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### **B. Taking Schlag Seriously: Practices in the Legal Academy: *Picking Up the Law***

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# Picking Up the Law

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## I. QUESTIONS

The Pierre Schlag immersion course inspired by this symposium has been absorbing, unsettling, and invigorating. One need not have dipped too deeply into the Schlag oeuvre to realize that to the extent critique is an art form, Pierre is a great master.<sup>1</sup> This mastery is apparent whether one identifies with the author or with his targets.<sup>2</sup> Even the discomfort of seeing myself at times among the latter did not diminish my capacity to marvel at Pierre's clear-eyed and withering intellectual satire of the ideological and aesthetic practices of legal academia.<sup>3</sup> Yet despite the clarity of his writing, or perhaps because of it, Pierre's work spawns a host of questions. I pose a few of them here.

Pierre does a brilliant, indeed hilarious, sendup of the compulsive repetition of the "What Should We Do?" question in the law school

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\* Professor of Law, Boston College Law School. I am grateful to Maria Grahn-Farley, Anthony Farley, Evangeline Sarda, and Catherine Wells for their support and assistance while I was writing this article. I am also grateful to Irene Good, Lou Dundin, and Cindy Robinson for their research efforts, to Donna Gattoni and Theresa Kachmar for their administrative assistance, and to Boston College Law School for its research support. I am indebted to Michael Fischl at University of Miami School of Law for organizing this symposium and inviting me to participate. I extend gratitude as well to the participants in the symposium for their engagement in these ideas, and to Pierre Schlag and Jack Schlegel for communications even after the symposium had concluded.

1. While it praises Pierre's achievements, the term "great master" has a double edge in this context. Some critical thinkers are likely to understand the process of anointing great masters as an illegitimate use of authority and the category itself as a race-specific and gender-specific designation. Questions about how to view Pierre's work through the lens of race and gender were raised during the February symposium. Some of these questions are explored in Joanne Conaghan, *Schlag in Wonderland*, 57 U. MIAMI L. REV. 543 (2003).

2. Of course, defensive and unreflective emotional states generated by identification with targets of the critique can obscure recognition of this mastery. For psychological insight into distress reactions such as these, see Peter Goodrich, *Pierre the Anomalist: An Epistemology of the Legal Closet*, 57 U. MIAMI L. REV. 791 (2003).

3. His satirical tone and trenchant analysis are displayed abundantly in PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND* (1996) [hereinafter *LAYING DOWN THE LAW*] and PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998) [hereinafter *ENCHANTMENT*]. For a glimpse of his biting humor, see Schlag's Top Ten charts on the normative articles of the eighties containing only five entries, including Have a Nice (Really Elegant and Totally Abstract) Day, We Should Talk and Talk and Talk About Talk and Just Keep on Talking, and The Zeitgeist is Going My Way. *LAYING DOWN THE LAW*, *supra*, at 19-26. For Schlag's reasoned argument against the possibility of reason as the medium for law, see generally *ENCHANTMENT*, *supra*. For Schlag's elaboration of the implications of law as an aesthetic practice, see Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002).

context,<sup>4</sup> a question that he views as derived from the law professor's misplaced yet routine identification with the figure of the judge.<sup>5</sup> Nevertheless, many of the writings prepared for this symposium posed some version of that question and some modest replies to it.<sup>6</sup> Jack Schlegel asks the question directly, albeit facetiously, in the title of his paper.<sup>7</sup> Too intimidated by Pierre's critique to ask the question directly, even in a facetious way, I ask it in a disguised way, although I think that my variants on the question may be different enough from "What should we do?" to be better questions.<sup>8</sup>

4. See, e.g., LAYING DOWN THE LAW, *supra* note 3, at 17-36. Here is an excerpt: ["What should we do?"] is an interruption posing as an origin. It poses as an origin in that it takes itself to be the original motivation for engaging in legal thought. And yet here, the "What should we do?" interrupts the process of trying to understand what enterprise we, as legal thinkers, are already engaged in. It interrupts the process of attempting to reveal the character of our disciplines and our practices as legal thinkers. . . .

. . . .  
In fact, normative legal thought is so much in a hurry that it will tell you what to do even though there is not the slightest chance that you might actually be in a position to do it.

*Id.* at 27-28.

5. [I]t is the self-identification with the figure of the judge that establishes the pathways, limits, concerns, procedures, and preoccupations of American legal thinkers.

*Id.* at 135.

[T]his self-identification with the subject-formation of the judge establishes a set of intellectual tasks for legal academics—namely, the tracing of law back through its authoritative materials, the policing and normalization of new forms of legal thought, the recognition and conceptualization of new juridical problems, the expulsion of spurious or subversive jurisprudential tendencies, and the perfection and general improvement of existing formulations of law.

*Id.* at 137.

But even as the self-identification of legal thinkers with the figure of the judge is becoming increasingly strained and increasingly improbable, legal thinkers are still living its history. The self-identification survives at an abstract, but nonetheless foundational, level. It survives as an aesthetic, in the fundamental ontological forms and in the pervasive normative orientation of American legal thought.

*Id.* at 138.

To be self-identified with the subject formation of the judge is thus to be intellectually compromised. It is to be beholden to a rhetoric, an aesthetic, and normative commitments that are pervasively anti-intellectual—that are, in fact, destructive of intellectual endeavor.

*Id.* at 145.

6. See, e.g., Jeremy Paul, *Beyond Reason and Interest*, 57 U. MIAMI L. REV. 593 (2003); John Henry Schlegel, *But Pierre, If We Can't Think Normatively, What Are We to Do?*, 57 U. MIAMI L. REV. 955 (2003); David A. Westbrook, *Pierre Schlag and the Temple of Boredom*, 57 U. MIAMI L. REV. 649 (2003).

7. See Schlegel, *supra* note 6.

8. It is intimidating to offer tentative reactions, from the standpoint of clinical legal education or any other, to fully conceived intellectual achievements like *The Enchantment of Reason*. Although I thought I trusted my reactions, I also feared that Pierre would be several

Among the questions that Pierre's work raises for me are these: "Where can someone persuaded, at least in part, by Pierre's decimation of the dominant work of the law school<sup>9</sup> continue to stand within it?" This is not a variation of Paul Carrington's assertion in the mid-eighties that critics have an obligation to resign from law teaching.<sup>10</sup> It is an attempt to address the intractable dilemma of how to live life in accord with your insights, which is exceedingly difficult when you work within a framework built on denying those insights.<sup>11</sup>

Other ways to frame the question are: "Within Pierre's critique, is there such a thing as an authentic law professor?" "Does his work admit of the possibility of achieving something resembling respectability as a legal academic?" Or, stated differently, "Where within a law school can a postmodern legal critic stand?"

For the duration of this essay, I adopt the positioning question, "Where Can One Stand?" as an alternative to "What Should We Do?" The question is compelling to me for this reason: While I have a sense of Pierre as a scholar, I have no sense of Pierre as a teacher. As I read his prolific outpourings, I kept trying to imagine him in his day-to-day role as a teacher. Who is Pierre Schlag as a teacher? What is the content and method of his classroom? Has he developed a counterpedagogy? What do his students learn? Are there ways of approaching the subject iden-

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moves ahead of me, seeing the rhetorical devices and intellectual strategies that I could not see deployed in my own writing, as he has honed this talent to an extraordinary degree. While I typically resist the confessional mode, I am reporting this experience because I think Pierre's writing would be more widely appreciated if readers were more aware of the psychological impact that his work had on them. Despite the complexities embedded in the law review convention of excessive footnoting, it has created an easy way for me to offer this commentary.

9. According to Pierre, the dominant work of the law school is the proliferation of normative legal thought. See *LAYING DOWN THE LAW*, *supra* note 3.

10. See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 226-27 (1984).

11. One of Pierre's numerous accounts of the phenomenon of denial within legal academia is as follows:

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

Until normative legal thought begins to deal with its own paradoxical postmodern rhetorical situation, it will remain something of an irresponsible enterprise.

*LAYING DOWN THE LAW*, *supra* note 3, at 37-38. For another account of denial, see Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1695 (1996) [hereinafter *Hiding the Ball*] ("American law is organized to shuttle doubts and challenges away from the ontology of law, preferably to technical questions, very often to normative ones, if necessary to epistemic inquiries, but always away from ontological inquiry.").

tity of the law teacher that are less tarnished by his critique than is the caricature of the typical law professor in the classroom who at various times shows up in Pierre's descriptions of anti-intellectual academic life?<sup>12</sup> As a law professor, is it possible to ask directly of those who have come to pick up the law whether it isn't better, for example, to lay it down?<sup>13</sup> If it is, and if he does, how does that conversation sound?

## II. THIS COULD BE YOUR CLINIC

I want to suggest a possible location for a law professor who, with Pierre's help, has become at least sufficiently dispossessed of the enchantment of reason to wrestle with these questions.<sup>14</sup> Considering this location requires imagining into existence a Pierre Schlag Postmodern Legal Clinic and asking whether the thought experiment produces anything intelligible.<sup>15</sup> To lend more particularity to these imaginings, try to conjure up a criminal defense program within this clinic, where the professor engages with students about their work representing indigent clients facing misdemeanor charges in the local criminal court. Other than for crassly self-serving reasons, (i.e., I am quite familiar with such a setting),<sup>16</sup> I have chosen this outpost<sup>17</sup> for discussion purposes in this essay in part for the reason I chose it for my work, that is, because it largely elides the question whether to affirmatively

12. For one example, see *Hiding the Ball*, *supra* note 11, at 1683-85.

13. Laying down the law, with its ironic double meaning, is the possibility Pierre raises in the final paragraph of *Laying Down the Law* as an alternative to celebrating, expanding, and worshipping law. See *LAYING DOWN THE LAW*, *supra* note 3, at 166.

14. The enchantment of reason refers to the pervasive tendency of American legal thinkers to deny that reason, the perceived medium through which law operates, rests on precarious grounds and is thus another form of belief. *The Enchantment of Reason* elegantly elaborates this argument and its implications. See *ENCHANTMENT*, *supra* note 3.

15. Pierre has not previously sought to develop an account of a postmodern legal clinic, nor is it clear that he would welcome such an endeavor. He has, however, sought to account for the clinic's marginalization in legal education as a material reflection of the internal/external (read: privileged/unprivileged) dichotomy that pervades American legal thought. See Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991) [hereinafter *Normativity*].

16. Familiarity is both a benefit and a drawback. While it provides experiential grounds for filling in the details of this thought experiment, it also raises greater possibilities for self-delusion. In Pierre's words: "[I]t is to be expected that any participant's perspective on his own practice will include the rhetorical means for the self-preservation of the practice." *LAYING DOWN THE LAW*, *supra* note 3, at 135. Alternatively, "[I]t is less than pleasant to actually consider the emptiness of a discipline when it is one's own." *ENCHANTMENT*, *supra* note 3, at 10. I leave for others to evaluate whether the risks Pierre cites are realized in this essay.

17. I deliberately chose the term "outpost" to invoke resonances of the colonial character of American criminal justice. For fuller development of the colonial resonances in American criminal justice, see James M. Doyle, *"It's the Third World Down There!" The Colonialist Vocation and American Criminal Justice*, 27 HARV. C.R.-C.L. L. REV. 71 (1992), and James M. Doyle, *Into the Eight Ball: The Colonialists' Landscape in American Criminal Justice*, 12 B.C. THIRD WORLD L.J. 65 (1992).

choose the law as a path to progressive change. When the criminal justice bureaucracy is poised to run over your client, the criminal defense lawyer's choice to use law is not a choice to embrace law but to wield it defensively in light of the other options.

Here is an account of a Pierre Schlag Postmodern Legal Clinic, the plausibility of which I throw open for consideration.<sup>18</sup> The first noteworthy feature of the clinic is that a student who stands with a client in criminal court is no longer placed in the subject position of the judge. Already this disrupts Pierre's account of conventional legal education.<sup>19</sup> Rather, the student's identification is with the lawyer, a spot from which she may also identify or connect with, or at least relate to, the client.

Joanne Conaghan observed that nothing nasty or horrid ever happens to anyone in Pierre's books.<sup>20</sup> This would not be true in Pierre's clinic. In a criminal case, nasty and horrid things have likely already occurred, and clinical pedagogy involves encountering it. Clients in criminal cases often report experiences that enlarge the students' frames of reference if only because they provide data that the law school curriculum might otherwise avoid or suppress. In and of itself, this possibility may facilitate critique.<sup>21</sup> Instead of focusing on what Pierre calls law's "unthought," the unexamined belief of legal thinkers and actors that law operates through the idiom of reason,<sup>22</sup> the clinic would shift the focus to law's "unthought of," the dispossessed,<sup>23</sup> the people whose oppression Conaghan feared was being further marginalized in Pierre's work.<sup>24</sup> This alone is a destabilizing and potentially critique-engendering shift, because excluding the "unthought of" is an important part of law's "unthought."<sup>25</sup>

18. In prior articles, I have tried to develop the intersections between clinical education and other jurisprudential movements in legal education. See, e.g., Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991) [hereinafter *A Theory-Practice Spiral*]; Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717 (1992) [hereinafter *Clinical Perspective*]. This essay, in beginning to develop the possible intersections between postmodernism and clinical education, extends the series.

19. Pierre acknowledges that the formative identification of the legal thinker with the judge—an identification which law professors instill in students—can break down to some extent among practicing lawyers. See *LAYING DOWN THE LAW*, *supra* note 3, at 155. He does not discuss how the identification with the judge disintegrates among lawyers, what its consequences are, or what takes its place.

20. See Conaghan, *supra* note 1, at 547.

21. For a description of critique as an aspirational methodology of clinical education, see *A Theory-Practice Spiral*, *supra* note 18, at 1657-62.

22. See *ENCHANTMENT*, *supra* note 3, at 23.

23. See *A Theory-Practice Spiral*, *supra* note 18, at 1686; see also *Clinical Perspective*, *supra* note 18, at 744.

24. See Conaghan, *supra* note 1, at 558-69.

25. Otherwise, the systemic race and class hatred that seems to undergird the outcomes of

In a clinic, the student-attorney is asked to critically reflect on the experiences of performing her role.<sup>26</sup> While reasoning through and talking about doctrine may represent an aspect of these experiences, it is an aspect that is likely to recede vastly in importance as the student accesses law through the complex, multidimensional interactions of bureaucratic imperatives, interpersonal dealings, informal processes, power relations, and so forth, all experienced as impressions, sensations, feelings, intuitions, and actions.<sup>27</sup> This is not the pedagogy skewered by Pierre's critique.<sup>28</sup>

To understand the assortment of phenomena that arise in a clinic, the student must focus intensely and purposefully on the meaning and consequences of her behavior and the behavior of others.<sup>29</sup> To make sense of these experiences, the clinic student may need to sort out in a nuanced way how the bureaucratic culture of the court deploys law and power and violence.<sup>30</sup> In other words, making sense of these experiences would seem to require critique of conventional legal culture.<sup>31</sup> In many instances, reason can be observed to have played a limited role in the processing of the case. The robust immediacy of such experiences

criminal cases would undermine the belief that reason is the medium through which law operates. For an examination of the operation of inequality—particularly race and class inequality—through the administration of criminal law, see generally DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999). While Pierre focuses on how law is constructed to repress its pervasive violence, see, e.g., *LAYING DOWN THE LAW*, *supra* note 3, at 143-49, David Cole, among others, identifies more specifically those to whom that violence is directed. The failure to identify the beneficiaries and the objects of law's bureaucratic violence is a concern raised about Pierre's writing from a feminist/critical race perspective. See, e.g., Maria Grahn-Farley, *An Open Letter to Pierre Schlag*, 57 U. MIAMI L. REV. 755 (2003).

26. This is the substance of the clinical method of learning from experience. See *A Theory-Practice Spiral*, *supra* note 18, at 1647-54.

27. *Id.* at 1652 ("As an epistemological matter, a broader and deeper sort of comprehension may follow from integrating knowledge which has been absorbed not just through cognition, but through a jumble of impressions, sensations, feelings, intuitions, and actions, that are accessible at various levels of awareness."); *Normativity*, *supra* note 15, at 876 ("[I]n law practice, . . . the political, the social, the psychological, the rhetorical, and the rational are all differentially related in complex ways.").

28. See, e.g., *Hiding the Ball*, *supra* note 11, for an account of traditional classroom pedagogy. Pierre analyzes the political imperatives that relegate the clinic to a cognitive and physical area outside the classroom. See *Normativity*, *supra* note 15, at 927.

29. See *A Theory-Practice Spiral*, *supra* note 18, at 1663:

To say that making students responsible is the best way to make them responsible is not the simple tautology that it appears. It means that actively taking responsibility contributes to the development of responsible character . . . [in part because it] engages a person at a more intense, purposeful, and consequential level.

30. Robert Cover famously confronted us with the awareness that law occurred on a field of pain and death. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

31. Law school clinics are well-positioned to facilitate such critique. See *A Theory-Practice Spiral*, *supra* note 18, at 1656 ("Supplementing traditional law school education by embedding law in its context, clinics have the potential to transform the study of law into the study of a culture that deploys law for various purposes.").

may well be a route to exposing through teaching, not through scholarship, what Pierre calls “the Noble Scam” for the flimsy account of law that it is,<sup>32</sup> raising the possibility that the lessons of *The Enchantment of Reason* may be internalized far more vividly when they are constructed empirically and experientially.

When conscientiously undertaken, this critical clinical process holds promise of revealing the assumptions, biases, and values that are reflected every day in criminal court. For a Schlagian, this shift in context from law professor’s law to an encounter with bureaucratic legal culture is an encouraging one,<sup>33</sup> potentially illuminating the disparity between the legal theories that the criminal law doctrine espouses and those that the criminal court expresses.<sup>34</sup> This shift in context also enhances the prospects for law professors to do something more than what Pierre, in his inimitable style, terms “thug-training.”<sup>35</sup>

Let me give some examples of how a clinic might advance Pierre’s insights through a teaching method. When released from the controlling grip of law professor’s law, 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<sup>36</sup> is far less effective when the

32. From within the Noble Scam, law is the application of reason to legal artifacts (that themselves manifest reason) to produce proper outcomes. See ENCHANTMENT, *supra* note 3, at 34-39.

33. According to Pierre, law manifests a bureaucratic logic, and “practicing lawyers experience law as a complex network of bureaucratic power arrangements that they have learned to manipulate.” *Normativity*, *supra* note 15, at 804. The only thinkable legal thoughts, Pierre observes, are those that conform to a narrow aesthetic whose boundaries are dictated by the need to mask the violence inflicted by legal bureaucracies. See, e.g., LAYING DOWN THE LAW, *supra* note 3, at 155-59. Alternatively, “the primary role played by normative legal thought is to constitute students . . . as polite, well-mannered vehicles for the polite transaction of bureaucratic business.” *Normativity*, *supra* note 15, at 866. In other words, they are taught to speak “niceness to power.” LAYING DOWN THE LAW, *supra* note 3, at 6.

34. Pierre has observed that “the passionate normative life of the law has no readily apparent relation to the actual structure or content of legal practice.” *Normativity*, *supra* note 15, at 803. “The incommensurability of normative discourse with bureaucratic practice suggests that the opportunities for the exercise of any ‘authentic,’ normatively competent behavior are extremely restricted within bureaucratic forms of life.” *Id.* at 881. Pierre illuminates these observations about the separation of normative legal thought from the practice of law through his analysis of a fictional criminal case that arose when attorney Stuart Markowitz was arrested for driving while intoxicated, a scenario that appeared on *L.A. Law*. *Id.* at 852-84.

35. This is the reason, Pierre asserts, that law professors insist that law is governed by reason: without reason, law is ritualized violence and they are thug-trainers. See ENCHANTMENT, *supra* note 3, at 21. The characterization is only slightly less unflattering in *Laying Down the Law*: “Legal academics [are] trainers of meta-insurance adjusters.” LAYING DOWN THE LAW, *supra* note 3, at 38.

36. Understanding the law as coherent and its application as justified is a necessary deceit, Schlag observes. Otherwise, legal actors would notice the violence of their enterprise and be less able to function according to law’s normative needs. See LAYING DOWN THE LAW, *supra* note 3, at 156-59.



student-attorney, through identification with a client, can see the suffering that the system both ignores and produces.<sup>37</sup> The student, whose clinical process urges her to try seeing the world through her client's eyes,<sup>38</sup> may also see that the bureaucratic process does no such thing.<sup>39</sup> Rarely will a court expend effort trying to understand the client's life, and the limited amount of official time devoted to the case exposes this reality.<sup>40</sup>

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37. Consider, for example, the suffering inflicted by forced incarceration, separation of families, and state killing as responses even to acts that arise, at least in part, from untreated addictions, undiagnosed mental illnesses, and the corrosive effects of poverty. See also Pierre's characterizations of criminal law, as depicted in the Markowitz arrest episode of *L.A. Law*, to be "sex-hating," "life-denying," "fun-killing," "Orwellian," "unaccountably random," "awesomely powerful," and "wrong." *Normativity*, *supra* note 15, at 853, 857.

38. See, e.g., Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2700 (noting that the caring lawyer should try "to enter her client's world without leaving her own"); Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLINICAL L. REV. 65, 67 (1994) ("[C]linical education, through its attention to concrete particularities and the feelings that they evoke, operates by an inherent narrative method.").

39. According to Edward Dauer and Arthur Leff, bureaucracies treat people "as nonpeople." See Edward A. Dauer & Arthur Allen Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 581 (1977).

40. "Hopelessly awash in a sea of cases, the Court is unable to administer justice. Recognizing that, it has redefined its mission. The measurement of success is the disposition rate, how many cases can be moved in and out of the court, without regard to how they are moved." Harry I. Subin, *The New York City Criminal Court: The Case for Abolition*, in OCCASIONAL PAPERS FROM THE CENTER FOR RESEARCH ON CRIME AND JUSTICE 8 (Graham Hughes ed., 1992). Subin reported that approximately 213,000 cases were processed in the New York City Criminal Court in 1990 at an average of five minutes for each case. *Id.* at 1. See also OFFICE OF THE ADMINISTRATOR FOR THE COURTS, THE 1992 REPORT OF THE COURTS OF WASHINGTON 7-8 (1992) (reporting that lower courts in Washington state disposed of 391,135 cases in 1992); Maureen Mileski, *Courtroom Encounters: An Observation Study of a Lower Criminal Court*, 5 LAW & SOC'Y REV. 473, 479 (1971) (reporting that nearly three-quarters of the cases in one court were handled in one minute or less).

Public defenders often operate under such staggering caseloads and resource constraints that individualization of the client's situation is impossible. See, e.g., NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, INDIGENT DEFENSE CASELOADS AND COMMON SENSE: AN UPDATE 26 (1992) (finding an average annual misdemeanor caseload of 613 cases per attorney); AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE IN CRISIS: A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES: SOME MYTHS, SOME REALITIES, AND SOME QUESTIONS FOR THE FUTURE 43 (1988) (recommending a caseload of no more than 300 misdemeanors per attorney per year). Caseload volume like this requires triage in representation. See John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1239-48 (1994) (describing the public defenders' triage process).

Most studies of the criminal court as an organization depict it as a bureaucracy in which judges, prosecutors, and defenders generally cooperate to process cases, typically involving underprivileged people, as expeditiously as possible. See, e.g., PETER F. NARDULLI, THE COURTROOM ELITE: AN ORGANIZATIONAL PERSPECTIVE ON CRIMINAL JUSTICE 66 (1978). Some commentators question the necessity of routine nonadversarial processing of so many cases in so little time. See, e.g., Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1107 (1984) (arguing that within current resource levels, a bench trial system could be substituted for plea-bargaining).

On the other hand, if the student has developed a relationship with the client, the apparent dichotomy offered by conventional criminal law between guilt and innocence, free will and determinism, may already have begun to dissolve.<sup>41</sup> When confronted with the complexity and ambiguity of some clients' life circumstances, student attorneys might come to see that each of these supposedly oppositional terms is not an uncontested observation but an ideological choice.<sup>42</sup> Whether this realization arrives as a slowly dawning awareness, a postmodern epiphany, or in some other form, the point is that experiencing the system's contradictions in a broader material sense rather than through an abstracted form of thinking can create greater space for critical consciousness to emerge.<sup>43</sup> The critique is not derived from the operation of reason, though this may play a role. Rather, it becomes palpable and visible when it is experienced in the first person, when by virtue of the assumption of the lawyer's role the student has become implicated in the system's workings.

The value of being implicated to generate the motivational conditions for critique is something of a paradox. The clinic facilitates critique by enabling broad information gathering and extended empiricism at the very moment when students are first picking up the law.<sup>44</sup> Although students may enter clinics for the purpose of increasing their comfort level with working in the law, the clinic can cultivate discomfort with law's workings.<sup>45</sup> This might be the source of the creative tension that generates the opening for critique. While law students may

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41. Pierre observes that these dichotomies are imposed as if they were accurate descriptions of social reality. This is always a "reductionist enterprise," as the judge "is constantly seeking to impose the template of the 'law' on situations whose meanings exceed any template." *LAYING DOWN THE LAW*, *supra* note 3, at 155.

42. For a discussion of the notion of individual guilt and innocence as ideological rather than descriptive, see Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 *J. CRIM. L. & CRIMINOLOGY* 969 (1986), and Michael Bayles, *Character, Purpose, and Criminal Responsibility*, 1 *LAW & PHIL.* 5 (1982). See also Charles L. Black, Jr., *The Crisis in Capital Punishment*, 31 *MD. L. REV.* 289, 298 (1971):

[W]e are dealing here, in truth, with philosophic issues which philosophy has quite failed to resolve—issues of determinism, free will, and responsibility. But we are not debating these issues philosophically. We are putting some humans through unutterable agony on the basis of a pretense, nothing short of frivolous, that we have satisfactorily resolved these issues. How can we dare go on doing this?

43. Pierre implies that the student will learn instead to compartmentalize herself as a way of managing the contradictions that law practice presents. See *Normativity*, *supra* note 15, at 928. This is certainly one way to reduce the obvious dissonance, but critical consciousness of the sort Pierre has developed is another.

44. See, e.g., *Clinical Perspective*, *supra* note 18, at 746 ("Clinical educators encourage and expect clinical participants, all of whom have access to thick layers of data, to devise multiple interpretations of multiple phenomena.").

45. See, e.g., *A Theory-Practice Spiral*, *supra* note 18, at 1657.

be learning enchantment with reason in classrooms where, as Pierre says, the ball is hidden, they cannot easily form professional identities in the controlled classroom environment.<sup>46</sup> Perhaps it is only when students are in the early stages of professional identity formation, when they are first becoming legal subjects, when they are first picking up the law, that the meaning and consequences of laying it down, or doing something else with it, can be meaningfully grasped.<sup>47</sup> Perhaps the clinic is a form of concrete political organization of the sort that Jeremy Paul recommends for advancing Pierre's work.<sup>48</sup>

This is not to suggest that clinical experience will inevitably generate Pierre's critique or his posture toward law. Clinical education offers only a methodology, but the contextualism and empiricism immanent in the enterprise lend themselves to multiple interpretations of numberless details.<sup>49</sup> A postmodern legal thinker guiding the clinic's intellectual inquiry may foreground certain questions that might otherwise be framed differently or avoided entirely in the law school curriculum—questions like, "What would happen if we laid down the law?" The point is not that the clinic will inexorably generate some set of correct answers to this question, but that the clinic's critical epistemology might possibly function as a counterpedagogy in the law school environment.

My suggestion here is that a clinic may be a law school setting in which sober reckoning with law's identity, meaning, and actions is realistically possible.<sup>50</sup> This contradicts Pierre's assertion that it is impossible to do law without participating in law's illusions,<sup>51</sup> without taking up its metaphysics.<sup>52</sup> Conversely, my contention is that it may be possible to take up law consciously, strategically, even skeptically, and examine its workings in the process. At least at the outset, using it does not

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46. See *Hiding the Ball*, *supra* note 11, at 1683-87. Pierre questions not only why the ball is hidden but whether a ball exists. *Id.* at 1695-1704.

47. See, e.g., David Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636 (1983) (suggesting that law students learn from internalizing habits at the point that they first encounter professional responsibilities).

48. See generally Paul, *supra* note 6.

49. See *Clinical Perspective*, *supra* note 18, at 746 ("[From a clinical perspective,] a deficient analysis is one derived in the absence of careful empiricism and devoid of the data from which alternative interpretive accounts might be constructed.").

50. As Pierre acknowledges: "[Law practice] 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." *Normativity*, *supra* note 15, at 868.

51. See ENCHANTMENT, *supra* note 3, at 106 ("It is not possible to have or to do law . . . without engaging in such illusions [e.g., that law has an objective, stable identity]. It is precisely these illusions . . . that make law . . . possible.").

52. Schlag identifies the metaphysics of American law as the ascription of an objectivist and subjectivist aesthetic to legal artifacts. In other words, laws and cases are perceived as having stable, object-like identities and subjective powers to constrain, require, compel, and so forth. See ENCHANTMENT, *supra* note 3, at 97-108.

require believing in it.<sup>53</sup> Daria Roithmayr's sophisticated elaboration of a radical pragmatist's posture toward law illuminates this approach.<sup>54</sup>

### III. POSTMODERN AND SOMEWHERE TO GO

A clinic can give a critic a place to stand in a law school's pedagogy.<sup>55</sup> It involves standing with a person in need, one whose need may be created by the intersection of the legal system with the structures of poverty, race, and other caste systems in our culture.<sup>56</sup> The critical thinking that can emerge from the clinical process—from the dynamic interaction between professor, student, client, and other actors in the legal bureaucracy—has an embodied existence that can be more meaningful than the politically correct pose that Pierre mocks in *The Enchantment of Reason*: "I speak here as a Harvard-educated white male."<sup>57</sup> Pierre's point, that this gesture does not genuinely grapple with its sub-

53. Schlag calls this "as-if" jurisprudence and observes that it is "parasitic on the metaphysics that it denies." ENCHANTMENT, *supra* note 3, at 114. Consequently, he is unpersuaded that law can be understood in this way: "[F]or those engaged in 'doing law,' how could they not believe in the metaphysics at least some of the time? . . . It would be a strange mind that could play such a role effectively while also remembering that it is just a role." *Id.* at 108-12.

Other thinkers feel more sanguine about using law agnostically and instrumentally. See, e.g., Daria Roithmayr, *A Defense of Radical Pragmatism*, 57 U. MIAMI L. REV. 939 (2003).

54. See Roithmayr, *supra* note 53, at 947-53.

55. See ENCHANTMENT, *supra* note 3, at 126 ("[Lawyers] have been taught to think formally, think universally, think neutrally, think impersonally. They have been trained to empty themselves of bias, passion, commitments. The ideal, which is never quite reached, is to achieve the view from nowhere."). To the contrary, to represent a client in a clinic is to adopt a view from somewhere, often with a sense of commitment, passion, and acknowledged bias on behalf of one's client.

56. In the *L.A. Law* drama, when attorney Stuart Markowitz says he is "lucky" to have his driving while intoxicated charge dismissed, Pierre calls this

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 . . . denies to himself that he is part of this web of social power, and avoids any reckoning with the social sources of his power. . . .

*Normativity*, *supra* note 15, at 858.

Likewise, inability to "beat a rap" is part and parcel of what it means to belong to an unprivileged caste, and the students who represent such clients in a clinic often learn this lesson vividly.

57. For example:

[T]he first time someone announced in a formal scholarly work or presentation, "I am speaking here as a Harvard-educated white male," the statement was probably thought-provoking—effectively directing the audience's attention to the relations between social identity of the author and his work. The audience might have paused to think about the significance of whiteness or Harvardness as an aspect of context. But through repetition, this act of critical reflexivity, this act of foregrounding, is ultimately retired back into the context. The self-identification becomes little more than the tired ritual of a familiar and boring political code.

ENCHANTMENT, *supra* note 3, at 75.

ject position, is well-taken, but the upshot of this observation should not be that reflexivity accomplishes so little that it is to be avoided.<sup>58</sup>

It is easier to grapple with one's subject position when one's reflections are grounded in material contexts and emerge in relation to particular others whose respective relationships to law's consequences highlight one's own positioning. A clinic is but one location for such critical reflection, but it may be an especially useful one for developing critical self-consciousness and for examining law's differential material consequences for people who are located in various social positions.<sup>59</sup> While I hesitate to recommend a legal clinic to someone as relentlessly unprogrammatically as Pierre,<sup>60</sup> I do consider it a potentially valuable vantage point within the law school for developing and teaching critique. I

58. The missing reflexivity of *The Enchantment of Reason* may be one of the sources of the race-and-gender-based critique that emerged at the February symposium. This absence of reflexivity suggests that Pierre did not consider his own subject position relative to the ideas in the book sufficiently interesting to explore. At least in that sense, his work resembles the scholarship it is critiquing.

White feminists and theorists of color are particularly inclined to explain experientially how they have come to a perspective that diverges from a dominant paradigm. This seems a requirement of intelligibility for those whose experiences may not be widely shared and consequently are often excluded. See, e.g., Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1990); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); BELLE HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* (1984); Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS 5 (1998).

The theoretical basis for this reflexivity has been elaborated in feminist standpoint literature. See, e.g., Patricia Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought*, 3 SOC. PROBS. 514 (1986); Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, 14 FEMINIST STUD. 575 (1988).

Since Pierre's understanding of enchantment, and his non-consequentialist approach to working with it, may be integrally related to his subject position, the race and gender critique may, in part, derive from a sense that the absence of reflexivity is an unacknowledged attribute of privilege. For different reasons Duncan Kennedy urges Pierre to make a greater effort to contextualize and historicize his writing. See Duncan Kennedy, *Pierre Schlag's The Enchantment of Reason*, 57 MIAMI L. REV. 513 (2003).

59. See, e.g., *A Theory-Practice Spiral*, *supra* note 18, at 1672-77 ("No one concerned with the power allocations in legal process can avoid such critical institutional assessment. . . . [C]linicians are deeply concerned with the conditions that trigger legal process, with the consequences of legal process for their clients, and with the effect of legal process on all who encounter it.").

60. Perhaps the best example of Pierre's resistance to programmatic thought comes at the conclusion of *Laying Down the Law*:

Some legal thinkers are rendered quite anxious in the present moment. "What comes next?" they want to know. "What will be next?" they wonder. "What admirable vision of law will next capture the legal imagination?"

Maybe nothing. Maybe what comes next is that we stop treating "law" as something to celebrate, expand, and worship. Maybe, we learn to lay down the law.

LAYING DOWN THE LAW, *supra* note 3, at 166.

think it fits well with Jack Schlegel's suggestion that law professors could go the honest route of empirical social inquiry about structures of law practice, and that doing so "would complicate our understanding of law enough to make it really interesting in human terms to our communities and our students."<sup>61</sup>

While I think this may be a plausible description of a critical legal clinic, I am aware that the possibility I envision occurs infrequently and in few law school clinics. This alone might suggest that I am chasing a fantasy. Or maybe it is just that as yet there is little overlap between postmodern legal thinkers and law school clinicians.

Why is that? Because despite my recommendations, it would be crazy for a postmodern legal thinker to choose the "unserenity" of a clinical law professor's life.<sup>62</sup> Marginalized though postmodern legal thinkers are, at least they lead a typical law professor's life which is organized to promote the production of scholarship, the real coin of the university realm.<sup>63</sup> While their views may be ignored or dismissed, at least postmodern legal thinkers obtain a certain amount of institutional prestige, respect, and reward from the rate and placement of their post-tenure publications. Consciously disengaging from this set of institutional power relations to participate with students in the chaotic drama of law practice for purposes of developing a legal counterpedagogy for understanding law and its consequences is in many respects foolhardy.<sup>64</sup> Practically speaking, this may make the Pierre Schlag Postmodern Legal Clinic unachievable, but not because it is unintelligible.

What would make it unintelligible is if the acculturation of law students into the dominant paradigm, the "Noble Scam," was so effective that by the time they reached the clinic, students had so internalized law's unthought, and so needed to continue to accept law's unthought,

61. Schlegel, *supra* note 6, at 969.

62. "Unserenity" is Jerome Frank's word for the atmosphere of trials. See Jerome Frank, *Legal Thinking in Three Dimensions*, 1 SYRACUSE L. REV. 9, 23 (1949). See also Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 908 (1933) (describing "[t]he rough-and-tumble activities of the average lawyer's life").

63. Pierre recognizes that bringing the legal clinic into the classroom "would be [for the classroom professor] to surrender professional and political benefits already secured . . . ." *Normativity*, *supra* note 15, at 927.

64. Bringing the clinic into the classroom would also require of traditional legal faculty:

[E]xtensive 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.

that they resisted and rejected any fundamentally critical insights about law. This observation may be largely true.<sup>65</sup> While acculturation poses a formidable obstacle to counterpedagogic efforts in general, perhaps it too can be conceived as a pedagogic issue rather than an insurmountable problem. I began to consider what a pedagogic process for moving through resistance might look like when I was wrestling with this question: What would it take for Pierre's account of law to be openly engaged in law schools rather than vilified or ignored?

#### IV. DISSOLVING RESISTANCE, ENABLING CRITIQUE

I think an answer to this general question, like an answer to the more specific question of how to overcome clinic students' resistance to critical insights, may lie in pursuing Peter Goodrich's point that Pierre's critique confronts the legal academy with desires it cannot name.<sup>66</sup> If that is true, then resistance is expected and any possibility of overcoming it depends on acknowledging those suppressed desires. Where this insight leads me is to thinking about the process of dissolving resistance as one of developing and managing a process of grieving.<sup>67</sup> Teachers in other disciplines, notably the humanities, have drawn on Lacan to suggest that teaching is a process of working through the fear and the grief unleashed by detachment from the comfortable ideas that we so desire to keep.<sup>68</sup> Since identity is structured defensively, it does not magically change by learning new concepts and ideas.<sup>69</sup>

Learning that involves changing values is accompanied by a sense of loss. Giving up a deeply held belief is like letting go of a relationship that has ended or a beloved person who has died, each of which was internally constructed as a dense network of images, emotions, and sig-

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65. Pierre believes that it is impossible to escape law's metaphysics. See *supra* notes 51-52 and accompanying text. Nevertheless, as *The Enchantment of Reason* itself reveals, it is possible, albeit psychologically and socially costly, to get some purchase on the ways of law's enchantment.

66. See Goodrich, *supra* note 2, at 794.

67. My unexpected turn to the subject of grief provoked considerable discussion and disagreement at the February symposium. Some of the discussion centered on whether we at the symposium were grieving and what it was we were grieving. While an engaging conversation, this was not, to my mind, central to my point. I was raising the possibility of griefwork as a pedagogy to help students address their feelings of loss when faith in law's nobility and perfectability was shattered by engagement with critiques like Pierre's. I thought perhaps lessons learned from griefwork might enable such engagement. Presumably, we at the symposium were already engaging Pierre's work without significant distress and therefore were not likely to benefit from the same sort of griefwork that I was suggesting as part of a pedagogy for those who were inclined to reject critiques like his more reflexively.

68. See, e.g., Marshall W. Alcorn, Jr., *Ideological Death and Grief in the Classroom: Mourning as a Prerequisite to Learning*, 6 J. PSYCHOANALYSIS CULTURE & SOC'Y 172 (2001).

69. *Id.* at 173, 175-76.

nifiers.<sup>70</sup> Grief is arduous because it requires significant adjustments in our internal life, which include retracing the vast number of images, feelings, and beliefs associated with the idea, then withdrawing our attachment to each of them.<sup>71</sup> Grieving is painful because it requires us to experience the feeling of abandoning pieces of our identity.<sup>72</sup>

So too can openness to a powerful critique of beliefs long and tightly held engender real distress, the kind of distress that, when unacknowledged, can produce some of the condemnatory reviews that Pierre's work has at times received.<sup>73</sup> The distress comes from the work of withdrawing our attachment to the internalized network of images, sensations, words, and concepts that constitute part of our experience of ourselves.<sup>74</sup> No wonder people resist, avoiding such wounds and experiencing prolonged periods of anxiety at the glimpse of such a prospect. This is one way to think about the dynamic of simultaneous attraction and repulsion that Peter Goodrich identified in the reviews authored by some of Pierre's harshest evaluators.<sup>75</sup>

We construct ourselves and our world of desires so that letting go of our desires is an extraordinary anguish. In recognition of this psychological process, I want to conclude with the suggestion that we turn to the psychoanalytic literature of working with grief to learn how to better work with the fear of loss that may well underlie resistance to critique.<sup>76</sup> Whether used in conjunction with a clinic or outside of it, understanding the psychodynamics of mourning may help us devise better methods for becoming more effective critical teachers and scholars.

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70. *Id.* at 175.

71. *Id.* at 177.

72. *Id.* at 175. See also JEFFREY BERMAN, *DIARIES TO AN ENGLISH PROFESSOR: PAIN AND GROWTH IN THE CLASSROOM* (1994).

73. See, e.g., Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 *YALE L.J.* 253 (1996); Brian Leiter, *Objectivity and the Problems of Jurisprudence*, 72 *TEX. L. REV.* 187 (1993).

74. See, e.g., Alcorn, *supra* note 68, at 175 ("Mourning is a situation in which one must respond to the loss of a key component of one's identity."). Maybe this is another way of understanding Duncan Kennedy's observation that given Pierre's analysis, "it would be astounding if anyone paid any attention to him." Kennedy, *supra* note 58, at 514.

75. Peter Goodrich cites to negative commentary on Pierre's work by Brian Leiter, Neil Duxbury, Matthew Kramer, Guyora Binder, Robert Weisberg, Douglas Litowitz, Francis Jay Mootz, and David Carlson. See Goodrich, *supra* note 2, at 799-806.

76. Buddhist writer Joanna Macy recommends a process that she calls "despair work" as a way of exploring our feelings of distress. JOANNA MACY, *WORLD AS LOVER, WORLD AS SELF* (1991). I learned about Joanna Macy's book from my colleague Catharine Wells. See Catharine Pierce Wells, *The Perils of Race and Gender in a World of Legal Abstraction*, 34 *U.S.F. L. REV.* 523, 533-35 (2000) (applying despair work as a method of healing from hurtful race and gender dynamics).