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A Reply—The Missing Portion

PIERRE SCHLAG*

I wish to thank Michael and Pam Fischl for organizing and hosting this symposium. I also wish to thank the participants for the care they have taken in reading my work and the thought they have put into their responses. It is both an honor and a humbling experience to have so many thoughtful people comment on one's work.

I have been struggling for some time with a way to respond to the criticisms, observations, invitations, reproaches, and cajoling offered in these papers. Not only is it a formidable task because the papers are so many (and issue from so many different angles) but also because they often require some real thought and reflection on my part.

Occasionally, I would like to say in response, "No I didn't say that. And in fact if you would look at page 436, you can see that . . . See it there?" But I've read these kinds of author replies before (so have you) and let's face it: whether or not they are warranted, they're kind of boring—reminiscent of the "Did so/Did not, Did so/Did not" structure of an earlier stage of life.

In an effort to push the conversation along (rather than rehearse the "Did so/Did not" structure), I offer a number of observations, questions, and ruminations below. Some of these have bite; others are offered in the spirit of wonder.

THE MISSING PORTION

A good number of papers affirm that there is something missing in what I have produced. What is missing, however, is rarely the same thing. But it is always missing and its absence is almost always perceived as a problem. Let's call the missing portion "Z."

Where I differ with my critics is almost never on the question whether Z is missing. And seldom do I disagree that it might be interesting or helpful for someone to add in Z. Often though, my reaction is: "Great, why don't you do it?" Sometimes my reaction is less charitable: "But it's already been done: it's not helpful to do it again. Z, Z, Z – it's boring. We're just going to sound like machines." Regardless of charity or lack thereof, where I do disagree is in the sometimes implicit, some-

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times explicit claim that the failure to include someone's favorite Z in my account compromises what I have done.

I try deliberately to do what other people are not doing. The suggestion in some of the papers that I should do what others are already doing, or have already done very well, doesn't seem terribly helpful to me. There are, of course, times when reading the responses that I want to say to my critics: "You are absolutely right. I didn't do that (write about the body, the material aspects of reason, critical race theory, the politics of reason, and more . . .). *The Enchantment of Reason* doesn't explore those things. It didn't set out to explore those things. And you're right: it would be very interesting to do so. And in some cases, maybe *The Enchantment of Reason* would have been a better book had I done so But I don't see that my failure to do that impeaches what I have done. So please don't read *The Enchantment of Reason* in a totalizing spirit (as some sort of standard exhaustive work on reason).¹ This is more the sort of thing one attempts to write once the discipline has broken down (a point I have explored elsewhere and now take as a given).²

DISCIPLINARY BREAKDOWN AS OPPORTUNITY

One of the virtues of the disciplinary breakdown in law is that there really are possibilities for doing any number of different and interesting things. You don't have to do standard legal scholarship. You don't have to spend your days "rigorously" tracing out the xylem and phloem at the ends of your disciplinary tree. You don't have to simulate the good judgment of the academy (when this good judgment is offensive).

As I see it, 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. Renouncing those default institutional paths, of course, is no easy matter.

1. Goodrich's and Kennedy's essays elaborate on the form of *The Enchantment of Reason*. See Peter Goodrich, *Pierre the Anomalist: An Epistemology of the Legal Closet*, 57 U. MIAMI L. REV. 791 (2003); Duncan Kennedy, *Pierre Schlag's The Enchantment of Reason*, 57 U. MIAMI L. REV. 513 (2003).

2. Westbrook's essay deals directly with this theme and struggle. David A. Westbrook, *Pierre Schlag and the Temple of Boredom*, 57 U. MIAMI L. REV. 649 (2003). Hackney provides a more comforting diagnostic of the state of legal theory—finding hope in the proliferation of perspectives. James R. Hackney, Jr., *The "End" of: Science, Philosophy, and Legal Theory*, 57 U. MIAMI L. REV. 629 (2003).

FALSE EMPOWERMENT (NO. 1)

From the very first day, law school training leads law students to believe that judicial decisions produce important consequences for the social order. The presumption is that the words of the judge (if they are well crafted) will effectively produce a social reality that corresponds roughly with the words uttered. But what reason is there to believe this?³

FALSE EMPOWERMENT (NO. 2)

The endlessly repeated question in first year, “What should the court do?” leads law students to believe that courts respond to the force of the better argument. This would be tolerable if one added two provisos:

1. The better argument often means little more than the one the courts are predisposed to believe; and
2. In the phrase “force of better argument” it’s important to attend not just to the “better” part, but to the other term as well.

FALSE EMPOWERMENT (NO. 3)

Law students first learn of many complex social and economic realities through the medium of case law. What they learn is thus the law’s vision of these economic and social realities. Not surprisingly, there is an almost magical correspondence between legal categories and social or economic practices. This magical fit leads law students (later to become law professors) to have an extremely confident view of the efficacy of law.

Many law students are cured of this belief-structure by a stay in the legal clinic or by law practice.⁴ There is one group of people, however, who are generally not cured of this belief-structure at all, but whose faith is actually intensified. These are the people who hold prestigious judicial clerkships where an emotional proximity to and identification with their judge (“my judge”) leads to an even greater confidence in the efficacy of law. These people are frequently chosen to teach in law schools.

FALSE EMPOWERMENT (NO. 4)

False empowerment can be disempowering. It can also lead to pessimism and despair.

3. Not much, as Susan Silbey shows. Susan S. Silbey & Patricia Ewick, *The Double Life of Reason and Law*, 57 U. MIAMI L. REV. 497 (2003).

4. Phyllis Goldfarb, *Picking Up the Law*, 57 U. MIAMI L. REV. 973 (2003).

PESSIMISM, DESPAIR, ETC. (NO. 1)

Many people react to a loss of faith in law or legal studies with despair or pessimism. But this is the despair and pessimism that comes from giving up a naïve or a romantic vision of law and/or legal studies. The onslaught of this despair and pessimism is a good thing. It is like the thirty-something who realizes that he is mortal and that life is brief. Generally, this is not welcome news. At the same time, it may help prevent a life spent in Heideggerian dread, tanning salons, or the interstices of footnote 357.

PESSIMISM, DESPAIR, ETC. (NO. 2)

When the academic loses faith in law or legal studies, typically that person is most troubled because she has lost the framework that makes her academic project possible. But so what? Isn't the demand that law conform to an academic project arguably a selfish one?

THE CON, THE JOKE, AND THE IRONIC TRUTH

The Con: In the courtroom, the appellate judge is typically seated behind an elevated bench. On the classroom blackboard the appellate judge is chalked in above the plaintiff and the defendant. This is both a reflection and a reinforcement of the belief that the appellate judge is an intellectually and politically privileged legal actor.

The Joke: In actuality, the appellate judge is a person who operates in conditions of severe information deficits and whose outlook is thoroughly manipulated by professional rhetoricians. Very often he has little or no understanding of the configurations of the social field to which his rulings will apply. What's more, this is a person who is prohibited from talking about the social field, except with a highly restricted number of people.

The Ironic Truth: On the other hand, because we believe the appellate judge is a particularly privileged intellectual and political actor, we contribute to making him so.

A CRUEL HOAX

Legal intellectuals like to believe that law is an intelligent enterprise. They like to believe that the law offers an interesting vocabulary, grammar, and rhetoric through which to think about the world and law itself. This is naïve. The political demand that law be efficacious means that law must track, must indeed incorporate popular beliefs about social and economic identities, causation, linguistic meaning, and so forth. (Those beliefs are often intellectually bereft.)

THE ARGUMENT ROOM

The argument room is a place where academic advocates go to argue passionately about law and politics. (Apologies to Monty Python.) Within the room, arguments are won and lost; triumphs and defeats are had. But generally, no one outside the room pays much attention to what goes on inside the room. Sometimes there is seepage and fragments of the conversations are heard outside the room.

Participants most often spend their time arguing about what should happen outside the room. This they call “knowledge” or “understanding” or “jurisprudence” or “scholarship” or “politics.” The one thing that generally cannot be talked about inside the room is the construction of the room itself.

POLITICS (No. 1)

For progressive legal thinkers, politics is a “theoretical unmentionable”: The concept “politics” does a great deal of theoretical work and yet its identity remains generally immune from scrutiny. The categories (right, left) and the fundamental grammar of politics (progress, reaction, and so forth) generally go unquestioned. Oddly, while everything else seems to be contingent, conditional, contextual, and so on, the categories of politics seem to be oddly stable, nearly transcendent. Strangely, this occurs at a time when the categories, left and right (and even politics itself), seem increasingly fragile and non-referential.

Still, this is an intensely political time—political not in the sense of significant social contestation (not much of that) nor in the sense of ideological struggle (not happening much either). Rather, political in the sense of very significant reorganizations and reallocations of power, wealth, and so on.⁵

Capital (for lack of a better term) is in a period of rapid self-reorganization in which it increasingly regiments precincts of life previously offering some resistance to its grammar—to wit: time, family, media, public space, wilderness, and so forth. The point is not that these precincts were immune to capital before, but rather that capital is advancing at such an intense rate to bring about a significant disruption and a qualitative change in these precincts. This change is manifest not only in the colonization of new precincts, but in the self-organization of capital

5. Hence, the historical contextualization advocated by Judge Davis seems to me entirely appropriate. 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 (2003). The kind of work I have done is not opposed to this contextualization and historicization. Instead, it is a kind of caution about the ways in which such historicization and contextualization might be accomplished and what might be expected from such work.

(new financial vehicles) and, of course, in new literary and intellectual forms (postmodernism as both symptom and diagnosis).

Meanwhile, the old categories, the old grammar, the old answers, seem to have lost some of their hold. The right is intellectually stagnant. And the left is, as a social presence, ontologically challenged. Indeed, in the United States, we seem at present to have several right wings and no left wing. This does not mean that "politics" as a social category is necessarily dead. It might mean simply that we (and others) have not understood, have not grasped, have not articulated its new configurations.

What would be required on the intellectual level is a re-evaluation not only of the conventionally articulated categories, but of the social and economic ontology. At its best, postmodernism (and there has been a lot of bad reactionary and nostalgic postmodernism) is an attempt to trigger such a re-evaluation. Progressives, understandably, strive to protect their categories, grammar, and self-image from these challenges. But this is not without cost.

POLITICS (NO. 2)

To argue in favor of political positions is sometimes political. But it is not always political. Sometimes taking up a political argument is political and sometimes it has no consequences whatsoever. One cannot know beforehand. But it is a serious mistake to suppose that arguing in favor of a political position is in and of itself political.

Very often in the legal academy, to argue for a political (or normative) position is not political at all. It simply triggers a scholastic, highly stereotyped meta-discourse about whether the arguments advanced are sound, accurate, should be adopted, or the like.

A PROBLEM FOR THE LEFT

Traditionally, the left has defended the victims of capitalism, imperialism, and racism. Indeed, this is an important part of what it means to be "on the left." Meanwhile, in the university, scholarly attention depends upon the production of new exciting ideas and research agendas. This poses a problem for the left: the victims of capitalism, imperialism, and racism remain the same. The political-intellectual defenses advanced on behalf of victims remain the same. This leads to a certain sense of weariness and *déjà vu*—stereotyped arguments, standard rhetorical moves. A tendency to fight the same old fights. Machines. This is a problem.

A PROBLEM FOR PROGRESSIVE LEGAL THINKERS

As the author of *Laying Down the Law*, it just isn't clear to me that law is the sort of thing that is endlessly perfectible. At times it seems to me that law is a lot like military strategy. You can try making military strategy the best it can be (maybe you should). But when you get done it's still going to be military strategy.

In that context it would be a good thing to have a few people (I volunteer) to be less than completely enthralled by military strategy. The same would go for law. It could be that law is objectionable in important respects because, well . . . it's law. If you are going to mediate social contradictions through a linguistically normalized system of organized institutional force (e.g., law) you should not expect the results to be pretty (no matter how humane or contextual you get along the way).

LAW AS A WHITE MALE PRODUCTION

It seems worthwhile to have a few people focus on the production side of law's equations—how is this law produced, what versions of self does it enact, how does it reproduce itself, how does it achieve rhetorical supremacy, how does it mediate its various crises, etc. etc. etc.

In my work—the construction of the subject, anti-disciplinarity, the critique of normativity, the enchantment of reason, the politics of form, the aesthetics—I have been concerned with these kinds of questions. I think there is a politics to that—however incomplete, unfinished, elliptical, underdetermined, and open-ended it might be.⁶

POLITICS AS ARROGANCE

As a legal thinker, I believe in trying to do something that has intellectual, political, or aesthetic value. Any one of the three would be just great—a real success, something worthy of respect. This is especially so because, given the institutional paths laid out by the legal academy, it's pretty easy to strike out.⁷

6. For discussion, see Goodrich, *supra* note 1.

7. Rittich's essay lays out alternative kinds of scholarly enterprises one might follow. Kerry Rittich, *Enchantments of Reason/Coercions of Law*, 57 U. MIAMI L. REV. 727 (2003). Farley's essay is a provocative effort to actually practice a different form of (legal) writing. Anthony Paul Farley, *The Dream of Interpretation*, 57 U. MIAMI L. REV. 685 (2003). Gudridge's essay takes another tack—finding in the repetitions of law the sources of critique and deviation. Patrick O. Gudridge, *Mit Schlag (Repetitions)*, 57 U. MIAMI L. REV. 607 (2003). Maria Grahn-Farley's article on child rights can be seen as an effort to break form. Maria Grahn-Farley, *A Theory of Child Rights*, 57 U. MIAMI L. REV. 867 (2003).

But if one has a choice, which should one pursue? Perhaps it depends upon where one thinks one can advance, say, or do something worthwhile. This will depend upon a person's talents and field as well as his/her estimation of context and possibilities. From this standpoint it seems odd that someone should feel authorized to say: "You should do X."⁸

LEGAL THOUGHT AS ARROGANCE

The belief is that the future of the free world, the maintenance of the rule of law, the welfare of the republic, the liberation of oppressed peoples, the direction of the Court, the legitimacy of the Florida election, hangs on a law professor's next article. This is the *esprit serieux* gone nuts. The most significant effect of this belief is to arrest thought and end the play of ideas necessary for creativity.

SERIOUS AND NOT (NO. 1)

Yes, legal interpretation sometimes takes place in a field of pain and death.⁹ But that hardly means that legal studies takes place in a field of pain and death. It is a residual objectivism that enables legal academics to believe that when they write about law—what it is or what it should be—they are somehow engaged in the same enterprise as judges. They're not.

It is not that legal scholarship is without consequence. It's just that the institutional and rhetorical contexts are sufficiently different that the consequences are different as well.

SERIOUS AND NOT (NO. 2)

There is an important, indeed foundational, category mistake that sustains American legal thought—it is the supposition that because academics and judges deploy the same vocabulary and the same grammar, they are involved in largely the same enterprise. I just don't think that's true.

8. Maranville puts it this way: "[P]erhaps we should stop trying to find a solution for what 'we' all should do, in the abstract. We have different gifts, and different interests." Deborah Maranville, *Building a Better Sand Castle: Fantasy, Growth, and the Enchantment of Reason*, 57 U. MIAMI L. REV. 1007, 1023 (2003). See also Tamara R. Piety, *Smoking in Bed*, 57 U. MIAMI L. REV. 827 (2003).

9. It is important to recall the context in which Cover's famous phrase was issued. Cover was writing in reaction to a scholarly tendency (exemplified in the work of James Boyd White and Ronald Dworkin) which rather uncritically assumed legal interpretation to be essentially a literary or philosophical enterprise. Cover's essay is best understood as a corrective to this tendency. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

My own view is that legal academics are but one social group (among many) competing for the articulation of what law is. Judges are another. Social movements, corporations, public interest groups, administrative officials, criminals, etc., are some of the others.¹⁰

For most of the history of the American law school, academics have anointed judges as privileged speakers of law. In turn, legal academics have adopted the habits, forms of thought, and rhetoric of judges—thereby accruing to themselves the authority to say what the law is.

Legal academics legitimate their claim to say what the law is by fashioning law as an academic discipline requiring expertise. Legal academics then hold themselves out as possessing this expertise.

Among those critical theorists who seek to contest this expertise, one can distinguish two approaches. One approach is to try to reveal the emptiness of the claims to expertise among the legal intelligentsia and to reveal how these claims nonetheless gain power. Another approach is to try to relocate the authority to say what the law is among those who have been excluded.

I do not see these approaches as antithetical, but rather as complementary. Furthermore, both approaches will in fact reinscribe, will performatively reinforce, precisely the sort of rhetorics and hierarchies they contest. No way around that.

I think critical thinkers all do this—though in different ways. And it's certainly worthwhile pointing out how it is being done.¹¹ At the same time, no one is safe or immune from this sort of criticism.

SERIOUS AND NOT (No. 3)

To learn to laugh at what is taken seriously, but is not serious, is a serious thing to do. To take seriously what is not, is a drag.

A PROBLEM FOR PROGRESSIVES

Progressives wish to pursue a politics that is efficacious. This means keeping track both of the social context in which progressivism articulates itself (on the side of the subject), and the social context in

10. Silbey's essay elaborates this point concretely and persuasively. See Silbey & Ewick, *supra* note 3. It is also articulated in Jack Schlegel's work. John Henry Schlegel, *But Pierre, If We Can't Think Normatively, What Are We to Do?*, 57 U. MIAMI L. REV. 955 (2003).

11. Hence, Joanne Conaghan takes me to task for a failure to address feminist jurisprudence, and Mariah Grahn-Farley as well as Dariah Roithmayr reproach me for a failure to address critical race theory. Joanne Conaghan, *Schlag in Wonderland*, 57 U. MIAMI L. REV. 543 (2003); Daria Roithmayr, "Easy for You to Say": *An Essay on Outsiders, the Usefulness of Reason, and Radical Pragmatism*, 57 U. MIAMI L. REV. 939 (2003); Maria Grahn-Farley, *An Open Letter to Pierre Schlag*, 57 U. MIAMI L. REV. 755 (2003).

which progressivism seeks to register its results (on the side of the object). But this work of reconnaissance—a work that is necessary—may bring unwelcome news: namely that progressivism unmodified is no longer a terribly cogent project. Choices will have to be made: to defend progressive thought against this unwelcome news or to put the identity of progressive projects at risk by encountering this unwelcome news.

FORMALISM (OR PIERRE MENARD'S LAW REVIEW ARTICLE)

Formalism is virtually an inexorable condition of legal scholarship in the following sense: a legal academic generally writes scholarship outside the social pressures of what a lawyer would call real stakes, real clients, or real consequences. The failure of an argument in the pages of the *Stanford Law Review* is generally very different from the failure of an argument in a brief or an opinion. The difference in context changes the character and consequences of the acts—even if the authors use exactly the same words.

BINARY AND NOT (INSIDER/OUTSIDER, IMMANENT/TRANSCENDENT, MIND/BODY ETC. ETC. ETC.)

It's one thing to deploy oppositional binarism to describe the broad structures of a text. It's quite another to adopt binarism as an intellectual lifestyle choice.¹²

Oppositional binarism has a special hold/appeal in American law precisely because: 1) law is often identified with what appellate courts say it is; and 2) by the time a case gets to an appellate court, the reductionism of litigation and the binary structure of the adversarial orientation has reduced the dispute to an either/or (e.g., liberty vs. equality or formal equality vs. substantive equality, and so on).

But

Oppositional binarism flounders because law does not have fixed, uncontroversial grids. Hence, for instance, the notion that a person is an insider or an outsider just doesn't track with much of anything (except perhaps the author's own formalism).

If one thinks about it, a person is an insider in this respect (he's white) but an outsider in that respect (he's working class) and then an insider with respect to his pedigree (he went to Columbia) but really an outsider within his insider Columbia status because he was profoundly

12. The essays by Jane Baron and Jeremy Paul make this point much more elaborately. Jane B. Baron, *Romancing the Real*, 57 U. MIAMI L. REV. 573 (2003); Jeremy Paul, *Beyond Reason and Interest*, 57 U. MIAMI L. REV. 593 (2003).

alienated from the Columbia social scene and blah blah blah. After a while (very soon, actually) the insider/outsider distinction loses its hold. The point is, unless you happen to have a well-formed, non-overlapping fixed grid (and this would be a very strange thing for a critical theorist to have!), oppositional binarism (like everything else) ultimately collapses.

Interestingly, there was a moment of slippage in the history of critical legal studies (or perhaps the fem-crits) when binary oppositionalism slid from a heuristic into (of all things) a metaphysic!

THE MACHINES

In Keith Aoki's comic strip, the agents of R.E.A.S.O.N. and P.I.E.R.R.E. fight each other in a comically clichéd fashion. It is Nick Fury jurisprudence. And there is something strikingly right about that (however humbling it may be for me and others).

One of the things that happens in the Nick Fury comic strips (as in Keith Aoki's contribution) is that the antagonists deploy machines against each other. In legal thought, we have a lot of machines in operation.¹³ By this I mean that a great deal of so-called legal thought is not really thought at all—but the deployment of a series of rhetorical operations over and over again to perform actions (usually destructive in character) on other peoples' texts or persons. Every argument tends to become a machine. Over time, legal academics tend to become their own arguments. Then, of course, they become their own machines. At that point, it's time to move on. This is why there is hope.

CODA

There are real advantages to working within an academic field whose disciplinary structures have disintegrated. The gift is that you really can study, think about, and pursue almost anything you think is interesting, salient, or politically helpful. The trick is not to waste the opportunity.

13. The essays by Jeanne Schroeder and David Carlson as well as Fran Olsen are exemplary instances of this mechanical subsumption of one text to another. Jeanne L. Schroeder & David Gray Carlson, *Law's Non-Existent Empire*, 57 U. MIAMI L. REV. 767 (2003); Frances Olsen, *Peace, Civil Disobedience, and Anti-Discrimination Law: A Critical Appraisal of Reason and Politics*, 57 U. MIAMI L. REV. 989 (2003).