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The Epidemiology of Critique

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A decade and a half ago, I experienced my proverbial fifteen minutes of fame when *Some Realism About Critical Legal Studies* appeared in these pages.[1]

That certainly wasn't the plan. In much the same sense that "all politics is local," all legal scholarship is surely local as well, and in its conception *Some Realism* was as local as could be. Written at the height of the critical legal studies (cls) "Red scare" of the mid-1980s – and designed to reach an audience of Miami law faculty and alums who were still much in the thrall of the late, great Dean Soia Mentschikoff – the article emphasized the intellectual roots of cls in American Legal Realism and thus represented an effort to make the community a bit more comfortable with then-recent (and highly exaggerated) reports that "the crits" were taking over the school.[2]

Although the primary point of the piece was that legal reasoning could frequently justify more than one outcome in a particular case – and, my, how quaint the indeterminacy debate seems these days – it was

* Professor of Law, University of Miami. Special thanks to Pat Gudridge and Jeremy Paul for exceptionally insightful readings of an earlier draft; to Jennifer Christianson, Jason Kairalla, and the rest of the Volume 56 Executive Board of the *University of Miami Law Review* for their faith in this Symposium; and to Michael Huber, the incoming Editor-in-Chief, whose patience and professionalism made a successful completion of the project possible.

1. Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505 (1987).

2. *See, e.g.*, WASH. TIMES, Sept. 25, 1986, at 5A (listing Miami among several law schools where cls purportedly had a "sizeable influence"); Noreen Marcus, *Law's New Wave: Critical Legal Studies Comes to UM*, MIAMI REV., Sept. 29, 1986, at 1. On the cls "Red scare" more generally, see Jerry Frug, *McCarthyism and Critical Legal Studies*, 22 HARV. C.R.-C.L. L. REV. 665 (1987) (book review).

my effort to impersonate Robert Hale that created the stir. Drawing upon Hale's work exploring the hidden politics of American private law,[3] I posed a hypothetical I had developed to spur critical thinking and debate in my labor law class: What would the world be like if the law granted labor rather than capital the legal entitlement to the fruits of the joint enterprise – naturally, it was the ownership of a "widget" that was at stake – and labor paid capital a "wage" for the latter's input in commodity production?[4]

In retrospect, I may have overestimated the comfort level of my intended audience with Realist-style critique, or perhaps comforting

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3. *See, e.g.*, Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

4. Fischl, *supra* note 1, at 527. In its entirety, the passage read thus:

> Near the beginning of my course on labor law, I engage my students in the following dialogue: Picture an employee who works for a company that produces widgets. One working day, this employee builds four widgets and, at the end of that day, tenders to her boss an amount in cash equal to the cost of the necessary materials and their procurement, the reasonable rental value of her workspace and tools, and the apportioned cost of other managerial expenses. She then leaves the shop and takes the widgets with her, planning to sell them and keep the profit. What, I ask, will happen?
>
> My students stir restlessly until someone volunteers that the employer will sue the employee, or have her arrested. On what theories, I respond. Someone hazards the guess that the employee has committed the tort of conversion or the crime of theft. I then ask why the *employer* is not guilty of the same misconduct when he pays the employee a reasonable "rent" for her labor, keeps the widgets for himself, and sells them for his own profit. There is more stirring and murmuring, until someone finally says, "Because the widgets belong to the employer – the law says that they're his property."
>
> Why should that be, I ask. After all, there is nothing "necessary" about permitting the employer to "rent" the worker and keep the widgets; why not structure the relationship the other way around? When someone objects that, if we did that, "then we wouldn't have capitalism," I reply that that's exactly my point. The law reflects and enforces a core assumption about the relationship between employer and employee in a market economy: the employee's legally protected interest in the job is limited to his wage, while the employer is accorded the exclusive right to both the widgets and the profits to be earned from their sale. . . .
>
> To cls, the decision to give legal sanction to (and hence to enforce by state coercion) this or *any* distribution of legal entitlements reflects assumptions that should not be immune to re-examination and critique. We might want to consider the current arrangement in light of our democratic and egalitarian aspirations and ask whether it exacts too great a cost in terms of the self-determination and the bargaining power of working people. Or we might conclude that employer ownership provides advantages in terms of investment incentives and transaction efficiencies, and therefore decide that we prefer to leave things the way they are. The point is that the current distribution is a *choice* – not a "natural" or "necessary" phenomenon. It only *seems* "natural" because of our habit of treating the initial distribution of legal entitlements as a "private" law issue, which obscures the fact that this arrangement is wholly a matter of political choice. A major aim of cls, then, is to open up such subjects to democratic examination and debate.

Id. at 527-28 (footnote omitted; italics in original).

skeptical alums and senior colleagues was not what I was up to after all. But not in my wildest dreams did I imagine the attention that the "widget hypothetical" would eventually receive and the reaction that it would provoke.

As I would later learn, the trouble began when a reporter from *The New York Times* interviewed Derrick Bell – then a member of the Harvard Law faculty – about the failure of several scholars associated with cls to secure tenure at Harvard, and Professor Bell urged the reporter to read *Some Realism* (among other things) in order to get a feel for the ideas associated with cls.[5] The reporter evidently did her homework, and she and her editors eventually decided to run an excerpt from my article in connection with the Harvard story. I caught wind of this when she called to verify my name, rank, and institutional affiliation, but when I actually saw the piece – in the Sunday "Week in Review," no less – I was stunned to discover that the "widget hypothetical" was reprinted virtually in its entirety as a sidebar with the caption, "What the Fuss is About."[6]

Fuss indeed. For better or for worse, one of the consequences of having your scholarship appear in the Sunday *Times* – rather than in the usual places – is that people actually read it and respond to it, and respond to it they did. I heard from academics working in a wide variety of fields (including economics, philosophy, business, and life sciences) and from a fair number of regular folks as well – most in both groups bearing the unsettling news that my quote had convinced them that everything they had suspected all along about cls was pretty much spot-on. In the meantime, a law and business newspaper in Miami ran a brief story comparing my moment in the sun to that of Gary Hart's then-recent sailing partner, and that brought a second wave of incoming mail, local and equally unflattering.[7]

To be sure, some of my correspondents were more generous than others, and none was more gracious than Guido Calabresi, then a civilian and dean at Yale, who saw the *Times* piece and wrote a charming letter requesting a reprint of the article.[8] A cordial correspondence ensued, but things got a little touchy during an exchange about the strik-

5. Letter from Derrick Bell, Professor of Law, Harvard Law School, to Richard Michael Fischl, Professor of Law, University of Miami School of Law 1 (Aug. 31, 1987) (on file with author). Professor Bell now teaches at New York University School of Law, and that's a story in itself.

6. Jennifer A. Kingson, *Harvard Tenure Battle Puts 'Critical Legal Studies' on Trial*, N.Y. TIMES, Aug. 30, 1987, § 4 (The Week in Review), at 6.

7. *See* Mary Anne McAdams, *UM Law Professor Excerpted by New York Times*, MIAMI REV., Sept. 4, 1987, at 11. As Miami humorist Dave Barry might put it, I am not making this citation up.

8. Letter from Guido Calabresi, Dean, Yale Law School, to Richard Michael Fischl,

ing absence of scholars associated with cls at his law school. There is a none-too-pretty story there – I was vaguely familiar with that story, and Dean Calabresi may have suspected as much – but, demonstrating my best company manners, I confined myself to noting the irony of that absence given Yale's historical association with Legal Realism.[9] His response, which cut to both the chase and the quick, was that "those with Cow Pox don't get Small Pox."[10]

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As I cleared the decks to begin drafting this Introduction, that remark was very much on my mind. To be sure, small-pox jokes seemed funnier back then – as did so many things – and in any event credit must go to Duncan Kennedy for developing and popularizing the legal-theory-as-virus metaphor in connection with the critical tradition in American law.[11] But the epidemiology of critique suggested by Dean Calabresi's *bon mot* stirred in my imagination as I read my way through some earlier assessments of Pierre Schlag's scholarship and the two dozen contributions to this Symposium. For much like a virus, Pierre's work seems to produce patterned symptoms among many of those who encounter it (e.g., irritable scholar syndrome and a compulsion to ask, with increasing impatience, for directions); in other cases to mutate into harmless conformity with the predispositions of the host ("we're all deconstructionists now"); to encounter hearty resistance in certain populations (one can almost picture the antibodies swarming his texts); and to reproduce itself endlessly in still others (all together now: authority! experience! tradition! perception! custom! convention! faith! emotion! and so on!).

To be sure, these strong reactions will come as no surprise to those familiar with the scholarship in question, which contests some of the most cherished practices and beliefs of the legal academy. According to Pierre, our obsession with normative questions ("What should be done? How should we live? What should the law be?") undermines our capacity to comprehend the law that already *is* and our decidedly humble (if

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Professor of Law, University of Miami School of Law 1 (Sept. 4, 1987) (on file with author). Dean Calabresi is now a judge on the United States Court of Appeals for the Second Circuit.

9. On the historical association, see LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986); on the none-to-pretty story, see Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1530-34 (1991).

10. Letter from Guido Calabresi, Dean, Yale Law School, to Richard Michael Fischl, Professor of Law, University of Miami School of Law 1 (Sept. 28, 1987) (on file with author).

11. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE} 73 (1997) (describing the critical tradition of legal realism and cls as a "'viral' strain" in American legal thought); *see generally Critical Legal Studies (Début de Siècle): A Symposium on Duncan Kennedy's* Critique of Adjudication, 22 CARDOZO L. REV. 701-1189 (2001).

not entirely innocent) role in its operation,[12] and our efforts to represent law (or at least the law we *like*) as reason's fairest child are self-delusions at best and apologies for power's dominion at worst.[13] Such claims are obviously not likely to go over well among legal academics, and often they haven't.[14] Taken together, they challenge what might be described as the "authority-fetishism" of the mainstream American jurisprudential tradition: the seemingly relentless quest for that special something (legal science, situation sense, policy analysis, reasoned elaboration, rights, principles-not-policies, wealth maximization, etc.) that will turn a debatable "ought" into a transcendent and incontrovertible "is" and thus remove the author (that would be *us*) from the picture. In Pierre's apt phrase, it's law as a continuation of God by other means . . . and pay no attention to that really busy guy behind the curtain.[15]

The challenge to authority-fetishism fares better in this crowd, and – if I may be permitted another deployment of the viral metaphor – the reason may be that many of the contributors have found a refuge of sorts in "inoculation." Thus, Pierre's claims may well produce milder reactions among scholars whose work is associated with various schools of critical legal thought – cls, radical legal feminism, critical race theory, left-postmodernism etc. – that have long viewed reason and much of legal normativity as profoundly implicated in various forms of invidious social and institutional hierarchy. To be sure, those who struggle to reconstruct reason and normativity in order to avoid the pitfalls identified by critical theory – those who would, in other words, reconfigure authority in a kinder and gentler image – are likely to resist and perhaps even resent Pierre's argument that the reconstructive enterprise is far more likely to replicate than to remedy those errors. But those who have given up the search for "the voice of the father, the holy word of law"[16] are likely to be more receptive to his claims, more likely to view his challenges to reason and legal normativity as a useful adjunct to their own. And those who have given up that search because they think *the search is the problem* may well conclude that Pierre's challenge to authority-fetishism is pretty much spot-on.

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12. *See* Pierre Schlag, *Normativity and the Politics of Form*, 29 U. PA. L. REV. 801 (1991).

13. *See* PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998).

14. For some particularly virulent reactions – and a fascinating account of what may produce them – see Peter Goodrich, *Pierre the Anomalist: An Epistemology of the Legal Closet*, 57 U. MIAMI L. REV. 791 (2003).

15. Pierre Schlag, *Law as a Continuation of God by Other Means*, 85 CAL. L. REV. 427 (1997).

16. Goodrich, *supra* note 14, at 814.

My sympathies lie with the latter view – "the search is the problem" was the principal point of *The Question That Killed Critical Legal Studies*[17] – and it isn't hard to fathom from whence my own particular inoculation came. For one thing, I was raised in the Baltimore Catechism era (i.e., pre-Vatican II) Catholic Church of no-meat-on-Fridays, no-food-for-three-hours-and-no-drink-for-one-before-Communion, mandatory-Mass-on-Sundays, Gregorian-chant-and-prayers-at-the-foot-of-the-altar, saving-pagan-babies fame. When it comes to breeding resistance to the claims of authority, the Church was surely the Mother of All Cow-pox for those of a certain age who are more likely to take aim at "the holy word" than to celebrate it, let alone set out to actually *look* for it.

If the Catholic Church is the unwitting Mother of resistance, at least in my own case American labor law may well be the Father, for work in my primary field of study has an amazing way of putting authority – and especially the *law's* authority – in its place. The Labor Relations and Employment Law Section program at the Annual Meeting of the Association of American Law Schools a few years back is revealing in this connection. The topic was "New Approaches to Organizing," and the speakers included the chief counsel to the Chair of the National Labor Relations Board ("NLRB" or "Board"); a union president and a professional labor organizer; and several prominent labor law scholars.[18]

In a presentation that turned out to be a fitting metaphor for the relationship between labor and law at the turn of the century, the NLRB representative spoke of several then-recent Board decisions in the organizing area, and the rest of the panelists basically ignored everything he said.[19] The labor organizer, for her part, gave an inspiring account of the Los Angeles Justice for Janitors campaign, an effort to unionize thousands of custodial workers who clean office buildings in L.A. The campaign she described completely avoided the process estab-

17. Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992); *see also* Richard Michael Fischl, *Privileged Positions*, 17 LAW & SOC. INQUIRY 831 (1992).

18. "New Approaches to Organizing" panel, AALS Annual Meeting, Labor Relations and Employment Law Section session (Jan. 1995) [hereinafter Labor Section session] (tape on file with author).

19. Presentation of William R. Stewart, Chief Counsel to NLRB Chair William B. Gould IV, Labor Section session, *supra* note 18. To be sure, participants on academic panels are frequently guilty of listening only to themselves, but what made the treatment of the NLRB representative stand out was that the panelists in this session were otherwise uncommonly interactive. No doubt I was especially sensitive to the dynamics because I had had the extraordinary good fortune of working for Bill Stewart during the late 1970s and early 1980s at the NLRB. Bill handled the awkward encounter with his usual wry humor, observing that he had initially been happy to appear on the panel "because I *thought* I was going to be with *friends*." *Id.* (emphasis audible in original).

lished by the National Labor Relations Act (NLRA), under which those desiring union representation seek an NLRB-conducted secret-ballot election and, if a majority of those voting favor representation, the union secures bargaining rights via an order from the NLRB. By contrast, the Justice for Janitors drive ignored the Board and even ignored the maintenance contractors that actually employed the janitors. Instead, the union mounted a campaign of publicity, parades, and mass demonstrations designed to bring pressure to bear on the corporate and professional tenants, owners, and financiers of the office buildings in which the janitors worked. The protest activities were also designed to persuade the public of the justice of the union's cause and eventually resulted in a collective-bargaining agreement guaranteeing higher wages and first-time health-care benefits for more than 90% of the custodial workers in the city.[20]

With a nod toward her audience of law professors, the speaker struggled visibly to address the role of law in the campaign: "I tried to think of something really kind of related to law," she confessed. "Other than keeping us out of jail, there wasn't much we did with lawyers."[21] When their turn came, the academics made the point even more explicitly, one of them arguing that the NLRA is "just irrelevant" in today's world of work[22] and a second pointing out that American labor's greatest successes – both historically and today – have almost invariably been the result of *violating* rather than following the law.[23]

The panel was not exactly in awe of the law, then, and the reasons for their views are obvious enough to those familiar with the recent his-

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20. Presentation of Cecile Richards, professional organizer for the Service Employees International Union, Labor Section session, *supra* note 18. An insightful and comprehensive account of the campaign is available in Catherine L. Fisk et al., *Union Representation of Immigrant Janitors in Southern California: Economic and Legal Challenges*, *in* ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 199 (Ruth Milkman ed., 2000). For a fictional but realistic and moving portrayal of an effort to organize an office building not covered by the original agreement, see (indeed, be sure to see) BREAD AND ROSES (Lion's Gate Films 2001) (U.S. release).

21. Presentation of Cecile Richards, *supra* note 20. To the same effect, see Labor Section session, *supra* note 18 (presentation of Donene Williams, President, Harvard Union of Clerical and Technical Workers):

> I tried to also think of a point to bring it around to lawyers, and it's this: We don't use 'em. We don't use 'em in our grievance procedure, which we don't even call a grievance procedure, we call it a problem-solving process. . . . We don't use lawyers in our contract negotiations. We do make sure that we're not breaking any laws when we negotiate something, but for the most part . . . we try not to use the law as the basis for making decisions.

22. Presentation of Charles B. Craver, Leroy Sorenson Merrifield Research Professor of Law, George Washington University, Labor Section session, *supra* note 18.

23. Presentation of James Gray Pope, Professor of Law, Rutgers-Newark Law School, Labor Section session, *supra* note 18.

tory of the labor movement. For one thing, the provisions of the NLRA that protect union organizing and collective bargaining have proven to be increasingly ineffectual, while the provisions that *limit* labor's capacity to engage in self-help – most particularly the prohibitions against secondary boycotts (e.g., picketing the target employer's principal supplier) – have to a significant degree had their intended effect.[24] Moreover, at the time of the panel, labor activists and academics were just beginning to perceive what has since become the conventional wisdom in our field: a confluence of developments – including the decline of long-term, full-time employment and a corresponding increase in "contingent" work; the intensification of global competition in product markets; the increasing ability and willingness of employers to export work to and import workers from low-wage markets; and the diminishing capacity of individual nation-states to govern new and old capital forms alike – is producing increasingly competitive labor markets that in turn make the legal institutions and practices of an earlier era (in the words of the panelist) "just irrelevant."[25]

Still, the relationship of American labor to American law is more complex and nuanced than the snapshot offered by the speakers might suggest. One presumes that "keeping [union organizers] out of jail" involves some careful negotiation of legal terrain, especially in the context of a campaign like Justice for Janitors whose tactics (e.g., parades and demonstrations targeting building owners and tenants) would have to be staged very carefully in order to avoid that pesky prohibition against secondary boycotts.[26] It is one thing to decide to forgo recourse

24. One reason that the secondary boycott provisions have worked so well in comparison with the protections for union organizing is the many NLRB and judicial interpretations watering down the latter. *See, e.g.*, JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); Karl E. Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978). But the disparity is also the product of a striking remedial asymmetry within the NLRA itself. Thus, when an employer credibly charges a union with engaging in a secondary boycott, the Board is required by statute to seek immediate injunctive relief, and the employer enjoys a private right of action against the union for damages resulting from the boycott. By contrast, there is no private right of action for damages – nor any requirement of immediate injunctive relief – when an employer fires an employee for union organizing; instead, in the typical case a prevailing employee will wait three-to-four years to get (a) backpay less interim earnings and (b) an offer of reinstatement to a really scary job. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 243-52 (1990).

25. Presentation of Charles B. Craver, *supra* note 22. On the developments described in text, see LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES (Joanne Conaghan et al. eds., 2002) and particularly the introductory chapters by Karl Klare and the late Massimo d'Antona; *see also* Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

26. The body of doctrine governing this area is much too complex – and much too beside the point here – to be worth recounting, other than to say that it is the product of an intricate interplay between statutory provisions prohibiting boycotts, a statutory proviso exempting "publicity other

to an ineffectual law that is designed to help you, but another thing altogether to ignore a law when an injunction (and jail time, if the injunction is likewise ignored) and a sizeable damages claim are the possible consequences. Indeed, as Jim Pope has eloquently argued for some time – and he was the academic on the panel who urged unions to violate the law – the American labor movement's legacy of law-breaking is not a legacy of "law-breaking willy nilly."[27] It is rather a legacy of the selective and strategic violation of laws and legal practices widely believed by those in the movement to violate the Constitution – albeit the Constitution as imagined and aspired to by labor's denizens rather than as interpreted by American courts.[28]

But labor's *pro*-law legacy is similarly complex: The provision that may arguably represent American labor's greatest affirmative legal accomplishment – section 7 of the original Wagner Act (now the NLRA), which affords employees "the right to engage in . . . concerted activities for the purpose of . . . mutual aid or protection"[29] – is, after all, a provision that offers protection for a kind of law-breaking that hits much closer to home. What the provision protects is a series of activities that most employers would consider egregiously disloyal and (were it not for the NLRA) grounds for immediate discharge: forming or joining a union; vigorously protesting an employer's decisions or policies; striking and picketing in order to force the employer to meet the union's demands. Not to put too fine a point on it, these activities amount to a collective biting of the hand that feeds you and risk the considerable wrath of the fist *sans* velvet glove. For a host of reasons, of course, the provision doesn't protect such transgressive activities very effectively, meaning that employers frequently can and do retaliate with legal impunity; accordingly, at the end of the day the protection that employees actually enjoy depends more upon their solidarity and resolve – and the support they receive from others – than on the provisions of the NLRA.[30] Engaging in such activities is thus a scary and difficult thing

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than picketing" (29 U.S.C. § 158(b)(4)), and a series of Supreme Court decisions limiting the prohibition's scope in the name of free speech. For an insightful overview of the maze and its underlying conceptual structures, *see* GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND (1999).

27. Presentation of James Gray Pope, *supra* note 23.

28. *Id.*; for the unabridged version of the argument in text, see James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L. J. 941 (1997).

29. 29 U.S.C § 157 (2002).

30. To cite just one example of the risks involved – albeit a dramatic one – Paul Weiler estimates that an employee was unlawfully discharged in one of every three representation elections conducted by the NLRB during the 1980's. *See* Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1019-24 (1991). Critics of his study put the figure for 1980 at one in five, but concede that the ratio was close to one-in-three by the latter half of that decade. *See* Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions:*

to do, but engaging in these activities is exactly what labor activists do – and labor's lawyers defend – every day.

Whatever else one might say about all of this, it certainly isn't anything remotely resembling authority-fetishism – except, I suppose, to the extent that authority-phobia is a form of authority-fetishism – that gives labor activists the courage to speak a subversive truth to employer power.[31] And while the invocation of constitutionalism in the service of their law-breaking efforts bears some resemblance to the mainstream American jurisprudential tradition referred to earlier – that relentless quest for a special something that's bigger than the both of us (or bigger than you, anyway) on which our self-serving claims can rest – the difference is that labor's "higher law" isn't a magic-bullet argument, a trump-card principle, or a series of Supreme Court decisions (read *this* way), but rather a collective sense of injustice growing out of the lived experience of workplace life and struggles.[32]

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In labor's story, then, law is neither punchline nor promised land, but is instead a part – and frequently a very important part – of a terrain

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Another Look at the Significance of Employer Illegalities, 58 U. CHI. L. REV. 953, 990-91, 994 (1991) (Table 7).

31. *See* Richard Michael Fischl, Fear and Loathing on the Picket Line: Labor Law and the Social Dimension of Workplace Protests (Oct. 12, 2003) (unpublished manuscript, on file with the author).

32. *See* Pope, *supra* note 28. This realization may provide fresh insight into E.P. Thompson's famous and endlessly-cited passage on "the rule of law" and its role in social justice movements:

> I am not starry-eyed about this at all. This has not been a star-struck book. I am insisting only upon the obvious point, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizens from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretentions of power continue to enlarge, a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power. It is to throw away a whole inheritance of struggle *about* law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger.

E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266 (1975) (emphasis in original). On the one hand, a body of important critical work published since *Whigs and Hunters* has demonstrated that neither the notion of "arbitrary power" nor that of "the rule of law" fairly captures the practice of legal decision making in at least one jurisdiction prominently associated with the latter ideal; simply put, all the action lies somewhere in between. *See, e.g.*, KENNEDY, *supra* note 11; STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE AND MIND (2001). But if we shift focus from the first part of the paragraph to the last – from the broader claims about the rule of law and its glories to Thompson's astute insights about the role of law-invocation and law-critique in social justice movements – then what he says may resonate as profoundly for the American labor movement as it does for early 18th century British foresters.

of struggle and transgression. And accordingly those who work in the labor law field – labor activists, their lawyers, and academics whose work is sympathetic with labor's cause – may well find themselves relatively immune to the authority-fetishism that Pierre's work so astutely challenges. (Look, Ma, no symptoms!)[33]

Which is not to suggest that we have nothing to learn from Pierre, for the practices and habits of legal academia are difficult to dislodge without constant vigilance, self-consciousness, and self-critique – and all that critical reflexivity can, as Pierre notes, turn a mind to mush.[34] Indeed, there is obviously some tension between taking Pierre's critiques seriously (on the one hand) and blithely continuing the conventional practices of the legal academy (on the other). How can we purport to admire the work of someone urging us to "lay down the law"[35] – someone who is so boldly seeking to dethrone the law from its lofty perch in our work – and continue to be Law Professors (in both senses of the term)?

For many of us, that tension is a very real one, and in fact I had at one point planned to open this Introduction with a narrative in the style of a *film noir* voice-over (think Humphrey Bogart in "Dark Passage" or Jack Webb of "Dragnet" fame): *I live two lives*, it would have begun. *By day, I'm a serious and self-respecting labor law professor issuing solemn, carefully reasoned normative prescriptions to students, to colleagues, to judges, to legislatures . . . to the world. But in the dark of night, alone and in the privacy of my study, I read Schlag. Devour his every word. Revel in his rejection of legalism, of normativity, of reason, of everything I hold dear. And this is my story.* (You get the picture.)

But then I remembered: I *don't* live two lives.[36] True enough, to "read Schlag" is to become far more self-conscious about one's participation in the conventions of legal scholarship and indeed of legal argument and legal thinking more generally. When I write about (to take a not quite random example) section 7 of the NLRA, it is now impossible to cast it in a role that has *it* doing all the work – "commanding,"

33. To be sure, there's an ambiguity here, much as there was when Dean Calabresi originally offered his cow-pox/small-pox account of the Yale faculty's resistance to cls during the latter's heyday: Is the point that those who've been inoculated in this way just don't "get it," or is it that they've "had it" all along? I have always assumed that Dean Calabresi meant the latter, and of course that is my intended meaning as well, but Pierre and other readers may be less certain.

34. *See* SCHLAG, *supra* note 13, at 65.

35. *See* PIERRE SCHLAG, LAYING DOWN THE LAW—MYSTICISM, FETISHISM AND THE AMERICAN LEGAL MIND (1996).

36. I also remembered that the last time I let my sense of irony out of its cage I found myself blamed for the demise of cls. *See, e.g.*, William H. Simon, *Fear and Loathing of Politics in the Legal Academy*, 51 J. LEGAL ED. 175, 179 & n.6 (2001) (mistaking irony for eulogy in the title of *The Question That Killed Critical Legal Studies*).

"requiring," "prohibiting," "protecting," "suggesting," etc. – or at least impossible to do so without a wink or some other form of rhetorical distancing.[37]

More to the point, then, Pierre helps us remember what we already know but all too easily repress or forget. In the context of a profession in which argument mobilization is the coin of the realm – what do we do most of the time but teach it, write about it, analyze it, take it apart, take it *seriously*? – it is easy to lose sight of the fact that arguments seldom change the world all by themselves.

To return briefly to the story that began this Introduction, I can now see more clearly what I was up to when I developed the "widget hypothetical" all those years ago. When I was in law school, Duncan Kennedy made us read Robert Hale's work, and it just rocked my world. For I thought I would be able to use it to prove to any fair-minded person patient enough to think it through that market capitalism requires as much legal coercion as socialism – and thus that the question is not *whether* the state should play a role in the economy but rather *what* role it ought in fairness to play. I entered teaching some years later against the backdrop of a growing body of work challenging the employment-at-will rule and urging increased legal protection for job security.[38] The widget hypothetical was my effort to bring Hale's insights to the debate by demonstrating that the distribution of "ownership" rights in the workplace was a product of political choice and not simply "the nature of things."

The hypo continues to provoke if not necessarily persuade;[39] I'm content with that, and besides it gave a young and untenured academic a rare taste of fame. But what I was ignoring – indeed, what many of us who were busy constructing powerful arguments for legally enforceable job security had seemingly forgotten – was that American labor already had the "ruby slippers." More accurately, labor had *taken* the ruby slippers by making job security a lived reality in many American work-

37. *Compare, e.g.*, Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989) (pre-Schlag) (in which section 7 sometimes appears to have a life of its own) *with, e.g.*, Richard Michael Fischl, *'A domain into which the King's writ does not seek to run': Workplace Justice in the Shadow of Employment-at-Will*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES, *supra* note 25, at 253 (post-Schlag) (in which section 7 "does" things only ironically).

38. *See, e.g.*, Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983); Gary Minda, *Employment At-Will in the Second Circuit*, 52 BROOK. L. REV. 913 (1986).

39. *See, e.g.*, Charles A. Sullivan et al., TEACHER'S MANUAL FOR CASES AND MATERIALS ON EMPLOYMENT LAW 5 (1993) (stating that the widget hypothetical "makes conservatives in the class apoplectic").

places. One would scarcely guess from arguments like the one I was making back in 1987:

> that American workers and their unions have played an important historical role in the development of a world in which job security has been a core value and in which conflicts over arbitrary dismissal have been the central feature of labor relations; one would scarcely guess that the protection (*de facto* as well as *de jure*) that many workers still enjoy is in no small measure the result of workplace struggles, of union organizing campaigns, of strikes supporting demands made during collective bargaining, and of employers who have only agreed to the so-called implicit contract [of career employment] as a prophylactic against unionization.[40]

One could scarcely guess, in other words, that the battle to be won was not merely a clash of legal arguments, but was instead – as my earlier discussion of labor and law suggests – a struggle to be lived and mounted in countless workplaces, in the streets, and in courtrooms as well.

Which is not to say that arguments are nothing; they can sometimes persuade a judge – or, eventually, a whole lot of judges; and, every once in a while, large segments of the broader culture – to accept the justice of one's cause.[41] As my colleague Patrick Gudridge notes, they may also on occasion offer hints of opposition and dissent.[42] But arguments are not everything, a point that is all too often lost in the fray of argument construction and demolition in our daily professional lives. Pierre's work serves as a vivid and powerful argument for remembering that – an irony that he would appreciate, perhaps more than anyone else.

* * * * *

This Symposium is a tribute by a diverse group of critical scholars to the work of a colleague who has rocked *our* world, and – whether "inoculated" or not – the contributors have found much to admire, learn from, and embrace in Pierre's scholarship. But my confrères pay Pierre their greatest tribute by offering careful and in many instances highly critical readings of the work, and – in the spirit of that tribute – I have

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40. Fischl, *Workplace Justice in the Shadow of Employment-at-Will*, *supra* note 37, at 274 (criticizing a similar erasure of labor struggles in recent scholarly work suggesting that the development of career employment during the 20th century – and the threats to it today – are the product of economic forces and employer responses to them).

41. For the rare but important example of an argument that "had legs," see CATHARINE A. MACKINNON, THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

42. Patrick O. Gudridge, *Mit Schlag (Repetitions)*, 57 U. MIAMI L. REV. 607, 628 (2003). For an example of such an argument – and its interplay with considerable forces of rhetorical assimilation – see Fischl, *Self, Others, and Section 7*, *supra* note 37, at 854-58 (discussing Judge Learned Hand's powerful depiction of labor solidarity in the famous *Peter Cailler* case).

attempted to organize the essays around the critical themes that emerge from their readings.

The essays in Part I of the Symposium – "Enchantment and Critique: If They're So Enchanted, Why Aren't They Smiling?" – offer a series of perspectives on Pierre's argument that enchantment with reason disables critical capacities with respect to law and legal thinking. The authors agree that Pierre has identified a striking and important pattern in mainstream American legal thought, but each of them identifies an audience less in the thrall of enchantment than Pierre's analysis might be read to suggest.

Susan Silbey and Patricia Ewick examine stories told by Americans who are *not* lawyers, judges, or legal academics about their everyday encounters with law and discover a lay legal consciousness that is equal parts enchanted and disenchanted.[43] Like Pierre, however, they offer an assimilationist account and argue that the interplay of those contradictory understandings thwarts critique, rather than opening a space for it, among "ordinary people."[44] Duncan Kennedy takes on the very concept of "the enchantment of reason," teasing out multiple meanings and finding some more persuasive than others.[45] Duncan says that Pierre is right about the lure of reason for scholars doing mainstream legal theory, but concludes that the claim is overstated with respect to other legal professionals (including practitioners and academics doing doctrinal work) and oblique to the plight of critical scholars who are already struggling with the consequences of *dis*enchantment.[46] Joanne Conaghan likewise observes that "some of us may be more enchanted than others," noting in particular the work of feminist and critical race scholars who have long been mounting their own battles with reason.[47] In contrast to their critiques, Joanne argues, Pierre focuses 'nigh exclusively on "the legal conceptual regime" and very little on material practices; as a result, "[t]he *systematicity* of reason's exclusionary tendencies, its role in constituting and reinforcing *particular* hierarchies, is simply not brought into view."[48]

The essays in Part II of the Symposium – "The Enchantment of Critique: Its Causes and Cure" – focus on Pierre's extraordinary capacity

43. Susan S. Silbey & Patricia Ewick, *The Double Life of Reason and Law*, 57 U. MIAMI L. REV. 497 (2003).

44. *Id.* at 508-12.

45. Duncan Kennedy, *Pierre Schlag's* The Enchantment of Reason, 57 U. MIAMI L. REV. 513 (2003).

46. *Id.* at 535, 539-41.

47. Joanne Conaghan, *Schlag in Wonderland*, 57 U. MIAMI L. REV. 543, 549 (2003) (emphasis in original).

48. *Id.* at 551.

for identifying patterned oppositions and false dichotomies in American legal thought but argue that, on occasion, Pierre may himself be enchanted by his patterns and grids. Jane Baron takes up Pierre's juxtaposition of "law" and "reason" (on the one hand) with "'authority, custom, convention, force, power, experience, emotion, faith, dogma, and so on'" (on the other) and finds a subtle privileging at work: "All of the[se] latter qualities – until subdued by the flattening and enervating effects of reason – have an authenticity, a reality, that Schlag never accords to law."[49] What the juxtaposition and privileging may obscure, Jane argues, is the law's role in the *construction* of those "realities" – and thus the prospect of changing them by changing law.[50] Jeremy Paul identifies a different dichotomization with a similar effect: By treating "reason" and "interest" as opposites, Pierre's work may miss an important connection between the two.[51] Jeremy argues that it is precisely its "link to self-interest that has made reason such a powerful tool in the historic battle against the forces of power, authority, tradition, custom, and so forth."[52] In the final essay in this Part, Patrick Gudridge examines the interplay of law and aesthetics portrayed in Pierre's most recent article.[53] Sympathetic with the larger project but critical of the particular portrayal – in which "modes of presentation impl[y] nothing at all about the existence of underlying structures or processes, motivating historical triumphs of outrages, recurring socio-psychological needs or warps, or the like" – Patrick analyzes a series of texts, legal and otherwise, in search of a "clashing politics" and "the hint, at least, of the possibility of legal opposition."[54]

The essays in Part III of the Symposium, "Reason's Empire," are divided into two sections. The first – "Reason's History: Disciplinarity and the Academy" – features contributions by James Hackney and Bert Westbrook. James ties Pierre's critique of legal reason to parallel developments in philosophy and the history of science, noting the contemporary rejection of the "quest for certainty" that has traditionally characterized work in all three fields.[55] The histories he traces, he concludes, "illustrate the problematic nature of privileging any form of knowledge, let alone legal theory, as holding out anything akin to abso-

49. Jane B. Baron, *Romancing the Real*, 57 U. MIAMI L. REV. 573, 583-85 (2003) (quoting SCHLAG, *supra* note 13, at 40).

50. *Id.* at 585-87.

51. Jeremy Paul, *Beyond Reason and Interest*, 57 U. MIAMI L. REV. 593 (2003).

52. *Id.* at 600.

53. Gudridge, *supra* note 42; the article he discusses is Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002).

54. *Id.* at 607-08, 628.

55. James R. Hackney, Jr., *The "End" of: Science, Philosophy, and Legal Theory*, 57 U. MIAMI L. REV. 629, 635 (2003).

lute 'T'ruth."[56] Bert situates Pierre's work in the history of the University and its contemporary decline, and he argues that Pierre is an academic "romantic" defending the classical view of the Academy against modern incursions of ideology and interest.[57] Bert argues that it is Pierre who is enchanted by reason and thus critical of contemporary legal thought because it "is not argument in pursuit of truth; it is argument in pursuit of power."[58]

In the second section – "Reason's Lure: The Enchantment of Subordination" – Anthony Farley and Kerry Rittich explore "the enchantment of reason" in specific social contexts. Anthony offers an extended meditation on the guilty pleasures of racial domination and explores the complex roles of law and reason in constructing racial hierarchies.[59] "The power of interpretation," he argues, "divides masters from slaves," and he locates the "ecstasy of hierarchy" – for master and slave alike – in the exercise of that power.[60] Kerry describes the strategic deployment of "enchantment" in the law and development field, where "the rule of law" is "'a new rallying cry for global missionaries.'"[61] The "missionaries," she explains, are the "good governance" advocates, who "use arguments about law's reason and difference from politics, special interests, and the strictures of culture and tradition" in order to mask an imperial agenda: "the continuation of politics by means of law, specifically, a politics that has become powerful enough to deny that it is politics."[62]

Following Part III, we take a break from the essays to present an extraordinary piece in comic book form by Keith Aoki.[63] I won't try to characterize Keith's contribution except to note that it provides a gentle reminder to "normativos" – Pierre's name for legal academics who are given to issuing Solemn Normative Prescriptions Designed to Change the World – that in the end we are typically addressing only a room full of students, however wonderful and talented those students may be. During the "live" version of the Symposium, Keith presented an early draft of the cartoon via overhead projector, and those of us unfamiliar with the form were amazed to learn that the artwork, complete with

56. *Id.* at 648.

57. David A. Westbrook, *Pierre Schlag and the Temple of Boredom*, 57 U. MIAMI L. REV. 649 (2003).

58. *Id.* at 676-77.

59. Anthony Paul Farley, *The Dream of Interpretation*, 57 U. MIAMI L. REV. 685 (2003).

60. *Id.* at 689.

61. Kerry Rittich, *Enchantments of Reason/Coercions of Law*, 57 U. MIAMI L. REV. 727, 728 (2003) (citation omitted).

62. *Id.* at 733.

63. Keith Aoki, *P.I.E.R.R.E. and the Agents of R.E.A.S.O.N.*, 57 U. MIAMI L. REV. 743 (2003).

speech balloons, was prepared before the story was complete and the dialogue written – a vivid and perhaps not so accidental metaphor for the invisible but very real constraints of form in our own work.

The essays in Part IV – "Law's Closet: Critique and the Critic" – explore the psychodynamics of Pierre's relationship with the various targets of his critique. In an "open letter" to Pierre, Maria Grahn-Farley emphasizes a point touched on by other contributors as well: Why does he focus exclusively on the work of "the white, senior, tenured, male faculty within mainstream American law," and why doesn't he engage with feminist and critical race scholars whose critiques of the mainstream have much in common with his?[64] Maria portrays Pierre in a complex relationship with the very "Dads" of the academy whose work he challenges, suggesting that he may be fetishizing "'Dadhood'" even as he critiques their work.[65] Jeanne Schroeder and David Carlson argue that, despite his unrelenting critique of normativity, Pierre has a normative agenda of his own: to eliminate the "distortions" of law and legal thinking in order to liberate "the *natural* subject from whom completeness and authenticity have been unfairly denied by the legal bureaucracy."[66] Drawing on the work of Lacan, they concede that "the legal subject is indeed 'castrated' by the law" – as they read Pierre to suggest – but argue that "this very castration . . . is the condition of possibility for the actualization of freedom."[67]

Peter Goodrich shifts the focus to Pierre's critics and suggests that their "vehemen[ce]" is a reaction to Pierre's effort to "out" them – that is, a reaction to his "attempt to confront the legal academy with desires that it cannot name, with insights that it excludes, with the material supports of its abstract and often unthinking norms."[68] Peter observes that Pierre's critique of normativity has drawn particular fire for its failure to advocate an alternative, locating that response in status anxiety: "It is not enough, in other words, that Schlag has his own project; he needs to prescribe a project for others and then the new program can substitute for the old, a new order can provide the criteria of excellence that will underpin the hierarchy that will determine who we will become."[69]

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64. Maria Grahn-Farley, *An Open Letter to Pierre Schlag*, 57 U. MIAMI L. REV. 755, 761 (2003); to the same effect, see Conaghan, *supra* note 47, at 546. Duncan Kennedy and Peter Goodrich make a similar point, noting Pierre's tendency to write as if he were all alone in critiquing the mainstream jurisprudential tradition. *See* Kennedy, *supra* note 45, at 515; Goodrich, *supra* note 14, at 807 n.54.

65. Grahn-Farley, *supra* note 64, at 763.

66. Jeanne L. Schroeder & David Gray Carlson, *Law's Non-Existent Empire*, 57 U. MIAMI L. REV. 767, 770 (2003) (emphasis in original).

67. *Id.* at 771.

68. Goodrich, *supra* note 14, at 794.

69. *Id.* at 810.

Tackling related themes, Tamara Piety attributes the "strong emotions" evident in responses to Pierre's work to the critics' "obsess[ion] with rightness" and the threat posed by Pierre's argument that their beloved reason "is not always right."[70] Tamara argues that such critics are over-reading Pierre; in her view, his work is less a rejection of reason *writ large* than a refreshing challenge to "the empty rituals" and "false pieties" of much legal scholarship.[71]

* * * * *

Questions about what a post-Pierre "project" would look like pre-occupied a number of the participants as they asked, with varying degrees of irony, what ought to be put in the place of the professional practices that Pierre so astutely critiques. That is what someone once identified as "the question that killed critical legal studies" and hence the title of the fifth and final part of the Symposium: "The Return of the Killer Question: Where Do We Go From Here?"

The essays here are divided into two sections. In the first – "Taking Schlag to (the) Task: Reconstructing Rights, Reason, and Politics" – the contributors examine the significance of Pierre's insights for the role of law and legal thinking in the quest for social justice. Emphasizing Pierre's acknowledgement that his theories might not have extra-territorial application because "'[t]he social and intellectual contexts in which law and legal thought is produced in other countries [are] likely to differ and to require different analysis,'" Dennis Davis takes issue with the absence of social contextualism in the local critiques that Pierre *does* offer, "as if [such] concerns may apply elsewhere but not in his own backyard."[72] In particular, Dennis suggests that this absence might undermine Pierre's critique of "the casting of political struggles in the idiom of 'rights'"; drawing on the example of current efforts in South Africa to deal with the ravages of HIV, Dennis argues that "rights talk" can play a vital and salutary role in struggles for social justice.[73] Maria Grahn-Farley offers a different perspective on the utility of "rights" in such struggles.[74] Focusing on the rights of children, she takes Pierre's critique as a point of departure but brings to the task the attention to particularities of context that Dennis found lacking; the result, *contra* Dennis, is a trenchant critique of the ways in which rights analysis rein-

70. Tamara R. Piety, *Smoking in Bed*, 57 U. MIAMI L. REV. 827, 828, 836 (2003).

71. *Id.* at 828.

72. The Honorable Dennis M. Davis, *Dissonance Orientation: The Occupational Hazard of Being a Judge or a Requirement for the Job?*, 57 U. MIAMI L. REV. 853, 855 (2003) (quoting SCHLAG, supra note 13, at 14).

73. *Id.* at 855, 860-64.

74. Maria Grahn-Farley, *A Theory of Child Rights*, 57 U. MIAMI L. REV. 867 (2003).

forces both the "master norm" of "white adult male hegemony" and the subordination of others to that norm.[75] Finally, taking up themes raised in Maria's open letter[76] and also in Joanne Conaghan's essay,[77] Daria Roithmayr notes Pierre's "fail[ure] to consider the way in which the ideology of reason structures racial and gendered power," but adds that his critique of reason likewise neglects a silver lining – i.e., "that women and people of color might be able to use the ideology of reason to *resist* racial and gendered power."[78] Daria attempts to sketch a "radical pragmatism" that resists reason's imperial and universalizing tendencies by avoiding questions like "What is true?" and focusing instead on "what works" for particular disempowered communities "in the current political, social, economic and legal climate."[79]

In the second section – "Taking Schlag Seriously: Practices in the Legal Academy" – the contributors reconsider academic practices in the light of Pierre's critiques. The first two essays, by Jack Schlegel and Phyllis Goldfarb, outline strategies for making our teaching and writing more relevant to the work our students do when we're finished with them. Jack argues for a shift in our focus from the normative practices Pierre critiques to empirical social inquiry.[80] The failure of normative legal thought to engage in any serious way with the world of law our students actually face, he argues, "guarantees that the gap between the ideal and the actual in legal behavior will be closed infinitesimally, if at all, and will instead perpetuate an asserted problem in the guise of solving it, supporting the continuing employment of law professors, I suppose, but not otherwise being effective."[81] Phyllis proposes a "Pierre Schlag Postmodern Legal Clinic" that might avoid many of the shortcomings of current normative training: "When released from the controlling grip of the law professor's law," she argues, "the legitimation that can come from the appearance of employing reason by applying doctrine through a legal ritual to a person charged with a crime is far less effective when the student-attorney, through identification with a client, can see the suffering that the system both ignores and produces."[82] Phyllis argues that the lessons thus gained from the experience of "doing law"

75. *Id.* at 912-14.

76. Grahn-Farley, *supra* note 64, at 762.

77. Conaghan, *supra* note 47, at 551.

78. Daria Roithmayr, *"Easy for You to Say": An Essay on Outsiders, the Usefulness of Reason, and Radical Pragmatism*, 57 U. MIAMI L. REV. 939, 940-41 (2003) (emphasis added).

79. *Id.* at 948.

80. John Henry Schlegel, *But Pierre, If We Can't Think Normatively, What Are We To Do?*, 57 U. MIAMI L. REV. 955 (2003).

81. *Id.* at 968.

82. Phyllis Goldfarb, *Picking Up the Law*, 57 U. MIAMI L. REV. 973, 979-80 (2003) (footnotes omitted).

might also represent a "cure" for the enchantment of reason, "contradict[ing] Pierre's assertion that it is impossible to do law without participating in law's illusions, without taking up its metaphysics."[83]

Fran Olsen provides the third essay in this section and applies Pierre's critiques to an academic project of her own: a lecture she gave at a conference in Israel on Women and Peace.[84] In this unusually transparent exercise of what Pierre refers to as "critical reflexivity,"[85] Fran examines her lecture – an exploration of the connection between peace and antidiscrimination activism in Israel, with a particular focus on the role of women – to see whether and to what extent she too has succumbed to reason's "enchantment."[86] In the fourth and final essay, Debbie Maranville considers whether enchantment is such a bad thing after all.[87] Taking her cue from Pierre's charge that reason's partisans are engaged not in a reasoned enterprise but rather in "'magical thinking'" and "consensual make-believe," she offers an extended mediation on the role of fantasy – for good and for ill – in our own lives and in the life of the law.[88]

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Pierre, of course, gets the last word, and, in deference to that, I shall resist the considerable temptations of formal symmetry and let his contribution speak all for itself.[89] But I do want to offer an observation on a point he makes in response to the participants who have called on him to plight his troth with feminist, critical race theorists, and other critical scholars.[90] "As I see it," he observes, "part of being an intellectual is having your *own* projects, your *own* intellectual agenda, your *own* sense of what to do – as opposed to simply following the default institutional paths laid out for you."[91] As most of these essays acknowledge, there is no scholar more astute at mapping "those default institutional paths" – and identifying the stultifying intellectual and moral consequences of taking them – than Pierre. But I disagree that "following" those paths and "having your *own* intellectual agenda" are the only choices available to critical scholars.

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83. *Id.* at 982 (footnotes omitted).

84. Frances Olsen, *Peace, Civil Disobedience, and Anti-Discrimination Law: A Critical Appraisal of Reason and Politics*, 57 U. MIAMI L. REV. 989 (2003).

85. SCHLAG, *supra* note 13, at 63-64.

86. Olsen, *supra* note 84, at 1002-06.

87. Deborah Maranville, *Building a Better Sand Castle: Fantasy, Growth, and the Enchantment of Reason*, 57 U. MIAMI L. REV. 1007 (2003).

88. *Id.* at 1009-10 (quoting SCHLAG, *supra* note 13, at 108-09).

89. Pierre Schlag, *A Reply—The Missing Portion*, 57 U. MIAMI L. REV. 1029 (2003).

90. *See supra* note 64 and accompanying text.

91. Schlag, *supra* note 88, at 1030 (emphases added).

In any other context, Pierre would be the first to spot the self-directed autonomous subject rearing his (yes, his) head here, erasing community and context. Surely it is possible to acknowledge and even celebrate one's location in a community of critical scholars – from the Realists on whose work we continue to build to contemporaries who greatly value one's work even as they critique it – and at the same time to maintain the integrity of the positions we take, to take responsibility for scholarly choices, to do original and pathbreaking work, and to worry a little less about the "own" part. As this Symposium eloquently attests, there is "much to give and much to gain."[92]

92. Grahn-Farley, *supra* note 64, at 765.