an embattled tradition—one that has perhaps already been overwhelmed by moralist jurisprudence.<sup>46</sup> Like the legal formalists, contemporary doctrinalists have questioned the origins, structure, and effectiveness of the contemporary call for open-ended value-oriented jurisprudence. They have condemned the normative orientation as an undesirable politicization of legal discourse,<sup>47</sup> as ill-advised legal perfectionism,<sup>48</sup> as legal adventurism,<sup>49</sup> and even as an Eastern Establishment conspiracy.<sup>50</sup> While the technical doctrinalists tend to be center to right in political orientation, they do not announce themselves as such. They tend to insist on a relatively sharp distinction between law and politics and on the irrelevance of the latter to the former. Instead of a value orientation, the doctrinalists prefer more technical, more traditional forms of legal reasoning. This traditional kind of legal reasoning is claimed to be distinctly legal—different and separable from the general cultural run of moral or political argument. The doctrinalist theory of legitimacy and legal meaning inclines heavily and very rapidly to legal positivism.

This conventional dispute between the moralists and the doctrinalists has been extremely influential in fashioning the legal

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adjudicative actions as legitimate only insofar as dictated by the prior normative utterance, express or implied of extra-judicial authority.

Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1496 (1988).

<sup>43</sup> See West, *supra* note 36, at 534-35.

<sup>44</sup> See *id.* at 534-39.

<sup>45</sup> See Cohen, *supra* note 28, at 812.

<sup>46</sup> In this age of dissonance within the legal academy, one commonality is that virtually every group or assortment presents itself as a beleaguered minority struggling against insurmountable odds.

<sup>47</sup> See Van Alstyne, *supra* note 37.

<sup>48</sup> See Monaghan, *supra* note 36.

<sup>49</sup> See R. BORK, *supra* note 21.

<sup>50</sup> See *id.*

academy's understanding of normative legal thought. Indeed, throughout the legal academy, normative legal thought is often conventionally associated with what I have described here as moralist jurisprudence and opposed to technical doctrinalism. And because the moralists have charged the doctrinalists with formalism<sup>51</sup> and authoritarianism,<sup>52</sup> one prevalent understanding in the legal academy is that normative legal thought stands in opposition to formalism.

Yet as one strives to understand the character of this dispute and its arguments, they collapse. What, for instance, supports the moralists' demand for greater recognition of the normative in law? Like the realists before them, the moralists typically argue that there is not enough candid recognition of the value-laden and dialogic character of law. Often this claim is represented as turning on the form/substance dichotomy. In form/substance terms, the claim is made that foundationalist *form* in legal discourse prematurely closes off dialogue, illegitimately placing certain *substantive* concerns or questions off limits.<sup>53</sup> This foundationalist form is then found to be objectionable because it is exclusionary, or inauthentic, or mystifying, or simply lacking in candor. At times, however, the moralist claim is articulated on the theory/practice pivot, with the moralists contrasting their favored brand of explicitly value-oriented *theory* with what they describe as an essentially authoritarian *practice* of legal argument and legal interpretation. The criticism here seems to be that technical doctrinalism is insufficiently developed as a self-conscious theoretical and communicative enterprise; that it remains too much of an unthinking, unthought, and unexamined practice<sup>54</sup>—one that prematurely terminates a self-conscious and thorough moral or ethical questioning of the conceptual framework used to create law and to judge.

Now, these arguments are intelligible. There are, after all, many differences between the jurisprudence of Robert Bork and that of Ronald Dworkin.<sup>55</sup> At the same time, however, these differences

<sup>51</sup> See Singer, *supra* note 40.

<sup>52</sup> See West, *supra* note 36.

<sup>53</sup> See, e.g., *id.* at 539 ("The authoritarian tradition in constitutional decisionmaking by definition precludes moral debate.").

<sup>54</sup> See West, *supra* note 41, at 678-79.

<sup>55</sup> Consider, however, the following argument:

The best reason to oppose Bork, in short, was that he reminded us of ourselves; if we rightfully condemned him, we condemned our profession. Indeed, I suspect that mixed in with all the other fuel that fed the intense,

are not absolute, and their intelligibility as well as their importance are functions of the extent to which one is already implicated in the intellectual force field defined by this normative dispute. The fact is that many of us are deeply implicated in the conceptual matrices and social alliances associated with this dispute. Nonetheless, the matrix of oppositions organizing this dispute deconstructs. Moralistic jurisprudence turns out to be authoritarian and technical doctrinalism turns out to be value-laden. If this claim seems counter-intuitive (and it does), it is because our stereotyped representation of the dispute between moralistic jurisprudence and technical doctrinalism is itself so deeply sedimented.

Indeed, if the moralist is so certain that technical doctrinalism is a formalist authoritarian mode of legal thought, it is precisely because that is how the moralist first experiences technical doctrinalism. For instance, if like Robin West, your jurisprudence is organized by the grammar and categories of moral philosophy, you will undoubtedly, indeed effortlessly, experience Borkian conceptualism as the unselfconscious, only barely theorized replication of unexamined legal practice. You will experience Bork's jurisprudence as an illegitimate and premature attempt to close off moral legal dialogue through the imposition of incoherent and impossible dialogic criteria. For you, Borkian jurisprudence is a thoroughgoing failure because it never even begins to give you any plausible (i.e., moral) justifications for cutting off your moralistic jurisprudence, your moralistic arguments.

The temptation, if you are anything like Robin West, is thus to conceptualize Borkian jurisprudence as the unjustified imposition of an unexamined practice, of an unselfconscious convention, through an authoritarian form.<sup>56</sup> And, in what appears to be a logical correspondence, the temptation is very great to conceptualize your own jurisprudence as thought (not practice), self-conscious (not conventional), and open to the "real" substantive issues (not closed off by an authoritarian form).<sup>57</sup>

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almost exhilarated academic opposition to Bork was something close to self-hatred.

Nagel, *Meeting the Enemy* (Book Review), 57 U. CHI. L. REV. 633, 636-37 (1990).

<sup>56</sup> See West, *supra* note 36 (characterizing the positivist approach to constitutional interpretation as authoritarian and unselfconscious).

<sup>57</sup> This description finds a striking echo in Robin West's comparison of "progressive positivists" and "conservative positivists":

The pivotal psychic *difference* between conservative and progressive positivists is political, not jurisprudential: whereas the conservative positivist

To experience the difference between your jurisprudence and Borkian jurisprudence in this way is no doubt valid. The flattering self-conceptualization, however, is not. The self-conceptualization goes wrong because it imagines that the ostensibly open-ended, anti-foundationalist, moral value-talk of the moralists somehow escapes the enclosures, the authoritarian character of practice, convention, and form. This view is wrong in that it imagines itself as outside of any practice, any convention, any form, and thus, as some sort of formalism-free, non-coercive, non-authoritarian discourse. The short of it is: The menu of options available at present simply does not include a rhetoric that would be formalism-free, non-coercive, and non-authoritarian.

The moralist approach is in a sense, as authoritarian, formalist, and coercive as the technical doctrinalism it decries. Consider for instance, Robin West's arguments that we should replace the authoritarian question "what does the Constitution mean?" with what she considers the normatively open, non-authoritarian inquiry "what should the Constitution mean?" The problem with West's position is that this last question is hardly free from the constraining (and enabling) force of convention, privileged texts, canonical authorities, or formal grammar that animates any professional discourse.<sup>58</sup> To have to argue what the Constitution *should* mean is already to privilege a whole series of highly conventional assumptions about how to carry on dialogue.<sup>59</sup> It is already to assume that existing ethical categories, reasoning moves, and their associat-

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sees in the set of acts and choices that constitute the "law" opportunities for obedience to prior legal commands, the progressive positivist sees in the same set of acts and choices opportunities for authenticity, freedom, self-actualization, and judgment. . . . "Law," then, for the conservative positivist, mandates *obedience*, while the same "law," for the progressive positivist, mandates *choice*. Law creates, rather than closes, possibility and responsibility.

West, *supra* note 41, at 687-88. As West accurately suggests, this sort of progressive vision, along with its insistence on a radical individual subjectivism, is associated with existentialism (I would add, the Sartrean kind). *See id.* at 687.

<sup>58</sup> This sounds, of course, very much like the sort of argument that Stanley Fish often makes. *See* S. FISH, *supra* note 25. A number of clarifications: I am not arguing that all discourses are equally authoritarian, though, in one often overlooked and therefore ironically non-trivial sense, they are. I am not arguing that one cannot recognize differences between more or less authoritarian discourses. Instead, I am saying, first, that it is wrong to claim that there are some legal discourses that are free from authoritarianism; and second, that the question of the extent to which a discourse is authoritarian is always answered within a discourse.

<sup>59</sup> *See infra* text accompanying notes 196-209 & 258-84.

ed rhetoric, sociology, and psychology should be entitled to govern the dialogue. Rather than privileging the text, conventions, authorities, argumentative moves, and grammars of originalism and legalism, the moralist form privileges the sort of texts, conventions, authorities, argumentative moves, and grammars that moralists like to read, write, and reproduce. But of course:

This is inevitable; one cannot do anything, least of all speak, without determining (in a manner that is not only theoretical, but practical and performative) a context. Such experience is always political because it implies, insofar as it involves determination, a certain type of non-“natural” relationship to others . . . . Once this generality and this a priori structure have been recognized, the question can be raised, not whether a politics is implied (it always is), but which politics is implied in such a practice of contextualization. This you can then go on to analyze, but you cannot suspect it, much less denounce it except on the basis of another contextual determination every bit as political.<sup>60</sup>

This fall from grace of moralist jurisprudence into authoritarianism, formalism, and coercion is no doubt difficult for moralists to understand. It is difficult to understand because within the tradition of moralist jurisprudence, the coercive, authoritarian, conventionalist, routine character of this discourse is simply not visible.<sup>61</sup> Indeed, the moralists typically underestimate the extent to which their agendas, their ways of framing questions, their texts, and their argument forms operate as an unredeemed formal and authoritarian restriction on the creation of legal meaning.<sup>62</sup> Many of us have been constituted to think of normative legal thought as (the good) open-ended, non-authoritarian, anti-formalist response to those (bad) latter-day formalists.<sup>63</sup> The result is that we routinely fail to recognize that, in privileging moralist inquiries, the moralists are at the same time privileging a certain view of history, of psychology, of sociology, of rhetoric, of the aesthetics of reason,

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<sup>60</sup> J. DERRIDA, *Afterword: Toward an Ethic of Discussion*, in LIMITED INC 136 (1988).

<sup>61</sup> See Schlag, *Normative and Nowhere to Go*, *supra* note 5, at 183-87.

<sup>62</sup> One simply cannot think that moralist jurisprudence is free from authoritarianism. Rather, like every other professional group in the academy (historians, deconstructionists, doctrinalists, etc.), moralists are perfectly willing to entertain any inquiry—so long, of course, as it is pursued on their own terms.

<sup>63</sup> Or to adopt the valences of the other side (the technical doctrinal side), the dispute has constituted us to see normative legal thought as the (bad) adventurous, undisciplined, utopian response to the (rightful) rule of law position.

of conversation itself—namely their own, the one that informs and that is implicit in their own moral philosophical outlook.<sup>64</sup>

So the barriers erected to distinguish and privilege moralist jurisprudence (the dichotomies of form/substance, theory/practice, thought/convention, dialogue/authority, etc.) collapse. It is only from within the stabilized, situated perspective of the already committed moralist jurist that the specific deployments of these distinctions are experienced as valid and can thus be successfully conceptualized. What we have been doing, however, is destabilizing the sedimented matrix of oppositions that allows this dispute to go on, that enable this moralist perspective to forget, ironically (and fatally) its own perspectivity.

Just as the moralist position can collapse into technical doctrinalism, the reverse can occur as well. To argue that one should read the Constitution by focusing on the words of John Bingham or James Madison rather than on the words of John Rawls or Jurgen Habermas<sup>65</sup> is still to argue that one *should* do this as opposed to that.<sup>66</sup> Technical doctrinalists are in one sense every bit as normative as the moralists; they just try to keep the normative work off center stage. Here, Bork's recent work is ironically (and fatally) revealing. His work relies heavily on a rhetorical technique that might be called *concept-packing*. He argues that the Constitution is "law" and then by reference to the beliefs of the American people,

<sup>64</sup> This privileging of moralist talk is in a sense very much a power play, the primary effect of which, if successful, is to create power in moralist thinkers or moral philosophers at the expense of other professional academics. See Mailloux, *Truth or Consequences: On Being Against Theory*, in *AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM* 65, 68-70 (W. Mitchell ed. 1985).

<sup>65</sup> Consider Larry Solum's use of Habermas in constitutional interpretation:

The distinction between communicative action and strategic behavior and the principle of equality of communicative opportunity go a long way toward explaining and justifying the core of first amendment doctrine, but they also enable a reinterpretation of the freedom of speech that can serve as the basis for a comprehensive critique of existing doctrine.

Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. L. REV. 54, 135 (1989).

<sup>66</sup> See R. BORK, *supra* note 21, at 9 ("One purpose of this book is to persuade Americans that no person *should be* nominated or confirmed who does not display both a grasp of and devotion to the philosophy of original understanding." (emphasis added)).

Not all originalists fall into the trap of making such transparently value-based prescriptive arguments in favor of originalism. For a sophisticated defense of originalism, see Monaghan, *supra* note 36, at 384 ("For the purposes of *legal* reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration.").



or the self-evidence of what is meant by "law," he *packs* into that concept immutability,<sup>67</sup> neutrality,<sup>68</sup> and safeguards against "political judging."<sup>69</sup> Having loaded the concept law with all this normative baggage, he then *unpacks* the normative implications later when they are needed to bolster an argument. Of course, given that we have just seen him loading major concepts like law with all sorts of normative baggage, his implicit claim that he refrains from normative value choice is somewhat difficult to believe.<sup>70</sup> His rhetorical strategy thus depends upon an appeal to moral or political values, and transparently so. More generally, if one listens carefully to the technical doctrinalists, it turns out that their criticisms of moralist jurisprudence are not criticisms of the normative orientation per se, but criticisms of particular normative orientations.<sup>71</sup> Indeed, criticisms of normativity often turn out to be the negative part of the author's brief for her favorite normative vision, which, when all is said and done, is no less normative than the one under attack.

What then divides moralist jurisprudence from technical doctrinalism? My argument here is not that they are the same.

<sup>67</sup> See R. BORK, *supra* note 21, at 143 ("When we speak of 'law,' we ordinarily refer to a rule that we have no right to change except through prescribed procedures.")

<sup>68</sup> See *id.* at 145-46 ("If the Constitution is law . . . courts must choose principles which they are willing to apply neutrally, apply, that is, to all cases that may fairly be said to fall within them.")

<sup>69</sup> *Id.* (arguing that a court's use of neutral principles "is a safeguard against political judging").

<sup>70</sup> Indeed, this concept-packing and retrieval-as-needed constitute Bork's major rhetorical normative move. Bork, of course, is hardly alone in following such a rhetorical strategy. What is striking, however, is that he does his freighting of key concepts right in front of the reader. Accordingly, we are not exactly surprised (or convinced, for that matter) by what he unloads.

<sup>71</sup> And the criticisms that technical doctrinalists usually make of moralist jurisprudence are very much informed by value judgments. In Bork's case, for instance, his criticisms of the liberal professoriat are informed by value-based objections to the politicization of law:

Professions and academic disciplines that once possessed a life and structure of their own have steadily succumbed, in some cases almost entirely, to the belief that nothing matters beyond politically desirable results, however achieved. . . . It is coming to be denied that anything counts, not logic, not objectivity, not even intellectual honesty, that stands in the way of the "correct" political outcome.

R. BORK, *supra* note 21, at 1. Or, "[t]he point of the academic exercise is to be free of democracy in order to impose the values of an elite upon the rest of us." *Id.* at 145. Or, "[t]hose who have tempted the courts to political judging will have gained nothing for themselves but will have destroyed a great and essential institution." *Id.* at 2.

Rather, I am suggesting that the representations of both the moralists and the technical doctrinalists as to their own and each other's positions collapse. The moralists, in their insistence on normative dialogue, are no more free of convention or practice or even authoritarianism than are the technical doctrinalists. The technical doctrinalists, in their canonical insistence that judges must say what the law is independently of what it should be, are no more capable of avoiding value judgments and value arguments than the moralists.

Indeed, while there is a stylized bipolar rhetoric deployed by the moralists as well as the technical doctrinalists,<sup>72</sup> it is hardly evident that the divisions this rhetoric is designed to mark off can stay put once the rhetoric is itself examined. On the contrary, when we examine the arguments, we notice that they depend upon a recursive, rather fragile, and exceedingly familiar dichotomous structure:

**Moralists Emphasize/Value**

Justification  
Open-endedness  
Dialogue  
Self-consciousness  
Responsiveness  
Adequacy

**Doctrinalists Emphasize/Value**

Derivation  
Certainty  
Tradition  
Authority  
Restraint  
Precision

**Moralists Criticize**

Closure  
Authority arguments  
Formalism  
Authoritarianism  
Conventionalism

**Doctrinalists Criticize**

Open-endedness  
Extra-legal sources  
Deformalization  
Discourse  
Adventurism

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<sup>72</sup> Bork says that we "are told that the choice is between a cold, impersonal logic, on the one hand, and, on the other, morality and compassion." *Id.*

Moralists Conceptualize  
 Jurisprudential Harm As  
 Preclusion of . . .  
 Exclusion of . . .  
 Arguments  
 Voices  
 Illegitimacy  
 (lack of justification)

Doctrinalists Conceptualize  
 Jurisprudential Harm As  
 Invasion of . . .  
 Corruption of . . .  
 Institutional framework  
 Conceptual structure  
 Nihilism  
 (lack of foundations)

The insistence, and indeed dependence, of both sides on this rather blunt dualism make this structure very easy to deconstruct. There is a sense in which this recursive dichotomous vision has already been deconstructed. This summary list of crypto-positions (indeed, the dispute between moralist jurisprudence and technical doctrinalism itself) looks very much like a reenactment of the familiar argument structures deployed in classic rules v. standards disputes, carried out on the jurisprudential fields of legal philosophy, the theory of adjudication, and the theory of judicial interpretation.<sup>73</sup> The dispute is part of a cluster of recurrent and associated oppositions that have marked out and established our jurisprudential discourse and our legal thought:

Rules:

Formalism  
 Technical doctrinalism  
 Descriptive thought  
 Legal Positivism  
 Doctrine

Standards:

Realism  
 Moralism jurisprudence  
 Normative thought  
 Natural law  
 Policy

It is no surprise, then, that this bipolar dispute between the moralist jurisprudence and technical doctrinalism collapses. Likewise it is no surprise that many of us already experience (prior to this article) the dispute as collapsing in this way.<sup>74</sup> In turn, this

<sup>73</sup> See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (both on the classic "rules v. standards" dialectic).

<sup>74</sup> In this essay (and elsewhere), I am trying to get beyond the conventional understanding of the dispute. I see both sides as caught up within their own formalism and both sides as pervasively normative. My claim here is that both the old-style doctrinalism and moralist thought can most helpfully be understood as two related moments within the same practice of normative legal thought that are also highly reminiscent of the classic rules v. standards dispute. Indeed, one side

collapse destabilizes our understanding of moralist jurisprudence *as a genre* distinct from, and opposed to, technical doctrinalism. While we retain the sense that the moralist jurisprudence of a Ronald Dworkin is somehow different from the doctrinalist jurisprudence of a Robert Bork, nevertheless our conceptualizations of these differences no longer seem to be adequate.

Hence, just as we must avoid positing that normative legal thought is somehow distinct from descriptive or positive thought, we must also resist positing that moralist jurisprudence is distinct from technical doctrinalism. Resisting such oppositions is not easy because our tendency is to oppose normative legal thought to both descriptive and technical doctrinal thought. And yet this resistance is important because, to the extent we allow ourselves to reduce normative legal thought to moralist jurisprudence or to evaluative thought, we are likely to miss the way in which technical doctrinalism and descriptive legal thought may be shaped by the very same practice of thought that shapes moralist jurisprudence and evaluative thought.

### C. *Normative Legal Thought v. Nihilism*

In the American legal academy, inquiries that appear to question the presumed ethical foundations of the legal order are often met with charges of nihilism. One consequence is that our understanding of normative legal thought is at least in part shaped by the sense that normative legal thought is what stands between us and the abyss. Whereas the two previous oppositions (normative v. descriptive) and (moralist v. doctrinalist) divided the world of legal thought into the normative and the non-normative, this third opposition casts normative legal thought as coextensive with legal thought. This last opposition leaves nothing besides normative legal thought but nihilism—a position whose identity and significance are both so obviously horrible that apparently they do not even need to be described.<sup>75</sup>

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emphasizes the need for openness, flexibility, context, etc., while the other emphasizes the need for closure, certainty, and generality. As with the classic rules v. 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 Schlag, *supra* note 73, at 426-29; see also Winter, *Foreword: On Building Houses* (forthcoming 69 TEX L. REV. (1991)).

<sup>75</sup> See Carrington, *supra* note 15, at 226-27; Fiss, *supra* note 15, at 762-63 (not tracing out the implications of nihilism); cf. *infra* note 86.

The first significant deployment in the legal academy of this opposition between a normatively charged orthodoxy and a bleak nihilism occurred in the attacks on the legal realists during the late thirties.<sup>76</sup> Morris Cohen, for instance, characterized realist psychoanalytic approaches as “anti-intellectualism” and suggested that they led to a kind of “nihilistic absolutism.”<sup>77</sup> Kantorowicz claimed that the realist approaches would lead students to study the “art of bribing judges.”<sup>78</sup> Bodenheimer suggested that the skepticism of legal realism prepared the intellectual ground for a tendency toward totalitarianism.<sup>79</sup>

But despite all this passion, the conceptualist defenders of the faith left the opposition between their own orthodoxy and nihilism intellectually underdeveloped. Nihilism remained under-theorized—a sort of vacant and ominous linguistic marker signifying primarily the utterly horrible status of whatever *is not* the reigning conceptualist orthodoxy. Apart from some solipsistic orthodoxy-centered arguments, the conceptualists provided no serious demonstration of the mediations that would lead from realism to nihilism.

Despite its vacuity, the same opposition resurfaced in the early 1980s in criticisms of cls thought. In 1982, Owen Fiss attacked the radical individual subjectivism he perceived as inherent in both cls thought and deconstruction.<sup>80</sup> Fiss equated this radical individual

<sup>76</sup> For a general treatment of the legal academy's reception of legal realism in the late thirties (i.e. on the eve of WW II), see E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 159-78 (1973).

<sup>77</sup> Cohen, *On Absolutisms in Legal Thought*, 84 U. PA. L. REV. 681, 691 (1936).

<sup>78</sup> Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240, 1252 (1934).

<sup>79</sup> E. BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 316 (1st ed. 1940).

<sup>80</sup> The equation of deconstruction with radical individual subjectivism—a conflation commonly found both within the cls movement and in the work of its critics—is, in one sense, quite surprising. In France, Derridean deconstruction is usually criticized, not as a celebration of unbridled individual subjectivity, but rather on the grounds that it extinguishes or suspends the individual subject. See L. FERRY & A. RENAULT, *FRENCH PHILOSOPHY OF THE SIXTIES: AN ESSAY ON ANTHUMANISM* 15-19, 122-52 (M. Cattani trans. 1990). Ferry and Renault query: “Instead of attempting to extend even further the “destruction of the subject,” with the intention of constructing this “hyper-Heideggerianism,” . . . would it not have been more useful and more illuminating to accept these traces and to question them instead of ineffectively rejecting them?” *Id.* at 152.

In another sense, however, the radical individual subjectivist version of deconstruction—this quintessentially North American (mis)understanding—is utterly predictable. Indeed the North American receipt of deconstruction through the culturally and cognitively embedded framework of a radical individual subjectivism virtually guaranteed that deconstruction would be understood as sanctioning a radical subjectivism in interpretation.

subjectivism with nihilism and opposed both to objectivity and normative coherence.<sup>81</sup> This attack on cls thought—charging it with nihilism—was reiterated in more emotive terms in Paul Carrington's famous essay:

The professionalism and intellectual courage of lawyers does not require rejection of Legal Realism and its lesson that who decides also matters. What it cannot abide is the embrace of nihilism and its lesson that who decides is everything, and principle nothing but cosmetic. . . . Teaching cynicism may, and probably does, result in the learning of the skills of corruption: bribery and intimidation. . . . If this risk is correctly appraised, the nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school . . . .<sup>82</sup>

Carrington's statement was vociferously opposed by a number of legal thinkers.<sup>83</sup> Subsequent attempts to link cls thought with nihilism became somewhat more nuanced.<sup>84</sup> But even in the more nuanced invocations of the opposition, "nihilism" remained largely under-theorized, signifying principally a position at once unappealing and untenable.<sup>85</sup>

Within the legal academy, recognition of these points is rare—though not non-existent. Drucilla Cornell, for one, has recognized that, "the 'irrationalists' in the conference on Critical Legal Studies" re-instate the subject-centered approach to the ethical that Derrida rejects. See Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, 11 CARDOZO L. REV. 1687, 1699 (1990). For elaboration on all these points, see Schlag, "Le Hors de Texte," *supra* note 5, at 1634-41.

<sup>81</sup> Said Fiss:

The idea of adjudication requires that there exist constitutional values to interpret, just as much as it requires that there be constraints on the interpretive process. Lacking such a belief, adjudication is not possible, only power.

The roots of this alternative version of nihilism are not clear to me, but its significance is unmistakable. [Under this theory t]he great public text of modern America, the Constitution, would be drained of meaning. It would be debased.

Fiss, *supra* note 15, at 763.

<sup>82</sup> Carrington, *supra* note 15, at 227. Note the echo of Kantorowicz's invocation of the art of bribery. See *infra* text accompanying note 78.

<sup>83</sup> For responses to Carrington's article, see the collection of essays and letters in "Of Law and the River," and of *Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 1-26 (1985).

<sup>84</sup> Compare Singer, *supra* note 40 (arguing for a conception of legal reasoning that is divorced from a search for certainty) with Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986) (criticizing the theories of "nihilists" as a misuse of the philosophy they look to for support of their theories).

<sup>85</sup> For example, Joe Singer defined nihilism this way:

As with the realists, the charge of nihilism against cls served principally as a crude performative tool of political exclusion and intellectual repression. In both the case of the realists and cls-ers, those who launched the charges of nihilism seem to have been either unwilling or incapable of thinking seriously about nihilism and its relation to their own positions.<sup>86</sup> Critics of cls seem to have believed that because nihilism is so epistemologically or ethically unappealing, it could not possibly describe our thought or condition.

As it has been transmitted to us, then, the opposition between normative legal thought and nihilism is not particularly helpful to our attempts to understand normative legal thought. Because in this opposition normative legal thought is everything and nihilism is virtually nothing, it is not clear at all what we could possibly gain by thinking of normative legal thought in opposition to nihilism. Nihilism seems to be the linguistic marker for a sort of free-floating and diffuse orthodox fear of difference, a fear of otherness.

The very abstraction and vacancy of the term "nihilism" in legal thought depletes the term of any rich contrast by which to understand normative legal thought. Nonetheless, something valuable can be learned from the encounter with this opposition. What can be learned from the experience of both realist and cls thinkers is that attempts to question the orthodox form of legal thought are likely to prompt *nihilism-fear*.

We are so accustomed to demanding value judgments and normative stances in legal thought that any intellectual approach that risks displacing or disorienting the normative system that enables these value judgments and normative stances is likely to leave us with nihilism-fear. This fear, in turn, is likely to lead us to resist, distort, and reject any approach that risks destabilizing our normative commitments and the conceptual approaches that sustain them.<sup>87</sup> Hence, legal thinkers routinely think that they are already

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The rationalist believes that a rational foundation and method are necessary, both epistemologically and psychologically, to develop legitimate commitment to moral values; she also believes that such a rational foundation and method either already exist or can be discovered or invented. Nihilism is only a *partial* rejection of rationalism: The nihilist rejects the second assumption, but not the first.

Singer, *supra* note 40, at 5 n.8.

<sup>86</sup> For a studied account of Nietzsche's depiction of various kinds of nihilism, see M. HEIDEGGER, *NIETZSCHE* (1982).

<sup>87</sup> Thus, currently it is apparently considered a good, or at least a worthwhile,

in possession of a rational mode of thought that enables meaningful normative legal dialogue. In simpler terms, legal thinkers always already think that they are at another fork in the road. This pre-reflective commitment of the legal thinker has significant anti-intellectual consequences that dramatically limit what can be thought and what can be asked. If we are going to get anywhere in legal thought, serious effort will have to be devoted to impairing the comfort of our own pre-reflective commitments to this engrained tendency to jurisprudential happy talk.<sup>88</sup>

#### D. Discussion

As we have seen, our pre-reflective understandings of normative legal thought are constituted by a series of oppositions that collapse whenever intellectual attention is turned their way. This raises an interesting question: are we at all in a position to attempt an understanding of normative legal thought?

My sense (given that there are 100 pages that follow this one) is that we are, but not by way of the conventional strategies typically deployed in contemporary legal thought. The usual strategies identify the object of inquiry by providing "definitions," "models," "ideal types," and the like. In this sense, it is our practice as legal thinkers to discuss aspects of legal thought by first reducing them to an objectified, stabilized, usually essentialized object-form—located invariably somewhere "out there." Indeed, even today, among many legal theorists, this sort of objectification, stabilization, externalization, and essentialization of thought continues to be considered "good form"—an integral aspect of what it means to be intellectually "serious."

But, arguably, this conventional approach is no longer intellectually "serious." On the contrary, part of the reason the descriptive/evaluative distinction and the moralist/conceptualist distinction collapsed a few pages ago is that those distinctions and their associated argument logic are typically represented (by their proponents) in highly objectified forms: as "theories," as "positions," as "ideas," as "models," etc.

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argument to suggest that some explanatory or descriptive approach to law would extinguish the possibility of meaningful normative discourse.

<sup>88</sup> See, e.g., Schlag, *supra* note 7, at 958-60; Schlag, *Normative and Nowhere to Go*, *supra* note 5, at 187-91.



I would like to try to avoid objectifying normative legal thought *in this way*. I want to urge that normative legal thought cannot be considered *simply* as a kind of thought that is “out there” already reducible to a set of ideas, propositions, theories, definitions of its content, or character. To reduce normative legal thought to an object-form, to a definition, to a genre, to a specification of boundaries, or to a definite location in social and intellectual space is to misunderstand and miscast not only the thought to be inquired into, but the thinking that is to pursue the inquiry itself.<sup>89</sup> Such a reduction of thought to object-forms is a bad business.<sup>90</sup>

If we were to reduce normative legal thought to a set of ideas, theories, or models, or any other conventionally reified space for thought, we would be led into making certain kinds of mistakes—mistakes that are ironically characteristic of normative legal thought

<sup>89</sup> See Brudner, *The Ideality of Difference: Toward Objectivity in Legal Interpretation*, 11 CARDOZO L. REV. 1133, 1145 (1990) (“Because it mistakes its own products for autonomous objects, ordinary [legal] consciousness remains an undeveloped interpretive process. . . . The task of understanding is to re-enact consciously the implicit creative activity of ordinary consciousness, interpreting the latter’s objects as . . . realizations of a project.”); see also Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 795 (1988) (“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.”). As Steve Winter notes:

Because . . . assumptions and beliefs are internalized as the very grounds of consciousness, they are largely imperceptible to the conscious subject: These conceptualizations are *transparent* in the sense that they act as an invisible 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 12, at 1497 (footnote omitted).

<sup>90</sup> It is, however, a very old business:

Plato’s doctrine of “truth” is therefore not something of the past. It is historically “present” but not as a historically recollected “consequence” of a piece of didacticism, not even as revival, not even as imitation of antiquity, not even as mere preservation of the traditional. [Plato’s doctrine of “truth”] is present as the slowly confirmed and still uncontested basic reality, a reality reigning through everything . . . .

. . . .  
 . . . [M]an thinks in terms of the fact that the essence of truth is the correctness of the representing of all beings according to “ideas” and esteems everything real according to “values.” *The decisive point is not which ideas and which values are set, but that the real is expounded according to “ideas” at all, that the “world” is weighed according to “values” at all.*

Heidegger, *Plato’s Doctrine of Truth*, in 8 PHILOSOPHY IN THE TWENTIETH CENTURY 255, 269-70 (W. Barrett & H. Aiken eds. 1962) (emphasis added).

itself. I will mention two kinds of mistakes engendered by the usual objectifying practices of contemporary legal thought.

The first kind of mistake is that this objectification immediately situates the subject (here, you and I) as already *outside* the reach of the object under inquiry. In this one move of situating one's self outside the form of thought, two transformations are accomplished instantaneously. First, the inquiry has just been tremendously simplified. Second, the value of the inquiry and the interest in whatever it might produce have just been radically reduced (close to zero). And the reason is this: to situate one's self *outside* the thought to be inquired into is in effect to stabilize a naïve subject-object relation whereby the subject (here, you and I) eclipses from consideration and critical inquiry what we, as authors and readers, have already contributed in the construction, in the formulation of the object of inquiry. In the case of "normative legal thought," for instance, our attempts to "define carefully" a "precise" object of inquiry might amount to little more than a mindless and self-indulgent rehearsal of our own stereotyped discourse moves on an empty signifier known as "normative legal thought."

There is a second kind of mistake engendered by premature objectification. If we indulged in a reductive objectification of normative legal thought, we would be led away from recognizing that normative legal thought is not just theory, ideas, substance, and outcomes, but is simultaneously practice, activity, form, and process. When a normative legal thinker writes, she is not just recommending some course of action. She is rehearsing a style of argument—one that reinforces certain social relations between author and reader; one that reinforces a certain aesthetic representation of social life—of who the key actors are, of how they are related, of the status of discourse, communication, and reason, of the relations of theory and practice, form and substance, outcome and process.

Thus, if we are to understand normative legal thought, we must try to resist as much as possible the conventional reifying practices of contemporary legal thought. But now, ironically, this caution turns out to have an unexpected implication. If we take seriously the observation that the practice of objectification is conventional and pre-reflective in the very form of our legal thought, we cannot dispense with objectification simply by defining our terms carefully or engaging other such conventional conceptualistic exercises.<sup>91</sup>

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<sup>91</sup> We have been so accustomed to finding meaning *in* the text, *in* the Restatement, *in* the doctrine that, despite even our most sophisticated theoretical attempts

On the contrary, to understand that legal thought is a practice, that it is conventional in character, and that it is a process, is to recognize that objectification is sedimented not only in normative legal thought, but in us.

Objectification is in some senses unavoidable. Not only is it unavoidable—but in some senses it is obviously helpful in allowing us to communicate. The question, then, is not whether one objectifies—but how.<sup>92</sup> Now in some sense, normative legal thought is already self-objectifying: it reenacts consistent and recursive strategies that solidify in visible and stereotyped patterns. Consider, for instance, these quotes rudely excerpted from the conclusions of articles in volume 103 of the *Harvard Law Review*:

*Let us not fall victim to the paralysis of neutral analysis. Instead, we must meet and talk together, . . . We must talk specifically about the kinds of community we would fashion . . .*<sup>93</sup>

*The real problem with contemporary doctrine is not that it fails to attain some overarching reconciliation among these competing considerations . . . but rather that it fails to articulate with sufficient clarity what is actually at stake in the definition of public discourse. We need to establish a domain of public discourse . . . . Doctrinal formulation should assist courts in the evaluation of these*

to avoid such naïve objectifications, the object-form nonetheless continues to rule. Use of the “in” preposition often signals and effectuates an inside/outside distinction that serves to objectify the field. See, e.g., Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37, 55-56 (1987) (demonstrating how Fish uses the inside/outside distinction to objectify and then defeat “theory”). This inside/outside distinction, so common in law, effectuates what Lakoff and Johnson call the “container metaphor” effect. See G. LAKOFF & M. JOHNSON, *METAPHORS WE LIVE BY* 29-32 (1980); Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 661-64 (1989) (showing how Fish relies upon the container metaphor to make his arguments against “theory”). The container metaphor and the inside/outside distinction are big in the legal meaning business. Indeed, it is common for legal theory articles to include some footnote (usually around number 6) that reads “By [. . .], I mean, that which contains [. . .], but not including [. . .].”

<sup>92</sup> “But there are several ways of being caught in this circle. They are all more or less naïve, more or less empirical, more or less systematic, more or less close to the formulation—that is, to the formalization—of this circle.” J. DERRIDA, *Structure, Sign and Play*, in *WRITING AND DIFFERENCE* 278, 281 (1978) (referring to a “reasonably” similar circle).

<sup>93</sup> Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1044 (1990) (emphasis added).

considerations, rather than masking them under wooden phrases and tests.<sup>94</sup>

The traditional understandings of statutory construction are inadequate . . . . *The interpretive principles suggested here are intended for the President, regulatory agencies, and Congress, as well as for the courts.*<sup>95</sup>

*Scholarship should reveal and debate the Court's value choices. . . . Ultimately, the decisions must be defended or criticized for the value choices the Court made. There is nothing else.*<sup>96</sup>

*The system will function better when doctrine reflects reality . . . . What is needed is a single event that will crystalize the developments that have already occurred and focus judicial attention on a new line of development. A sweeping Supreme Court opinion might work, but a more promising solution is a statute.*<sup>97</sup>

*If one unequivocal conclusion follows from this review of the law of the mentally retarded parent, it is that the formal classification should be abolished as a basis for state interference with the parent-child relationship. . . . What follow are some specific recommendations . . . .*<sup>98</sup>

There is a recursive quality to the patterns of legal thinking evidenced in these excerpts, a prescriptive, normative quality to the form of this legal thought. And indeed, these recursive patterns are not new; they have been in place a long time.<sup>99</sup> Nor has the

<sup>94</sup> Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 683 (1990) (emphasis added).

<sup>95</sup> Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 503-04 (1990) (emphasis added).

<sup>96</sup> Chemerinsky, *supra* note 40, at 104 (emphasis added).

<sup>97</sup> Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 770 (1990) (emphasis added).

<sup>98</sup> Hayman, *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1268 (1990) (emphasis added).

<sup>99</sup> It is interesting to compare the concluding statements of volume 103 of the *Harvard Law Review* with the concluding statements found in volume 1 of the *Harvard Law Review*, published in 1888 during Langdell's tenure as Dean of Harvard Law School. What is striking in making such a comparison is how little the grammar of academic legal thought and the role of the academic legal thinker have changed since the days of Langdell:

In conclusion . . . . *This proposition, it is hoped, will find favor with the reader in point of legal principle. It can hardly fail to commend itself on the score of justice and mercantile convenience.*

Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1, 16 (1887) (emphasis added).

In the present opinion of the author *such would be the best way out of the difficulty . . . . He would, therefore, close with the suggestion* of three statutes, whose rigid enforcement might, with due adjustment to meet evasions, be expected to meet the case.

Stimson, "Trusts," 1 HARV. L. REV. 132, 143 (1887) (emphasis added).

*The theory* that State laws "unreasonably" affecting foreign or interstate commerce may be held unconstitutional . . . is objectionable . . . .

*In the opinion of the writer . . . the purpose or intention of the State Legislature . . . is the only criterion . . . and the difficulties of the law would be greatly lessened if the Courts would clearly and in express terms adopt this criterion.*

Greeley, *What is the Test of a Regulation of Foreign or Interstate Commerce?*, 1 HARV. L. REV. 159, 184 (1887) (emphasis added).

Some cynic, who has had the patience to read so far, will, no doubt, remark that the legal profession is not a charitable institution, and that men practise law to get money . . . and not from philanthropic motives. To this I answer that no profession can be great unless the money-making aims of the individual are leavened by a sense of the importance of his vocation and of the dignity of the body that pursues it. . . . *This is the quality which we need to foster . . . .*

Lowell, *The Responsibilities of American Lawyers*, 1 HARV. L. REV. 232, 240 (1887) (emphasis added).

*These are the questions upon which the justice of the proposed legislation depends. Till they shall have been understood, considered, and argued by those competent to the task, it will never truly be said that George has been refuted.*

Clarke, *Criticisms Upon Henry George, Reviewed from the Stand-Point of Justice*, 1 HARV. L. REV. 265, 293 (1887) (emphasis added).

*It is preposterous to attribute any such sweeping effect to the [fourteenth] amendment.*

. . . .

. . . [I]t has not yet been decided or provided that the independence as to local matters, which forms the strongest bulwark against that disintegration so often predicted . . . is to be subjected to the surveillance of the national courts. *And it is to be deplored that the Supreme Court of the United States, upon which chiefly rests the responsibility for preserving the proper relation of dependence and independence between things national and things local, should have adopted a course which may tend to countenance such an idea.*

Dunbar, *The Anarchists' Case Before the Supreme Court of the United States*, 1 HARV. L. REV. 307, 323, 326 (1887) (emphasis added).

*[I]t is only just that the bill-holders, whose debt has not yet been extinguished, should be allowed to prove against it in competition with the other creditors.*

*Of the four views presented the last would seem to be the only one consistent with justice and the intention of the parties.*

Williams, *A Creditor's Right to His Surety's Securities*, 1 HARV. L. REV. 326, 337 (1887) (emphasis added).

These do not exhaust the kind of concluding remarks found in articles of volume 1 of the *Harvard Law Review*. Indeed, not all articles conclude with transparently normative prescriptions. For instance, Langdell's seriatim survey of equity jurisdic-

recursive character of these patterns gone wholly undetected; legal thinkers have themselves reflected upon the dominant patterns of legal thought:

With monotonous regularity, law review articles attempt to speak to courts deciding today's legal issues, in the hope that some legal actor, such as a lawyer, will refer to the article in a legal argument and persuade some judge (or, more likely, law clerk) to adopt the conclusions and analysis the article advocates . . . .<sup>100</sup>

When viewed as an academic discourse, the most distinctive feature of standard legal scholarship is its prescriptive voice, its consciously declared desire to improve the performance of legal decisionmakers.<sup>101</sup>

The reason for this irreducible normativity is that the subject of legal scholarship is law, and law is a mechanism through which our society operationalizes its normative choices. In a society like ours, moreover, these choices are a matter of conscious and continual debate.<sup>102</sup>

[L]egal academics often style themselves as judges—above, beyond, neutral with respect to the interested party or practitioner, and after or innocent of the messiness of legislative or sovereign choice. . . . [W]e may even style ourselves as judges of the judiciary, making assessments in teaching and writing about cases which were “correctly” or “incorrectly” decided.<sup>103</sup>

[M]ost of our writings are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good. In one or another form this has been the staple of legal scholarship and at least has the claims of tradition.<sup>104</sup>

tion, ironically entitled *A Brief Survey of Equity Jurisdiction*, invariably concludes each installment with a very terse, laconic, declarative, and unbelievably canonical articulation of what the law is. Langdell, at least, seems to have been every bit the legal formalist we hoped he would be. See Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55, 72 (1887); *id.* at 111, 130; *id.* at 355, 387 (1888). For an interesting account of the theoretical architecture of Langdellian formalism, see Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

<sup>100</sup> Schauer, *Constitutional Conventions* (Book Review), 87 MICH. L. REV. 1407, 1409 (1989).

<sup>101</sup> Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847-48 (1988) (footnote omitted).

<sup>102</sup> *Id.* at 1853.

<sup>103</sup> Kennedy, *A Rotation in Contemporary Legal Scholarship*, in CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 353, 380 (C. Joerges & D. Trubek eds. 1989).

<sup>104</sup> Brest, *The Fundamental Rights Controversy: The Essential Contradictions of*

Now, clearly, legal thinkers themselves have an understanding of the patterned character of their own normative legal thought. Below I have tried to describe the character of this normative legal thought in terms of a set of family traits. I have deliberately left the problem of objectification unstable and unresolved. Hence, the list below can be read as describing the paradigm case of a piece of normative legal thought. It is also possible, however, to understand this description as an attempt to trace the network of forces and relations that comprise normative legal thought as a process. Based on the discussion thus far, and on our own already immersed understanding of normative legal thought, normative legal thought might be described as an aggregate and the aggregation-in-process of the following family traits:

Normative legal thought is *prescriptive*. It recommends some identified doctrine, theory, attitude, institutional framework, hermeneutic methodology, or the like to the reader.

Normative legal thought is *monistic*, it has a single-norm orientation. Insofar as normative legal thought is prescriptive, it seeks to prescribe a single authoritative norm to rule within the defined jurisdiction of the enterprise. Even when it advocates pluralism (e.g. contextualism) or dualism (e.g. dialectical thought), normative legal thought will nonetheless envelop such potentially non-monistic stances within a monistic form.<sup>105</sup>

Hence, normative legal thought strives for a textual formalization that will produce a single norm. The aim is thus to articulate or develop a norm that is *complete, self-sufficient, discrete, separable, trans-situational, non-contradictory, and non-paradoxical* within its intellectual or legal jurisdiction.<sup>106</sup>

*Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981).

<sup>105</sup> This choice-orientation and norm-orientation produce monistic forms of thought. Normative legal thought is, in Cover's term, "jurispathic": aimed, even in its seemingly creative moments, at shutting down alternate conceptions of the problems or the issues under inquiry. See Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 16 (1983) ("It is the problem of the multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis—that leads at once to the imperial virtues and the imperial mode of world maintenance.").

<sup>106</sup> One can see that these criteria have some connection to the dominant belief among legal thinkers that the law is (at least relatively) autonomous. The main operative strategy in contemporary legal thought has been to render law autonomous by separating it from the political and the social. Indeed, separation has been the main source of metaphorical conceptualization for maintaining the autonomy of the rule of law. See *infra* text accompanying notes 295-316.

In turn, the self-sufficient, discrete, and trans-situational character of the norm selected is associated with the *positive* character of normative legal thought. Even critical (negative) moments are usually presented as being in the service of the construction of some positive norm. So even when normative legal thought is concerned with changing insights, attitudes, temperaments, epistemic frameworks, etc., it does so by enveloping these efforts in the norm-form as a *positive norm*.

The single-norm orientation also implies a *conclusion-oriented* enterprise. What matters to both the reader and author of normative legal thought is the conclusion; the process of argumentation is not valued intrinsically, but only insofar as it potentially validates or invalidates the conclusion.

The single-norm orientation also implies that much of the work of normative legal thought lies in *norm-selection*, that is, the selection by some reader or ultimate addressee of the favored norm from a number of possible, extant or hypothetical options.

Normative legal thought is thus *choice-oriented*; it acknowledges that the reader is entitled to choose norms, attempts to enlist the reader in choosing the norm, and then attempts to channel (as much as rhetorical effectiveness will permit) the reader's choice to the favored norm of the author.

And because the reader is constructed as one called upon to engage in ethical, moral choice, much of the work of normative legal thought consists in *norm-justification*—in justifying the author's favored norm to this choosing reader.

Normative legal thought also has *practical, worldly ambitions*. It seeks to have the favored norm not just adopted by the reader but put into effect—even institutionalized or realized in social practice.

This choice-oriented norm-justification means that the practical realization, the actualization of the norm is deferred. It is up to the reader to take the further steps necessary to put the norm into effect. Normative legal thought is thus *action-deferring*, contemplating that the action necessary to give effect to the norm will be done by the reader or someone connected to the reader after the reading

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This strategy is evident, for instance, in the recurrent tendency of legal thinkers to distinguish an "internal" from an "external" perspective on law, thereby allowing the requisite separation of law from the political and the social. For discussion of the import of this internal/external distinction, see *infra* text accompanying notes 295-316.



is completed, outside the text, yet nonetheless subject to the norm and the arguments proposed by the text.

The stance of much of normative legal thought is produced within a self-defined adversarial context, thus requiring *adversarial advocacy* in favor of the selected norm. Indeed, the argument structures are often reminiscent of those employed by lawyers in appellate argument,<sup>107</sup> with litigation techniques of fact recharacterization and issue framing often deployed even in the context of otherwise sophisticated intellectual argument.<sup>108</sup>

Because of the adversarial advocacy and the conclusion-oriented stance of normative legal thought, it tends to be *reader-centered*. In other words, normative legal thought strives to respect and reflect (as much as possible) the presumed belief-structures, assumptions, ideals, and self-image of the imagined reader.<sup>109</sup>

In sum then:

Normative legal thought is an enterprise of  
 norm-selection  
 norm-justification

This enterprise deploys a rhetoric that is  
 prescriptive  
 value-oriented  
 adversarial advocacy  
 choice-oriented  
 action-deferring  
 single-norm oriented  
 conclusion-oriented

The rhetoric of normative legal thought aims to produce, recommend, and institutionalize norms that are:

practical, worldly  
 complete  
 self-sufficient

<sup>107</sup> See Barnhizer, *The Revolution in American Law Schools*, 37 CLEV. ST. L. REV. 227, 235-39 (1990) (observing that American legal scholars tend to be advocates).

<sup>108</sup> Sophisticated legal academics (like their sophisticated counterparts in law practice) will tend to downplay the appearance of advocacy and instead assume a more neutral, dispassionate, problem-solving posture.

<sup>109</sup> Cf. Barnhizer, *supra* note 107, at 238 (concluding that the advocacy orientation rests on a recognition that "even the most profound insight must capture the attention of those toward whom it is directed").

discrete  
 separable  
 trans-situational  
 non-contradictory  
 non-paradoxical  
 positive

These characteristics are the family traits that describe and comprise normative legal thought. At some times, and in some instances, some traits become more dominant or more visible than others. Normative legal thought thus does not have a static and fixed identity.<sup>110</sup> It has no pre-given boundaries. And that is because normative legal thought is not simply an object-form or a genre, but also a process—a kind of rhetorical economy of relations and forces that channels and organizes legal academic thought. It is a decentralized economy that, despite the lack of any fixed or stable center, nonetheless exerts gravitational force on the production of legal thought, enabling and leading it to become typically the kind of thought described by the conjunction of traits above.

That much of contemporary legal thought should exhibit a conjunction of these traits is not surprising. Many of these traits are mutually entailed<sup>111</sup>—metaphorically<sup>112</sup> and rhetorical-

<sup>110</sup> We should not assume, for instance, that any given instance of normative legal thought should exhibit all the traits described above. Nor should we assume that there is any particular privilege to be accorded to the precise way I have described the traits above. Nor should we assume that because any given instance of legal thought does not share many of the traits described above, that the instance falls somehow “outside” of normative legal thought.

<sup>111</sup> In other words, the rhetorical economy makes it likely that any work of legal thought that is found to participate in many of these characteristics will, upon further examination, be found to participate in many of the remainder as well.

<sup>112</sup> This entailment is in part metaphorical, often subconsciously so. For instance, the notions that normative legal thought yields single-norms that are complete, self-sufficient, discrete, distinct, positive, etc., stem from the common generative metaphor that understands ideas as objects. See G. LAKOFF & M. JOHNSON, *supra* note 91, at 206-09.

Indeed, all these characteristics pertain to objects, and it is easy to see that normative legal thought tends to treat the production of the norm through the norm-selection and norm-justification enterprise very much as the production of an entity, thing, or object.

The work of Steven Winter provides a general introduction to the metaphorical character of cognition, culture and law that informs these observations. See Winter, *supra* note 91; Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989) [hereinafter Winter, *Cognitive Dimension*]; Winter, *supra* note 12; Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) [hereinafter Winter, *Standing*];

ly.<sup>113</sup> The repeated coalescence of this same set of traits is precisely what gives normative legal thought the appearance of a genre. It is this repeated coalescence of the same set of traits that makes law review articles almost always look the same: the structures of law review articles are extremely easy to identify precisely because the articles—as products of the rhetorical economy of normative legal thought—already arrive on the scene in a highly stereotyped form.<sup>114</sup> “We must do this.” “They should do that.” And so on.

The process of normative legal thought typically (though not necessarily) yields its paradigmatic object-form, but the power, the relations, and the forces of this process exceed the paradigmatic case of the object-form. Normative legal thought shapes, enables, and distorts all legal thought, including that sort of thought which (like this very article) seems so far removed, so distant from the paradigmatic case.

To understand that normative legal thought is both paradigmatic object-form and process helps explain why one moment we seem to think of it as a genre (opposed to such other genres as descriptive thought or technical doctrinalism) and why the next moment we think that normative legal thought is all there is—short of nihilism.

## II. HOW TO BE NORMATIVE, WIN FRIENDS, AND INFLUENCE CONNECTIONS

One of the consequences of the unquestioned dominance of normative legal thought in the academy is that there has been little or no articulate consideration of just how it is that this thought produces or expects to produce its effects. Yet normative legal thought clearly represents itself as having practical, worldly ambitions. Much normative legal thought reveals an expectation and a desire for its own realization in judicial or statutory law (for formalists) or by effective action in the social sphere (for realists). While this much is clear, what is not clear and indeed has not even

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Winter, *supra* note 31.

<sup>113</sup> For example, the *reader-centered* character of normative legal thought, its solicitous attention to the belief structures of the audience, leads to a *choice-oriented* rhetoric that explicitly and implicitly acknowledges that the reader can and is entitled to make a choice among which norms should govern. Likewise, this same *reader-centered* character often leads to argument structures and strategies commonly used by lawyers—*adversarial advocacy*.

<sup>114</sup> See Schlag, *Normative and Nowhere to Go*, *supra* note 5, at 170-71.

been seriously questioned, is how normative legal thought expects to realize these ambitions.

That this question should arise only now is unsurprising. For most of the history of American legal academic thought, it would have been unthinkable to ask such a question. It is only now, when the effectiveness of normative legal thought is in doubt, when the receptivity of judicial (and other) audiences is questionable,<sup>115</sup> when the very identity of any fixed paradigm for legal thought is uncertain, that the question can even arise. Because the question arises seriously for the first time, we are without any strong, self-conscious, widely shared theoretical frameworks to help our inquiry. Still, we are not entirely without markers or resources. If we pay close attention to the normative legal thought that emerges from the academy, we may yet understand how normative legal thought thinks it produces its effects. The more popular normative legal theories, for instance, indirectly reveal a great deal about what normative legal thinkers believe they are doing with their normative legal thought. Instead of reading normative legal theory in terms of what it means for adjudication or "law," we can usefully read these theories for what they reveal about the enterprise of normative legal thought. Indeed, many of our contemporary jurisprudential theories can easily be seen as instances of projection, where

<sup>115</sup> As one study found:

The number of citations [in Supreme Court opinions] to legal periodicals decreased from 963 in the 1971-73 period to 767 in the 1981-83 period. We find this decline substantial. . . .

. . . .

Our study suggests a decreasing judicial reliance on legal periodicals by the court that would seem to be the most receptive to the contributions of legal scholarship.

Sirico & Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134-37 (1986) (footnote omitted).

If anything, this decrease in the number of citations to law reviews probably understates their increasing irrelevance to judicial decisionmaking. With the advent of increasingly bureaucratic modes of judicial decisionmaking and the expanded role of law clerks, I would expect that citation of law review articles is more and more a kind of window dressing and that law review articles are less and less significant to the production of the actual decision.

For discussion of the increased role of law clerks, see R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 102-19 (1985); Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 CATH. U.L. REV. 787, 799 (1983); McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 785-87 (1981); Richman & Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. MICH. J.L. REF. 623, 626-28 (1988); Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248, 252 (1981).

authors and readers displace onto the judiciary their own idealized self-images as legal thinkers.

Not surprisingly, those theories that are most popular within the legal academy are those that project the most attractive self-image. Consider, as an example, Dworkin's theory of law as integrity and his depiction of the ideal judge as "Hercules."<sup>116</sup> Regardless of whether Hercules is an accurate or a desirable model of the appellate judge, he certainly resonates profoundly in the self-image of the contemporary legal academic. Indeed, it is easy to understand Hercules as the projection of the legal academic's idealized self-image onto the character of the appellate judge. Similarly, Dworkin's theory of law as integrity can easily be understood as a projection of the kind of elegant theory-construction that characterizes the most esteemed legal scholarship onto the appellate judicial opinion writing process.

And of course, as self-images go (for either judges or legal academics), the one provided by Dworkin is extremely flattering:

Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best they can.<sup>117</sup>

As a conceptual field for projection by legal academic readers, one of the great advantages of Dworkin's theory is that it can slide easily from concrete and determinate interpretations to extraordinarily moving and generous abstractions about what "making the law the best it can be" might mean.<sup>118</sup> Dworkin's theory is thus constructed as a tour de force that permits both author and reader to oscillate between sophisticated (though thin) and meaningful (though controversial) readings.<sup>119</sup>

<sup>116</sup> See R. DWORKIN, *supra* note 35.

<sup>117</sup> *Id.* at 255.

<sup>118</sup> If one does not hypostatize or reify the main terms of the Dworkinian description, it appears to provide a highly sophisticated account of what judges do and should do. The cost of such a sophisticated reading, however, is that Dworkin's meta-theory becomes ample enough to accommodate (and rather indeterminately so) just about any contemporary version of jurisprudence including, *cls*, feminist jurisprudence, and law and economics. It suffers from a certain thinness. To the extent, however, that the main terms of Dworkin's theory become hypostatized and reified, the thinness of the description disappears and Dworkin's theory becomes at once much more meaningful though also much more controversial. See Schlag, "*Le Hors de Texte*," *supra* note 5, at 1660-64.

<sup>119</sup> Though it is rarely self-evident when Dworkin means to advance his "concept"

While these points about the ambiguity or ambivalence of the Dworkinian theory could easily be turned into objections, that is not the point here. Rather, my claim is that Dworkin's theory articulates indirectly something very important about what many legal academics believe courts do. His theory gives an extremely eloquent, sophisticated, and respectable voice to the otherwise simple legal academic belief that judges who experience precedent, law, and doctrine as constraint, nevertheless often do and likely should strive very hard to "read" this law, to "stretch" this doctrine or positive law in order to do the right thing. At the same time, Dworkin's theory also gives voice to the typical legal academic concern with judicial imperialism by insisting that the "stretching" be done in a principled and coherent manner. Dworkin's theory delivers what legal academics want: neither mechanical jurisprudence nor freewheeling utopia—but rather the middle way.

Hence, Dworkin's text gives sophisticated and respectable expression to precisely this sense of what adjudication is and should be. In turn, this sense is a projection of what legal academics themselves do in their scholarship. Indeed, the vast bulk of contemporary legal scholarship attempts to read and organize authoritative legal materials in such a way as to make a normatively pleasing arrangement. Legal academics stretch the cases—sometimes very far,<sup>120</sup> sometimes hardly at all.<sup>121</sup> But they virtually always try to arrange the cases in a coherent and principled manner.<sup>122</sup>

of adjudication as opposed to his "conception" of adjudication. See R. DWORKIN, *supra* note 35, at 70-72.

<sup>120</sup> What counts as "stretching cases very far," of course, depends upon the stretcher's (or stretchee's) baseline understanding of what the cases mean in the first place, a baseline understanding which, these days, is generally quite insecure. Without delving into the issues posed by these last observations, I will note that most legal thinkers would think that Tribe's interpretation of *National League of Cities v. Usery*, 426 U.S. 833 (1976), stretched that case pretty far. See Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) (arguing that the case cannot be understood as anything but an effort by the Court to provide the states leeway to afford their citizens basic governmental services guaranteed by the Constitution, and thus it is not a move by the Court to restrict personal rights, but a step reflecting an underlying recognition of affirmative rights in a just constitutional order).

<sup>121</sup> Keeping in mind the caveat *supra* note 120, one can say that many contemporary legal thinkers consider Nowak's treatment of constitutional law cases, see J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* (1986), as hardly stretching the cases at all.

<sup>122</sup> Even cls scholarship (in the early days of that movement) sought to arrange cases in the coherence of a stabilized pattern of "the fundamental contradiction." See Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984)

The main points of difference among legal thinkers turn upon what they think constitute "the authoritative legal materials," how they rank or organize conflicting values, what import and what twist they place on aesthetic criteria like coherence, consistency, etc., and the extent to which they understand all of these variables to be interpenetrated and interactive. All of this is to say that whatever its relevance for judges and adjudication, *Law's Empire* is an extraordinarily sophisticated account of what the vast majority of contemporary legal academics think they are doing with their legal thought. Indeed, the paradigm of contemporary legal thought—whether in treatises, articles, or the classroom—is the rendition of an interpretation of precedent, doctrine, theory, and law that will make them better, more just, more fair, and more efficient in a principled and coherent way.<sup>123</sup> What Hercules does is what legal academics do: apply intellectual faculties to the rewriting of the law so as to make it more principled, coherent, and morally appealing.<sup>124</sup>

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(arguing that theoretical and methodological developments exemplified in promissory estoppel cases represent failed attempts to overcome the fundamental contradiction of classical nineteenth century legalism).

<sup>123</sup> Depending upon how fast and how loose we are with the main terms "principled" and "coherent," we can expand or contract the number and the kinds of contemporary jurisprudential stances that are plausible candidates for Dworkin's meta-theory of law. If we play fast and liberally, as Dworkin sometimes means to, we can even argue (and quite plausibly so) that the *cls* positions are the ones that make the law "the best it can be." Even as *cls*-ers describe case law and doctrine as internally contradictory, they nonetheless represent this recognition of our legal "tradition" as offering a normatively appealing stance. See, e.g., Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 525 (1987) (arguing that judicial interpretation is not objective and neutral because "the judge's own moral values and ideological assumptions inevitably play a powerful role"); Singer, *supra* note 40, at 9 (proposing that legal reasoning's lack of a rational foundation liberates us to develop "passionate moral and political commitments").

<sup>124</sup> Indeed, the Dworkinian jurisprudence is such a good idealized account of the self-image of legal academic thought that it even serves as a sort of ceremonial exorcism of some pervasive ambivalences of legal thinkers. Its oscillation between sophisticated (though relatively empty) abstraction and concrete (but controversial) meaningfulness at once simulates and defuses the ambivalence that most legal thinkers experience in reconciling established legal tradition and moral principle, truth and politics, law and utopia, order and morality. Part of Dworkin's success is attributable precisely to the fact that he places the concerns of legal academic thinkers in the foreground and manages to allay these concerns in a "relentlessly interpretive" approach that represents itself not only as coherent, but as the very rule of principle on earth. See Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 943-44 (1991) (describing the anxiety-reducing role of normative legal thought).

But what do the normative legal thinkers think they are doing when they are being Hercules? What do they think is being accomplished by this discursive enterprise of *norm selection* and *norm justification*? Here, I want to give an empathic, sympathetic account of the experience of doing normative legal thought.<sup>125</sup> Again Dworkin is an excellent guide.<sup>126</sup>

What does Hercules want to do in his Empire? Like the legal academic, he is relentlessly interpretive, we know. But at what does all this interpretation aim? If it is not exactly clear what Hercules seeks to accomplish (render a decision? write doctrine? issue an appellate opinion?), there is the same sort of ambiguity among legal thinkers. What we do know is that normative legal thinkers want to persuade an important institutional actor (usually a judge) to adopt a particular norm. Their self-conscious motive is thus *norm-adoption*.

While the normative legal thinker typically does not imagine himself as serving a particular named client (in either the lawyerly or the social theoretical sense), neither does he envision himself as choosing proposed norms in a normative or political vacuum. On the contrary, the normative legal thinker has a rich picture of the legal field—the argumentative framework, the beliefs and perceptions of the relevant audience, its fears, hopes, aspirations, and much more.<sup>127</sup> The normative legal thinker also has a set of political or moral values.

Both the representation of the field and the moral and political values are to some extent plastic, but not infinitely so. The

<sup>125</sup> Thus crass careerism, political self-advancement, status elevation, psychological, or sociological motivations are bracketed, just as these considerations are routinely bracketed in the arguments made by the normative legal thinker to his or her audience.

<sup>126</sup> Despite my commitment to empathy, I can't put out of my mind the fact that I will be trying to make normative legal thought "the best it can be," and that this raises certain problems. I face (and I hope the reader will face) the paradox here. When I try to be empathic, I am caught within an oscillation between a normatively appealing (but partially unbelievable) account of what normative legal thought is doing and a believable (but not so normatively nice) account of what it is doing. In the text, I have decided to follow Dworkin's lead and provide a normatively appealing account.

<sup>127</sup> Here, Duncan Kennedy is substantially more helpful in his account of the legal thinker as judge than Ronald Dworkin. See Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) (describing the process of legal reasoning the author would use in deciding a case and presenting a conflict between what the law is and what he believes it should be). Dworkin, by contrast to Kennedy, tends to be exceedingly abstract and vague in his understanding of the institutional, rhetorical, and procedural forces that help shape the legal thinker's understanding of the legal field.



plasticity of the field depends in part on the differing capacities of legal thinkers for reformulating both their representation of the field and their own political or moral values. Typically, the normative legal thinker understands himself to be choosing a norm based upon his representation of the legal field and his normative values. Typically, the normative legal thinker looks for channels of argument within the legal field that can support norms consonant with the legal thinker's own moral or political values.

All sorts of trade-offs are possible here. For example, a legal thinker may decide to pursue a particularly promising channel of argument within the legal field even though it appears to be only partially consistent (if at all) with his own values.<sup>128</sup> Another legal thinker, on the other hand, may be so committed to a particular political or moral stance that she will develop her stance in adverse conditions, even though the argument possibilities in other areas or for other norms appear to be much more successful.<sup>129</sup>

Thus, choosing which norm to support is for the normative legal thinker already a question of norm-justification; the choice of which norm to support is already being decided by thinking about how and whether the norm can be justified according to the (legitimate) reasoning criteria of the internalized external audience. Again, what counts as "justification" and what counts as "(legitimate) reasoning criteria" differ among legal thinkers and are subject to reformulation. While the normative legal thinker typically experiences norm-justification as governed in part by the beliefs of his readers (the external audience), he also shares much of those beliefs

<sup>128</sup> Here, I am referring to those surprising professions of faith that appear to be—even though perhaps they are not—inconsistent with the author's past professions of faith. Consider this surprising statement by the author of the three editions of *Economic Analysis of Law*:

Perspective—not theory. Even if skepticism as dogma is not a contradiction in terms (as well it may be), my own skepticism is a mood or attitude—a disposition to scoff at pretensions to certainty, to question claims (even my own) to the possession of powerful methodologies founded on professional expertise, and to disbelieve in absolutes and unobservable entities—rather than a theory.

Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 829 (1988).

<sup>129</sup> Consider the following passage:

So what is the value of another article on state action? First, I hope that change, at least in the long term, will occur if it is demonstrated emphatically and repeatedly that limiting the Constitution's protections to state action makes no sense. History shows that if doctrines and concepts are attacked long enough and hard enough they may begin to crumble.

Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 556 (1985).

himself (the internal audience). Thus though it is true that the normative legal thinker may sometimes advance arguments that he does not believe or considers make-weight, or trivial, that certainly does not describe the whole or even the main part of the norm-justification experience. On the contrary, for the normative legal thinker, the process of norm-justification is never simply, never just, a matter of public relations or rhetorical manipulation.

The appeal of normative legal thought is grounded precisely in the fact that it is rational, deliberative, authentic, and non-coercive. Normative legal thought appeals to shared values and shared understandings of what law is and what it ought to be. As Frank Michelman puts it, “[t]he *persuasive* character of the process depends on the normative efficacy of some context that is everyone’s.”<sup>130</sup> It presupposes “that such a fund of normatively effective material—publicly cognizable, persuasively recollectible and contestable—is always already available.”<sup>131</sup>

In this account of normative legal thought, two crucial assumptions are being made. First, there is an assumption that there is some normatively charged context that is both retrievable and universally shared. This assumption is crucial if normative legal thought is to avoid collapsing into authoritarianism or coercion. It is precisely this assumption that allows normative legal thought to claim that it is respecting the dignity of the individual. The second critical assumption is that the fund of normatively charged beliefs and ideals is normatively efficacious. It is this assumption that allows normative legal thought to claim that its normative content is not epiphenomenal, but does in fact regulate and guide the practices of legal thinkers, judges, and their institutions.

While normative legal thinkers typically hold to these assumptions, they are nevertheless aware that their arguments and thought operate in a rhetorical field. This poses a problem for my empathic account of normative legal thought. On the one hand, to suggest that normative legal thinkers believe that their thought cuts through the field of rhetorical manipulation would be to treat them as naïve (out of touch). What’s more, on some level, it would be wrong: normative legal thinkers show some recognition of how the rhetorical power of legal thought lies and how this power is deployed to achieve instrumental ends. But now here’s the

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<sup>130</sup> Michelman, *supra* note 42, at 1513.

<sup>131</sup> *Id.* at 1514.

problem: if normative legal thinkers are aware of the rhetorical, the power dimensions of normative legal thought, they can no longer claim that their thought is *outside* the field of coercion and manipulation.

Normative legal thought seems to be in a quandary here, and it's not at all clear how normative legal thinkers resolve this tension. It may be that I have been misled in my empathic attempts at describing what it is normative legal thinkers think they are doing and that the self-understanding of normative legal thinkers is much more along the lines of Plato's "noble lie."<sup>132</sup> Perhaps.<sup>133</sup> For the most part, normative legal thinkers typically try to avoid the problem with moves like this:

Participants in argument cannot avoid *presupposing* that the structure of their communication both excludes all force other than that of the better argument and neutralizes all motives other than the cooperative search for truth. These presuppositions may be counterfactual; still, *the cost of giving them up* is what Habermas following Apel, calls a performative contradiction.<sup>134</sup>

The intimation is that we must give up the recognition that we are involved in a rhetorical enterprise, that is, that we indulge in denial, lest we get caught up in "performative contradictions."<sup>135</sup>

<sup>132</sup> See THE REPUBLIC OF PLATO 106-07 (F. Cornford trans. 1945) (setting forth what has come to be known as the "noble lie" which legitimizes class inequality through the idea that God fashioned farmers and craftsmen with iron and brass, "auxiliaries" with silver, and rulers with gold).

<sup>133</sup> My sense is that most legal thinkers probably understand on some level that normative legal thought is a coercive rhetorical enterprise, but so long as they believe in a pre-reflective way that normative legal thought "works," they will refrain from dealing with the kinds of questions posed in the text. This is in part why I have been concerned to show not simply that normative legal thought is *coercive* and *boring*, but also *ineffectual* and (ironically) *aimless*. See Schlag, *Normative and Nowhere to Go*, *supra* note 5.

<sup>134</sup> Warnke, *Rawls, Habermas, and Real Talk: A Reply to Walzer*, 21 PHIL. F. 197, 202 (1990) (emphasis added).

<sup>135</sup> While this is a traditional way of framing the problem, at least from the perspective of moral philosophy, it is itself rhetorically curious, because one senses that this way of framing the problem has not yet taken full cognizance of the rhetorical situation in which the problem is framed.

One can understand this point when one considers how strange it is in an activity like conversation—so fluid, so reflexive, so obviously temporal—to assume the necessity of static presuppositions at all. Indeed, why frame the problem in terms of this rigid either/or (*either* we make the presupposition that we are engaged in authentic noncoercive communication *or* we have to give up these presuppositions)?

One answer is that these kinds of conceptualizations are part of the embedded conventional modes of thought that constitute the present practice of academic moral philosophy. Cf. Heidegger, *Letter on Humanism*, in 8 PHILOSOPHY IN THE TWENTIETH

Generally, normative legal thought has not paid much attention to its own rhetorical situation and thus it has not given much serious thought to this problem—or even recognized it as one. In part, this oversight helps account for the upbeat and cheery character of normative legal thought. Typically, normative legal thought exhibits a confident Enlightenment vision—largely oblivious to the challenges that modernist and postmodernist thought poses to its status as a “serious” discourse. And, as we have begun to see, normative legal thought is not terribly self-conscious or self-critical. Indeed, only the rudest, the most sudden shocks to the system seem capable of jarring normative legal thought out of its complacency.

### III. *L.A. LAW'S EMPIRE*

On Thursday, March 29, 1990, at approximately 10:00 p.m., Stuart Markowitz was arrested for DWI. Stuart Markowitz is a 50 year old mid-level partner in a small L.A. law firm—a bit of a buffoon, something of a schlemiel, soft around the edges, but not entirely spineless.<sup>136</sup> He is one of the less ego-centered, one of the more principled characters on *L.A. Law*.<sup>137</sup> He is even (at times) surprisingly politically correct on gender issues.

As you might expect, it was an incredible shock to witness Stuart, this soft, kind, harmless man being rudely arrested. You can picture the scene. The cop is a predictable six-foot something, a Nordic blond Visigoth sporting the ubiquitous, standard cop-issue aviator glasses. Clear proto-fascist material. The shock of Stuart's arrest is compounded by our having learned just moments before that Stuart and his wife Ann had planned to go off to a motel to do (as Stuart announced in his best muffled baritone voice) “some unbelievably sinful things.”

In a few short T.V. frames, the promise of innocent sex is violently and definitively crushed by the powerful long arm of the law. If you are a member of the legal community, this scene has particular resonance for you: it evokes the iconic intrusion into the

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CENTURY, *supra* note 90, at 270, 273 (“One no longer thinks, but one occupies oneself with ‘philosophy.’”).

<sup>136</sup> See *L.A. Law* (NBC television broadcast, Mar. 29, 1990). *L.A. Law* is a television show depicting the lives, foibles, and failures of lawyers in a contemporary small Los Angeles law firm. The show's romanticization of the legal profession in terms of sex, power, and money was informally believed among the legal academics in the late 1980s to have played some part in producing the otherwise inexplicable upsurge in law school applications.

<sup>137</sup> Not that this is a highly principled or selfless crew, you understand.

marital bedroom condemned in *Griswold v. Connecticut*;<sup>138</sup> Orwell comes to mind.<sup>139</sup> Note the image of law here: it is on the wrong side, unaccountably random and awesomely powerful.

Stuart's breathalyzer tests reads .09.<sup>140</sup> This comes to us as somewhat of a surprise. True, Stuart had been seen sipping wine with Ann moments before the arrest, but he certainly did not look drunk, and besides, it's not in Stuart's character to drink and drive. Fortunately, we find out that Stuart will be represented by Michael Kuzak, Stuart's brash, young, sexy, terribly competent, and ruthless partner. In fine form, before taking Stuart's testimony, Michael sits down with Ann and Stuart to explain the law:<sup>141</sup>

Michael: Peter Himeson is the best toxicologist in the state. If he testifies for us, our stock goes way up. O.K. to the facts. . . . Now, you had a glass of wine minutes before leaving the restaurant right?

Stuart: Well, I had wine with lunch so I guess, it was . . .

Michael: Yes, but timing is very important. Let me explain something. It takes thirty minutes for a drink to get into your bloodstream. That means that if you had a glass of wine, just before you got into your car, our expert witness could testify

<sup>138</sup> 381 U.S. 479 (1965) (asking "Would we allow the police to search the sacred precincts of marital bedrooms . . . ?").

<sup>139</sup> See G. ORWELL, *NINETEEN EIGHTY-FOUR* (1964).

<sup>140</sup> California's DWI statute reads in pertinent part:

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

. . . .

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

CAL. VEH. CODE § 23152(b) (West Supp. 1991).

<sup>141</sup> Consider the ethical implications of such advice:

A lawyer who advises a witness about the law or about desired testimony before seeking the witness' own version of events comes dangerously near subornation of perjury; whether a violation is in fact committed is a question of the lawyer's intention and of his or her knowledge about the client's foreseeable reaction to the lawyer's information.

C. WOLFRAM, *MODERN LEGAL ETHICS* 648 (1986) (discussing lawyer interviews of witnesses in preparation for testimony).

that it wasn't in your system when you were arrested . . . . This is very important testimony . . . . So . . . When do you think you had that last glass of wine?<sup>142</sup>

Stuart and Ann understand implicitly:

Ann: He drank it right before we left.

Michael: Are you willing to testify to this?

Ann: Yes.

Michael: Good . . . Very good.<sup>143</sup>

Note that Michael has just elicited precisely the testimony he would like the witness to give without once inviting any reference to the truth of the matter. Michael understands, of course, that his role is circumscribed. He cannot overtly suborn perjury, or, more precisely, he cannot knowingly allow Ann or Stuart to lie about the chronology of Stuart's drinking. On the other hand, there is no rule of law, no provision of the ethical code, nothing at all that compels Michael affirmatively to find out the truth about when the drinking occurred.

We thus come to understand that whether or not Stuart will be convicted for DWI has virtually nothing to do with whether or not he was legally drunk at the time of the arrest. It has everything to do with the quality of the performances by various actors (most notably, Michael, Stuart, Ann, the cop, the D.A., and the experts) within the stylized, sometimes highly circumscribed roles that the law has scripted and structured for them.<sup>144</sup>

The image of law presented here is the performance of rhetorical moves within scripted, stylized roles that can be used by

<sup>142</sup> *L.A. Law*, *supra* note 136.

<sup>143</sup> *Id.*

<sup>144</sup> This description resonates in autopoietic social theory:

Legal communications are the cognitive instruments by which the law as social discourse is able to see the world. Legal communications cannot reach out into the real outside world, neither into nature nor into society. They can only communicate about nature and society. Any metaphor about their access to the real world is misplaced.

Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 *LAW & SOC'Y REV.* 727, 740 (1989).

And if one tries to think of adjudication in terms of the metaphor of the "real world," adjudication begins to seem utterly bizarre:

It is a Kafkaesque world in which people testify to what they neither saw nor heard accurately, nor recalled nor communicated fully, and in which victory was an end in itself, and men and women compromised to reach a decision which they based upon partially understood testimony, partisan arguments

the various actors to invoke or suppress institutional power.<sup>145</sup> There are ratios of power among the various actors, and depending how all the actors deploy their power possibilities, it will be *this* outcome rather than *that* one which will be produced. So far Michael Kuzak is performing his role well—so well in fact that he would like to make the case go away before trial. To this end, he has prepared the entire case before going to see the D.A. The provable facts are as follows:

1. Stuart had a .09 blood alcohol level, which is barely over the .08 DWI limit in California.
2. Two witnesses (Stuart and Ann) will testify that Stuart drank the wine just moments before he got into his car.
3. The state's top toxicologist—a highly respected person in the field—will testify that based on this time line, it would have been impossible for Stuart to be drunk at the time of the arrest.

Armed with these rhetorical obstacles to conviction, Michael Kuzak goes to see the D.A., a woman he happens to know by name. He tells her the provable facts. He adds that the case has been scheduled before Judge Matthews—a judge whom both Michael and the D.A. know to be a friend of the senior partner in Michael's firm. She looks skeptical. Michael pleads with her. He asks for a favor: "I need this one." Michael's tone implies: "come on, please, just this one time . . ." <sup>146</sup>

Michael and the D.A. apparently have a "professional friendship," an informal relation that arises from the repeated contacts of the routine. Very likely they have had cases against each other. It is this kind of professional friendship that sustains the vast informal network through which the long arm of the law does much of its work: plea bargains, settlements, consent decrees, etc. This is the network of the law within the law—the *shadow law*.<sup>147</sup>

and abstract judicial charges. Life and liberty, property and reputation are staked on bets or guesses as to what really happened.

J. MARSHALL, LAW AND PSYCHOLOGY IN CONFLICT 106 (1966).

<sup>145</sup> Of course, the importance of the performative quality of the communicative acts is borne out in other ways as well. At one point, for instance, Michael observes that their trial date is scheduled late, and that this is a good thing because the cop probably will not recall the incident very well.

<sup>146</sup> *L.A. Law*, *supra* note 136. This, of course, is preposterous, given that this case will be followed by an endless line of other cases—each also richly deserving of special treatment.

<sup>147</sup> Of all criminal defendants convicted in United States District Courts, the percentage who pled guilty are: 85.3 percent in 1989, *see* 1989 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 279

The shadow law works smoothly and efficiently in the shadow of the unwieldy bilateral monopolies created by the state's statutory criminal law. The shadow law reduces transaction costs through an institution known as "*the favor bank*,"<sup>148</sup> a huge, constantly rearranging assembly of ties, loyalties, debts, and obligations. To outsiders, it is the secret economy of the law operating in the interstitial spaces left by the rational structure of explicit doctrinal law. The favor bank is in significant part a feudal institution—hierarchical in structure<sup>149</sup> and operated on principles of loyalty and honor, and on ties of professional friendships, like the one between Michael and the D.A.<sup>150</sup>

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(1989); 86.0 percent in 1988, *see* 1988 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 297 (1988); 86.0 percent in 1987, *see* 1987 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 120 (1987); 85.7 percent in 1986, *see id.* at 120.

It has also been noted that

an almost irreconcilable conflict is posed in terms of intense pressures to process large numbers of cases on the one hand, and the stringent ideological and legal requirements of due process of law, on the other hand. A rather tenuous resolution of the dilemma has emerged in the shape of a large variety of bureaucratically ordained and controlled work crimes, short cuts, deviations, and outright rule violations adopted as court practice in order to meet production norms. Fearfully anticipating criticism on ethical as well as legal grounds, all the significant participants in the court's social structure are bound into an organized system of complicity. This consists of a work arrangement in which the patterned, covert, informal breaches, and evasions of due process are institutionalized, but are, nevertheless denied to exist.

Blumberg, *The Practice of Law as Confidence Game*, 1 LAW & SOC'Y REV. 15, 22 (1967). *The shadow law* is an expression coined from Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>148</sup> The "favor bank" is a jurisprudential concept developed by Tom Wolfe. *See* T. WOLFE, *THE BONFIRE OF THE VANITIES* 400-02 (1987).

<sup>149</sup> For example, compared to Michael and the D.A., Michael's senior partner and Judge Matthews are major players in the hierarchy of the favor bank.

<sup>150</sup> As in all "professional friendships," there is an inherent ambiguity in the relation of Michael and the D.A.: is the emphasis on the "professional" or on the "friendship"? Michael plays the ambiguity for all it is worth. He brings the D.A. a bouquet of daisies and he says "I need this one." *L.A. Law*, *supra* note 136. What do the daisies say? Perhaps the daisies say that Michael really is dealing in a personal capacity, that he wants to change the plea bargaining from the usual favor bank channel to a more personal one. Or perhaps they are part of a flirtation Michael is trying to offer as a quid for a drop-in-the-charges quo; maybe Michael is trying to con the D.A. into giving him something for free that should rightfully be handled through the favor bank. If so, Michael's ploy fails: the D.A. hands the daisies back to Michael, saying, "You owe me big." *Id.* So it is clear: the deal will be recorded in the favor bank, and Michael's account debited the appropriate amount.



In the end, the favor bank, the shadow law, and Michael's performance have done their work: the charges will be reduced to "reckless driving—dry."<sup>151</sup> And that's what matters to us: Stuart is just too nice a guy to be convicted. How does Michael come out? From the perspective of law in the books or law in the law school, Michael has engaged in some very questionable practices. Yet from a purely instrumental perspective, he has done a good job of it. Besides, this is what real law is like—playing the power ratios and manipulating the performances to get the right result. And in our role as TV viewers, we know the right result: it is to get soft, kind, harmless Stuart out of the sex-hating, life-denying, fun-killing, Orwellian grasp of the law.

At the end of this episode, Stuart and Ann are back at their law offices and Stuart drops the inevitable bombshell. "I was guilty: three glasses of wine," he says.<sup>152</sup> This is a brilliant piece of script writing. It is brilliant because it confirms the central point that law is a game of power and manipulation. The lawyers manipulate and control. The law manipulates and controls as it tells its story through the mouths of the various legal actors—the lawyer, the D.A., the suspect, and the witness—all acting in their legal roles. And it is only when the long arm of the law is retracted and the choreographed legal roles have been dropped, that Stuart can tell us that he was in fact drunk.

Did we see this coming? Probably. Could we have missed it? Sure: if we had insisted on believing that the statements made by Michael Kuzak, the lawyer, Stuart Markowitz, the suspect, and Ann Kelsey, the witness, were part of a field of undistorted rational discourse whose ultimate criterion is truth. We could have been taken in. But only if we indulged in one hell of a category mistake. We would have had to misconstrue a field of performances, of performative utterances, of power moves—that is, the field of law—for a field of undistorted rational discourse.

In our role as T.V. viewers of *L.A. Law*, we usually don't make that mistake. We understand that the law represented to us is not simply or even primarily a system of undistorted rational discourse.

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<sup>151</sup> *L.A. Law*, *supra* note 136. And this is utterly predictable: "One statistic dominates any realistic discussion of criminal justice in America today: roughly ninety percent of the criminal defendants convicted in state and federal courts plead guilty rather than exercise their right to stand trial before a court or jury." Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 1 (1979); *see also supra* note 147.

<sup>152</sup> *L.A. Law*, *supra* note 136.

We understand implicitly that it is an institutionalized arrangement of performative roles and possibilities that both enable as well as delimit the possibilities for truth-telling and deception. We understand that there is a great deal more going on than could possibly be captured by a medium that reduces law to stabilized "propositions," to rational arrangements of "ideas," to overarching "theories."

This is a world in which deceit plays an important part. Ann, Stuart, and Michael succeeded in deceiving some of the other characters on the show (including each other). By the end of the show, Stuart even ends up deceiving himself: reflecting upon the fact that by being able to pay \$3000 for a top toxicologist, he was able to beat the rap, Stuart says to himself, "I'm just lucky, I guess." This is an extraordinary moment of self-deception. Indeed, it hardly classifies as luck for an upper-middle class, well-connected, white male lawyer to be able to beat an isolated DWI rap. On the contrary, it's part and parcel of what it means to be part of that class. But Stuart abstracts himself away from this unwelcome bit of social self-knowledge, denies to himself that he is part of this web of social power, and avoids any reckoning with the social sources of his power: it's just plain, dumb, ineffable luck. Here we get a wonderful insight into how the average lawyer manages to deal with the web of social power in which he is enmeshed. Like Stuart, the typical lawyer denies that he is of the web. He claims that he is outside or above the web.

One of the striking aspects of *L.A. Law* is that, for all its obvious and not so negligible shortfalls, it is often a better approximation of the world of law practice than the routine academic productions of normative legal thought.<sup>153</sup> This perception is likely to be shared by anyone who has had any actual practice experience, anyone who understands that professional power is the juice that makes the wheels of the law-bureaucracies run. Lawyers tend to see their professional power as resting, "not on rules, but on local knowledge, insider access, connections, and reputation."<sup>154</sup> For instance,

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<sup>153</sup> Gillers notes: "I watched many hours of *L.A. Law*. The shows were uneven internally and from week to week. Some were heavy with adolescent humor and crude stereotypes. Others were admirable, occasionally masterful, in their depiction of legal and ethical issues. Lean and subtle, they could inspire class discussion." Gillers, *Taking L.A. Law More Seriously*, 98 YALE L.J. 1607, 1620 (1989).

<sup>154</sup> Sarat & Felstiner, *supra* note 4, at 1685. As Sarat and Felstiner observe: "Lawyers often suggest that their most important contribution is knowledge of the ropes, not knowledge of the rules; they describe a system that is not bureaucratically

"lawyer regulars" within the criminal justice system maintain intimate relations with all levels of personnel in the court setting as a means of obtaining, maintaining, and building their practice: "These informal relations are the *sine qua non* not only of retaining a practice, but also in the negotiation of pleas and sentences."<sup>155</sup>

The favor bank and the shadow law, more than the reason of the better argument, is the stuff of law. The favor bank cannot be seen in *Law's Empire*, but only on *L.A. Law*. *Law's Empire* is predicated on the separation of "law" from the social and on the confinement of law to the space of the rational, the conscious, and the originary.<sup>156</sup> Normative legal thought implicitly assumes that "we are a government of laws, not men."<sup>157</sup> *L.A. Law* reminds us that it is also the other way around. Practicing lawyers know very well that "[i]t makes all the difference which judge is deciding a case."<sup>158</sup>

When a lawyer presents a case to a jury, the opening argument, the direct examinations, the cross, the objections, and the summation all typically aim toward the paramount objective of making the jury believe the lawyer's story line and disbelieve the other side.<sup>159</sup> To this end, the lawyer will establish her authority, credibility, and rapport with the jury. Moreover, she will not presume on them too much but will construct a relatively clear and simple story line. This will be a prototypical story that resonates within the culture and evokes stereotypical responses such as pity, admiration, contempt, fear, and so forth. Each of the trial lawyer's actions in the courtroom will be designed to bolster, repeat, and reinforce that story line.<sup>160</sup>

rational but is, nonetheless, accessible to its 'priests.'" *Id.* (footnote omitted).

<sup>155</sup> Blumberg, *supra* note 147, at 21; see also J. CARLIN, *LAWYERS ON THEIR OWN* 105-09 (1962) (discussing the mechanics of a small-scale, solo criminal practice).

<sup>156</sup> Once in a while, normative legal thinkers will acknowledge that law is not originary, that it is in part an unconscious social construction and that it need not necessarily conform to a rational structure. See, e.g., Posner, *supra* note 128, at 854 (acknowledging that "[t]acit knowledge is important in legal reasoning"). But no sooner are these points acknowledged, than they are safely cabined within an overarching deliberative rational structure that serves to shut down the lines of inquiry they might open up. The legal unconscious remains virtually unexamined.

<sup>157</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>158</sup> A. DERSHOWITZ, *TAKING LIBERTIES: A DECADE OF HARD CASES, BAD LAWS, AND BUM RAPS* 2 (1988).

<sup>159</sup> The discourse of lawyers is "a paradigmatic case of strategic, success-oriented communication." Dan-Cohen, *Law, Community, and Communication*, 1989 *DUKE L.J.* 1654, 1668.

<sup>160</sup> Such practices have been widely recognized:

For the trial lawyer, the substantive doctrine and the law of evidence and of civil procedure, will serve two main functions. In one sense, they will be the filters, the screens through which the stock story-line must pass.<sup>161</sup> In this screening capacity, the positive law is obstructive. But the positive law is enabling as well: it organizes, echoes, and dignifies the lawyer's story-line. In this second sense, the law signals to the jury that this is not any sort of story being told but one that fits a prototypical pattern (i.e., defendant intentionally harmed plaintiff) and that therefore the story warrants a prototypical response (i.e., jurors should make defendant compensate plaintiff).<sup>162</sup>

In crafting this story, the lawyer will consider the self-image of the jurors, their values, and their beliefs about themselves. The lawyer will frame the story with a simple rhetorical structure in mind: believe my story because it will confirm your sense of yourself as decent, courageous, sensible, etc.; disbelieve my opponent's story because in order to believe it, you will have to give up part of your favorable self-image.

Thus, for the effective trial lawyer, truth, rationality, and moral values play a role but only in an instrumental sense—only insofar as they aid the lawyer in effectively manipulating the jury to reach the pre-determined desired outcomes. Control and manipulation are the objective. What matters is not the rationality of a story but whether the story will rhetorically and cognitively produce the

In an actual case there will be many potential frames of reference which *could be* recalled by jurors from their schematic databases . . . . However . . . cognitive biases and limitations cause jurors to filter out many of these potential frames of reference. Cognitive filtering explains why jurors do not consider much of the relevant evidence they have heard as they reach tentative conclusions about the case prior to deliberations. . . .

. . . The advocate, therefore, must develop a strategy to accommodate the juror's cognitive filters, thereby maximizing the possibility that the jury will appreciate the evidence favorable to her client.

Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 277 (1989).

<sup>161</sup> "Our criminal justice system is more appropriately defined as a screening system than as a truth-seeking one. This screening process is directed at accurately sorting out those whose deviancy has gone beyond what society considers tolerable and has passed into the area that substantive law labels criminal." Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 299-300 (1980).

<sup>162</sup> See Winter, *Cognitive Dimension*, *supra* note 112, at 2272-74 (describing the ways in which the advocate's story-line can persuade by tapping into an existing story-line shared by his or her audience).

desired result;<sup>163</sup> what matters is not moral value, but the moralistic self-image of the jurors.<sup>164</sup>

For the trial lawyer, the field is already in part constituted. As the litigation proceeds, countless factors increasingly limit the trial lawyer's possible strategies. The positive law sets the bounds of possible litigation. Discovery sets the bounds of the possible factual positions in the case. The identity of the judge sets the bounds of permissible evidence. Still, many of the power relations are the creation of the trial lawyer herself. She will establish a relation with the jurors and judge, and in doing so, will influence the jurors' relation with the judge, their task, and opposing counsel.

Neither the truth, nor the rational content, nor the moral effect of this relation matters. What matters is the relation itself: who commands, who silences, who is believed, etc. The trial lawyer knows all this. And the last thing she wants to do is re-present to herself all these relations in terms of a conventional separation and stabilization of truth, rationality, or moral value. On the contrary, to be effective, all of this must be implicitly understood—indeed internalized—as a system of differentiated relations among power, truth, rationality, rhetoric, and deceit. As Dauer and Leff put it:

A lawyer is a person who on behalf of some people treats other people the way bureaucracies treat all people—as nonpeople. Most lawyers are free-lance bureaucrats, not tied to any major established bureaucracy, who can be hired to use, typically in a bureaucratic setting, bureaucratic skills—delay, threat, wheedling, needling, aggression, manipulation, paper passing, complexity, negotiation, selective surrender, almost-genuine passion—on behalf of someone unable or unwilling to do all that for himself.<sup>165</sup>

All of this, of course, *appears* to be very far from the reigning image of law on the contemporary normative legal thought channel. Listen to Dworkin and experience the dissonance:

What is law? . . . Law's empire is defined by attitude, not territory or power or process. . . . It is an interpretive, self-

<sup>163</sup> There are nicer ways of saying the same thing: "Understanding how and why individuals view the world as they do will make advocates more effective in negotiations, strategic planning, client counseling, and other recurring legal contexts outside the courtroom." Moore, *supra* note 160, at 341.

<sup>164</sup> This description of the modern lawyer, of course, is not wholly unlike Plato's description of the sophistic views of Thrasymachus, who insists that justice is the effective exercise of power by the stronger. See THE REPUBLIC OF PLATO, *supra* note 132, at 41-174 (Books II-IV).

<sup>165</sup> Dauer & Leff, *The Lawyer as Friend*, 86 YALE L.J. 573, 581 (1977).

reflective attitude addressed to politics in the broadest sense. . . . Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past.<sup>166</sup>

Listen to Owen Fiss:

I continue to believe that law is a distinct form of human activity, one which, as Ronald Dworkin and others have insisted for some years now, differs from politics, even a highly idealized politics, in important ways. Political actors can and often do make claims of justice, but they need not. . . . Judges on the other hand, have no authority other than to decide what is just, and they obtain the right to do so from the procedural norms that surround their office and limit the exercise of their power.<sup>167</sup>

These visions of law offered by Fiss and Dworkin are a far cry from *L.A. Law*. Against that backdrop, the Dworkin-Fiss visions advertise an extraordinarily idealized, romanticized account of law—impossibly clean and orderly. They certainly seem quite distant from the vision of lawyering offered by Dauer and Leff.

And yet, is there really any contradiction here between the two visions? Does the validation of the Dauer-Leff view of the lawyer-as-bureaucrat somehow falsify the Dworkin-Fiss visions? Or, correspondingly, does the Dworkin-Fiss vision somehow falsify the Dauer-Leff account? The answer, surprisingly, is no. What Fiss and Dworkin describe as the practice of law *is* what Dauer and Leff describe as the practice of law. We have to understand that when Dworkin and Fiss give their idealized or romanticized accounts of law, they are not talking about a separate reality: the Dworkin and Fiss visions are real—and they are realized every day in precisely the ways described by Dauer and Leff. “Laying principle over practice” and “making the law the best it can be” *is* the harassment, *is* the aggression, *is* the manipulation. All this stuff about “deciding what is just” and showing “the best route to a better future, keeping the right faith with the past” *is* exactly what Dauer and Leff’s bureaucratic-lawyers say and do as they delay, threaten, wheedle, needle, manipulate, and otherwise kick people around.

Normative legal thought never quite manages to understand this point. Indeed the continued viability, the continued respectability of normative legal thought as an enterprise in the academy *depends*

<sup>166</sup> R. DWORKIN, *supra* note 35, at 413.

<sup>167</sup> Fiss, *The Law Regained*, 74 CORNELL L. REV. 245, 249 (1989).

upon its failing to understand this point. Normative legal thought routinely fails to understand this point by relentlessly repeating two errors.

First, normative legal thought believes that in the abstraction of the normative terms from their bureaucratic setting on *L.A. Law*, their meaning, their significance, has nonetheless been preserved.<sup>168</sup> Normative legal thought tends to disavow its own performative dimension; it tends to hide from itself the kinds of social and rhetorical uses to which it is put. Rather uncritically and solipsistically, normative legal thought tends to concern itself only with its own "substantive" propositional normative content and its own normatively sanctioned uses.<sup>169</sup> In this sense, we can say that normative legal thought is not a "serious" enterprise—but rather one that presumes uncritically that its main, or critical, significance is self-determined.

This fixation of normative legal thought on its own "substantive" propositional normative content is sustained by a second kind of prototypical mistake. Having abstracted its own discourse from the bureaucratic setting of *L.A. Law*, normative legal thought tends to assume that its own "substantive" propositional normative content somehow controls the way in which normative legal thought is used—that somehow its propositional normative content regulates the ways in which people get kicked around. Normative legal thought is thus prone to a naïve form of identity thinking where the normative significance of a legal term in the legal academy is blithely assumed to correspond roughly to the same normative significance in law practice. But it's not so.<sup>170</sup>

<sup>168</sup> This is a variant of Cover's criticism of the tendency among legal commentators to reduce law to the interpretation of de-contextualized texts. See Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986) (arguing that law cannot be understood apart from its own relation to the violence it occasions); see also Coombe, "Same as it Ever Was": *Rethinking the Politics of Legal Interpretation*, 34 *MCGILL L.J.* 601, 649 (1989).

<sup>169</sup> Later, we will see how the internal/external distinction, the separation of law from the social order, enables normative legal thought to excise from its own purview its own aesthetic, political, social and psychological significance. See *infra* text accompanying notes 295-319.

<sup>170</sup> Consider the observations of Professor John Mitchell, who represented some 600 criminal defendants over a period of nine years:

It has been said that those who commit street crimes recognize the necessity of law, but do not incorporate the norms of the law into their own view of what is right. I disagree. Street criminals accept the norms of the law, or at least see those norms as giving validity to their own internal value structure. The norms they assimilate, however, are not the idealized norms

And rhetorically, it is relatively easy to see that it is not so. We need only ask what kind of role normative legal thought, or Dworkin, could play on *L.A. Law*. The point here is not the usual one of trying to assess whether Dworkin's vision of Law is right or not. Rather, the question is, what *role* can Dworkin *perform*—what role can normative legal thought credibly *perform* on *L.A. Law*? What is the performative significance of normative legal thought?<sup>171</sup>

It is not easy to see what role Dworkin could play. For one thing, it is extremely difficult to imagine a normative thinker like Dworkin on *L.A. Law*. To the extent that we understand Dworkin as the author of *Law's Empire* or *Taking Rights Seriously* (as opposed to Ronald Dworkin, the man), it is implausible that he should become a regular character on *L.A. Law*: there is no leading role on the show for a regular character whose primary (if not sole) mode of communicative interaction is "authentic" normative legal thought.

Perhaps, then, we should think along more modest lines. Perhaps we could introduce Ronald Dworkin in a flashback. Michael Kuzak, faced with a very difficult appeal on constitutional grounds, could remember his old professor from law school. At a critical point in the case preparation, Michael would remember his old professor's words and these would, of course, provide the crucial missing link to win the case. "Yes—I've got it," exclaims Michael Kuzak. The judge "constructs his overall theory of the present law so that it reflects, so far as possible, coherent principles of fairness, substantive justice, and procedural due process, and reflects these combined in the right relation."<sup>172</sup>

No. Dramatically, this does not work. It is not credible. Normative legal thought cannot contribute to the practice of law *in*

of a just legal system; rather, they are the norms that the legal system conveys to the poor and nonwhite who experience it daily. They are norms that when taken back to the streets readily fulfill the value system of the archetypal street criminal, the armed robber: (1) no one cares about you, and the only way to survive is to have money; (2) those who have power can do whatever they please, including treating another human being any way they like.

Mitchell, *supra* note 161, at 324-25 (footnotes omitted).

<sup>171</sup> American (legal) culture is experiencing a shift from meaning based on constative value to meaning organized in terms of performative value. As this transition accelerates and becomes widely recognized, we experience an erosion of meaning. See Schlag, *Normative and Nowhere to Go*, *supra* note 5, at 185-86.

<sup>172</sup> R. DWORKIN, *supra* note 35, at 405.



*this way.* Its prescriptions and its subtle intellectual moves are simply not important to the practice of law in this way.

Perhaps, then, Ronald Dworkin could be allowed to make a speech at some bar convention about the rule of law and law's empire? Now, this dramatic option does work; this is credible theater. It can be scripted. Ronald Dworkin could even play the part himself. But there is something disturbing about this. The only role we have found for Ronald Dworkin or normative legal thought on *L.A. Law's Empire* is the ritualistic ceremonial one of providing the lawyering profession with a pleasing and admirable self-image. In other words, the one role dramatically possible for the normative legal thought of the legal academy is that of self-image maintenance for legal academics and lawyers.<sup>173</sup> This, of course, raises a disquieting question about the social significance of normative legal thought, suggesting that its primary significance is the performative one of providing and disseminating an appealing rhetoric and self-image for the lawyering profession.

In part, these observations bring us back to the early days of the cls legitimation thesis, when legitimation was a description applied to legal thought, as distinguished from judge-made law. In the early days of cls, Duncan Kennedy suggested that various kinds of legal thought were a kind of legitimation of existing legal institutions and practices.<sup>174</sup> As applied to academic legal thought, there is not much doubt that this legitimation thesis was and is right: virtually regardless of what is going on in the courts or the legislatures, most

<sup>173</sup> This point is suggested in Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 667-68 (1981).

<sup>174</sup> In the early days, Kennedy's articulation of the apologetic or legitimating character of academic legal thought was targeted at legal thought—in fact, legal theory. See Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 387-89 (1981) [hereinafter Kennedy, *Cost-Benefit Analysis*]; Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 209-11 (1979).

Quite possibly as the result of the typical identification that academics make between their legal thought and the law put out by courts, the legitimation thesis somehow became a claim about the function or role of law/courts relative to the social order. But, of course, this slippage of the legitimation thesis from the academy to the courts, from theory to positive law, presented some serious conceptual problems (to say the least).

This unfortunate slippage was no doubt prompted by the unconscious self-identification of legal thinkers with courts and judges. By virtue of their continued identification with courts and judges, legal thinkers tend to assume that they, like judges, are doing "law." They think that when they use the same three letter word ("law"), it means the same thing in the academy as it does in the courts. This is wrong. It is a routine mistake.

legal thinkers spend their intellectual energies rationalizing (i.e., making rational, coherent, appealing, etc.) whatever it is the courts are doing. Very often this legitimation effort takes the form of criticizing certain opinions or tendencies—but it is always in the attempt, in the effort to redeem, to celebrate, to validate the vast bulk of positive law, the legal institutions, and the thinking and practices of the contemporary American legal community.

While there can be little doubt that normative legal thought is always launched in the enterprise of legitimation, its role may go well beyond apologetics to the actual creation, production, and maintenance of the discourse and rhetoric that enables bureaucratic institutions and practices to organize themselves.<sup>175</sup> The normative legal thought of the academy may thus serve to keep the techniques and strategies of bureaucratic harassment, needling, wheedling, aggression, etc. in working order. There is a great deal to be said for this view. For one thing it helps to explain how the Fiss-Dworkin visions are completely consistent with the Kafkaesque Dauer-Leff vision of bureaucratic lawyering: when lawyers harass, coerce, intimidate, etc. they do it with the nice words, the nice arguments, the nice jurisprudence crafted by normative legal thinkers.

In accordance with this last view, the primary role played by normative legal thought is to constitute students (and to a lesser extent, lawyers and judges) as polite, well-mannered vehicles for the polite transaction of bureaucratic business. *Law's Empire* spells out the proper etiquette for the actors on *L.A. Law's Empire*.<sup>176</sup> This is not as surprising as it might first seem: remember that *Law's Empire* begins with and draws its inspiration from a discussion of courtesy.<sup>177</sup> Courtesy, of course, is nothing if not the studied observance of the idealized self-image of an existing social regime.

<sup>175</sup> On legitimation and apologetics, see Kennedy, *Cost-Benefit Analysis*, *supra* note 174, at 444-45 (arguing that efficiency analysis is a kind of legitimation for the system of private law). For discussion of the less morally appealing roles of normative legal thought, see Delgado, *supra* note 124, at 947-55.

<sup>176</sup> This is a slightly more gracious and slightly different way of saying what Stanley Fish has already said of Dworkin's theory: it's a nice piece of rhetorical work. As jurisprudence goes, it is in the genre of cheerleading. See S. FISH, *supra* note 25, at 390-92; see also Smith, *Pursuit of Pragmatism*, 100 YALE L.J. 409, 444-47 (1990) (suggesting that legal pragmatism is a kind of preaching, a kind of jurisprudence-as-exhortation).

<sup>177</sup> See R. DWORKIN, *supra* note 35, at 46-70. If one's basic motif for law is "courtesy," it's a pretty good (though not a sure) bet that the analysis is not going to take a searching self-critical turn.

So it is certainly plausible to think that normative legal thought's crucial role goes beyond apologetics to the maintenance and refurbishing of the rhetoric deployed on *L.A. Law's Empire*. But such a conclusion is hardly inexorable. After all, there is something quite unorthodox in trying to put Dworkin or any other normative legal thinker on the set of *L.A. Law*—they clearly do not belong there. And if I persist in trying to put them on the stage of *L.A. Law*, they will try vigorously to get off. This is quite predictable; we can expect normative legal thinkers to try to marginalize and deny *L.A. Law's Empire*.

From the perspective of normative legal thinkers, *L.A. Law's Empire* is tosh; it is a fallen and degraded world not worth thinking about or even recognizing.<sup>178</sup> If the world of law practice has become *L.A. Law's Empire*, then so much the worse for law practice—or so normative legal thinkers might argue. But this dismissive posture is not really available to them. Normative legal thought, after all, does not present itself as a mere intellectual exercise bereft of social or political ambitions. On the contrary, normative legal thought wears its worldly ambitions on its literary sleeves, as the names of its major productions—*Law's Empire* and *The Rule of Law*—indicate.

Owen Fiss reminds us eloquently of these worldly ambitions:

The judge might be seen as forever straddling two worlds, the world of the ideal and the world of the practical, the world of the public value and the world of subjective preference, the world of the Constitution and the world of politics. He derives his legitimacy from only one, but necessarily finds himself in the other. He among all the agencies of government is in the best position to discover the true meaning of our constitutional values, but, at the same time, he is deeply constrained, indeed sometimes even compromised, by his desire—his wholly admirable desire—to give that meaning a reality.<sup>179</sup>

Owen Fiss is entirely right: normative legal thought demands and desires not merely to be performed, but to be enacted in some realm beyond itself—to be realized in the social realm. This sociality of law is true even of the most austere, ascetic formalist approaches

<sup>178</sup> "Tosh" is one of Lon Fuller's expressions. It is meant to signify (and dismiss) the trivial, inessential packaging surrounding law's essence. See Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 360 (1979).

<sup>179</sup> Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 58 (1979).

that claim that law has an immanent moral rationality.<sup>180</sup> Even for such self-announced formalist accounts, there is a demand that law be not simply thought, but enacted, realized.

To recognize the significance of these worldly ambitions is to recognize that normative legal thought cannot be indifferent to *L.A. Law's Empire*. On the contrary, normative legal thought's ambitions are precisely to rule over the domain currently occupied by *L.A. Law*, to submit the conduct of the various legal actors to some normatively appealing overarching rational pattern. Normative legal thought cannot so quickly dismiss *L.A. Law's Empire*—for that empire is the realm where law is enacted. *L.A. Law's Empire* may be a degraded, fallen world, but it is most assuredly not tosh.

There is another reason why normative legal thought cannot simply dismiss or deny *L.A. Law's Empire*: it is in some senses a more resonant and richer source of intellectual inquiry about law than many of the genteel productions of normative legal thought. Obviously, there are things that *L.A. Law* gets wrong;<sup>181</sup> it is, after all, prime time TV. But despite its romanticization of law practice,<sup>182</sup> the program, in comparison with normative legal thought, is much more consonant with what we are told by psychology,

<sup>180</sup> See Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 982, 1012-13 (1988); *id.* at 1003 (“[T]he forms of justice cannot be understood detached from the particularity of the external interactions that they govern and from the specific regimes of positive law that actualize them.”).

<sup>181</sup> Several are noted in the following passage:

Convene a gaggle of lawyers and you will hear several varieties (and different intensities) of criticism of *L.A. Law*. The criticisms tend to focus on three aspects of the show: it makes lawyers' cases seem a good deal more significant than they are; it does not accurately recognize or describe the ethical issues lawyers face; it makes the work tasks of lawyers seem a great deal more exciting than they are.

Gillers, *supra* note 153, at 1607.

What strikes me, however, is that the very same three criticisms apply obviously—and perhaps even more readily—to much of the normative legal thought that issues from the legal academy.

<sup>182</sup> The romanticization of law practice on *L.A. Law* is sometimes very much like the romanticization of law practice in law school.

First, the action on *L.A. Law* is characterized by an over-abundance of “sexy” (soon-to-be-appellate) cases with odd or compelling facts, much like the casebooks and the classroom.

Second, if there is an over-abundance of moralization of law in the law school, *L.A. Law* suffers from the same defect. Every third Thursday is a replay of the Lon Fuller/H.L.A. Hart dispute. See *supra* note 37.

Third, like law school, *L.A. Law* tends to replay as live drama the jurisprudential disputes of ages and questions, frameworks and scenes, that have long since lost their intellectual vitality.

sociology, rhetoric, or even personal experience about the actual practice of law itself. In fact, one would have a very difficult time finding intellectually respectable sources of authority to credit the sort of psychology, sociology, and rhetoric that is (and must be) implicitly or explicitly assumed into methodological—and often—ontological existence by normative legal thought.<sup>183</sup>

Indeed, where is the intellectually respectable documentation to validate the main social and psychological categories of normative legal thought? Where is the psychological or sociological documentation to authorize normative legal thought's routine invocations of:

- the integrity of the sovereign individualist self?
- the phenomena of choice, consent, free will?
- the concept of unitary intent?
- the notion of individual agency?
- and so on?

There isn't much. By and large, normative legal thought has assumed its own psychology, sociology, rhetoric. The sociology, psychology, and rhetoric assumed into existence by normative legal thought is largely the unconscious concretization of its own *posited* aesthetic of social life—an aesthetic inherited from worlds now long since gone. There is little to support the social aesthetic of normative legal thought other than fiat and the power of academic inertia. Unfortunately for normative legal thought, its *posited* understandings of the psychological, the social, and the rhetorical are now stunningly anachronistic and strikingly discordant with much of what leading work in the humanities and social sciences have to tell us about human beings and what they do.<sup>184</sup>

To the extent, then, that normative legal thought remains concerned about the adequacy of its representations of the social sphere, it cannot afford to dismiss *L.A. Law's Empire*. To the extent that normative legal thought is or wants to consider itself an "authentic" enterprise, it must recognize the advanced bureaucratization of the practice of law, and strive to understand how its own

<sup>183</sup> Some normative thinkers attempt to escape this problem by specifying that they are operating within the normative realm—hence, adopting normative conceptions of the person distinct "from an account of human nature given by natural science or social theory." Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. PUB. AFF. 223, 232 n.15 (1985).

<sup>184</sup> The point is made globally by Alasdair MacIntyre, who demonstrates how the history of moral philosophy has evolved along tracks that have little relation to the aesthetics of our own social and psychological practices. See A. MACINTYRE, *AFTER VIRTUE* (1984).

psychological, sociological, and rhetorical maps are so discordant with those on *L.A. Law's Empire*.

#### IV. WHY HERCULES CAN'T DO *L.A. LAW'S EMPIRE*

Even if the dramatic requirements of *L.A. Law* do not leave much in the way of roles for a Dworkin, normative legal thinkers continue to strive to communicate to the actors on *L.A. Law's Empire*. Normative legal thinkers write articles, they write books, they seek to "intervene." And indeed, given their worldly ambitions, the normative legal thinkers must strive to intervene. For them, *L.A. Law* is a moral outrage—a fallen world, a bureaucratic shadow image of "real" law.

But how do normative legal thinkers intervene in and communicate to the world of *L.A. Law*?<sup>185</sup> Well, they say some very normative things. They appeal to conscience, to doing the right thing, to justification, to intellectual consistency, to normative coherence. In one sense this is utterly unremarkable and routine. Yet against the

<sup>185</sup> How does normative legal thought imagine that it effectuates its recommendations and prescriptions? Its options are actually quite limited. The following list describes in increasing order of sophistication the ways in which normative legal thought might without self-contradiction imagine that it produces its implications or effects:

1. Normative legal thought persuades judges to adopt the outcomes, principles, or values prescribed in the scholarship.
2. Normative legal thought provides rhetorical or stylistic comfort for judges who are already persuaded of the wisdom of the normative position, but need something to cite as authority.
3. Because normative legal thought provides better, more compelling, more encompassing versions of the legal analyses that judges have already developed, normative legal thought succeeds in extending the half-lives of judicial opinions and makes these opinions much more influential than they would otherwise be.
4. Normative legal thought influences courts by virtue of its political power.
5. Normative legal thought is influential, but only with very intellectual judges. Intellectual judges are a minority, but they are extremely influential among their peers.
6. Normative legal thought does not so much influence judges as it influences the moral-political belief systems of the community of 6,000 or so legal academics. The moral-political beliefs of this group of people is very important because they are teachers and their beliefs are transmitted to their students who in turn act on these beliefs once the students become lawyers.

These hypotheses share the presumption that normative legal thought is an authentic originary form of thought somehow distinct from the domains of power, psychology, and rhetoric. They share the presumption that the self-representation of normative legal thought is identical with normative legal thought itself. Ironically, this very (rationalist) way of thinking about normative legal thought is, as I will demonstrate later, itself a product of normative legal thought.

backdrop of *L.A. Law*, these sorts of interventions seem naïve, unworldly, and inappropriate. To try to engage in authentic normative legal thought on *L.A. Law* is to recognize just how out of place it is. The dramatic relations of *L.A. Law* are substantially more complex and richer than the stylized formalizations reproduced by even sophisticated normative legal thinkers. What we get by trying to put Dworkin or any other normative legal thinker on *L.A. Law* is a graphic depiction of the fragility of the assumptions that underlie normative legal thought.

But now we must ask: what is it about normative legal thought that makes it stand out as so obviously inappropriate for *L.A. Law*? The inadequacy of normative legal thought on *L.A. Law* stems from its routine and largely unconscious dependence on rhetorical assumptions that simply do not hold on *L.A. Law*. First, normative legal thought assumes that its addressees are actually or potentially normatively competent. Second, it assumes that its own categories and grammar resonate deeply and authentically within the culture in such a way that normative legal thought can be effective in transforming and regulating the culture. These assumptions greatly simplify normative legal thought's academic mission. In making these assumptions, it has assumed into methodological and ontological existence a world mapped in its own image, a world charted in its own categories.

Most of this kind of thought is addressed (at least nominally) to judges, either directly or via the selective mediation of lawyers or clerks.<sup>186</sup> While it is commonly assumed that legal thinkers "speak to judges and other formulators of law, helping them to understand and perform their job,"<sup>187</sup> this seems to be a case of wishful thinking. Perhaps at one time legal thinkers did speak to judges and did routinely help convey some useful prescriptions or helpful recommendations.<sup>188</sup> But it is difficult to believe that this

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<sup>186</sup> See Barnhizer, *supra* note 107, at 251-52 (emphasizing the symbiotic relation of legal scholars and the judiciary).

<sup>187</sup> McDowell, *The Audiences for Legal Scholarship*, 40 J. LEGAL EDUC. 261, 273 (1990).

<sup>188</sup> Certainly judges might have led them to believe so. This is what Learned Hand said in 1925:

"[Law teachers] . . . will be recognized in another generation, anyway, as the only body which can be relied upon to state a doctrine, with a complete knowledge of its origin, its authority, and its meaning. We [the judges] shall in very shame, if we have sense enough, acknowledge that pre-eminence which your position and your opportunities secure."

is generally (or even often) the case now. Judges simply do not have the time, the inclination, or the patience to read this stuff.<sup>189</sup> Besides, normative legal thought tends to be just about as boring,<sup>190</sup> lifeless, and unedifying as the judicial opinions it reflects and refracts.<sup>191</sup> Not surprisingly, the vast majority of the prescriptions, recommendations, and solutions produced by this thought will never reach a judge, or any other legal actor.

Some of these prescriptions, however, may, and in fact often will, find their way into the classroom. They may even seem appealing or persuasive to the students.<sup>192</sup> But even then, it is

Maggs, *Concerning the Extent to Which the Law Review Contributes to the Development of the Law*, 3 S. CAL. L. REV. 181, 187-88 (1930) (quoting HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 47 (1925)).

And certainly legal academics back then may themselves have engaged in some wishful thinking. Consider this wonderful attempt to buttress the importance of the academic role:

The ideas and citations in judicial opinions, it seems certain, are frequently drawn from law reviews, either by the judge directly or through briefs of counsel, although no reference to law reviews appears in the opinion.

A change is in progress, however. Law-review matter is, to a slight but increasing extent, being viewed by judges as "authoritative."

*Id.* at 187.

<sup>189</sup> What chance is there that judges are listening? Indeed, there is very little evidence to support the view that judges do in fact read or follow normative legal scholarship. Citation of scholarly articles in judicial opinions is probably the strongest piece of evidence that judges are reading them. But to conclude from the fact of such citations that judges are indeed persuaded by normative thought requires some significant leaps of faith. For one thing, it assumes that the understanding by judges of the articles they cite has some strong correspondence to the understanding of the authors who actually write the articles. This correspondence is hardly self-evident; creative use of citations by judges is a frequent phenomenon. What's more, many non-creative citations of academic work are to marginal or obvious points that the academic author often considers peripheral to her enterprise. But even if these problems did not exist, it is still not clear that judges cite normative legal scholarship because they are persuaded.

It is at least equally plausible that the judges (or clerks) deploy citations to legal scholarship in their opinions as a matter of style—in an effort to bolster already preformed opinions. Indeed, in informal conversations with judges at both the federal and state level, judges have told me that this is often the case. If this is descriptive of the judicial practice of citing scholarly works, then normative legal scholarship might have some marginal effectiveness. Thus, it might be the case that the existence of scholarly authority for a given normative position provides the intellectual comfort necessary for a court to adopt a given position or for a judge to write a dissent. See *also supra* note 185.

<sup>190</sup> See Schlag, *Normative and Nowhere to Go*, *supra* note 5, at 177.

<sup>191</sup> On the boring, deadening quality of recent Supreme Court constitutional opinions, see Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 177-82 (1985).

On the boring, deadening quality of contemporary legal thought, see White, *Intellectual Integration*, 82 NW. U.L. REV. 1, 5-6 (1987).

<sup>192</sup> While I think that most students and law teachers would readily agree that the



exceedingly unlikely that they will survive the institutional frameworks within which the students become employed. To the extent that these normative arguments do survive, it will be precisely when they are least necessary, that is, when they already fit the preformed agenda of interests and world views of the client, the court, or the legislature. Normative legal thought (even if it seems to be all the rage among left-liberals) is thus an extremely conservative enterprise—conservative in the sense that it tends to reproduce whatever regime is already in place.<sup>193</sup>

And indeed, because normative legal thought is so miscast for this scene, it would be surprising if normative legal thought did have much success pressing its recommendations and prescriptions on *L.A. Law's Empire*. Normative legal thought presupposes that its

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normative thought of legal academics does have effects on the normative orientation of students as well as other legal academics, this is not to claim that it has any effect on the normative character of their behavior. For instance, it is certainly conceivable that a thoroughgoing reading of Rawls could persuade some student or academic to drop her previous attachment to Nozick, and to embrace the difference principle. One result might be for the student or academic to then say, and perhaps even with great conviction, that she has become a Rawlsian. But apart from this new representation about her political beliefs, it is hardly self-evident that the behavior of the student or the academic will be affected in any other significant way. After all, the possibility of implementing the difference principle in legal practice, either explicitly or implicitly, is extremely remote.

And this is my point exactly: most normative legal thought (and the vast majority of academic moral philosophy) is quite simply irrelevant to the kinds of concrete political and social choices confronting the academic, the law student, or the lawyer or the judge or the citizen. In our society, no one is authorized to operationalize the vast majority of what normative legal thought considers to be important. The issues are neither before the courts nor the legislatures, and they only barely feature in our electoral campaigns and social life. Of course, the possibility that students and academics will become normatively sensitized as a result of exposure to this literature cannot be discounted, but the connection to any actual choice the student or the academic might make remains exceedingly remote.

<sup>193</sup> Even when it is left-liberal, normative legal thought has a conservative effect. Normative legal thought recommends and proposes, and then attempts to make these recommendations and proposals seem appealing by taking the reader's presumed belief structures and showing how they logically entail the "left-liberal" solution or proposal. The left-liberal solutions or proposals typically drop off into the abyss because there is no social structure (i.e., no jobs) within the legal profession to put them into effect. And while the left-liberal recommendations drop off into the abyss, what remains is the performative reinforcement and re-enactment of the reader's same old belief structures. Left-liberal normative legal thought is Sisyphian in character.

These arguments are taken from or inspired by Duncan Kennedy's perceptive and insightful description of the politics of law school pedagogy and curriculum. See Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1, 9-12 (1983).

relation to its addressees is already regulated by shared commitments to values (like truth, good, right, neutrality, etc.) and rational discourse criteria (coherence, consistency, authenticity, etc.). Accordingly, normative legal thought yields arguments that depend upon the presence of shared values and criteria of discourse of the speaker and listener. But now, if the aim is to regulate the actions and the actors on *L.A. Law's Empire*, these presuppositions are inappropriate in at least two major ways.

First, the values and discursive criteria presupposed by normative legal thought are not shared at a sufficiently concrete level to enable conclusions to follow in a relatively unproblematic manner. Rather, the values and concerns are far too abstract to enable an unproblematic resolution of serious disputes among the contestants. This point carries particular force when the community becomes thin and fragmented, as it is now. In those circumstances, normative legal thought will itself be incapable of recognizing, let alone reconciling, the concrete psychological, social, and rhetorical motivating forces that lead actors to disagree.<sup>194</sup> On the contrary, normative legal thought becomes increasingly epiphenomenal: the serious argumentative work is done at a preliminary stage, in the differing aesthetic accounts of social events and social action offered by the contesting parties.

There is a second way in which the presuppositions of normative legal thought are inappropriate for *L.A. Law's Empire*. Normative legal thought routinely represents the scene in which it is operating in its own image, as if its values and its discursive criteria already occupied a distinct and regulative role. Hence, normative legal thought represents the forces and relations identified by terms like rhetoric, psychology, and sociology as domains somehow distinct from and subordinate to the normative vocabulary and grammar. For normative legal thought, the identity of the normative is always known and already stabilized: a normative position is either contaminated by power or it is not; it is either genuine or it is not. In this either/or way, normative legal thought not only represents

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<sup>194</sup> See Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963 (1991). To the extent that it does recognize its own crisis ridden state, normative legal thought will reflexively seek to de-formalize, and to embrace otherness (hence, the current appeal of pragmatism, contextualism, and postmodern pluralism). But to the extent that normative legal thought fails to consider its own situation, its own project, it will remain oblivious to the character of its problems. If this remains true, de-formalization will likely result in the production of increasingly contestable, inconclusive, and ineffectual normative propositional content.

itself as distinct and separable from the contaminations of power and deceit, but as regulative of discourse and action.

What makes *L.A. Law's Empire* more interesting than the routine productions of normative legal thought is that on *L.A. Law's Empire*, normative argument is not assured of such a pre-scripted, regulative, leading role. On the contrary, on *L.A. Law's Empire*, the very identity of the normative is in question. On *L.A. Law's Empire*, there is no implicit assumption that the legal discourse provides access to a normativity insulated from power, deceit, or rhetoric. On *L.A. Law's Empire*, normative statements are just as likely to be received by the actors as rational persuasion as they are likely to be experienced as power moves.<sup>195</sup> The most troubling prospect for normative legal thought then, is that its principal contribution to the world of *L.A. Law's Empire* might be to furnish an increasingly elegant, polite, and appealing rhetoric—a rhetoric that is itself already the production of unexamined exercises of power.

The divergence between normative legal thought's ambitions and the possibility of their realization is all the more apparent when one takes note that normative legal thought is at once extremely ambitious and yet seriously out of touch with the world it seeks to rule and govern.

Normative legal thought often understands itself to be playing for very large stakes. *Law's Empire*, the leading popular work in jurisprudence, modestly confines itself to the study of "formal argument from the judge's viewpoint," yet nonetheless manages to bill itself as "Law's Empire" and to exalt the reader to become a legal "Hercules." This is not the jurisprudence of modesty.

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<sup>195</sup> When Michael Kuzak is telling the D.A. his provable facts about Stuart's drinking and arrest, just what is the status of those statements? Is Michael saying: "You ought not go ahead with this case because, given these facts, the likelihood is my client is not guilty and therefore should not be convicted." Or is Michael instead saying: "Look, if you go ahead with your case, you are going to have to get around some fairly difficult obstacles that I have already put in your way—so you are going to be spending a lot of time trying to achieve something you probably won't get anyway." Now, Michael could be understood to be making either or even both of these statements at once. And without more information—information that is not forthcoming—there is simply no way to tell. What's more, there is no necessary or usual relation or correspondence between the two kinds of statements. To put it in the Austinian terminology, there is no necessary correspondence we can establish in the abstract between the felicity of the performative significance of the statement and the truth of its constative significance. See J. AUSTIN, HOW TO DO THINGS WITH WORDS 1-11 (1975).

Such intellectual confidence might be justifiable if normative legal thought had a firm understanding of the social situation, or if there were some reason to think that the discourse of normative legal thought had tapped into the cultural sources that would allow us "to lay principle over practice to show the best route to a better future, keeping the right faith with the past."<sup>196</sup> But the gestures of normative legal thought do not map very well onto the scene of social and legal action.<sup>197</sup> The aesthetics of normative thought effect a rationalist simplification, stabilization, and subordination of the political, the social, the psychological, and the rhetorical. In normative legal thought, they have always already been subordinated to an overarching normative rationality that is already in command. On *L.A. Law*, as in law practice, by contrast, the political, the social, the psychological, the rhetorical, and the rational are all differentially related in complex ways.

Indeed, the various domains are difficult to distinguish from each other and their relations are far from being stabilized in some pre-existing hierarchy. On *L.A. Law*, as in law practice, it is often a real—that is to say, a dramatic—question whether acts of conscience are acts of morality or acts of rationalization, whether acts of persuasion are acts of rationality or acts of power, and whether the relations among the various actors are overdetermined, undetermined, or determined at all.<sup>198</sup> By contrast to *L.A. Law*, normative legal thought seems thin and two dimensional—like a text.<sup>199</sup>

<sup>196</sup> R. DWORKIN, *supra* note 35, at 413.

<sup>197</sup> One striking example of this systemic discordance is the recent advocacy of Civic Republicanism—a position that repeatedly bumps against the fact that there are no institutional mechanisms that could implement or otherwise host such a dialogic renaissance. For various formulations of this point, see Epstein, *Modern Republicanism—Or the Flight From Substance*, 97 YALE L.J. 1633, 1637-38, 1640-41 (1988) (asserting the primacy of the pluralist view of political markets as self-interested rent-seeking); Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1708 (1988) (noting the tension between the Republican ambition to design political institutions that promote discussion within the citizenry and the imperative of shielding political actors from private interest).

<sup>198</sup> I am not claiming that *L.A. Law*—or law, for that matter—can only be represented adequately as an undifferentiated mass of rationality-power-rhetoric (although as methodological starting points go, this would certainly be an improvement over the starting points of normative legal thought). Rather, I am suggesting that the differentiation is not single, but plural. In law practice, there are various co-existing differentially differentiated relations among power, rhetoric, rationality, etc.

<sup>199</sup> There is an author-centered character to normative legal thought that is well captured in one of Goffman's comparisons of theater to the novel:

Onstage one character's interpretive response to another character's deeds, that is, one character's reading of another character, is presented to the

In one sense, then, the flatness of normative legal thought proves to be a peculiar advantage—one that enables normative legal thought to operate in a world it systematically represents as “first best.”<sup>200</sup> Normative legal thought routinely assumes that it is operating in an epistemic regime in which the thinker already possesses a series of reasoning moves that are themselves secure, self-identical, and stable. It assumes a world of reasoning in which the medium and channels of communication are already established between author and reader, academic and judge;<sup>201</sup> in which the matrices carved by language and reasoning are already adequate to say anything worth being said. In this world, the autonomous self of author and reader is in control of its own thinking processes; it already stands whole, outside the duplicities of ideological and institutional distortion.

Now, as you might guess, to assume such a world of already secure, linear, non-paradoxical, and fully compliant communicative links simplifies the intellectual situation tremendously. The intelligibility and coherence of all the reasoning moves have been secured a priori; questions and inquiries can stand still; the impact, scope, and consequences of reasoning moves are already predictable. In such a world, the only significant intellectual task is to police the formal relations between the premises and the conclusions and to ensure that they are correctly observed.<sup>202</sup>

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audience and taken by them to be no less partial and fallible than a real individual's reading of another's conduct in ordinary offstage interaction would be. But authors of novels and short stories assume and are granted definitiveness; what they say about the meaning of a protagonist's action is accepted as fully adequate and true.

E. GOFFMAN, *supra* note 9, at 152.

<sup>200</sup> I am using “first best” here in opposition to the economic concept of “second best.” See generally Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1957).

<sup>201</sup> This belief is already anticipated and produced by the metaphoric expressions we use to describe linguistics acts—our language already leads us to describe linguistic acts as occurring within weightless, shapeless, unobstructed lines or “conduits” of communication. See Reddy, *The Conduit Metaphor—A Case of Frame Conflict in Our Language about Language*, in METAPHOR AND THOUGHT 284, 286-92 (A. Ortony ed. 1979). As Reddy shows, we are often trying to get our thoughts across better and so we try to pack our thoughts in as few words as possible, though sometimes, our sentences are filled with too many thoughts and thus the reader has problems extracting the meaning. See *id.* at 310.

<sup>202</sup> For an account of some of the techniques of this intellectual police work, see *infra* text accompanying notes 295-319.

This sort of thought-police work is extremely easy: The set of formalized symbols (legal categories) already bear a certain set of formalized relations to each other (consistency, coherence, and so on); they have already been codified. The basic legal object-forms (legal categories) have already been largely sedimented. The transformational grammar is fairly easy to learn. Duplicity, paradox, ideology, and instability have already been ruled out from the start as serious forces constituting or disabling the thought of the author and the reader. The thought and the thinker are already whole, competent, and unquestionably in charge of the production of the normative legal text.<sup>203</sup> What is more, the normative grammar assures that nothing can really disrupt this formal rhetorical economy.<sup>204</sup>

But while, in this sense, normative legal thought is extremely easy, in another, related sense, normative legal thought is very difficult. Its terminus is so demanding: normative legal thought must end on a concluding note that is non-paradoxical, non-contradictory, positive, and presumably capable of adoption on *L.A. Law's Empire*. The conclusion is normative legal thought's moment of high anxiety: that is where the normative text hopes to forge a connection to social action. Consider, for instance, Robin West's recent normative recommendation that "[p]rogressive constitutionalists, as well as progressive legislators . . . try to create a viable progressive interpretation of the Constitution, congressionally and popularly supported, with the explicit aim of creating a modern

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<sup>203</sup> True, the law may have to reckon with relativity, see Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 270-72 (1950), or even Heisenberg's uncertainty principle, see Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 17-20 (1989). But normative legal thought apparently authorizes the legal thinker to think and write about both relativity and the Heisenberg uncertainty principle from the confident, secure framework of Euclidean geometry, within which the grounds of thought do not shift. The thinker remains in charge.

Indeed, Tribe's and Cohen's presentations of modernist physics are offered within the very traditional and Euclidean framework, form, and practice of legal academic thought. See Cohen, *supra*, at 251-52, 272; Tribe, *supra*, at 5-23. I have previously tried to trace the ways in which traditional legal thought, taken quite seriously, defeats the assumptions it routinely makes about its own status and character. See Schlag, *supra* note 7, at 958-61.

<sup>204</sup> Richard Epstein, for instance, asserts that "[i]t takes a theory to beat a theory," Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435, 1435 (1983); see also Fischl, *supra* note 123, at 512 (citing Epstein with the comment that "often a theory's own adherents can do the job faster").

'constitutional moment.'<sup>205</sup> This call for a constitutional moment, for the relocation of constitutional practice from the courts to the legislature, for "a Constitution that is at once more progressive, more political, more challenging, more just, and more aspirational than we have yet imagined,"<sup>206</sup> is deeply moving. And yet, it moves nothing. Missing from West's recommendations is what is typically missing from normative legal thought: any sense of how the prescription (we should all try for a constitutional moment) might realize itself in the social sphere. The connection between works of normative legal thought and the social situation is often not a connection at all, but a rupture masquerading as connection. Very often, the graft does not take—we are left with an aporia—and the normative recommendations, left unconnected to any social reality, simply drop off into the abyss.

As in virtually all the work of normative legal thought, the social, rhetorical, institutional, or professional mechanisms of realization are assumed to be present, functioning, and responsive to the ideational recommendations of normative prescription. It is as if the machinery of the social and political world were already constructed with a series of workers waiting at the levers for instruction from normative legal thinkers.

Now it is precisely this sort of widespread, sedimented understanding of the situation that enables normative legal thought to believe that its issuance of prescriptions constitutes "serious" intellectual or political work. Yet to proceed with such first-best world assumptions about the situation, character, and role of legal thought and thinkers is to begin thinking *after* the crucial issues have already been begged off. The problem here is not that the structure of normative legal thought is an abstraction of the social or legal field. Rather, the problem is that it is the wrong sort of abstraction, one that, by way of selective essentialization, has succeeded in leaving behind most of the difficult and interesting problems.<sup>207</sup>

In this sense, even though normative legal thought makes life very easy for itself within its own simplified homeostatic matrices, it makes life very difficult for itself when the problem is how to

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<sup>205</sup> West, *supra* note 41, at 721.

<sup>206</sup> *Id.* at 720.

<sup>207</sup> Hence, the response that any form of thought must, even to get started, effect an abstraction of its object-field is inapposite here. See *infra* notes 290-94 and accompanying text.

translate normative prescriptions into the order of things. There is a ratio operating here.<sup>208</sup> The more the matrices of normative legal thought are stabilized, simplified and reductively organized, the easier life will be within the normative system and the harder it will be to translate normative productions into the order of things. Formalism, including normative formalism, has advantages, but these advantages ultimately have to be paid for: the cleaner, the more austere your normative conceptual universe, the less chance you can achieve anything meaningful with it on *L.A. Law's Empire*. Applying this ratio to normative legal thought, we see that its prototypical matrices are so stylized and so insulated from any "outside"<sup>209</sup> that its prospects for the realization of any normative prescription is questionable except perhaps when the prescription is so modest in its utopian leanings and hopes for change that it is already virtually an abstracted reflection of extant positive law.

If normative legal thought fails to understand its own rhetorical construction as a kind of formalism, it also fails to understand the character of *L.A. Law's Empire*. Indeed, the scene on which normative legal thought hopes to play is increasingly defined by an aesthetics of bureaucracy incommensurable with the aesthetic of an "authentic" normative discourse. Consider, for instance, the primary categories around which the grammar of normative legal thought currently organizes itself:

- self-determination/self-governance/self-realization
- free will/choice/consent/intent
- culpability/guilt/blame
- liberty/freedom
- autonomy/dignity/respect/personhood
- opportunity/privilege
- rights/entitlements
- duty/responsibility/obligation
- community
- necessity/coercion/duress
- private
- public

Compare these prototypical terms, which assume rational and normatively competent agents, with the scene of law—the law firm,

<sup>208</sup> For discussion of ratios in this aesthetic, social sense, see K. BURKE, *supra* note 9, at 3-9, 15-20.

<sup>209</sup> See text accompanying notes 276-322 (showing how legal thought deploys the inside/outside distinction to stabilize itself and insulate itself from challenges).



the courtroom, the jail, the social realm—a world increasingly defined by bureaucratic practices such as:

- formalized rule regimes
- routinized procedures
- rationalized production/technical mastery
- conceptual and organizational hierarchy
- instrumental forms of consciousness/operationalized value systems
- dependency on expertise
- high specialization of functions
- jurisdictional compartmentalization
- fragmentation and sectorization of knowledges
- strategic uses of linguistic, cultural resources

The incommensurability of normative discourse with bureaucratic practice suggests that opportunities for the exercise of any “authentic,” normatively competent behavior are extremely restricted within bureaucratic forms of life. For one thing, the organizational structure of bureaucracy—its zero-sum quality, its diffusion of causal lines of responsibility, its incentive/disincentive structures, and its routinization of rationalization (*raison de bureaucracy*)—are often structured in a way to preclude and obstruct normatively competent behavior. For another thing, the incommensurability makes it unclear how one would recognize or name “authentic” normative bureaucratic behavior in the first place.

Once we notice our bureaucratic circumstances, the character, identity, and possibility of the ethical becomes highly problematic. As a simple example, consider whether traditional moral virtues like honesty, sincerity, loyalty, honor of craft, etc., are “authentically” applicable or even intelligible in the context of bureaucratic institutions. To facilitate matters, consider the two lists of bureaucratic responses below and ask yourself two questions.<sup>210</sup> First, which list most plausibly conforms to traditional moral virtues? Second, when you have personally experienced these responses, which set seemed closest to doing the right thing?<sup>211</sup>

<sup>210</sup> These questions are not rigged to provide an answer. They are rigged to produce an ethical disturbance.

<sup>211</sup> And, if you want, here’s a third question: to what extent do your answers to the first two questions correlate with whether you have pictured yourself as giving or receiving these responses? This list was created with my friend and colleague David Eason and used in our seminar on Power, Ethics, and Professionalism.

*Bureaucratic Morality I:*

It's not my job.  
 Some other department.  
 I don't make the rules, I just follow them.  
 I'm sorry, this is not the proper form.  
 I wish I could, but I simply can't . . .  
     do that.  
     answer that question.  
 Come back tomorrow.  
 Oh, I would never have said that.  
 I'm sorry, your file is not in here.

*Bureaucratic Morality II:*

I really shouldn't be telling you this, but if . . .  
 No one will check on this.  
 You can't do it that way, but if you call it this instead . . .  
 Technically, it doesn't comply but . . .  
 Well, it's really supposed to be done that way, but what really  
     matters is . . .  
 I'm sorry your file is not in here . . .

My point is that absent further specification of the context (and often even with it), it is difficult to determine which set of responses more nearly corresponds with the traditional virtues.

The sort of uneasiness prompted by the presentation of these responses is a reflection, an instantiation of the inadequacy and incommensurability of our normative grammars and categories with the configurations of our present bureaucratic practices and institutions.<sup>212</sup> And while these normative grammars and categories continue to occupy our attention, the most thoughtful and sophisticated attempts to reconstruct the ethical in light of our modern or postmodern condition have the performative effect of revealing just how narrow and insecure the jurisdiction of the ethical has become.<sup>213</sup> This is why, in sophisticated accounts, the

<sup>212</sup> See generally A. MACINTYRE, *supra* note 184.

<sup>213</sup> Consider Michelman's discussion of what is required if we are to regard as possible "the historic American idea of constitutionalism":

Given plurality, a political process can validate a societal norm as self-given law only if . . . there exists a set of prescriptive social and procedural conditions such that one's undergoing, under those conditions, such a dialogic modulation of one's understandings is not considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom . . . . [This stipulation] contemplates, then, a self whose identity and freedom consist, in part, in its capacity for reflexively critical reconsideration of the ends and commitments that it already has and that make it

ethical voice often reduces to very fragile and highly abstract, almost mystical pleas to heed, as Drucilla Cornell puts it, "the call to witness to the Other,"<sup>214</sup> or the commitment "to the not yet of what has never been present, cannot be fully re-called, and therefore cannot be adequately projected."<sup>215</sup> The very fragility, abstraction, and mysticism of our most thoughtful and sophisticated ethical thought is testimony to the retreat of the ethical from our world.

If one recognizes the advent of bureaucracy and takes it seriously—admittedly a difficult task—we are returned to the question of just who or what normative legal thought thinks it is addressing? What messages are being received and what roles do the normative messages serve? What sustains normative legal thought? How does it manage to seem so plausible and meaningful to so many legal thinkers? If the effects of normative legal thought are not what it imagines them to be, what are they?

Strangely, these seemingly different questions all beget the same answers—answers that entail re-orienting our attention. Normative legal thought's hegemony has directed us for long to try to control,

who it is. Such a self necessarily obtains its self-critical resources from, and tests its current understandings against, understandings from beyond its own pre-critical life and experience, which is to say communicatively, by reaching for the perspectives of other and different persons.

Michelman, *supra* note 42, at 1526-28 (footnotes omitted). I do not think that these conditions hold even among those individuals who have had the most privileged access to the cultural and intellectual resources to construct the kind of self described by Michelman. (Just consider the character of faculty meetings.)

Michelman's conditions are exceedingly exigent, especially when counterposed with our unredeemed social situation. From our social situation, meeting Michelman's conditions seems hopeless, which is why I think that his account performatively confirms the very troubled character of the ethical in our time.

<sup>214</sup> Cornell, *supra* note 80, at 1689.

<sup>215</sup> *Id.* Drucilla Cornell represents the ethical with great passion and energy—yet her work also evidences a deep recognition of the awesome force that the stabilization of linguistic and cultural embeddedness, performativity, and representation create to confine and deny the ethical.

Hence, the ethical dream that she represents is always and already an extremely abstract, barely articulable, and always deferred hope against hope that the ethical may find expression and realization somewhere. When Cornell exemplifies her projection of a redeemed world, she writes, "The most obvious example of a 'redemptive legal movement' is the struggle to overthrow and outlaw apartheid in South Africa." *Id.* at 1713. But is this the most obvious or is it virtually the only kind of example? It is a stark testimony to the anachronistic character of the current conception of the ethical that it is most at home dealing with issues like apartheid, where the ethical thing to do is quite evident. But on questions like how should you and I live in our bureaucratic settings, ethics has little to say.

reform, and improve the legal order through normative good works that we have come to believe that the lines of force run predominantly one way (that way).<sup>216</sup> But normative legal thought, despite its ambitions and self-representations, is not an origin. It can acquire object-forms, but it is also in the nature of a process, a rhetoric, a social enterprise that enjoys a certain hegemony in the legal academy. What I want to show in the next section is that rather than thinking of normative legal thought as providing a basis for critique, reform or social change, normative legal thought instead reproduces its own aesthetic in ways that are intellectually as well as politically unhelpful. Normative legal thought sustains a kind of jurisprudential theater that in effect leaves legal thought arrested—the uncritical automatic production of academic bureaucracy and its inertia.

#### V. THE THEATER OF THE RATIONAL

Among the many reasons to put the jurisprudence of Ronald Dworkin on *L.A. Law* is to draw attention to the theatrical aspect of legal thought.<sup>217</sup> It is very easy for legal thinkers to forget that they are performers in an enterprise whose characters, roles, and action are always already largely scripted.<sup>218</sup> In part that is because most legal thinkers do not see themselves as engaged in theater in the first place. And they do not think that they are engaged in theater precisely because of the kind of theater they are already doing: they are doing the *theater of the rational*. The theater of the rational is precisely the kind of theater that is grounded in the forgetting of its own theatricality. To play a part in this theater is to rule out the recognition that one is doing theater.

Indeed, consider the dramatic scandal were Ronald Dworkin or Owen Fiss or even Bruce Ackerman to stop in the middle of their own works to contemplate *seriously*, the historical, psychoanalytic, or the cognitive scene of their own normative jurisprudence. Something would seem out of kilter, rhetorically askew. Reflexivity may be fine for Andre Gide<sup>219</sup> or John Fowles,<sup>220</sup> but it is not

<sup>216</sup> Note how well the normative orientation tracks with the instrumentalist aesthetics of bureaucracy. See *supra* text accompanying notes 210-11.

<sup>217</sup> Precedents here include Ball, *supra* note 9.

<sup>218</sup> "[O]ften what talkers undertake to do is not to provide information to a recipient but to present dramas to an audience." E. GOFFMAN, *supra* note 9, at 508.

<sup>219</sup> See A. GIDE, *THE COUNTERFEITERS* (1951).

<sup>220</sup> For instance:

acceptable for a Dworkin<sup>221</sup> or a Fiss or an Ackerman: we simply do not expect this sort of critical reflexive *act* to originate from these particular *agents*, or any like them.<sup>222</sup>

While it is predictable that many schooled in the older jurisprudences will fail to engage in such critical reflexivity—that they will in their usual subject-object separations think that “theory” is

When Charles left Sarah on her cliff edge, I ordered him to walk straight back to Lyme Regis. But he did not; he gratuitously turned and went down to the Dairy. Oh, but you say, come on—what I really mean is that the idea crossed my mind as I wrote that it might be more clever to have him stop and drink milk . . . and meet Sarah again. That is certainly one explanation of what happened; but I can only report—and I am the most reliable witness—that the idea seemed to me to come clearly from Charles, not myself. It is not only that he has begun to gain an autonomy; I must respect it, and disrespect all my quasi-divine plans for him, if I wish him to be real.

J. FOWLES, *THE FRENCH LIEUTENANT'S WOMAN* 105-06 (1969).

<sup>221</sup> And, interestingly, Dworkin knows all about John Fowles. He says:

Intentionalists make the author's state of mind central to interpretation. But they misunderstand, so far as I can tell, certain complexities in that state of mind; in particular they fail to appreciate how intentions *for* a work and beliefs *about* it interact. I have in mind an experience familiar to anyone who creates anything, of suddenly seeing something “in” it that he did not previously know was there. This is sometimes (though I think not very well) expressed in the author's cliché, that his characters seem to have minds of their own.

R. DWORKIN, *supra* note 39, at 155-56. Dworkin then cites the Fowles passage, *see supra* note 220. But, of course, despite Dworkin's familiarity with this reflexive move, he seems to be quite incapable of critically examining the scene of his own writing, of his own productions.

<sup>222</sup> In other words, the problem is an incongruity in the *act/agent* ratio. But perhaps the problem is different. Perhaps the problem is that self-conscious reflexive *action* is not appropriate on the scholarly *scene* or that this sort of *action* just doesn't fit with the *purposes* of these particular actors. If so, then we would then say that the *act/scene* ratio or the *act/purpose* ratio is askew. Or perhaps the sense of awkwardness does not so much turn on the identity of the agents as it does on the character of the psychoanalytic or rhetorical arguments, which simply may not be the sort of instrumentalities or *agencies* appropriate for the legal scholarly *scene* or to the *purposes* of jurisprudential inquiry. If so, we might say that the *agency/scene* ratio or the *agency/purpose* ratio is askew.

And if we were to say all this, we would be borrowing a great deal from Kenneth Burke, who writes:

Act, scene, agent, agency, purpose. Although over the centuries, men have shown great enterprise and inventiveness in pondering matters of human motivation, one can simplify the subject by this pentad of key terms, which are understandable almost at a glance. They need never to be abandoned, since all statements that assign motives can be shown to arise out of them and to terminate in them.

K. BURKE, *ON SYMBOLS AND SOCIETY* 139-40 (1989).

“objective” and “independent” of the agents that produce “it”—what is striking is that this failure is by no means limited to orthodox thinkers. On the contrary, the failure to inquire into the constitution of the subject that produces legal thought is (virtually) universal in contemporary legal thought.<sup>223</sup> Ironically, this failure occurs even where the jurisprudential approach would seem to lead almost unavoidably to a serious examination of the scene of academic production. I will give three examples of this striking, though utterly routine, lack of critical reflexivity: one from the so-called “right,” one from the so-called “center,” and one from the so-called “left.” In each case, I argue that the jurisprudential approaches lead readily to, and would indeed benefit from, an articulate consideration of the scene in which their own thought is produced and disseminated. Yet in all three cases, no such consideration is forthcoming.

On the so-called right, my example is drawn from law and economics. One of the interesting contributions of law and economics work is its consideration of the comparative advantages and disadvantages of various social coordination systems. Ronald Coase, for instance, discussed various ways of conceptualizing the comparative advantages of different types of social coordination mechanisms—most notably, the market, government regulation, and market by-pass mechanisms such as the firm.<sup>224</sup> Coase argued that in some situations, each kind of social coordination mechanism could be expected to be more desirable than the others.<sup>225</sup> Coase’s analysis found an echo and a normative elaboration in the work of Guido Calabresi, who developed the “cheapest cost avoider” approach to tort law. According to Calabresi, the function of tort law is to provide institutionally effective conceptualizations of the relevant actors and of the various cost-benefit judgments to be made so that the actor who is in the best position to make a certain kind of cost-benefit judgment is in fact led to make it.<sup>226</sup>

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<sup>223</sup> See Schlag, *The Problem of the Subject* (forthcoming 69 TEX. L. REV. (1991)). There are, of course, some counter-examples. See Frug, *Argument As Character*, 40 STAN. L. REV. 869, 921-27 (1988) (“We come, then, to the question of the character of *Argument as Character*.”); Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1556 (1990) (“[I]n addition to the usual footnotes, the bottom of the page will also contain occasional ‘rhetorical notes’ in which I shall identify and sometimes reflect upon the rhetoric of the article that you are reading.”).

<sup>224</sup> See generally Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) [hereinafter Coase, *Social Cost*].

<sup>225</sup> See Coase, *Social Cost*, *supra* note 224, at 18-19.

<sup>226</sup> See G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC*

The approach pioneered by Coase and Calabresi has now blossomed into a variety of sophisticated and complex variants. Much of this law and economics analysis strives to identify which institutional actor or social coordination mechanism can most efficiently acquire or manufacture the relevant choice information, make "correct" decisions, and act on those decisions.<sup>227</sup> Law and economics thinkers are thus extremely attentive to the sorts of informational advantages and disadvantages that the various competing social coordination mechanisms create.<sup>228</sup>

Tellingly, however, even though law and economics thinkers are quite capable of recognizing that every social coordination mechanism has informational blinders that must be considered in assessing its desirability, there is one institutional framework that is always implicated in the choice and yet (virtually) never examined by the law and economics thinkers: their own. Like almost all other legal thinkers, law and economics thinkers routinely situate themselves, their discourse, and their institutional framework somewhere "outside" the problem posed, as if they had no informational blinders, cognitive deficits, or conceptual disabilities whatsoever that would affect or skew the choice among various social coordination mechanisms.<sup>229</sup> What is strange about this, of course, is that once this simplifying supposition is brought to light, it appears to be not only wrong, but completely contrary to

ANALYSIS 135 (1970); Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972).

<sup>227</sup> Among law and economics thinkers, it is common to treat the market and its pricing system as an information dissemination device. See, e.g., Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 1-9, 22-25 (1980) (demonstrating how strict liability can lead the pricing system to reflect the costs of product risks in such a way as to lead to efficient consumption levels). For a general discussion of the informational character of pricing markets, see Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

<sup>228</sup> They have to be, given that the question they seek to answer is often precisely which social coordination mechanism—the market, firm, or government regulation—will produce the most desirable results.

<sup>229</sup> Coase, by contrast, did attend to this problem. This is evident from his consideration of what he saw as the paradoxical tendency of academics to support a free market of ideas, but not a free market of goods:

What is the explanation for the paradox? . . . The market for ideas is the market in which the intellectual conducts his trade. The explanation of the paradox is self-interest and self-esteem. Self-esteem leads the intellectuals to magnify the importance of their own market. That others should be regulated seems natural, particularly as many of the intellectuals see themselves as doing the regulating.

the very theory that law and economics thinkers deploy to assess the relative comparative advantage among various social coordination mechanisms. Perhaps even more striking is that the reliability of such assessments could only be enhanced by the consideration of the institutional advantages and disadvantages that law and economics thinkers experience in making such assessments.<sup>230</sup>

Law and economics thinkers are hardly alone in this kind of oversight. Many other jurisprudential approaches would seem to require, as a matter of their own intellectual seriousness, a critical examination of the scene in which their legal thought is produced; yet again no such examination is forthcoming. Consider an example drawn from the so-called center—legal neo-pragmatism. Neo-pragmatists believe many things, and a brief essentialist description would hardly do justice to the many pragmatist themes that have emerged. Still, one belief the legal neo-pragmatists seem to share is that the pragmatists understood truth as situated, practical, social, and contextual.<sup>231</sup>

Now, with all this emphasis on the situated, social, practical, and contextual character of legal thought, it would seem appropriate for legal neo-pragmatists to examine their own context: the social, cognitive, and rhetorical scene of their own thought, the scholarly situation within which their talks and articles and classes are being produced. But legal neo-pragmatism has yet to consider the scene of its writing<sup>232</sup> in any serious manner. Instead, it shuns what

Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 386 (1974).

For another rare deployment of this kind of reflexive insight, see Epstein, *supra* note 197, at 1642 (stating that academics “applaud republicanism because it gives skilled academics a comparative advantage: this is the public choice explanation as to why intellectuals prefer politics to markets”).

<sup>230</sup> For the general argument tracing out this claim, see Schlag, *supra* note 24.

<sup>231</sup> As James put it:

Truth for us is simply a collective name for verification-processes, just as health, wealth, strength, etc., are names for other processes connected with life, and also pursued because it pays to pursue them. Truth is *made*, just as health, wealth and strength are made, in the course of experience.

W. JAMES, *Pragmatism*, in PRAGMATISM AND THE MEANING OF TRUTH 104 (1978); see also Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 798 (1989) (arguing that the pragmatists “treated thinking as contextual and situated; it came always embodied in *practices*—habits and patterns of perceiving and conceiving that had developed out of and served to guide activity”); Minow & Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1599-1600 (1990) (noting that a key aspect of contemporary legal neo-pragmatism is its insistence on “contextual” analysis).

<sup>232</sup> The expression is borrowed from J. DERRIDA, *Freud and the Scene of Writing*, in WRITING AND DIFFERENCE 196 (1978).



would have seemed to be among the most pragmatic of questions: what are the functions, character, and possibilities of legal academic thought?<sup>233</sup>

Two neo-pragmatists who come close to discussing these questions are Martha Minow and Elizabeth Spelman. They begin their recent article on pragmatism with exactly the right (that is, the pragmatic) question. "As we turn to address the meaning of 'context' in these contexts, we are pointedly aware of a plausible question likely to occur to a sensitive reader: What is the context for our inquiry?"<sup>234</sup> But then, rather than answering the question and exploring the context of academic legal thought or law review writing or conference papers, or any other aspect of their scene, they define the context of their inquiry in terms of three scholarly and rather conceptualistic definitions of context.<sup>235</sup>

This failure to examine the scene of the writing is exactly the same pattern we observed in law and economics. In both cases, the jurisprudential commitments require examinations of the scene of writing, yet in both cases, having been brought to the brink (or beyond), the scene is left untouched and undisturbed, as if it had no impact upon and no significance for the thought being produced.

This pattern is not restricted to the "right" or "center." On the "left," consider the radical project of deconstruction. While the politics of deconstruction continue to be generally in question, in the legal academy, deconstruction is generally associated with the left. In France, deconstruction has often been characterized (and criticized) as a kind of radical and extreme intellectual movement.<sup>236</sup> Deconstruction, as a postmodern phenomenon, thus arrives on these shores in opposition to liberal humanism and its centerpiece, the sovereign individual subject. Derrida's own description of deconstruction proclaims as much: "Deconstruction does not consist in passing from one concept to another, but in overturning and displacing a conceptual order, *as well as the*

<sup>233</sup> For an early contribution linking the scene of writing to the character of its productions, see Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

<sup>234</sup> Minow & Spelman, *supra* note 231, at 1597.

<sup>235</sup> Note how there is a sense in which this conceptualism is in fact the (dominating) context within which legal thought is produced. Ironically, in a pragmatic way, this makes Minow and Spelman right to have focused on that conceptualist context. But the point from a pragmatic perspective is that there is much more to be said about how such a context structures, enables, and distorts our thought.

<sup>236</sup> See L. FERRY & A. RENAULT, *supra* note 80, at 122-52.

*nonconceptual order* with which the conceptual order is articulated.<sup>237</sup> Given this radical project of displacing and overturning not just the conceptual order, but the nonconceptual order within which the conceptual order is articulated, it would seem particularly appropriate for deconstruction as it is imported into American legal thought, to examine the scene in which it is operating—or rather, to displace and overturn the conceptual and nonconceptual matrices and forces within which it is received.

We might expect deconstruction, for instance, to attempt to displace the legal advocacy mentality so prevalent in academic legal thought, as well as to displace and overturn the authority structures of legal thought. We might expect a displacement of the sovereign legal author, the matrices of his thought, or the like. Little of this has occurred. On the contrary, rather than turning deconstruction on the scene of legal academic thought—which would correspond with Derrida's own deployment of deconstruction on the scenes of structuralism, Plato's philosophy, and academic thought generally<sup>238</sup>—virtually all the legal deconstructionists, like the law and economics thinkers and the neo-pragmatists, have shied away from such a critical turn on the scene of their own writing.<sup>239</sup> Instead, they have compressed deconstruction into an utterly traditional legal role: in their hands, deconstruction has become just another legal resource, just another set of reasoning moves, just another

<sup>237</sup> J. DERRIDA, *Signature, Event, Context*, in MARGINS OF PHILOSOPHY 307, 329 (1982).

<sup>238</sup> Derrida claimed that

"[p]recisely because it is never concerned only with signified content, deconstruction should not be separable from this politico-institutional problematic and should seek a new investigation of responsibility, an investigation which questions the codes inherited from ethics and politics. . . . Deconstruction is neither a methodological reform that should reassure the organization in place nor a flourish of irresponsible and irresponsible-making destruction, whose most certain effect would be to leave everything as it is and to consolidate the most immobile forces within the university."

J. CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 156 (1982) (quoting Derrida, *The Conflict of Faculties*).

<sup>239</sup> Of course, the validity of this statement depends upon who you call a *cls*-deconstructionist, how much deconstruction may have had a sub-textual influence on *cls*-thinkers not usually identified with deconstruction, and what counts as a critical examination of the scene of writing. But my point is that most of those *cls* thinkers who have made the most explicit, self-announced use of deconstruction have not engaged in an examination of the scene of their writing. But for a few counter-examples, see Frug, *supra* note 223; Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

“analytic tool”<sup>240</sup> for the legal academic to deploy at will against opponents.<sup>241</sup> As with the other two approaches, this failure of deconstruction to disturb its own relation to the scene of legal thought has produced a domestication of what might be a helpful and intellectually interesting contribution to legal thought.<sup>242</sup>

What is striking here is the repetition of the same pattern in three ostensibly very different jurisprudential approaches. In each case there is a manifest failure to question the scene of legal thought, even though each approach would seem to warrant a thoroughgoing examination or even disturbance of this scene. But there is something about the way the theater of contemporary normative legal thought is defined or established that leads legal thinkers away from taking cognizance of the scene in which they are acting or the kind of action in which they are engaged. Within the unspoken norms of legal thought, it is not considered legitimate, relevant, or serious to draw attention to this scene.

As you might imagine, this is an interesting recognition to achieve at this point because the very enterprise pursued here is precisely the sort that normative legal thought considers beyond inquiry—illegitimate, irrelevant, and unserious. What I am writing about in this article is thus the same thing as the resistance to what I am writing; I am trying to reveal the network of social, cognitive, and rhetorical forces that shape our thought and yet remain unconscious. I am trying to reveal the character of the legal unconscious.<sup>243</sup> And we have now encountered a serious blockage—an

<sup>240</sup> See Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 786 (1987) (“Deconstruction by its very nature is an analytic tool . . .”). For my discussion of this cls tendency to transform postmodern thought into operative argument sources, see Schlag, “*Le Hors de Texte*,” *supra* note 5, at 1641-47.

<sup>241</sup> See Balkin, *Tradition, Betrayal and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1629 (1990). I elaborate these points at greater length in Schlag, “*Le Hors de Texte*,” *supra* note 5.

<sup>242</sup> See Schlag, “*Le Hors de Texte*,” *supra* note 5, at 1631-37.

<sup>243</sup> Similar attempts in other fields have been undertaken:

The history of science, the history of knowledge, does not simply obey the general law of the progress of reason; human consciousness does not somehow retain the laws of its own history . . . . Beneath what science knows of itself . . . , there is something it does not know, and its history, its future, its events, its accidents obey a certain number of laws and determinations. These I have tried to bring to light. I have tried to identify an autonomous domain . . . , that of the unconscious of science, the unconscious of knowledge, which could have its own rules, much as the unconscious of the human individual also has its own rules and determinations.

unwillingness, an inability of legal thinkers to consider the scene of their own thought even when such a move would seem at once intellectually obvious and obviously beneficial.<sup>244</sup>

This blockage is easily understandable in practical terms. For any of these approaches to question the cognitive, rhetorical, or social scene of their own writing would immediately place in question their present formal configuration. It would—at least from their perspective—immediately trouble their intellectual authority and legitimacy (as these terms are currently understood). For an economist to draw attention to the comparative advantages and disadvantages of her discourse, or a neo-pragmatist to focus upon the academic conventions that have produced and validated her discourse, or a deconstructionist to destabilize the very conceptual and nonconceptual frameworks that allow her to import deconstruction into the academy, would be to challenge the very discursive scene that enables each of these kinds of thinkers to claim intellectual authority and legitimacy in the first place. It would be, in short, to challenge the very conceptual-institutional-rhetorical system that allows the claims to be articulated and heard.<sup>245</sup> But while these are obvious risks, the critical reflexive turn also offers obvious intellectual rewards. Nonetheless the reflexive turn is virtually never taken. Why not?

The very way the question has been framed here presupposes what is routinely presupposed in legal academic thought: that legal thinkers (you and I) are sovereign individual subjects who *choose* their own discursive positions and thought processes and announce these positions within a self-sufficient and weightless medium of communication, that you and I as sovereign individual subjects make rational decisions about such questions as whether or not to take a reflexive turn.

Now, it is precisely these pervasively sedimented assumptions that prevent us from understanding why the critical reflexive turn is not taken. We have thus reached that critical point in this article where the same rhetorical constructions that disable legal thinkers from taking the critical reflexive turn are also disabling us (you and I) from understanding how the critical reflexive turn is not taken. Our thought, our theater, and our selves are rhetorically construct-

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L. FERRY & A. RENAULT, *supra* note 80, at 6-7 (quoting *Interview with Michel Foucault*, MAGAZINE LITTÉRAIRE, Mar. 1, 1968).

<sup>244</sup> See *supra* text accompanying notes 224-42.

<sup>245</sup> See Schlag, "Le Hors de Texte," *supra* note 5.

ed so that the critical reflexive turns become (virtually) unthinkable. The very form and practice of our thought already establishes us as such competent conversants in an already rational and rationally legitimated discourse—as such relatively autonomous, coherent, integrated, rational, as ordinary, individual subjects—that, for the most part, we are simply not capable of even entertaining the requisite doubts to investigate how *we* are socially and rhetorically constructed. Indeed, even as you read this (and as I write it), it is difficult for each of us to remember that it is the way you and I think that is being put in question and that, therefore, at this very moment, there is no safe external place for you or me to go to adjudicate the truth or falsity of what is being said by recourse to some set of pre-established, noncontroversial criteria.

We are no longer having the usual sort of stereotypical scholastic conversation in which we can somehow separate our selves from the conversation that is taking place. On the contrary, we are in a conversation aimed at demonstrating the ways in which our rhetoric shapes us and the way we think about legal thought. And the very difficulty of the last paragraph is in part attributable to the fact that the intense critical reflexive turn—the one you are experiencing now—is quite foreign to our rhetoric. It can even be experienced as annoying and coercive.

Indeed, as you read, you experience this conversation as an attack on the self—your self. But that is the point: it is perfectly understandable that you should feel assaulted. The rhetorical turn here is leading you, the reader, to deal seriously with the question of your own autonomy as reader. And, of course, this is not easy or pleasant because you, as a legal thinker, have already been rhetorically constructed to think of yourself as an autonomous, self-directing, rational, choosing entity, and this text, in its very form and rhetoric, is disturbing that self-image. It is rather rudely, without asking your permission, leading you to question the status of your self-image as such an autonomous entity.

Believe me, at this moment, we are most definitely not having a rational conversation among rational autonomous choosing entities. Rather, you are being manipulated and in a way you may not find particularly pleasant. For even as you recognize that you are being manipulated, you are also being reminded—even as you read the next word of this sentence<sup>246</sup>—that you are not the

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<sup>246</sup> Don't think you can get out of this by refusing to read any further. It won't work. You can stop reading, but you will have serious questions about whether *you*

autonomous, rational, self-directing, choosing entity you assume yourself to be. Part of what makes this text so trying at this point is that it is refusing to honor, even in the most superficial ways, the conceit that the reader is a rational, self-directing, choosing subject. And we (you and I) are so invested in and invested with that self-image that I almost feel I should apologize to you for some breach of some unspoken rule of author-reader courtesy. There has been a breach of good form here. And that is because the challenge has not been just a substantive, remote, theoretical challenge, but a challenge to the very form and practice of the thinking of the rational, self-directing, choosing self—your self.

If we consider this breach of good form, it becomes apparent that my rhetorical assault on the self as rational, self-directing, and choosing occurs right on the surface of the text, right up front, in plain view, openly. Part of the reason I'm doing it so openly is to demonstrate that this tacit practice, of "good form," is also the way the rational, self-directing, choosing self has been constructed in the first place. Indeed, your expectation as a reader is that you will be treated with a bit more deference, respect, and courtesy. No exhumation of some deeply buried generative structure is required to recover the rhetorical construction of the autonomous, rational, coherent self. Rather, the social and rhetorical construction of the sovereign individual subject occurs under our very noses—in the open movements of the form, the practice of our own thought.

We don't notice this process of social and rhetorical construction of the self, not because it is deep and far removed from the everyday, but because our rhetoric is itself structured to suppress such inquiry, because it is our process, form, and practice not to pursue inquiries into the process, form, and practice of our own thought. Indeed, we (you and I) as legal thinkers are constructed and reconstructed as sovereign individual subjects even at the moments when the sovereign individual subject would seem to be most at risk—when we are reckoning with conventionalism, social constructivism, deconstruction, and the like.

Indeed, even when legal thinkers come close to recognizing that the individual subject may well be a vastly overstated rhetorical, cognitive, or linguistic construction, nonetheless the very form of their thought succeeds in situating their selves and the selves of

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decided to stop reading or whether the obnoxiousness of these paragraphs *made* you stop.

their readers outside this recognition.<sup>247</sup> In fact, it is just that tension—between the recognition that the self is socially and rhetorically constituted and the conflicting one that the self remains autonomous—that leads to the phenomenon I have called the relatively autonomous self.<sup>248</sup> In the end, while this self concedes both its own autonomy and its social construction, it is autonomy, rationality, etc., that come out on top.

Inasmuch as we are constructed as sovereign individual subjects, the very idea of troubling the process, form, and practice of our own thought simply does not, and often cannot, occur to us. And insofar as it doesn't occur to us, it becomes our process, form, and practice not to inquire into the process, form, and practice of our thought. If we take a look at the field of legal thought, it is apparent that it is already constructed in our own image. The very process, form, and practice of legal thought systematically situates both author and reader in a rhetorical field that represents itself as an already extant, self-sufficient, virtually complete mode of rational discourse—just waiting to be put to good use by sovereign individual subjects (conversant in the field).<sup>249</sup> The rhetoric constructs both reader and author as the beneficiaries of an already constituted, nonproblematic, nonparadoxical, already rationalized mode of argumentative strategies, reasoning moves, and the like—not just as a potential, but as an already realized, already in place, first-best world<sup>250</sup> of reasoning and communication.<sup>251</sup>

This, in a sense, is the crowning success of Enlightenment epistemology. But there is an ironic twist: Enlightenment rationality has become so successfully engrained in our processes, forms, and practices that (ironically) we have (almost) completely lost the quintessentially Enlightenment capacity to question, to criticize our processes, forms, and practices themselves.<sup>252</sup> So in another

<sup>247</sup> See Schlag, "Le Hors de Texte," *supra* note 5; Schlag, *supra* note 223.

<sup>248</sup> The relatively autonomous self is a constructed self that concedes that it is socially and rhetorically constituted yet maintains its own autonomy to decide just how autonomous it may or may not be. See Schlag, *supra* note 91, at 44.

<sup>249</sup> I.e., legal academics.

<sup>250</sup> See *supra* notes 200-01 and accompanying text.

<sup>251</sup> For instance, even the more sophisticated responses to cls claims of contradiction and indeterminacy (not to mention a few cls presentations themselves) assume, in their own form, the existence and the operational effectiveness of an already constructed, rational, and shared discursive framework that will allow us to decide whether the cls claims are right or not. See, e.g., Stick, *supra* note 84, at 332, 385-401. But, of course, it is precisely the status of such "serious" frameworks that cls thought puts in question.

<sup>252</sup> To put it plainly, if somewhat misleadingly: we have come to believe in our

sense, the rationality of the Enlightenment has become so successful, so hegemonic that it has become immobilized through its own institutionalization.<sup>253</sup> The Enlightenment commitments to reason, to criticism, and to rebellion against unreasoned convention have themselves become firmly embedded as a barely visible, largely unquestioned, almost unquestionable convention.

Indeed, the process of rational thought is not just pervasive, but self-reinforcing. The taken-for-granted sense that this rational discourse is already self-sufficient and adequate to the task of legal thought in turn authorizes the deprivileging of form. There is no particular reason to examine the form of legal thought in any serious way because the form of legal thought is already assumed to be adequate for its purposes and to be within the control of relatively autonomous subjects. The form within which legal thought is produced is considered to be weightless and inconsequential, such that the vocabulary and grammar of legal discourse are assumed to be adequate and sufficient to allow any important or legitimate substantive message to get through. In consequence, what is considered central, crucial, and important in legal thought is almost invariably conceptualized as substance. Hence, even on the rare occasions when form is made the *primary* focus of inquiry, it is only after form has been reconceptualized in terms of the categories of substance. Inquiry into form—in the sense of inquiry into the formative framework within which legal thought is produced—remains, at this point, largely beyond the possibilities of contemporary legal thought.

Inasmuch as it is substance, and not form, that matters, legal thought also privileges outcomes at the expense of process. Legal thought is supposed to materialize into outcomes and, thus, process is supposed to be subservient to the attainment of that goal. This privileging of outcome at the expense of process is a mimesis of the representation of legal discourse as an already-in-place, self-sufficient, shared, rationalized mode of discourse ready for deployment by a relatively autonomous subject: insofar as the process of rationalist discourse is already established as satisfactory, the only action in legal thought lies in the deployment of this system to produce outcomes—hence the usual fixation of legal thought on the

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own rationality, in a fundamentalist manner; we have come to believe it implicitly, in a manner that goes without saying, in every saying.

<sup>253</sup> Correspondingly, those persons most seriously committed to reason and to thinking are likely to be those most typically identified as irrational or nihilistic.



production of "ideas," "theories," "positions," "models," and other such conventionally reified terminal thought-analogues.

Inasmuch as the goal of legal thought is to produce (substantive) outcomes, in what is admittedly an ongoing process, theory must already be in a position to regulate practice. This is implicit in the assumption that legal discourse is already a self-sufficient and rationalized field of discourse enabling relatively autonomous subjects to control their own thinking. Hence, in legal thought, theory is routinely depicted as being in control of or as informing practice. Indeed, theory is very often depicted as the source of constraint or restraint on legal interpretation,<sup>254</sup> the source of normative outcomes, and the generative origin of substantive intellectual visions.<sup>255</sup>

The privileging of substance over form, outcome over process, and theory over practice is recursive. The rationality of legal thought, the sovereignty of the relatively autonomous subject, are preserved because that which could potentially destabilize them is always already relegated to the excluded or marginalized region of the subordinate term (i.e., form, process, practice) and, thus, immediately put beyond view or subjected to control. Yet, this establishment of the field in terms of a privileging of theory over practice, substance over form, and outcome over process is itself excluded from view because the work of field-definition (exclusion) is itself performed in the excluded regions. It is our practice to deprivilege our practice. It is our form not to inquire into our form. It is our process not to question the process of our thought. It is not just that we (you and I) *think* this way. We *are* this way.

Sometimes this hierarchy of privileging and deprivileging acquires a form that is (virtually) absolute, as in the recursive inability of legal thought to inquire into its own practice in any serious way. But it is important to understand that the privileging/deprivileging will usually take many forms at once, some of which

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<sup>254</sup> Hence, many legal thinkers who have pre-occupied themselves with questions of judicial review or the indeterminacy debates have assumed that the only kind of meaningful restraint on judicial behavior is either in explicit theories or in articulable standards. See, e.g., Fiss, *supra* note 15, at 744-46 (describing how "disciplining rules" provide standards which constrain judicial interpretation).

<sup>255</sup> See, e.g., Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)*, 6 CONST. COMMENTARY 231, 248-49 (1989) (noting that a "constitutional theory is an effort to justify a constitutional practice—to justify, that is, a particular interpretive style/judicial role" and necessarily includes arguments about the good of the resulting practice).

are far from absolute.<sup>256</sup> And it also important to understand that any piece of legal thought often partakes of a plurality of relations among the privileged and deprivileged terms at once, as the following list suggests:

Substance, outcome,  
and theory are:

originary  
starting points  
end-goals  
structural  
dominant  
governing  
primary  
cause  
enclosure  
active  
reality  
right  
essence  
us

Form, process, and  
practice are:

derivative  
non-starters  
detours  
accessorial  
subservient  
governed  
secondary  
effect  
enclosed  
passive  
appearance  
power  
existence  
them

It is easiest and most helpful to think of this list as describing "default positions." This expression implies that we (you and I) can depart from these discursive settings, but that it takes both thought and work to do so. The default positions are most powerful and most difficult to abandon precisely when they are set in those sectors that have been marginalized and are decidedly difficult to recover and examine: our process, form, and practice.

Now, even if one reads this possibly dualistic chart in the appropriately pluralistic spirit (as I have been trying to encourage), it still seems difficult to believe that such a simple layout could accurately describe the generative structure of our own (ostensibly complex, refined, and sophisticated) legal thought. Not only is this description an unflattering, if not insulting, vision, but it also seems improbable that legal thought itself could systematically reduce to such simple patterns. I have four answers to this reaction—the last of which is probably the most important.

First, this reaction is in some sense right. This dualistic account (for all its pluralism) is inadequate in some way as an account of the

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<sup>256</sup> I illustrate the ways in which dualist representations of our thought are already very much pervaded by the decentering effects of pluralism in Schlag, *supra* note 7, at 962-63.

generative structure of our legal thought. It cannot be an ultimate account because it is very likely informed by a discursive structure that is itself inadequate or incomplete.

Second, this account does get something right. When we engage in legal thought, we almost invariably find ourselves situated in the left hand terms, usually trying very hard to distinguish our selves and our thought from the right hand terms. We (virtually) never write legal thought from a position that recognizes our situation as one that is passive, enclosed, accessorial, derivative, mere effect, or appearance. At times, we may think those things, but even if we should think those things, our rhetoric will disable us from saying them.

Third, I acknowledge both the resonance of this dualistic structure within our legal thought as well as its inadequacy as an ultimate account. What is being described here is the generative structure of our legal thought as we run up against it—from positions still organized to some extent by the default positions of contemporary legal thought.<sup>257</sup> We are encountering a blockage that has effectively prevented inquiry into the process, form, and practice of our legal thought. It is a recursive rhetorical *blockage* (hence, unsatisfactory), yet also very much *our* blockage (hence, resonant and true).

Fourth, it is striking *just how much* this blockage turns out to be *our* blockage. This is striking, but not surprising: what is described here (so unappealingly) as a blockage coincides with what was earlier described (much more charitably) as normative legal thought. And, of course, this is not accidental: one of the most significant effects of normative legal thought is precisely to reproduce the rationalist rhetoric—as well as the sort of self that recursively reproduces that rationalist rhetoric.

Consider the relation of the rationalist rhetoric to the character of normative legal thought.<sup>258</sup> This earlier description of normative legal thought, and our previous understanding of how normative legal thought hopes to accomplish its ends, is actually quite consonant with the rationalist rhetoric I have just described. Such

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<sup>257</sup> This is simply a description, a pattern that seems to dominate contemporary legal thought, but has just become visible in this writing in a movement that begins to displace the sovereign individual subject and dissolve the systemic deprivileging of inquiry into the process, form, and practice of our own thought.

<sup>258</sup> And consider the paradigmatic form of normative legal thought described earlier, *supra* notes 106-14 and accompanying text.

a rationalist rhetoric is precisely the sort of generative discursive environment in which we would expect normative legal thought to thrive, and it is precisely the sort of rhetorical framework that we would expect normative legal thought to establish, entrench, and maintain. This reciprocal constitution of normative legal thought and rationalist rhetoric, this consonance and mutual entailment, is evident in various ways.

It is apparent that virtually all aspects of normative legal thought are suited to the rhetorical reproduction and maintenance of the sovereign individual subject. As Charles Fried put it, "[b]efore there is morality there must be the person. We must attain and maintain in our morality a concept of personality such that it makes sense to posit choosing, valuing entities—free, moral beings."<sup>259</sup> This insistence of normative legal thought on the importance of a morally competent, normative subject is quite consonant with the rhetorical construction of the legal thinker as a sovereign individual subject. Indeed, this rationalist rhetorical construction is at once a prefigurement and the entailment of what Fried calls "choosing, valuing entities—free moral beings."

The normative enterprise of *norm-selection* and *norm-justification*, with their emphases on choice orientation, value orientation, and prescription, is keenly suited to keeping the sovereign individual subject in the driver's seat. Likewise, the *single-norm, conclusion-oriented* character of legal thought, with its fixation on end-products and its requirements that these end products be *non-paradoxical, non-contradictory, complete, self-sufficient, discrete, separable, and trans-situational*, is conducive to deflecting any serious interrogation of either the rhetorical practices, forms, or processes that constitute the sovereign individual subject or his rhetorical enterprise: Hence, we are drawn toward the meticulous dissection and examination of what the legal subject has produced and whether these end-products have been produced in the right (non-contradictory, non-paradoxical, linear, authority-driven) way. And in turn, this orientation draws attention away from the legal subject who is producing all this stuff in the first place.<sup>260</sup>

The *action-deferring* and *reader-centered* character of normative legal thought likewise ensure that no serious challenge is posed to the identity or character of the sovereign individual subject. The

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<sup>259</sup> Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1068-69 (1976).

<sup>260</sup> See Schlag, *supra* note 223.

texts of normative legal thought are supposed to have their effect by appealing to the choice and the intellectual faculties of the reader. The texts are supposed to honor the reader's already performed views, ideas, prejudices, and aesthetic representations of social and political life. There is to be no overt disabling or subversion of *her* identity or role. For instance, within the rationalist rhetoric of contemporary legal thought, it is permissible to write articles *about* Derridean deconstruction of legal thought—but to actually *practice* Derridean deconstruction will simply evoke resistance, misunderstanding, and incomprehension. The expectation is that any author will, of course, explain and justify any significant departure from the default positions and will refrain from any rhetorical exercise that might actually require active change on the part of the reader.

Finally, the *adversarial advocacy* orientation of normative legal thought—which is attributable, at least in part, to the conflation of the role of lawyer and legal academic—does much to insulate the sovereign individual subject and its rhetorical supports from scrutiny. Because so many legal academics understand their legal thought to be positional in character—on behalf of some (intangible, often very worthy but poorly identified) client-surrogate, much of legal thought is produced within the explicit context of adversarial advocacy among academics and is devoted to advancing or defeating this or that position. Many normative legal thinkers understand themselves to be engaged in “passionate advocacy” on behalf of some cause. Now admittedly, there is no tribunal listening; no one is empowered to put all this normative passion into effect. But this does not mean that this passionate advocacy is therefore without effect: on the contrary, it often succeeds in bracketing any serious questioning of the rhetorical systems that enables such aimless passionate advocacy to be produced in the first place. Indeed, when one is engaged in passionate arguments to an imagined tribunal, the last thing one will do is question the argumentative structures that allow the arguments to be framed and presented in the first place.

Not only does normative legal thought conduce to the maintenance of the sovereign individual subject and his rationalist rhetoric, but one can see the reverse process at work as well. Indeed, if normative thought occupies so much attention in the legal academy; if normative legal thought seems like the obvious, the “natural” thing to do; if the “what should we do?/what should the law be?” question seems so legitimate, so important; and if normative legal thought seems veritably like law itself, it is because the rhetorical

situation—the default settings—have already enabled us, constituted our discourse, and configured our roles so that we will produce normative legal thought.

Think about it this way: suppose that, contrary to my intimations, you really are a sovereign individual subject. Suppose further that you already are in communication through an undistorted medium of communication (known as law) with other very powerful sovereign individual subjects (otherwise known as judges and legal academics). Suppose as well that all sovereign individual subjects (including judges and legal academics) are not only receptive to, but obliged to follow rational argument—to put theory in charge of practice. Finally, suppose that these judges or academics face a series of problems that hurt a lot of people, or waste human resources or otherwise injure the community. Given these assumptions, why not engage in normative legal thought? Why do anything else?

It is important not to underestimate the importance or the resilience of this embedded rationalist rhetoric: it is this rhetoric that successfully deforms not only modernist<sup>261</sup> but post-modernist<sup>262</sup> thought within the legal academy. The resistance of the rationalist rhetoric is both conscious and embedded in the very form and rhetoric of normative legal thought. Indeed, when confronted with challenges from modernism or postmodernism, the recursive move of normative legal thought has been to ignore the implications of modernism and postmodernism by encasing these implications within its same old rationalist conceptual and rhetorical structures. Normative legal thought treats modernism and postmodernism as new “substance”<sup>263</sup> ready for assimilation within the same old unreconstructed rationalist rhetoric.<sup>264</sup>

Even in sophisticated legal thought, one sees the effects of this rationalist rhetorical structure on the reception of postmodern

<sup>261</sup> See Schlag, *supra* note 34.

<sup>262</sup> See Schlag, “*Le Hors de Texte*,” *supra* note 5, at 1636.

<sup>263</sup> That is, as new footnotes.

<sup>264</sup> See Schlag, *supra* note 34, at 1204-05. That American legal thought has failed to internalize either modernism or postmodernism is not surprising, as both in their own ways present a very serious critique of the individual subject. Modernism resituates the individual subject within a totalizing force field, thus allowing the individual subject to appear as derivative, secondary. Postmodernism explodes the individual subject from the inside, denying the subject a unitary or coherent center. Given modernist implosion and postmodernist explosion of the individual subject, normative legal thought, of course has been unremittingly antagonistic and resistant to both modernism and postmodernism.

thought. For instance, consider Robin West's recent attempts to enlist Foucault in the service of what she calls "progressive constitutionalism." She uses Foucault to underwrite the notion that "[m]odern progressive political theory begins with a central, even definitive, insight: conservative *deference* to communal authority—whatever form it takes—directly implies a parallel deference to the clusters of social power that invariably underlie it."<sup>265</sup> West then cites various works by Foucault.<sup>266</sup> But West's point is not Foucault's point at all. Foucault's argument is Nietzschean, not normative, and his point is not that various social groups like "conservatives" give *deference* to social power, but that social groups, their configurations, and their identities are themselves effects of truth/power. Robin West's use of the term "deference" implies that conservatives are somewhere outside of social power—somewhere sufficiently distinct and separate from social power that they can apparently choose to *defer* to social power. This logic of deference and choice is not the Foucaultian understanding, but is instead the conventional rationalist separation of power from the categories of truth and normativity.

West continues: "They may have power, in turn, because they are right (and thus have survived centuries of critical inquiry) or, as Foucault's social 'archaeologies' have aimed to reveal, they have power *for some other reason*, such as that *they serve* the interests of dominant social groups."<sup>267</sup> Again, this is not so much Foucault as a distortion of Foucault's thought through the conventional rationalist rhetoric of the legal academy.<sup>268</sup> Foucault does not talk of social groups as having power for "some other reason," or any "reason," for that matter. On the contrary, following the Nietzschean inversion, Foucault's enterprise is precisely to demonstrate that "reason" and "reasons" are themselves the productions of power.<sup>269</sup> So when West says "[i]n any case, normative authority *rests* on some form of social power,"<sup>270</sup> she is not following Foucault

<sup>265</sup> West, *supra* note 41, at 678 (emphasis added).

<sup>266</sup> See *id.* at 678 n.70 (citing M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977); M. FOUCAULT, THE HISTORY OF SEXUALITY (1978)).

<sup>267</sup> *Id.* at 678 (emphasis added).

<sup>268</sup> And the intellectual source domain for this sort of conceptualization of political or social life is much less Foucault and much more some sort of power elite social theory. See, e.g., C. MILLS, THE POWER ELITE 3-4 (1956).

<sup>269</sup> See *supra* notes 4-5 and accompanying text; see also M. FOUCAULT, POWER/KNOWLEDGE 112 (1980).

<sup>270</sup> West, *supra* note 41, at 678 (emphasis added).

at all.<sup>271</sup> On the contrary, it is precisely the conceptualization of normative authority *as distinct from and resting upon* social power that Foucault repeatedly questions.<sup>272</sup> But it is not just normative authority that West separates from social power, but the subject as well. Hence for West, “when the conservative embraces, preserves, respects, and defers to the teachings of communal authority, he or she necessarily, whether or not intentionally, embraces the social power that underlies it.”<sup>273</sup> This is not the Foucaultian understanding,<sup>274</sup> but the envelopment, the encasement of Foucault’s thought within the channels of rationalist normative rhetoric.

Ironically, this is precisely the sort of intellectual-institutional effect of truth/power that would have interested Foucault himself.

<sup>271</sup> These sorts of rationalist renditions of Foucault are not isolated incidents: they are patterned products of the routine normative rhetoric.

“[I]t is indicative of the epidemic character of the individual-as-reality-syndrome that even critical legal authors who are deeply influenced by Foucault’s ideas and enthusiastically take over his political messages plainly refuse to draw the epistemological consequences.” Teubner, *supra* note 144, at 731. For a discussion of the ways in which Derridean deconstruction has sustained the same rationalist distortion, see Schlag, “*Le Hors de Texte*,” *supra* note 5, at 1636-47.

<sup>272</sup> I understand that someone could say, “where do you stand to say all this?” and try to get me involved in some sort of performative contradiction (i.e., the ultimate in status degradation in the philosophy department of your choice).

I have a few partial observations. The performative contradiction objection is currently taken in the legal academy to be a real killer move. But this move often imagines itself as resting on a secure foundation of knowledge, some a priori understanding of the form that intellectual activity should or must or does take. It also usually imagines (sometimes quite erroneously) that the truth games of the interlocutor (the questioner) and of the speaker (me) are the same—and that we stand relative to truth on the same epistemic footing or lack thereof. Elsewhere, I’ve suggested that these kinds of assumptions are products of a kind of disciplinary solipsism. See Schlag, *Normative and Nowhere to Go*, *supra* note 5, at 181.

I think the performative contradiction move is itself an exercise of power whose main effect is to police the bounds of intellectual inquiry in a way that reproduces the same old homeostatic matrices of rationalist thought. You’ll notice that part of what I’ve done here is pull the same sort of reflexive move back on the hypothetical objection: “Where do you stand to ask where do you stand?” I don’t want to dismiss the problem or the question of the performative contradiction. At the same time, I must admit that I am not nearly as troubled by it as I am apparently supposed to be.

When people say, “well where can you go, what can you say if you are engaged in a performative contradiction?” I want to say, “where don’t you go, what don’t you say, if you are constantly avoiding performative contradictions?” If truth is understood, however tacitly, as representation, then performative contradiction is a problem. If truth, however, is a revealing, then the performative contradiction move loses a great deal of its bite.

<sup>273</sup> West, *supra* note 41, at 678.

<sup>274</sup> See Teubner, *supra* note 144, at 735 (“The human subject is no longer the author of the discourse. Just the opposite: the discourse produces the human subject as a semantic artifact.” (citation omitted)).



It is interesting precisely because it is emblematic of the reception extended by normative legal thought to most modernist or post-modernist work. Within normative legal thought, the postmodern de-centering<sup>275</sup> of the self is immediately transformed from what might be described as an activity, or engagement, or process into a "thesis," a "position," an "idea"—a "theory," in short, *into* the very sort of intellectual entity already so stabilized and so encased in the rationalist object-form that "it" is guaranteed to leave the self of the normative legal thinker and the very form of his thought unchallenged and undisturbed.

In this way, normative legal thought continues to play well in the academy: we have all already been constructed as actors in the theater of the rational. The setting is in place, the parts are written, and it's all so convincing that far from questioning the scene, we have forgotten that it is theater we were trying to do. And, of course, now, having lost our bearings (almost) entirely, it is theater that is doing us: "What should we do?" "Where should we go?"

## VI. THE POLITICS OF FORM

What are the politics of normative legal thought? Political stasis and intellectual syndicalism. One of the consequences of the dominance of the normative, its positive prescriptive aspect, and its value orientation is that legal thinking becomes subordinated to political value commitments. I am not saying that legal thought has now become politicized in contrast to some imagined, prior period where legal thought was supposedly free from politicization. Rather, the claim is that legal thought has now become politicized along some rather static, fairly blunt, and normatively oriented lines.

For instance, consider this familiar division of the field: law and economics, mainstream doctrinalism, liberal legal theory, feminist jurisprudence, *cls.* Virtually each of these groups of legal thinkers depicts its situation and its intellectual approach as embattled—as engaged in a struggle for the direction of law. This configuration of the jurisprudential field is quite familiar to all of us. I could call it "premature politicization" or "the politics of nostalgia." I am going to call it both.

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<sup>275</sup> Not to mention the modernist interrogation.

### A. *Premature Politicization*

The field configuration seems to be a kind of premature politicization in the sense that it leaps from a now relatively widely shared notion that law is politics to a shallow, yet apparently utterly definitive, conceptualization of politics. The notion that law is politics has de facto taken on the sense that law is informed by normative value choice and normative value commitments. The jurisprudential field then becomes organized around this largely archaic understanding of politics as the value choice of individuals about how the legal or political order ought to be constituted. The left, the liberals, and the conservatives of the academy then come to be defined in terms of their value choices, their value orientations, or their stances on the importance of making value choices. This is not confined to the intellectual plane, but has become the hegemonic regime within which the production of legal thought occurs. This politicization is premature in the sense that its operant understanding of politics has yet to encounter the current forms and practices of power. The pathways, the directions, and the effects of power are rarely, if ever, subordinate to "value choices."<sup>276</sup>

### B. *The Politics of Nostalgia*

I am tempted to call this the politics of nostalgia as well, because every political group in the legal academy wants to present itself in terms of some worthy political tradition with strong resonant symbols—some tradition that has long since lost any sense of effectiveness. For example, the left in legal thought engages in a certain celebration of old and new left ideas and personages. Occasionally cls-ers will identify themselves as intellectual guerrillas, or even compare themselves to insurrectionary figures like Che.<sup>277</sup> Even if we put aside these few instances of political romanticization, much of cls thought nonetheless remains inspired by a drive to repeat, revive, and reenact the politics of the Sixties.

If this political self-identification seems a bit out of touch currently, conservatives and liberals fare no better. Liberals still draw their inspiration consciously (or at this point, more likely subconsciously) from a political text that must read a lot like *A Theory*

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<sup>276</sup> Schlag, *supra* note 223.

<sup>277</sup> See, e.g., Binder, *On Critical Legal Studies As Guerilla Warfare*, 76 GEO. L.J. 1, 1 (1987) (likening cls legal thinkers with approval to guerilla fighters).

of Justice.<sup>278</sup> By and large, they are still writing articles for the Warren Court (or wishing they could). They still think of the great political problems of the age in terms of the individual versus the community.<sup>279</sup> What the liberals fail to notice is that while they are talking about the individual versus community, the reproduction and extension of bureaucratic practices routinely traverses back and forth across the public/private distinction without giving that venerable liberal distinction a moment's thought—thereby extinguishing *ab initio* the liberal version of both individualism and community. It turns out that being a liberal means that you worry a great deal about getting just the right combination of individual freedom and community, while getting neither.

As for conservatives, they have this absolutely uncanny capacity to arrive on the scene way too late. Conservatives always appear bearing the gifts of tradition and the past, asking us to conserve these gifts and thereby preserve our communities,<sup>280</sup> and perhaps even our very identities.<sup>281</sup> It is no doubt pleasant to stand up in support of worthy traditions and the great constructions of the past, but conservatives almost always forget that access to the past is always and already mediated by the present. And in our present, there is not a great deal left to conserve, and not too many social practices that will help conserve whatever is worth conserving. We live, as Baudrillard suggests, in an epoch of simulation: simulated culture, simulated intellectual life, and for conservatives, perhaps most vexingly, simulated conservatism.<sup>282</sup> And the simulations have almost already lost their ability to refer back to the "real thing."

What I am claiming here is that within the legal academy (and perhaps outside as well), not only the political programs, but the political identities of the left, liberals, and conservatives, are now very much in question. The left-cls glorification of the Sartrean individual subject helps produce a self that in its high Sartrean moments recognizes its own absolute freedom,<sup>283</sup> but that for the

<sup>278</sup> See J. RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>279</sup> See *Symposium on The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

<sup>280</sup> See M. OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 169 (1962).

<sup>281</sup> See Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1066 (1990) ("We must respect the past because the world of culture that we inherit from it makes us who we are. . . . We must, if we are to be human beings at all, adopt toward the past the custodial attitude Burke recommends.").

<sup>282</sup> See J. BAUDRILLARD, *SIMULATIONS* i (1983).

<sup>283</sup> See J. SARTRE, *BEING AND NOTHINGNESS* 573, 616-17, 625-26 (1956).

rest of the day is shaped and driven by precisely the same market-bureaucratic practices that conservatives and liberals are also helping to establish, expand, and entrench.<sup>284</sup> Liberal humanism, with its insistence on legalizing all aspects of social intercourse through its "rights" rhetoric, is in effect imposing a politically correct, totalitarian sameness on everyone. They can be called "rights," but that does not immunize them from becoming a kind of bureaucratic social control device. The conservative call seeks to preserve "our" traditional values, but because it is late, it helps entrench precisely the sort of market-bureaucratic state that has already rationalized, regimented, and effaced those values.

In this way the "value orientation" hegemony of legal thought does promote a kind of political stasis. Indeed, in the maintenance of this value orientation hegemony there is a great deal of unconscious complicity among the various groups. Conferences, colloquia, and symposia are typically arranged along the usual normative break-lines among the camps such that all camps have to be represented. The militancy of each group serves to police and regiment not only its own forces, but, ironically, the forces of the other camps as well. There is a tremendous degree of intellectual and political reductivism among all groups. What we get is a kind of intellectual syndicalism, in which the jurisprudential order is maintained and the intellectual or research agenda is stabilized by an ironic yet tacit agreement among openly antagonistic parties.

No one chooses this state of affairs. The old intellectual elites are burdened with the call of an onerous political responsibility to their followers. They regret the loss of intellectual freedom. The young intellectual elites are burdened with honoring (or honoring in the breach) conceptual systems, intellectual styles, and political stances that they do not believe and no longer find useful. In the name of scholarship, dialogue, thought, academic freedom, political responsibility, moral responsibility, seriousness, etc., we have an academic regime that induces massive amounts of repression and

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<sup>284</sup> As Foucault observed:

What I am afraid of about humanism is that it presents a certain form of our ethics as a universal model for any kind of freedom. I think that there are more secrets, more possible freedoms, and more inventions in our future than we can imagine in humanism as it is dogmatically represented on every side of the political rainbow: the Left, the Center, the Right.

Martin, *Truth, Power, Self: An Interview With Michel Foucault* (Oct. 25, 1982), in *TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT* 9, 15 (L. Martin, H. Gutman & P. Hutton eds. 1983); see also Schlag, *supra* note 223.

compelled production. Most of contemporary legal thought is currently the outgrowth (one way or another) of bureaucratic domination.

### C. *Slippage and Resonance*

Precisely how is this system of normative legal thought maintained? The question has a certain bite here because the conventional, benign answers upon which normative legal thought sustains itself are no longer available. On the contrary, my claim is that *the prescriptions* of normative legal thought rarely produce any significant effects—except to provide the occasion for the reproduction and reinscription of the rationalist aesthetic, its rhetorical organization of law and social life, and indeed our very selves.

Thus, the claim is not that normative legal thought is without effect, but that the politics of normative legal thought are not what normative legal thought imagines them to be: its politics are in the process, the practice of its construction, and the form of its dissemination. Thus, it is only a little ironic that I will close by examining beginnings—how normative legal thought constructs itself and the theater of the rational.

As I have tried to show, the very ways that normative legal thought repeatedly reinscribes itself are also the ways it insulates itself from challenges. This is a *politics of form* that establishes itself through the related processes of *slippage* and *resonance*. These processes are difficult to describe because they are themselves the processes that produce the stabilized matrix of legal thought that enables us to think as we do. Hence, to attempt to locate or define such processes (slippage and resonance) within the usual established categorical matrices would be to confuse these processes with their effects.

It turns out, however, that we already have some familiarity with slippage and resonance. Slippage has been going on throughout this article. We witnessed slippage earlier when I claimed that the dualism of descriptive/normative thought slides into legal formalism/realism, which, in turn, slides into the dualism of technical doctrinalism/moralist jurisprudence.<sup>285</sup> Slippage is the slide of the same force (and the reproduction of the same effects) across our sedimented and reified conceptual structures; it is a kind of transposition that occurs unconsciously. Slippage is *intellectual*.

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<sup>285</sup> See *supra* notes 20-74 and accompanying text.

Slippage is what occurs when *L.A. Law*, the television program, becomes a metaphor for law practice (*L.A. Law's Empire*), then the rhetorical vehicle for a demonstration of how legal argument does its work, and then finally a stage setting for an aesthetic evaluation of normative jurisprudence. Slippage is *rhetorical*. Slippage is also what occurs throughout this article when the footnotes constantly shift the grounds and context from philosophy to sociology, from fiction to truth, from low culture to high culture, and so on. Slippage is *cultural*. Moreover, slippage is what happens throughout this article, when it is read as one continuous movement from a politics that claims to be a politics of substance, of values, of theory, and of results to what in this section turns out to be the politics of form. Slippage is *political*. Slippage is the diagonal transversal movement of the same force (and the same effects) across the conventional reified sectors that mark our world—sectors like the intellectual, the rhetorical, the cultural, and the political. Slippage does its work in all directions—moving from fiction to truth (and vice versa), from the material to the ideal (and vice versa), from reality to appearance, etc. You may have noted that slippage has been occurring even as we read and write this paragraph.

Resonance is the echo made by what slippage has inscribed. If slippage has been pervasive, then there will be a great deal of resonance. For instance, if the distinction between formalism and realism or rules and standards seems important or true, it is because these distinctions resonate virtually everywhere. If the dichotomies usually associated with Plato (fiction/truth, ideal/material, reality/appearance) resonate, it is because these dichotomies have been inscribed pervasively in our philosophy, in our rhetoric, in the indexing systems of libraries,<sup>286</sup> and in the definition of the jurisdiction of the intellectual disciplines and subdisciplines that have organized themselves around these dichotomies.<sup>287</sup> Resonance describes that part of the rhetorical organization of this article where each part echoes the others in different ways.

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<sup>286</sup> See Delgado & Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207, 208-09 (1989).

<sup>287</sup> Hence, moral philosophy typically brackets power. Political science typically studies power by bracketing the ethical. Psychology typically studies the individual by bracketing the social. There is a lot of bracketing going on throughout the university. This disciplinary bracketing is not nearly as simple, as two-dimensional, or as clean, as this footnote makes it out to be—but I think the point has been made, at least sufficiently to resonate.

Slippage and resonance cannot do their work when they meet up with resistance. For instance, as we saw earlier, neo-pragmatism, deconstruction, and comparative institutional analysis are all arrested by the resistance of the rationalist rhetoric and the disciplinary defenses of the sovereign individual subject. Each of these jurisprudential approaches could beneficially undertake inquiries into its own situation, but the rationalist rhetoric is stronger, and slippage is arrested. Resistance has been present as a strategy here as well. The attempt to put Dworkin and normative legal thought on *L.A. Law* is a clear example of resistance because it is clear to everyone that Dworkin and normative legal thought won't take on *L.A. Law*.

Slippage, resonance, and resistance by themselves have no conventional moral or political value. They organize the world and our selves and allow us to operate in ways that are sometimes helpful and sometimes not. I have tried to demonstrate how these processes work, and I have invoked them to show just how powerful they are. Now that the conceptual structures of these processes is explicit, I want to show how they help construct, stabilize, and order our legal and social world. I understand this construction, stabilization, and ordering to be the *politics of form*. This is a politics, of course, that does not leave much room for the legal academy's current normative thought as a politically meaningful enterprise. So it goes.

#### D. Nesting

One of the classic ways the normative rhetoric extends and insulates itself from displacement is "nesting." In this nesting process, views, forces, and phenomena that could potentially destabilize the system of normative rhetoric are reconfigured within the rationalist form so that their disruptive potential is neutralized. We have already seen this process at work with neo-pragmatism, comparative institutional economics, and deconstruction: neo-pragmatism becomes formalized as a set of ideas, theories, or approaches to be applied; comparative institutional economics is deployed from a purportedly supra-institutional vantage point; and deconstruction becomes transformed into a set of operationalized techniques. In each case the various approaches are in effect reconfigured within the rationalist normative rhetoric and thereby stripped of their destabilizing potential. In effect, whatever is admitted within normative legal thought becomes encapsulated or

enveloped within the rationalist rhetoric in a way that ensures compatibility.

One effect of this rationalist nesting process is to neutralize challenges to the orthodoxy by representing the challenges in much less salient or threatening forms—a kind of jurisprudential inoculation.<sup>288</sup> Hence, for instance, the social construction of the subject is often represented as an idea the normatively-constructed sovereign individual subject can accept or reject without having to confront it as the truth of her being. Likewise, deconstruction is represented as supporting a form of radical individual subjectivism that turns out to be at once untenable and politically harmless, or as a set of argumentative techniques that can be wielded at any time for any reason by any individual subject. The price of acceptance for any destabilizing intellectual movement in the legal academy is a kind of self-deformation in which the movement conforms to the existing matrices of the dominant rationalism.

Not surprisingly, the effects of this rationalist nesting process are not confined to the intellectual plane. The very process of continuous and repetitive rationalist nesting of so many disparate intellectual currents reconfirms the universality of rationalism, and thus entrenches rationalism cognitively and rhetorically. Rationalism becomes the universal mode of discourse, confirming its validity each time it admits (and covertly neutralizes) the disruptive potential of any new approach.

Its success and its embeddedness ensure that only those modes of thought most amenable to the rationalist form will be integrated into legal discourse. It is no accident that of the various interdisciplinary approaches to legal thought, the most successful have been those most rigorously formalized in the rationalist image: micro-economics and American-Anglo-Saxon moral philosophy. Even within the ostensibly destabilizing influences that comprise cls thought—neo-Marxism, phenomenology, structuralism, deconstruction—the most successful strains of contestatory thought have been those most configured in the image of rationalism: structuralism and Sartrean existentialism.<sup>289</sup>

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<sup>288</sup> Jamie Boyle provides a good example of this inoculation strategy in his description of H.L.A. Hart's attempt to protect legal thought from the realist indeterminacy arguments. See Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 711 (1985).

<sup>289</sup> Indeed, the main folk-intellectual inspiration informing cls thought is the opposition of structuralism and existentialist phenomenology. Jamie Boyle aptly describes the ways in which the cls attempts to pursue one of these lines of inquiry



This rationalist nesting process works on basic descriptions or understandings of social reality as well as on intellectual approaches—it is, for instance, one way by which legal thinkers and their legal thinking are abstracted from the complexities of *L.A. Law's Empire*. We have already seen this abstraction at work. *L.A. Law's Empire's* complicated mass of differentiated relations among power, truth, rationality, deceit, and rhetoric is reconfigured by abstracting the various relations through and into a rationalist form.<sup>290</sup> Regularities are identified, relations are established, and the field of regularities and relations becomes stabilized as if it were the controlling schema governing the occurrences on *L.A. Law's Empire*.

Once this rationalist schema of relations becomes emancipated from its social context, it becomes cognitively and rhetorically embedded. The complicated mass of differentiated relations of power, truth, rationality, deceit, and rhetoric are represented as organized in accordance with the network of rationalist relations. As a result, while recognized as important components, power, deceit, and rhetoric are nonetheless represented and encapsulated as isolated instances (very often deviations) subordinate to the overarching and controlling framework of rationality.

This sort of abstraction and stabilization of the social field is believable (and believed) because rationality does in fact have some connection to the social field; there is some resonance. Moreover, because the rationalist framework becomes cognitively and rhetorically embedded as a discursive formation, those in whom it has

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inevitably leads to consideration of the other. *See id.* at 740-44; *see also* Schlag, *supra* note 223.

This is no accident: structuralism and existentialist phenomenology lead to each other precisely because they are complementary parts of the same flawed subject-object map—that which has channeled virtually all thinking in the American legal academy since its inception. *See* Schlag, *supra* note 223. According to this view, *cls* thought is the most advanced expression of a flawed conception of subject-object relations. What Bourdieu says of Lévi-Strauss seems easily applicable to orthodox *cls* thought:

The main thing is that Lévi-Strauss, who has always . . . been locked within the alternative of subjectivism and objectivism, cannot see the attempt to transcend this alternative as anything other than a regression to subjectivism. He is, like so many other people, a prisoner of the alternative of individual versus social phenomena, of freedom versus necessity, etc., and so he cannot see in the attempts being made to break away from the structuralist "paradigm" anything other than so many returns to an individualist subjectivism and thus to a form of irrationalism . . . .

P. BOURDIEU, *supra* note 1, at 62.

<sup>290</sup> *See supra* text accompanying notes 174-77.

become embedded lose the ability to understand the social field in any other way. For legal thinkers, the rationalist aesthetic soon becomes all there is. This is why critiques of rationalism like the one offered here (or, indeed, the modernist and postmodernist assaults on rationalism) are so often apprehended and experienced as threatening, as signaling a total loss of order and meaning, as nihilistic.

Once the rationalist aesthetic becomes cognitively and rhetorically embedded, slippage continues from the cognitive and the rhetorical, to the social and the professional. Indeed, to think within the rationalist aesthetic is to acquire all the distance as a human being from others that is implicit in the distance that normative legal thought takes from *L.A. Law's Empire*. To think as a rationalist is not just to *think* in a particular abstracted way, it is to *be* one who deals with others in a particular abstracted way. The more rationalist one's form of thought, the more one's dealings with others is mediated by pre-figured, invariant, and sharply drawn conceptual categories. This is why Duncan Kennedy and Mark Kelman are correct in their observation that individuals who are more rule-like (read here more rationalist)<sup>291</sup> tend to favor substantively individualist regimes.

Between the rationalist rhetoric of the law-school classroom and the ether of the eightieth floor of the Wall Street office building, there is the process of slippage, of mimetic repetition. And, in the end, it is the rationalist character of normative legal argument and its self-satisfied distancing from the complexities of *L.A. Law* that enables the lawyer on the eightieth floor—sharply dressed, and well-manicured, his memoranda clean, crisp, and error-free—to save or ruin barely known lives with magisterial detachment. These stereotypical (but, indeed, requisite) accoutrements—the manicure, the crisp, freshly laundered cuffed shirts, the fixation on typo-free papers—are all vehicles and echoes of distancing between the self and the action. In the psychoanalytic idiom, they are the vehicles of denial that make the dirty work possible.

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<sup>291</sup> There is a certain family resemblance between rule regimes and rationalism. See Schlag, *supra* note 34, at 1211-13. At the same time, I do not want to flatly equate rule regimes with rationalism because standard regimes tend to be organized in highly rationalist ways as well. That is, pro-standard legal thinking in the legal academy is almost always very rigidly nested within second-order rule forms. That is, pro-standard legal thinkers often tend to be (unbelievably) rule-like in their insistence for standards.

If the eightieth floor of the Wall Street law firm does not seem in some sense an outrage, a grotesque episode, it is because the eightieth floor is itself a resonance, an architectural and social inscription of the same rationalist form of thought, cognition, and rhetoric practiced in the law school classroom. The relation of the eightieth floor on Wall Street to the dirty harbor indistinguishably below, the relation of the clean white typo-free brief to the lives of the parties, the relation of the theater of the rational to *L.A. Law's Empire*, the relation of the law school classroom to life itself—these are all the same relation. And the same relation is regularly slipping from one sector to the other—from the intellectual to the rhetorical, to the professional, to the social, and back again.

Rationalist forms of thought produce just the sort of rhetoric, just the sort of “self” that enables the formation of a professional corps of lawyers cognitively and psychologically capable of running the sort of abstracted social coordination mechanisms known as Wall Street law. Similarly, Wall Street law creates the sort of stabilized, routinized, and recursive socioeconomic institutions and practices that make the stabilized and abstracted character of rationalist normative rhetoric possible. What we have in both cases is a process of slippage. The rationalist form in one sector slides (without conscious effort) into another sector, and then another, and so on.

This process of slippage from one sector to another in turn entails the cognitive phenomenon of resonance. If the eightieth floor Wall Street firm seems normal to the incoming associate rather than an outrage, it is because the relation of the eightieth floor to the people below is a mimetic replay, an echo of the relation of the rationalist normativity of the classroom to life itself. The eightieth floor seems right because it resonates with the rationalist normative rhetoric. Similarly, the rationalist normative rhetoric seems like a helpful way to think because it resonates with the eightieth floor.<sup>292</sup> Resonance allows the rationalist normative rhetoric to maintain itself. There are correspondences between rationalist normative rhetoric and the constitution of the social field.<sup>293</sup> The rationalist normative rhetoric is thus not so much

<sup>292</sup> The ability to experience (consciously or not) this kind of resonance is considered so important to law school that the LSAT has at times tested for this ability: “A is to B as I is to ?”

<sup>293</sup> Not only does it seem as if rationalism is all there is, but slippage makes rationalism seem to be everywhere. Indeed, as the rationalist rhetoric becomes a

completely wrong in its conceptualization of social life as it is systematically incomplete, overstated, and overextended.

This mimetic repetition and successive embedding of the same rationalist normative rhetoric in different sectors of social life (the intellectual, the professional, and the social), occurs as our attention is focused on other matters—on prescriptions, recommendations, substance, conclusions, theories. On the intellectual plane, one significant effect of nesting is to colonize, defuse, and distort destabilizing forces (such as deconstruction or postmodernism). Nesting accomplishes its effect by admitting and reconfiguring intellectual challenges in the rationalist format.<sup>294</sup> The rationalist rhetoric, however, does not replicate itself just by nesting. Some challenges and some dislocations must simply be kept *outside* of the rationalist rhetorical system altogether.

*E. Border Patrol Jurisprudence: The Uses of the Inside/Outside Distinction*

Through its privileging of theory over practice and substance over form, contemporary legal thought represents itself as “theory” and “substance.” “Theory” and “substance” in turn are typically represented as:

- rationality
- reasoned elaboration
- dialogue
- discourse
- interpretation
- judgment

(all of which are also often represented as law).

Excluded from the self-representation of legal thought are:

- power
- social force
- blind convention

rhetorically, and thus professionally, embedded discursive formation among legal academics, it slips into classroom discussion and there becomes entrenched among law students, who then become lawyers. Thus we have a continuous process of slippage, whereby the rationalist normative rhetoric slides from an intellectual system to a discursive formation to professional performances to cognitive and social embeddedness.

<sup>294</sup> Thus, for instance, before neo-pragmatism will be considered by orthodox legal thought, its contributions must be reformulated as distinct “propositions,” “ideas,” and “theories.” It must be recast in object-form artifacts that the normative rhetoric (and normative thinkers) can recognize. See Schlag, *supra* note 223.

social necessity  
 social contingency  
 historical accident

(all of which are often represented as concededly important to the development of law, but not law itself).

When presented in this graphic manner, this either/or form of thinking looks quite crude and unbelievable. That is because it is crude—in the sense of basic, unrefined, and not yet mediated by critical reflection. But while crude in these senses, this either/or form of thinking is hardly unbelievable. On the contrary, it is believed over and over again—even in the highest reaches of jurisprudential thought. Indeed, this sort of either/or thinking has a long and distinguished (albeit not always enlightened) history in jurisprudence where it is routinely featured in the famous dichotomy between “the internal perspective” and “the external perspective.”<sup>295</sup>

This distinction is critical to the formation of *Law's Empire* and to its insulation from *L.A. Law's Empire*. One of the striking things about *Law's Empire* is that while it claims to be just that (i.e., Law's Empire), the technical definition of its jurisdiction turns out to be exceedingly narrow, almost trivial. Dworkin's exclusionary technique is utterly classic. As he is engaged in the *constative* enterprise of defining the object of his inquiry, he is also engaged in the *performative* enterprise of excluding unwanted complications. From the very beginning of his book, Dworkin excludes troublesome or potentially destabilizing considerations through a series of either/or vacuum boundary oppositions.<sup>296</sup> Dworkin starts his book by announcing that he does not “discuss the practical politics of adjudication. . . . [He is] concerned with the issue of law, not with the reasons judges may have for tempering their statements of what it is.”<sup>297</sup>

This is the first of what will be several major either/or oppositions to come. With this one, Dworkin announces that he is concerned with *law*, as opposed to the *non-law* and quite possibly frivolous reasons judges may have for tempering their statements of what the law is. Hence, Dworkin is concerned with the “real” law,

<sup>295</sup> H.L.A. HART, *THE CONCEPT OF LAW* 86-88 (1979).

<sup>296</sup> The “vacuum boundary” notion was developed in Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 *BUFFALO L. REV.* 383, 383-85 (1979).

<sup>297</sup> R. DWORKIN, *supra* note 35, at 12.

not the distortions that judges and lawyers may make of it on *L.A. Law*. Dworkin continues:

My project is narrow in a different way as well. It centers on formal adjudication, on judges in black robes . . . .<sup>298</sup>

. . . .

Some critics will be anxious to say . . . these arguments obscure—perhaps they aim to obscure—the important social function of law as ideological force and witness. A proper understanding of law as a social phenomenon demands, these critics say, a more scientific or sociological or historical approach . . . .

. . . .

This objection fails by its own standards. . . . Of course, law is a social phenomenon. But its complexity, function, and consequence all depend on one special feature of its structure. Legal practice, unlike many other social phenomena is *argumentative*. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the *practice* . . . .<sup>299</sup>

Dworkin has set up a second either/or here. There is something that is called legal practice and it is bounded: indeed, “every actor *in* the practice,”—that is, any *insider*—knows very well that legal propositions are given their legal sense only “*within* the practice.” So, one can think of law *within* the practice of law or *outside* of it. But either way, law has an *inside* and an *outside*; it is bounded.<sup>300</sup> Dworkin does not argue this; it is simply an aesthetic consequence of the conventional deployment of the inside/outside distinction, or what Lakoff and Johnson call “the container metaphor.”<sup>301</sup> It

<sup>298</sup> Clearly, then, Dworkin does not belong on the episode of *L.A. Law* described earlier. See *supra* text accompanying notes 136-52. That episode had very little to do with either “formal adjudication,” or “judges in black robes.” Note also how Dworkin claims the center here, thereby implicitly relegating *L.A. Law* to the periphery.

<sup>299</sup> R. DWORKIN, *supra* note 35, at 12-13.

<sup>300</sup> See, e.g., G. LAKOFF & M. JOHNSON, *supra* note 91, at 29-32 (describing the container metaphor—the establishment of inside/outside boundaries in conceptualizing events, actions, activities, and states of being). For a discussion of the container effect in the legal context, see Winter, *supra* note 31, at 1150-52 (showing the links between the container metaphor and objectivist epistemology).

<sup>301</sup> Inasmuch as we are each embodied containers, we project our own in-out orientation not simply on physical objects, but on the visual field itself, on events, actions, activities, and states. See G. LAKOFF & M. JOHNSON, *supra* note 91, at 29-32. Consider, for instance, the way we use the container metaphor to describe states: he’s *in* love; we’re *out of* trouble now; he’s coming *out of* the coma; I’m slowly getting *into* shape; he *entered* a state of euphoria; he fell *into* a depression; he finally *emerged from* the catatonic state he had been *in* since the end of finals week.

is so conventional, so familiar to think that law is bounded, that it has an *inside* and an *outside*, that one might not even notice that something rather contestable has just been asserted.

This has been the second major either/or in less than a page. By this point, the book begins to have some rhythm. Nothing complex, you understand. Nonetheless, the reader is prepared to anticipate and accept Dworkin's thought in either/or terms. And Dworkin exploits this anticipation for he is about to formulate the killer either/or—the one that will be ritually invoked throughout his production to eliminate any threats to the theater of the rational or to *Law's Empire* itself:

People who have law make and debate claims about what law permits or forbids . . . . This crucial argumentative aspect of legal practice can be studied in *two ways* or *from two points of view*. One is the *external* point of view of the sociologist or historian . . . . The other is the *internal* point of view of those who make the claims. . . . This book takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the *issues of soundness and truth* participants face. We will study formal legal argument *from the judge's viewpoint* . . . because judicial argument about claims of law is a useful paradigm for exploring the *central, propositional* aspect of legal practice.<sup>302</sup>

Now as an aside, consider that on the stage of *L.A. Law's Empire*, this monologue would be wildly implausible, verging on the incoherent. On *L.A. Law's Empire*, judges are hardly "central" to legal practice. And if there were a single central aspect to legal practice, it would hardly be "propositional" in character. And as for the issues with which the participants or the actors struggle, these can hardly be accurately represented as "issues of soundness and truth."

But on the theater of the rational, Dworkin's statement is eminently plausible. Indeed, his statement is almost coterminous with the structure of the theater of the rational itself. His either/or establishes that one can try to make sense of legal practice from the *inside* (the internal point of view) or from the *outside* (the external point of view).<sup>303</sup> This move authorizes the author (Dworkin here) to locate the boundary between the internal and the external point of view in social and intellectual space. That is, it authorizes

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<sup>302</sup> R. DWORKIN, *supra* note 35, at 13-14 (emphasis added).

<sup>303</sup> With Dworkin situated in the very best place: the inside.

Dworkin not merely to make an abstract distinction, but to allocate the baggage of the world on one side or the other. And that, of course, is precisely what happens. Dworkin situates (virtually) everything that could possibly destabilize or threaten his empire on the outside. Sociology, history, legal practice itself, the perspective of lawyers, etc. are all already on the skids, already located on the *outside* where they can have no significant disruptive effect on what is on the *inside*, most notably “formal legal argument from the judge’s viewpoint . . . the central, propositional aspect of legal practice.”<sup>304</sup> In effect, the inside/outside distinction has severed these devalued aspects of law (like sociology, history, etc.) from *Law’s Empire*.

This severance is made possible by another conventional effect of the inside/outside distinction: it essentializes what is on the inside and separates “it” from what is relegated to the outside.<sup>305</sup> In our case, we would expect Dworkin’s rhetoric to essentialize the internal point of view, to map out its scope and fill in its content. But actually this has already been accomplished in the quote above. Indeed, it is amazing how quickly Dworkin’s assertion that there actually exists an “internal point of view” to the practice of law is reductively essentialized to the “study [of] formal legal argument from the judge’s viewpoint.”<sup>306</sup> The point so far is not that Dworkin has committed some argumentative *faux pas*. On the contrary, the point is to recognize that the rhetorical conventionality of the inside/outside distinction and its derivative, the internal/external perspective, have enabled controversial matters to be assumed *into* and *out* of existence without being questioned.

While the internal point of view is essentialized, the inside/outside distinction is performing other important rhetorical work—important exclusionary work. Excluded from Dworkin’s rendition

<sup>304</sup> R. DWORKIN, *supra* note 35, at 14.

<sup>305</sup> As Steve Winter puts it:

Perhaps the single most identifying characteristic of the objectivist model of rationality is the “law of contradiction” that flows from the belief in essences. . . . Thus, an object either has a property or it does not. Either a proposition or its negation must be true . . . .

. . . .

The entire, cherished apparatus of objectivist rationality turns out to be metaphorically structured. . . . [O]bjectivist categorization according to common properties is premised on a conception of categories as metaphoric containers.

Winter, *supra* note 91, at 652, 661.

<sup>306</sup> R. DWORKIN, *supra* note 35, at 14.



of the "internal perspective" are exactly those social features like power, force, blind convention, history, psychology, sociology, etc., that would threaten his enterprise if considered.

Take sociology, for instance. Because Dworkin's deployment of the internal/external boundary always already excludes sociology, he can always already dismiss it as an external perspective.<sup>307</sup> Thus Dworkin does not have to consider the sociology of legal thought, the ways in which sociological forces constrict legal thinkers such as judges and himself. And indeed, this sort of argument is repeated routinely throughout Dworkin's book, serving to deflect challenges to his account of what he calls law. Yet this marginalization of the social and the historical seems—now that we think about it—clearly wrong. It seems clear that a competent judge (or legal academic) would want to think about the social and historical location of her own thought processes.<sup>308</sup> Why, then, do we almost automatically believe Dworkin when he tells us that sociology and history are part of the external perspective?

In part, it is because Dworkin is hardly the first to use the internal/external perspective in these ways. He is following a long, well-sedimented convention of legal thought. H.L.A. Hart, for instance, believed that it was useful to distinguish the external point of view of the "observer who does not himself accept" the legal rules, from the internal point of view of the "member of the group which accepts and uses them as guides to conduct."<sup>309</sup> For Hart, the external point of view can be useful to predict the behavior of members of the group, but it cannot reproduce "the way in which the rules function in the lives of certain members of the group."<sup>310</sup>

It is precisely the embeddedness of this distinction which routinely leads us to represent law as if it 1) has a boundary; 2) that can be located in social/intellectual space; 3) that separates law

<sup>307</sup> Imagine, for instance, that Dworkin's internal perspective were structured in such a way that he or Hercules actually had to deal with the sociological relations of *L.A. Law's Empire*. What do Hercules and *Law's Empire* have to do with *L.A. Law*? Dworkin believes he doesn't have to answer this question because he can always already claim that *L.A. Law* is quite simply outside of *Law's Empire*. The view from *L.A. Law* is an external perspective that, therefore, cannot organize, disrupt, or otherwise challenge the internal constitution of the practice called law.

<sup>308</sup> Dworkin recognizes that the legal actor will sometimes want to examine the historical record to the extent that some historical fact may be germane to the litigation. *See id.*

<sup>309</sup> H.L.A. HART, *supra* note 295, at 86.

<sup>310</sup> *Id.* at 88.

from destabilizing inquiries and knowledges; and 4) that stabilizes the realm of law by encasing it in objectivist form. Not surprisingly, this sedimented rationalist distinction reproduces itself automatically, without anyone questioning whether this is a useful or accurate way of representing law. The thought of those who think about law arises from within the sedimented intellectual practices of those who have left their marks before. Kent Greenawalt, for instance, writes:

In trying to develop a satisfactory account of law that appropriately treats both normative and conventional elements, one can usefully distinguish an outsider's, or sociologist's, view from that of a participant who must actually decide what the law is. It is no coincidence that Hart, while emphasizing the "internal point of view" taken by officials, has been mainly interested in the former and Dworkin the latter. Because convention looms larger in a sociologist's view of law than a participant's, and normative elements are more central for a participant, Hart's focus has led him to stress convention, and Dworkin's focus has led him to concentrate on normative evaluation.<sup>311</sup>

There is nothing wrong with Hart focusing on convention and Dworkin stressing normative evaluation—nothing wrong so long as the distinction between the internal and the external perspective is as helpful as it is cracked up to be. But it is not clear that it is. One of the consequences of allocating the world's intellectual baggage to one side of the dichotomy or to the other is that this procedure eclipses some interesting questions about the connections between sociology (Hart's focus) on the one hand and normative evaluation (Dworkin's interest) on the other.

If one is constantly operating in a world in which these are seen to be two different and relatively unrelated enterprises, then the lack of connection is established and sanctified from the very beginning. This leaves us with a sociology of law that is largely immunized from normative argument, and a normative evaluation that has no ready correspondence to what sociology tells us about who we are. It leaves us, that is, precisely where we were when we noted that the aesthetics of normative legal thought are discordant with the aesthetics of bureaucracy that define the social sphere.<sup>312</sup> It leaves us with the awesome dissonance we earlier experienced

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<sup>311</sup> Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 663 (1987).

<sup>312</sup> See *supra* text accompanying notes 210-11.

between *Law's Empire* and *L.A. Law's Empire*.<sup>313</sup> And it is precisely the conventionally entrenched and normatively defended distinction between the internal and the external perspective that systematically enables and legitimates legal thinkers not to think about, or even recognize, this otherwise stunning dissonance.

Moreover, this aesthetic distinction slides over into the social field. We begin by thinking of law as bounded on aesthetic grounds; we end up thinking of the social phenomenon of law itself as a kind of bounded object. The problem, of course, is that whether the social phenomenon of law is bounded is quite controversial. Yet, the "aesthetic" supposition of an internal and external perspective succeeds in presupposing this problem away; it succeeds in establishing into existence social facts that are little more than the predictable result of conventional metaphorical usage.<sup>314</sup>

The insulation and segregation of knowledge happens at the intellectual, cognitive, and professional levels. As Kent Greenawalt anticipated, the intellectual/cognitive effects of the distinction between the internal and external perspectives are translated into professional formations/deformations.<sup>315</sup> Unfortunately the professional intellectual divisions created and maintained by the internal/external perspectives may not be particularly helpful to serious intellectual endeavor. For example, the split between law and social science is associated with a rather unbelievable (albeit all too real) professional polarization. As Lawrence Friedman put it:

Probably no serious scholar clings absolutely to either one of the two polar positions; nobody thinks that the legal system is totally and absolutely autonomous; and nobody (perhaps) seriously puts forward the opposite idea, that every last jot and tittle, every crumb of law, even in the short, short run, can be and must be explained "externally." But most lawyers, and a good many legal scholars and theorists, tend to cluster somewhere toward the autonomous end of the scale. Social scientists interested in law,

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<sup>313</sup> See *supra* notes 136-216 and accompanying text.

<sup>314</sup> Robert Summers puts it this way:

An important job for legal theorists is to develop adequate accounts of certain general social facts of and about law, not just as a preliminary to doing legal theory, but also as legal theory itself. Such facts must figure *directly* in descriptive accounts of various general facets of law. In addition, we could not do a lot of the normative and conceptual work in legal theory that we now do without such facts (or such facts fairly assumed).

Summers, *On Identifying and Reconstructing a General Legal Theory—Some Thoughts Prompted by Professor Moore's Critique*, 69 CORNELL L. REV. 1014, 1034 (1984).

<sup>315</sup> See Greenawalt, *supra* note 311, at 663.

and legal scholars with a taste for social science, tend to cluster somewhere toward the other end . . . .<sup>316</sup>

If Dworkin's invocation of the internal/external perspective works so well, if it seems so plausible, it is in part because the distinction resonates so well with the present configuration of the university—the divisions of departments, disciplines, and sub-disciplines. The sorts of distinctions that Dworkin makes are not only professionally, but physically inscribed. The entire university is carved up into departments that are housed in separate buildings.

This division of the university of disciplines can seem perfectly sensible. Within each discipline and sub-discipline we have complex formalizations that appear to be helpful, productive, and "serious." But as one gains distance from any particular discipline or sub-discipline and tries to make sense of the entire assembly of disciplines and sub-disciplines, a new picture emerges. It suddenly looks as if each discipline or sub-disciplinary group has carved up its own jurisdiction, its own intellectual territory, so that all the truly difficult and interesting questions, all the major intellectual obstacles are located outside, beyond the boundaries of each discipline and sub-discipline. From a distance, it looks as if there is (virtually) no intellectual action to be found on the inside—just the mindless rehearsal of disciplinary discourse moves. It looks as if the jurisdictions have been defined so as to avoid and externalize all intellectual challenges or dilemmas, as if the department structures and the various disciplines and sub-disciplines have all been mapped out so as to maximize the possibilities for formalization and to minimize encounters with aporias, contradictions, paradox, or the like. It looks as if the disciplines are organized to frame intellectual problems that will minimize the necessity for any significant thinking.<sup>317</sup>

In other words, the disciplines and sub-disciplines quite literally organize themselves *around* aporias and paradoxes. They achieve a

<sup>316</sup> Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1581-82 (1989).

<sup>317</sup> The result has been described by Heidegger:

When thought comes to an end of withdrawing from its element, it replaces the loss by making its validity felt . . . as an educational instrument and therefore as a scholarly matter and later as a cultural matter. Philosophy gradually becomes a technique of explanation drawn from ultimate causes. One no longer thinks, but one occupies oneself with "philosophy."

Heidegger, *supra* note 135, at 273.

respectable formalization not because they “know” anything, but because they are organized so that they don’t have to know about the contradictions, aporias, and paradoxes that surround them and that effectively define and limit their intellectual jurisdiction.

As an example, consider the role of the performative contradiction. Until very recently, the worst thing one could do in academic thought was to get caught in a performative contradiction. Not surprisingly, after decades of striving to avoid performative contradictions, we have a sedimented academic structure and sedimented “knowledges” all nicely arranged in discursive formations constituted to avoid performative contradictions. But after decades of avoiding performative contradictions, there is now a new concern: where don’t you go, what do you miss, if you keep trying to avoid performative contradictions? And, of course, there is a political angle to all this. After all, fear of performative contradiction discourages and marginalizes reflexive inquiry into the status of our own statements and our own knowledges. Fear of performative contradiction thus has a conservative effect. And what is conserved, of course, is the jurisdictional and structural integrity of our knowledges. But, of course, because this integrity depends upon such a truncated definition and establishment of the knowledges and the disciplines, it is almost a joke: integrity as joke.

Consider, for instance, that the jurisdiction of legal thought is delimited largely by reference to the doctrinal pronouncements of appellate judges. Indeed, this reductive equation of the “internal perspective” on law with the pronouncements of the appellate judge is at once routine and bizarre. Why should the appellate judge—typically a passive, infrequent, thoroughly manipulated, and generally inaccessible participant in the production of law—serve, not just as the main, but the only referent point for “the internal perspective?” Why not “the lawyer,” “the legislator,” “the bureaucrat,” “the average citizen?” And why, for that matter, should we routinely attach so much importance to what judges think about law?<sup>318</sup>

And there are political as well as intellectual, cognitive, and professional effects and implications that result from the deployment of the internal/external perspective. In Dworkin’s case, the internal perspective presents an unbelievably appealing vision of

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<sup>318</sup> Can you imagine trying to make sense of the automobile market by adopting “the internal perspective”—and then equating the internal perspective with the dealer’s point of view?

contemporary law while relegating its less admirable aspects to the professional oblivion of the external perspective. Thus Dworkin begins and leaves us with a highly romanticized vision of law as an appealing form of rational thought. This is not hard to do so long as one, like Dworkin, is rhetorically astute in ways that we, as participants in the theater of the rational, are already prepared to accept.

The theater of the rational comes with its own grammar for the suspension of disbelief; Dworkin need only hint at this theater in order to get the audience to participate. Dworkin is very good at this theater: he describes a minuscule fraction of the realm of law and makes it out to be *Law's Empire*; rather than alerting us that the law about which he writes is far removed from the law as it is practiced by lawyers in late twentieth century United States, Dworkin repeatedly invites the audience to confuse and conflate *Law's Empire* with what we know to be *L.A. Law's Empire*.<sup>319</sup> The (not quite) final irony of this recursive rehearsal of the internal/external perspective is that external perspective is forgotten, as the internal perspective comes to represent everything that "really" matters.

Meanwhile, the internal/external perspective slides well beyond the *intellectual* borders of the theater of the rational.

#### F. *The Birth of the Clinic*

The reverberations of the internal/external perspective do not stop in the genteel ether of intellectual thought. On the contrary, the internal/external perspective is marked and echoed in the very topography of the law school. The external, the *L.A. Law* stuff, is almost always located in and sharply confined to a rigidly demarcated space. This is a space demarcated and known as "the legal clinic." It is almost always to be found in a basement or in an annex, or in some other peripheral, typically devalued site, located outside the place where the main event—the traditional class—is held.

And there should be nothing surprising about this correspondence between the fancy jurisprudential dichotomy of internal/external perspective on the one hand and the graphic, physical separation of the traditional classroom and the clinic on the other. The latter is simply the material inscription of the already extant

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<sup>319</sup> Dworkin, of course, is hardly alone in this.

and ruling dichotomy between the internal and the external perspective, a dichotomy that has already been inscribed at the cognitive, professional, and political levels. Before the legal clinic became a place, before the name "legal clinic" became a metonym, it was an idea. In order to end up in a separate, peripheral, largely devalued place, the legal clinic had to be seen as a separate, peripheral idea—an idea separable from what goes on in the traditional classroom.<sup>320</sup> And given the standard cognitive, professional, and political inscription of the internal/external perspective, it was, of course, easy for law faculties to see legal clinics as not belonging in the classroom.

Indeed, to recognize the work of the legal clinic as something that did belong in the classroom would be to surrender professional and political benefits already secured by the sedimentation of the internal/external dichotomy. That is, such a recognition would entail, for the traditional legal faculty, extensive revision of the classroom script (a lot of hard work) and increased intellectual risk as legal "knowledge" would be subject to the vagaries, complications, and uncertainties of actual practice (a lot of ego risk). On the political level, to allow the clinic into the classroom would mean that the traditional faculty would immediately have to surrender the pleasant political fantasy that they are helping prepare lawyers for an always already noble and admirable enterprise (something akin to *Law's Empire* or the *Rule of Law*).

This separation between the theater of the rational and *L.A. Law* thus finds one of its most material, and hence most durable and indelible inscriptions in the division between the legal clinic and the traditional classroom.<sup>321</sup> The physical separation authorizes

<sup>320</sup> See *Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U.L. REV. 337 (1987).

<sup>321</sup> "Clinical courses originated on the fringe of the law school, not its core." *Id.* at 338 (remarks of Kandis Scott) (This is center/periphery imagery, not inside/outside, but close enough).

"What was once the fringe, or, as one of the Presidents of the Association of American Law Schools called it—"the side show"—now has become the main stream." *Id.* at 342 (remarks of Dean Hill Rivkin).

"Life was very simple at that point. The big debate was between in-house or out-house clinics." *Id.* at 347 (remarks of Roger Wolf).

It is important to recognize that the separation is repeated throughout law school experience. In moot court competitions, for example, it is common practice for traditional faculty to sit in as judges and ask the traditional theater of the rational questions. After the moot court competition is over, though, the pretense somehow drops, the internal perspective is forgotten, and both professors and students launch into a *real-politick* description of the rhetorical character of the argument in particular

student role differentiation. The social significance of this separation is that it constructs students who behave as if the two worlds—the legal clinic and the traditional classroom—have little to do with each other. Students quickly learn that anything assimilated in the legal clinic is irrelevant to the traditional classroom in which the law is explored from “the internal perspective.” The student learns that she can be one kind of law person in the clinic and a completely different kind of law person in the classroom. She learns one of the key lessons the legal academy imparts to its students: to internalize contradiction and to defuse contradiction by compartmentalizing the self.<sup>322</sup>

This ability to compartmentalize the self in terms of performative roles becomes very important to the student once she becomes a lawyer—it is the technique by which the student-become-lawyer resolves the contradictions practice presents. It is the technique by which ugly actions are insulated in a compartment of the self and rationalized away. As the saying goes, “it’s just my job.” It is in this way that the lawyer is constructed to become a key site for the management of social contradictions.

Given the way the internal/external perspective becomes inscribed in the structure of the self, it really is no surprise that this jurisprudential distinction should resonate. It is relentlessly recursive and reenacted at various levels, all of which, by virtue of their synchronicity, tend to confirm each other. So not surprisingly, after being relentlessly projected and subsequently inscribed at the levels of the cognitive, professional, political, material, and self, the distinction between the internal and external perspectives just simply seems true. In a psychoanalytic, rhetorical, and theatrical sense, the internal/external perspective is relentlessly acted out.

Now there are a few points I want to emphasize about the ways in which the internal/external perspective works. First, to the extent this inscription of this distinction slips from the cognitive, through the professional, and political to the material levels, the dichotomy and its organization of the world become more difficult to undo. They become more difficult to undo in the crude sense

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and appellate advocacy in general. Invariably, the students are quite shocked to discover that even the more theoretical, normatively inclined teachers—whom students are accustomed to view as actors in the theater of the rational—are not wholly unaware of the “practical realities” of appellate advocacy.

<sup>322</sup> For elaboration on the structure of this self, see Schlag, “*Le Hors de Texte*,” *supra* note 5, at 1667-73 (describing the relatively autonomous self).



that the distinction acquires greater social weight. Once the clinic is located downstairs or in the annex, it becomes more costly to try to integrate the clinic into the classroom. More importantly, however, once the clinic is downstairs or in the annex, it becomes more difficult even to imagine putting the clinic in the classroom. Thus, slippage works in the reverse direction as well. Once inscribed at the level of the material or professional, the embedded inscriptions of internal/external such as "classroom"/"clinic," and "regular faculty"/"clinical faculty" in effect confirm the "intellectual" validity and plausibility of the dichotomy. In this sense, the internal/external perspective resonates in the material and professional organization of the law school. Once inscribed in that organization, it is a powerful material confirmation of the idea that clinic and classroom carry on distinct activities. The process of resonance confirms the sense that the internal/external perspective is indeed anchored in "reality." The internal perspective of *Law's Empire* is in the classroom, and the external perspective of *L.A. Law* is in the clinic. In short, the internal/external dichotomy and its asserted content gain "intellectual" validity precisely because they have been inscribed at the cognitive, professional, political, and material levels.

What we learn, then, by taking the internal/external perspective dichotomy seriously, is that the kind of theater it supports, the theater of the rational, is itself constituted by a series of cognitive, professional, material and intellectual practices of questionable rationality. If normative legal thought is now in trouble, it is because it has been the main production on a kind of theater that is fast losing its credibility.

#### CONCLUSION

Normative legal thought is conclusion-oriented. Among other things, this means that normative legal thought works very hard to reach this point (the "Conclusion"). This is the point where the payoff is to be found—the what to do?, the prescription, the recommendation. This is so clearly the site of the payoff that many legal thinkers routinely turn to the conclusion first in order to decide whether it is worth reading the article or not. Why, after all, endure an arduous journey through scores of pages if the pay-off is not warranted?<sup>323</sup>

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<sup>323</sup> Imagine, then, the confusion of the poor reader who has picked up this article

Conclusions are the point at which normative legal thought is supposed to graft its thought onto a social or juridical reality outside the text. For normative legal thought, the conclusion is the anxious moment when the thought ceases and the prescription, the recommendation, is urged upon the reader. This is where the reader is supposed to make her choice whether to accept or reject the conclusion. If the argument has been good, and the prescriptions fit the argument, then the expectation of both author and reader is that the latter should adopt the conclusion as her own.

All of this, of course, is *déjà vu*. It resonates not just with the practices of reading and writing normative legal thought in the academy,<sup>324</sup> but with a more primal experience: the structure of the appellate brief. There is in the form of normative legal thought a mimetic replication of the structure of the lawyer's brief. The lawyer's brief begins with a statement of jurisdiction, a statement of the issues, the discussion of the facts, the argument of law, and then the request for judicial relief. Normative legal thought closely tracks this structure, and when it is complete, there is a conclusion. The conclusion in normative legal thought is thus the mimetic counterpart of the lawyer's prayer to the court for remedy, for decision.

The big difference, of course, is that the legal brief is almost invariably addressed to some agent who has the jurisdiction and the power to grant the relief requested, whereas, normative legal thought is almost invariably not. That too explains why the conclusion in normative legal thought is such an anxious moment. At the borderlands of consciousness, there is a sense in which normative legal thinkers know that their prescriptions and recommendations are not going anywhere. At the borderlands of consciousness, legal thinkers know that within the tens of thousands

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and engaged in precisely this practice—of turning to the conclusion first.

<sup>324</sup> It resonates, among other things, with Lakoff's source-path-goal schema. See G. LAKOFF, *supra* note 6, at 275. As Steve Winter puts it:

We identify the subject matter of a lawsuit through the elements of the causal schema. The defendant's act is the *source*, the causal chain is the *path*, and the plaintiff's injury is the *goal*. The remedial *source-path-goal* metaphor is virtually a mirror image of the causal one: The individual's injury is the *source* of a process that has as its *goal* an order from the court redressing that injury; the *path* that connects them is the plaintiff's proof that the acts of the defendant caused the injury.

Winter, *Standing*, *supra* note 112, at 1388 (footnote omitted). For further discussion of the role of this schema in the context of our conceptualization of causes of action and adjudication generally, see *id.* at 1388-91, 1412, 1457, 1472-78, 1496.

of pages of volumes 1 to 103 of the *Harvard Law Review*—for instance—there is an abundance of prescriptions and recommendations that have gone nowhere and done nothing but serve as the occasion for repeating argument structures and forms we now look back upon with an odd mixture of amusement, disdain, and humbling self-recognition.

But not perfect self-recognition. Not perfect—because if you look back at those pages of the *Harvard Law Review*, it is apparent that the old school academics, those who wrote in the earlier part of the twentieth century, were much more self-identified with the courts and the judges. The old school academics took themselves to be speaking to judges, to helping judges along. They identified with the mode of judicial thinking. It is easy to conclude that, for much of the earlier part of the twentieth century, legal academics were far more successful (at the very least) in fooling themselves that their work had some effect on the judiciary.

Currently, of course, this sort of supposition is hardly believable. For some legal thinkers, this recognition is the occasion for nostalgia. For others, it is nothing of the sort. Who wants to prescribe or recommend things to judges anyway? Sounds like a recipe for formalism.<sup>325</sup> What's more, if one enters the bureaucratic maze of doctrinal restatements restated, one ends up with restatement consciousness. And why do that? Because it's law? Doubtful.<sup>326</sup>

Law has apparently transformed itself into a bizarre bureaucratic form of life that reproduces itself, not just without consulting us or our wishes, but by shaping us and our wishes. What is the role of normative legal thought relative to bureaucratic practice? But that is already the wrong question. Normative legal thought isn't somewhere else, where it could then be relative to this practice. Normative legal thought is that inseparable aspect of bureaucratic practice that persists in mistakenly thinking that it is separate and distinct and then compounds this error by thinking that it rules over bureaucratic practice. Normative legal thought is at once an

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<sup>325</sup> Given that there is no case docketed and that the legal thinker is even further removed from the scene of action than the judge.

<sup>326</sup> Sometime in the future, the ALI will publish the Third Restatement on Everything. It will be a comprehensive compilation of four-part balancing tests all based on key terms that will themselves be defined in terms of four-part balancing tests, and so on in such a way that the Third Restatement on Everything will have achieved the first totally comprehensive, totally closed system of totally self-referential four-part balancing tests. It will be great. Then it will turn to mud.

abstraction of and indistinguishable from the operations and practices of bureaucracy.

There is no stable referent behind the bureaucratic practices' own self-representation and self-effectuation in normative thought. Normative legal thought has thus had the effect of retarding our understanding of our social situation within the academy.

Normative legal thought, of course, is also a mode of social control—both within and without the legal academy. As I've argued throughout this article, the rhetoric of normative legal thought establishes the identity and polices the bounds of legitimate legal thought. As this article itself demonstrates—constatively and performatively—normative legal thought is breaking down, is losing its appeal. This is what enables me to think and write this article, and what enables you to read and understand it.

There are enough dislocations, disruptions within normative legal thought and within our social order that we can actually begin to re-cognize (that is, to cognize again and differently) that normative legal thought is not as it represents itself to be; that its main significance lies in the rehearsal and the inscription of a false social aesthetic; that its politics are seriously out of date; that its contributions to the construction of social and legal reality are ambivalent at best, noxious at worst.

But what should we do? This question arrives on this scene predictably enough, but really much too late at this point. It's already being done. We've been doing it since the beginning of this article, and even before. We've been trying to show a whole series of routine normative agendas, questions, and frameworks the way off the jurisprudential stage. They are not helpful anymore. More accurately, more mildly: their *dominance* is not helpful anymore.

Needless to say, this article is not a glowing report of the enterprise of normative legal thought. Still, it is not meant as criticism. It is more in the nature of an attempt to help destabilize normative legal thought. What is happening here and elsewhere is that a whole way of thinking about the law is being troubled and displaced. For those who want to continue to live in the old ways, this process is not pleasant. Indeed, it's rarely pleasant to inhabit a social practice that is being changed without your consultation. *But don't let that distract you.* It happens all the time. It's happening now. With and without this article. It's the law.